

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	CC Docket No. 01-338
Carriers)	

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

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I. INTRODUCTION AND SUMMARY

The opening comments in this proceeding reflect a consensus on one point: that broadband, and in particular voice over Internet telephony (VoIP) broadband applications, represent the future of voice and data competition, and hold open the prospect of true facilities-based competitive choices for consumers in both the residential and business markets. As the ILECs themselves acknowledge, “Voice-over-IP services now clearly define the center of wireline voice competition.”¹ Covad is poised to play a critical role in bringing competitive broadband to these markets. It is the largest facilities-based wireline broadband competitive provider, with a national broadband network configured to provide voice and data services to both the residential and enterprise marketplace.

But as the opening comments make clear, unless the Commission takes the necessary steps to provide access to legacy bottleneck last-mile loop and transmission facilities, robust competition will not develop for a long time, if ever. That is because there are now at best two and only two sets of last-mile facilities that can be used to connect competitive broadband networks to customers: incumbent LEC wireline loops and high-capacity transmission facilities, and cable coaxial facilities. If competitors are given access to legacy ILEC facilities, they can connect their own broadband networks to end users, and the Commission will have created the conditions to allow a deregulated market of competitive facilities-based broadband voice and data providers to develop and prosper. The result will be more broadband output, lower prices, and innovative services that only facilities-based competition will bring. Covad in particular will take a leading role in bringing this facilities-based competition to the marketplace.

If the Commission denies access to the broadband capabilities of legacy loops and transmission facilities, however, the result will be at best a stagnant duopoly in which the cable

¹ UNE Fact Report at 1-5.

and wireline duopolists will have every incentive to extend their market power onto downstream markets such as VoIP applications. They will do what companies with market power always do: restrict output, raise rates, and stifle innovation that threatens their legacy services.

That is the stark choice set out for the Commission in the opening comments. Virtually all of the comments focus upon broadband, and in particular on the potential for VoIP to lead to robust facilities-based competition. Most commenters agree with Covad that the only way to bring this competitive potential to fruition is to unbundle legacy bottleneck loop and transmission facilities.

This includes the reinstatement of line sharing. Nothing in the record contradicts Covad's showing that line sharing promotes broadband deployment and is critical to the development of VoIP. Commenters also generally agree that the reasons the Commission gave for eliminating line sharing are no longer applicable. Line splitting is no longer a realistic alternative, for example. The ILECs therefore point to intermodal alternatives, but the evidence shows that the market is at best a duopoly.

The Commission must also reinstate unbundling of legacy hybrid fiber-copper loops. Commenters' emphasis on VoIP underscores the need to unbundle the existing legacy loops that will permit multiple VoIP providers to develop, whether or not these legacy loops incorporate fiber in some fashion. There is no countervailing policy concern. Whatever may be the case with fiber-to-the-home or fiber-to-the curb loops, there is no evidence that unbundling hybrid loops deters any investment.

Of course, in their zeal for deregulation, the ILECs routinely obscure the distinction between truly new and innovative loop architectures that allow new or substantially improved service to the public, on the one hand, and existing legacy hybrid or "packetized" loops, which

support at most first generation DSL and conventional analog voice service, on the other. Since competitive broadband supply is critical to robust competition, the Commission must revisit the basic distinctions in the original TRO to ensure that its unbundling rules are carefully tailored to incent new investment in truly new facilities and innovative services by *both ILECs and CLECs*. This will ensure that CLECs can reach the entire addressable market of consumers and businesses using all forms of legacy loops, including those, who, by historical accident or the operation of ILEC engineering criteria, happen to sit behind legacy hybrid loops. Covad respectfully submits that these customers are equally deserving of access to the new and innovative services, including VoIP, that facilities based CLECs supply.

Finally, the Commission must continue to unbundle DS-1 loops, as well as DS-3 loops below the 13 DS-3 threshold. The Commission's original impairment analysis properly took into account the immense advantages the ILECs enjoyed in deploying loops and interoffice transport. In this proceeding, commenters generally agree that CLECs cannot deploy their own loops and transport facilities below the capacity thresholds the Commission set in the TRO. Although the ILECs suggest otherwise, virtually none of the evidence they present concerns deployment of facilities below the thresholds. The fact that CLECs have deployed facilities above the thresholds in some places -- and potentially could deploy in other places -- is irrelevant, since carriers that need facilities above the thresholds *have already been denied access to them as UNEs*.

The availability of special access facilities does not eliminate CLECs' impairment. Commenters generally agree that the CLECs that have relied on special access to date have done so only for a select range of services in select locations. CLECs that are providing the type of data services Covad provides to small and medium sized business customers cannot rely on

special access -- especially since they do not have access to volume discounts on special access rates. And even where CLECs have been able to rely on special access facilities up until now, they will not be able to do so in the future now that the ILECs have obtained section 271 authority. Moreover, for the Commission even to attempt to evaluate where CLECs might temporarily be able to rely on special access facilities would create insuperable administrative difficulties without having any policy advantage. In fact, as shown in Covad's opening comments and below, relegating facilities-based competitors like Covad to special access for their critical loop and transport inputs will leave them subject to an inherent price squeeze benefiting their retail competitors, the ILECs. Under such price squeeze conditions, facilities-based providers like Covad would be rendered unable to compete.

The Commission must choose to facilitate the customer access that broadband providers, such as Covad, need to bring innovative alternatives to customers.

II. THE RECORD CONFIRMS THAT THE BROADBAND AND VOICE MARKETS ARE CHARACTERIZED BY AT BEST WEAK DUOPOLISTIC INTERMODAL COMPETITION

In Covad's opening comments it demonstrated that the broadband market is a limited duopoly market at best, with many residential customers having a choice of only their cable operator or their incumbent telephone company, and with many enterprise customers not having that choice. Other commenters agree.²

The Commission has stressed that on this point "actual marketplace evidence is the most persuasive and useful kind of evidence submitted. In particular, we are most interested in granular evidence that new entrants are providing retail services in the relevant market using

² See, e.g., MCI Comments at 95-99; Comments of Small Independent Competitive Local Exchange Carriers at 3 ("The Commission has embraced a policy that will result in a duopoly between the ILECs and the cable operators when it is competition that is called for.").

non-incumbent LEC facilities.”³ Here there is such evidence, and it shows, emphatically, that there is, at best, a duopoly, and in many cases an outright ILEC monopoly. Indeed, the ILECs’ own data powerfully corroborates these market conditions.

According to the ILECs, both cable operators and the ILECs are increasingly providing broadband services to their residential customers, while the enterprise market is served overwhelmingly by the ILEC alone.⁴ *There are no other alternatives.* By the ILECs’ own reckoning, there are a meager 300,000 residential satellite broadband subscribers, and that number is not expected to grow in any meaningful way over the next four years.⁵ There are only two million wireless broadband subscribers in both residential and enterprise markets combined, and, again according to the ILECs, that number too is not expected to grow appreciably over the next four years.⁶ There are *no* powerline broadband services commercially available, and the ILECs do not predict that there will be any over the next four years.⁷ In sum, even taking the ILECs’ own data at face value, there is at best a cable-ILEC duopoly in the broadband residential market, and an ILEC monopoly in the enterprise market. And the ILECs’ own predictive judgment is that this state of affairs will remain virtually unchanged over the next four years.⁸

³ *TRO* ¶ 93.

⁴ *See* Covad Comments at 26-28; ILEC Fact Report I-2.

⁵ UNE Fact Report 1-12, Table 9.

⁶ *Id.* It is therefore a powerful understatement to say, as the ILECs do, that wireless broadband “is not yet as ubiquitous as wireline broadband,” *id.* at II-37, and given the ILECs’ repeated claim that the future of all telephony is broadband, their claim that the absence of wireless broadband competition “is irrelevant to any proper competitive analysis,” *id.*, is just whistling in the wind.

⁷ *Id.*

⁸ The ILECs table describing multiple VoIP competitors, UNE Fact Report II-5 at Table 2, is thus deeply misleading. The ILECs list multiple cable operators but fail to acknowledge that they do not in fact compete against each other but operate in distinct geographic regions. The other competitors listed are entirely dependent upon access to the ILECs’ and/or cable operators’ last-mile loop facilities, and so exist only to the extent the ILECs and cable operators choose to suffer them.

Any broadband competition beyond that offered by the wireline/cable duopoly therefore requires access to the legacy wireline last-mile loop facilities that connect end users to monopoly and competitive networks. And, because the Commission previously had unbundled these last-mile facilities, there *are* competitive broadband networks capable of offering robust facilities-based competition to the ILECs and cable operators -- Covad's is the largest and most robust. But this competition is utterly dependent upon access to legacy bottleneck last-mile facilities. The facilities-based competition offered by Covad is thus a paradigmatic example of the kind of competition the 1996 Act was intended to promote: the sharing of "facilities that are very expensive to duplicate (say, loop elements)" that allows for competition through "other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)."⁹

Given the commenters' demonstration that the future of most residential and small business competition will depend upon broadband networks, the undisputed fact that these markets are a closed duopoly is overwhelmingly the most important fact in the record. And yet, the ILECs simply ignore this fact – and thus ignore decades of economic learning and real world experience (including experience in the broadband market in the U.S. when compared to experience with unbundling overseas) demonstrating that duopolies do not produce competitive outcomes or rapid innovation. The fact that the USTA II court admonished the Commission to consider intermodal competition does not mean that the Commission can or should find, based upon a single major source of intermodal competition, that this experience will not prevail here. To the contrary, the USTA decisions emphasize that the Commission should not invent some *sui generis* competitive analysis in order to determine impairment under the 1996 Act, but must

⁹ *USTA I*, 290 F.3d at 426 (quoting *Verizon Communications v. FCC*, 122 S.Ct. 1646, 1672 n.27 (2002)).

rigorously consider relevant economic and structural factors utilized in traditional forms of competitive analysis.¹⁰

To the extent the ILECs have any response to this point, it is that there are multiple VoIP providers offering service over these duopoly facilities. First, this very incipient form of competition by providers who do not control their own facilities, while laudable, is not the form of facilities based competition that the 1996 Act established as an overriding objective. Moreover, as Covad extensively described in its comments, carriers who are able to drive innovation in both network and application layers will provide compelling innovations beyond those achievable by VoIP application based providers, and in fact can support competition by these providers in many innovative ways.

In any case, without regulation preserving access to legacy loops there is absolutely no reason to believe or predict that owners of bottleneck facilities will allow these nascent competitors freely to cannibalize their legacy services, or to capture profits that duopolists can extract from downstream markets. Notably, the ILECs do not commit to continue to allow third party VoIP providers access to their broadband networks. Since VoIP cannibalizes their own narrowband voice services, the ILECs in fact have every incentive to prevent third party VoIP providers from using their network, or limit these competitors in ways that may not even be foreseeable today. Predictably, that is precisely what is happening in foreign markets in which broadband voice competition is actually taking place. For example, in Hong Kong the dominant carrier that controls the underlying facilities has just recently taken action to shut down VoIP providers that have attempted to make use of its legacy network.¹¹ Equally troubling, the ILECs

¹⁰ *See id.* at 426-27.

¹¹ “Hong Kong’s PCCW Asks Court to Block Web-Phone Service,” Wall Street Journal, October 12, 2004.

have every incentive to preserve their own narrowband voice services by declining to promote even their own VoIP services. Indeed, they are already acting on that incentive. SBC, Verizon and BellSouth thus all have adopted tying “policies” that mandate that their customers may not purchase broadband services from them unless they also purchase ILEC narrowband voice services. In fact, even where Verizon is providing a VoIP/DSL bundle in region, it still requires that its customers retain their analog voice service. Thus, unless the Commission permits Covad and others to make use of ILEC loops to provide broadband services, ILEC broadband VoIP will never be a substitute for narrowband voice service, since VoIP service cannot be obtained unless customers also obtain their primary voice service on the ILECs’ narrowband networks.

The ILECs’ claim that there could ever be more than two VoIP providers rests entirely on their assertion that cable operators (as distinguished from the ILECs themselves) will not likewise act on their incentives and shut down or attempt to disadvantage competitive VoIP providers. Thus the ILECs assert that the cable operators have adopted a “policy” of “network neutrality,” and at least to date have permitted third party VoIP providers on their cable networks. Their sole support for this claim is a year-old magazine article.¹² But there are no national legal requirements that the cable operators provide open access, and in fact the cable operators currently are vigorously asserting that they are under no legal or regulatory compulsion to make their networks available to anyone, for any reason.¹³ Presumably they are insisting on their right to exclude businesses, including VoIP providers, from their networks for a reason. And if the cable operators win that right, it is hardly prudent to assume that their “policy” of “network neutrality” will survive. Again, historical experience with respect to the cable

¹² UNE Fact Report at II-2 & n.4.

¹³ See *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (petition for certiorari filed Sept. 30, 2004).

companies' provision of access to competing video programmers, which led to the extensive reforms Congress enacted in the Cable Television Consumer Protection and Competition Act of 1992, is hardly comforting.

As Covad explained without contradiction in its opening Comments,¹⁴ the cable companies have the same incentive as the ILECs to capture retail telephone profits and revenue for themselves through their bottleneck last-mile facilities. They also may well choose not to fully develop even their own voice services either due to capital constraints or for fear that that would lead the telephone companies to more vigorously attack the cable companies' legacy video services market. For that is what duopolists do -- they do not compete vigorously, innovate and expand output to meet customer demand. Instead they engage in tacit collusion and exercise their market power to maximize their profits in ways that do not benefit consumers or the economy as a whole.¹⁵

In short, a cable/ILEC duopoly simply is not enough to ensure the rapid deployment of innovative broadband or voice services. As Covad demonstrated in its opening comments, the Commission has long understood that duopoly markets allow each duopolist to exercise market power to the detriment of consumers and to the economy.¹⁶ That is why neutral observers uniformly recognize that "the prospect of a broadband industry dominated by an ILEC-CATV duopoly therefore raises major concerns."¹⁷ It is why the Congressional Budget Office found that the ILEC-CATV duopoly would lead to "too few people . . . subscrib[ing] to a broadband

¹⁴ Covad Comments at 34-35.

¹⁵ See MCI Comments at 97-98.

¹⁶ Covad Comments at 29.

¹⁷ Ferguson, Charles H., *The Broadband Problem*, Brookings Institution Press p. 139 (2004). See Covad Comments at 29-30.

service at too high a price relative to the prices that would prevail in a more competitive market - a situation known as market failure.”¹⁸

The Commission cannot ignore this market failure. It need not attempt to predict precisely the ways the cable/wireline duopolists will behave if they are allowed to exercise their market power, or to attempt to construct regulation to cabin the harmful effects of duopoly power. Instead, in the 1996 Act Congress required the FCC to act to *eliminate* that market power at its source by unbundling bottleneck facilities so that facilities-based competitors can enter the market and so allow market forces to determine what products at what prices are available to consumers. Covad is ready to provide that competition, and others no doubt will follow. Covad already is offering VoIP services that are distinct from and superior to the “best efforts” services of companies that do not own and control their own networks. It offers quality of service voice transmission, E911 services, reliability guarantees and enhanced features not offered by POTS or other VoIP providers.¹⁹ But the opening comments make clear that a competitive market that will generate these and other services will not survive unless the Commission takes the necessary steps to unbundle legacy bottleneck loop and transport facilities.

This is all the more important if, as the ILECs predict, UNE-P competition is eliminated. UNE-L competition, as envisioned by the TRO, will not take its place because competitors will not make the investment to use last-generation Class 5 switches when future competition depends upon broadband packet-switched networks.²⁰ Commenters thus agree with Covad that,

¹⁸ Congressional Budget Office, *Does the Residential Broadband Market Need Fixing*, CBO Paper, December 2003, at 1.

¹⁹ See Covad Comments at 36-37.

²⁰ Verizon Comments at 88.

looking forward, it is likely to be residential broadband-based voice competition, or no competition at all.²¹

III. THE COMMISSION SHOULD REINSTATE ACCESS TO ILEC LEGACY LOOP ELEMENTS THAT SUPPORT FACILITIES BASED COMPETITION

Most commenters addressing the issue agree with Covad that the Commission should promptly reinstate access to line sharing and to legacy hybrid-fiber loops, including associated packet switching functionality.²² The decision to deny unbundling of these capabilities of bottleneck loop facilities was based on a series of predictive judgments that have proven to be unwarranted, and have been further undermined by subsequent events, as the record in this proceeding establishes.

A. The Commission Should Reinstate Access to Line Sharing

There is little dispute that competitors are impaired without access to the high-frequency portion of loops.²³ Obviously, if competitors are unable to replicate entire loops or obtain them from third party sources, they are equally unable to replicate only the high frequency portion of the loops. The Commission has consistently so held, and it should hold so again here.²⁴ Without linesharing, competitors that wish to offer broadband services must lease the entire loop. To make that purchase economical, they must necessarily sell voice as well as data services over that loop.²⁵ Covad's comments set forth in detail that due to poor and undeveloped ILEC provisioning processes, a cutover of an ILEC mass market customer to an integrated broadband/voice service is not currently a viable competitive alternative. Moreover, in the early

²¹ Covad Comments at 31-32.

²² See, e.g., ALTS Comments at 46; Supra Telecommunications Comments at 43; Small, Independent CLEC Comments at 3; Access One Comments at 1; ATX Communications *et al.* Comments 58-61.

²³ See, e.g., ALTS Comments at 46.

²⁴ TRO ¶ 248; Covad Comments at 41.

²⁵ ALTS Comments at 47.

stages of consumer VoIP, many consumers may not be comfortable without basic voice service from the ILEC. The result is that without line sharing the ILECs are able to leverage their stranglehold on the voice market into the broadband market as well. The elimination of linesharing in this manner greatly deters broadband competition.

The Commission's stated reasons for eliminating line sharing each have proven unfounded. Thus, commenters agree that line-splitting is no longer a realistic alternative.²⁶ Even at the height of UNE-P's popularity as a local service delivery method, line-splitting with a UNE-P provider would have been possible only in the small portion of the market that UNE-P providers had captured. Now that AT&T has abandoned that service delivery method, and the other major UNE-P providers appear poised to do the same, the Commission's prediction that line-splitting would become a robust alternative to line sharing has not proven out, and definitely will not prove out in the future.²⁷ Other Commission predictions, such as the possibility of offering broadband services in conjunction with UNE-L service, or the ability to collect revenue from video services through DSL-based broadband services, have also not come to pass, and face substantial hurdles of the ILECs own making.²⁸ Nor has the Commission's prediction that commercial arrangements would supplant regulation in this area.²⁹ No commenters have pointed to such arrangements, apart from the one long term arrangement Covad reached with Qwest.

Additionally, nothing in the record contradicts Covad's demonstration that line sharing promoted broadband deployment, both here in the United States while it was firmly in place, and

²⁶ *Id.* at 48; Earthlink Comments at 6.

²⁷ ALTS Comments at 48; Earthlink Comments at 4.

²⁸ Compare TRO ¶¶ 258-59 (UNE-L); ¶ 258 (video services). See also Earthlink Comments at 5.

²⁹ See TRO ¶ 265.

abroad, where competition based upon unbundling in countries like Japan, South Korea and elsewhere has led to deployment that far surpasses the deployment that exists here.³⁰

Finally, the comments support Covad's demonstration that VoIP holds the key to facilities-based residential competition, and line sharing is a critical transitional mechanism that will enable facilities-based VoIP competition to develop.³¹ With line sharing customers can retain their ILEC narrowband voice service and experience competitive broadband data service and VoIP service as a second-line voice alternative, to access competitive VoIP long distance services, and for added features only VoIP can provide. Then, when consumers have become comfortable with VoIP, and comfortable with the high level of service provided by a facilities-based provider like Covad, they can adopt VoIP as their primary voice line, porting their primary number to their VoIP line.³²

Not only does this transition path allow consumers to adopt this new broadband technology at their own speed, but it also avoids the necessity for a traditional hot cut. And, the record here establishes that the ILECs still have not developed scalable electronic hot cuts. In this way as well, line sharing powerfully promotes the Commission's broadband agenda, and will lead to greatly increased use of broadband networks by consumers. Elimination of line sharing, on the other hand, will needlessly deter deployment of broadband and permit the ILECs

³⁰ Covad Comments at 46-50.

³¹ ALTS Comments at 49.

³² This also highlights a fundamental flaw in the Commission's three year line sharing transition scheme, in which the portion of the loop charge paid by a CLEC increases to 100% of the loop charge over time, whether or not the DSL subscriber in question terminates ILEC voice service. By providing for this charge where a CLEC DSL subscriber retains ILEC voice service, the FCC has institutionalized double recovery of costs by the ILEC, and imposed increased costs on the CLEC, for absolutely no reason. A far more sensible approach would be to require that the CLEC loop charge reaches 100% of the UNE-L rate ONLY when the customer has terminated ILEC voice service, as the CLEC at that point will be the sole user of the loop.

to act on their incentive to suppress broadband VoIP applications as a way to preserve their narrowband voice revenues.

Notwithstanding all of this, the ILECs claim that the *USTA* decisions prevent the Commission from reinstating line sharing, because these decisions require the Commission to consider intermodal alternatives to wireline broadband, and to analyze whether the market is impaired in the absence of wireline competition.³³

That is precisely the analysis the Commission declined to undertake in the *TRO*, and that Covad urges the Commission to undertake here. When the Commission does undertake that analysis, it will find that the ILECs' claim that there is "robust intermodal competition in the broadband market"³⁴ is unsupported by any record evidence. As we observed at the outset, what that evidence shows, to the contrary, is that the market is at best a duopoly market that is not merely "impaired," but crippled, without shared access to ILEC legacy bottleneck loop facilities.³⁵ In sum, Covad and other commenters are asking the Commission to engage in precisely the inquiry the *USTA* court ordered the Commission to undertake. It is the ILECs who are encouraging the Commission to act in a lawless manner by abandoning line sharing without even analyzing the intermodal competition that exists and forming a defensible judgment about whether competition in the market is or is not impaired.

B. The Commission Should Reinstate Access to Legacy Hybrid Fiber Loops, Including Associated Packet Switching Functions

Commenters agree that the Commission must revisit and substantially refine the *TRO*'s fundamental determination to deny competitors access to the "broadband" capabilities of the legacy ILEC loop and transmission plant. As shown in Covad's opening comments, the

³³ See Verizon Comments at 150; SBC Comments at 100-102.

³⁴ *Id.*

³⁵ See *supra* pp. 4-10.

Commission's decision simply allows the ILECs to exercise monopoly power over an entire class of existing customers who have the historical misfortune to reside at the end of a loop that happens to have fiber in it somewhere. The decision in the *TRO* to bifurcate the broadband and narrowband markets, and to deregulate the former and regulate the latter has proven fundamentally unsound, for it did not (and as a practical matter could not) take into account how competition is in fact evolving now (and how it could truly blossom).

In fact, as the opening comments made clear, facilities-based competition will come from carriers using legacy loop and transport facilities to provide broadband services in conjunction with VOIP. This can and should be achieved by requiring the ILECs to allow facilities-based competitors to use legacy ILEC loops (including access to *legacy* hybrid facilities) to provide broadband services and facilities-based VOIP. This potential can only be realized if the Commission adopts a minimally intrusive, carefully targeted unbundling regime to support these forms of facilities based competition.

Commenters agree with Covad's demonstration that the Commission must revisit its decision to deny competitors access to the broadband capabilities of legacy ILEC loops.³⁶ The commenters' emphasis on VoIP competition in particular underscores the need for the Commission to revisit this judgment, for that competition is critically dependent upon the broadband capabilities of legacy last-mile bottleneck facilities. The ILECs do not dispute that fiber has already been installed in the loop plant and will continue to be installed to deliver narrowband services. *No* persuasive evidence supports the Commission's hypothesis that its decision to refuse to unbundle these facilities will lead to a whit more deployment. To the contrary, the weight of the evidence is that elimination of unbundling of *legacy* hybrid has had

³⁶ *See, e.g., ATX et al. Comments at 59; Access 1 Comments at 1.*

no beneficial effect on ILEC or CLEC investment.³⁷ Similarly, the ILECs do not dispute that the deployment of broadband loop electronics is already complete, and so no decision the Commission could make would possibly have any effect on that deployment.

Similarly, denying competitors access to the so-called “packet-switching” capabilities of legacy hybrid loops does nothing to encourage ILEC investment. As demonstrated in Covad’s opening comments, the “packetized” functions on a hybrid loop are little more than router functions which direct packets to ports on a switch. This is hardly revolutionary, and requiring ILECs to hand off CLEC-destined DSL traffic is minimally burdensome. In fact, notwithstanding the TRO, SBC to this day provides this form of hybrid loop access service as a UNE, and there is no evidence that this has limited SBC’s DSL rollout one iota. The same is true of handoff of TDM based traffic from hybrid facilities for business services, which the Commission required in the TRO, and which the Commission should act to preserve in this proceeding. Covad merely seeks appropriate unbundling of all legacy loops and the ability to access the output of those loops at its 2000 collocation spaces. A failure by the Commission to unbundle all legacy loops and the capability to access them in the ILEC central offices will serve to eliminate competition that would otherwise bring great consumer benefit, through both lower broadband prices and innovative broadband services. Most particularly, unbundling will bring enriched VoIP-based services to the consumer marketplace. Conversely, a refusal to reconsider these decisions will deter the deployment of VoIP, since the ILECs have every incentive to guard their narrowband voice revenues for as long as possible.

In sum, the record developed here makes clear that facilities-based residential competition depends upon broadband and VoIP deployment. The single most important and

³⁷ See, e.g., ATX *et al.* Comments at 60; Comments of Ad Hoc Telecommunications Manufacturing Coalition at 4-5.

effective step the Commission can take to incent that deployment is to allow facilities-based competitors such as Covad to compete in this market. For that to happen, the Commission must unbundle legacy last-mile broadband-capable facilities. It should therefore promptly reconsider its contrary decision in the *TRO*.

IV. CLECS WILL BE IMPAIRED WITHOUT ACCESS TO LOOPS AND TRANSPORT BELOW THE COMMISSION'S DEFINED CAPACITY THRESHOLDS

To provide competition in the data and VoIP markets, Covad and other CLECs also need continued access to high capacity transport and DS-1 loops. Commenters generally agree that the Commission's prior conclusion that CLECs cannot deploy DS-1 loops or transport (when they need fewer than 13 DS-3s) was correct. Covad demonstrated that reasonably efficient CLECs could not compete in the DSL market or T-1 market without access to unbundled DS-1 loops and DS-3 transport (below the 13 DS-3 threshold) as UNEs. Other CLECs did so as well. And the ILECs provide no evidence that suggests otherwise. The ILECs do not purport to show that even an efficient CLEC could deploy its own facilities when it needed 12 or fewer DS-3s worth of transport or DS-1 loops. They do not show that wholesale alternatives are available to CLECs that need transport and loops at these capacity levels. And they do not show such a CLEC could economically rely on special access facilities priced substantially above cost.

A. No Evidence Shows CLECs Can Self-Deploy Facilities Below the Capacity Thresholds

CLECs explain that they cannot deploy facilities below the previously established capacity thresholds. The ILECs do not show otherwise. They present evidence on the extent to which loops and transport have been deployed across the nation. But they present no evidence that any CLEC has successfully deployed transport anywhere to serve customers with fewer than

13 DS-3s worth of traffic or that any CLEC has successfully deployed DS-1 loops. Thus, none of the evidence the ILECs present on loop and transport deployment is even relevant to the question of whether CLECs can deploy facilities to serve customers below the capacity thresholds. Indeed, the ILECs enjoy immense first mover advantages, not to mention enormous economies of scope and scale, in constructing and maintaining high-capacity loop and dedicated transport facilities.³⁸ Indeed, the ILECs have not offered any compelling rebuttal of the Commission's previous findings of the immense advantages the ILECs have traditionally enjoyed over CLECs in constructing these facilities. More compelling cases for finding impairment if CLECs were required to reconstruct the vast webs of interoffice transport routes that connect CLECs' own substantial, collocated facilities, or the 100 million plus loops connecting central office locations to customers, are hard to imagine.

At the time of the TRO the Commission found that "[t]he record contains little evidence of competitive LECs' ability to self-deploy single DS1 capacity loops."³⁹ And it reached similar conclusions with respect to DS-3 transport below 13 DS-3s.⁴⁰ It remains the case that there is virtually no record evidence of deployment of any loop or transport facilities below the capacity thresholds. To the contrary, the record unequivocally shows that CLECs cannot deploy facilities below the capacity thresholds. Many CLECs show that this is true for them.⁴¹ Covad explained that this was true for it as well.⁴²

³⁸ See *TRO* at paras. 85-91 (discussing barriers to entry including ILECs' first-mover advantages, economies of scale, sunk costs, etc.).

³⁹ *TRO* ¶ 325. See also *id.* ¶¶ 321, 325.

⁴⁰ *Id.* ¶ 388.

⁴¹ See, e.g., KMC Duke Decl. ¶ 11 (KMC will not build laterals unless a customer purchases at least 3 DS3s); Xspedius Falvey Decl. ¶ 25 (Xspedius will not build laterals without 3 DS3s in customer demand); ATI Wigger Decl. ¶¶ 23, 24, 36 (ATI requires that a customer order OC-3 service before building to locations more than 500 feet from its fiber ring and will not build transport until it accumulates at least 15 DS-3s of traffic); SnipLink Abate Decl. ¶ 9, 10

Thus, CLECs with customer demand below the capacity thresholds cannot economically deploy their own facilities. But these are the capacities that Covad and many other CLECs need. And these are the only CLECs that matter, because CLECs that need facilities above the capacity thresholds *already are precluded from ordering such facilities as UNEs*. This is a crucial point, and one the ILECs ignore entirely. The evidence they present on potential deployment in particular wire centers is irrelevant, because, at the point where a CLEC has enough traffic that it potentially could self-deploy in these wire centers, it has no access to UNEs.

The ILECs contend, however, that CLECs can deploy facilities above the capacity thresholds and then readily wholesale such facilities. Even if this were true, however, this would not help a CLEC, such as Covad, that needs facilities below the capacity thresholds until other CLECs had in fact deployed such facilities and made them available at wholesale. That it might theoretically be possible for wholesalers to deploy facilities is irrelevant. All that matters to Covad is whether it can deploy facilities itself -- to which the unambiguous answer is no -- or whether wholesalers already exist on a particular route. Covad needs more than merely the ILECs' theoretical speculations that alternative wholesale facilities could become available if UNEs are taken away. Rather, Covad needs concrete, demonstrable evidence that sufficient competitive wholesale providers will be able to provide alternatives to ILEC UNE transport and loops if it is to have any assurance it will be able to continue offering service to its customers.

It was for just such reasons that the Commission differentiated between retail triggers and wholesale triggers. It set the retail trigger in the TRO at three for transport based on the premise

(SnipLink will not be able to build loops, and requires an OC-12 of traffic before deploying transport); Time Warner Telecom at 4 (cannot generally deploy DS-1 loops or DS-3 transport); AT&T Comments at 27 (cannot deploy below the capacity thresholds); One Eighty Johnson Decl. ¶ 7 (cannot self deploy DS1 loops); TDS Jenn Decl. ¶ 11 (cannot self deploy DS1 loops).⁴² Derodeff Decl. ¶¶ 48,50.

that the existence of three retail providers provided strong evidence that other CLECs could self-deploy and thus were not impaired.⁴³ Nonetheless, the Commission explained, where CLECs beyond the initial three could not deploy their own transport to serve customers below the capacity thresholds, they were impaired (unless wholesale facilities were available) and states could petition for a waiver of the retail trigger on this basis.⁴⁴ Moreover, the Commission did not set a retail trigger for DS-1 loops at all because it was clear that CLECs cannot self-deploy these loops.⁴⁵ It did not matter whether CLECs can or have deployed loops to these same customers above the DS-1 level because this would not show that CLECs could deploy DS-1 loops to serve customers.

It is now clear that CLECs cannot deploy facilities below the capacity thresholds anywhere. In other words, application of anything like the retail trigger would yield an answer that no CLECs have met the trigger virtually anywhere and that even if they had, additional CLECs could not deploy their own facilities below the capacity thresholds. As was previously true for DS-1 loops, it is now clear for all facilities below the capacity thresholds that CLECs cannot self-deploy and thus there is no need for anything like a retail trigger.

In contrast to its position on the retail triggers, the Commission set the wholesale trigger at two without any exceptions. It did not exempt DS-1 loops, and it did not permit waivers. This is because, so long as CLECs deploy facilities and wholesale them (regardless of whether the facilities they initially deploy are above the capacity thresholds), other CLECs could obtain facilities from these wholesalers even if they could not self-deploy.⁴⁶ Indeed, even this number of wholesale providers seems very low, as the presence of two providers in a market indicates

⁴³ TRO ¶ 400.

⁴⁴ TRO ¶ 411.

⁴⁵ TRO ¶ 327.

⁴⁶ *Id.*

merely duopoly, rather than robust competitive conditions. As Covad explained in its initial comments, wholesale prices only approach UNE rates when there are *several* CLEC wholesalers on a route.⁴⁷ But, even under the limited triggers adopted by the FCC, the evidence from the state proceedings shows that there are very few routes and locations on which even CLECs that have self-deployed loops and transport (above the capacity thresholds) are offering wholesale facilities below the capacity thresholds, as the QSI report shows.⁴⁸ CLECs confirm that wholesale transport is available on relatively few routes.⁴⁹ Thus, there is no need even to apply the wholesale triggers.

The ILECs do not provide any persuasive evidence to the contrary. They point to general statements of CLECs on web sites suggesting a willingness to wholesale loops and transport but these statements do not show where such wholesaling is offered or at what terms. The ILECs' claim that these statements evince a general willingness to wholesale everywhere is absurd given that there are many routes and locations on which these wholesalers have not even deployed facilities and on which it would clearly not be economic for them to do so. For example, Covad explained that it has no wholesale alternatives for DS-1 loops.⁵⁰ Indeed, as evidenced by the QSI report, when actual evidence on wholesaling was gathered in the state proceedings, and statements such as those the ILECs cite were examined in detail, it turned out that wholesaling

⁴⁷ De Rodeff Decl at 25-26.

⁴⁸ Cf. TRO ¶ 392 (record shows that “DS1 transport is not generally made available on a wholesale basis”).

⁴⁹ ATI Wigger Decl. ¶ 45, Eschelon Kunde Decl. ¶¶ 6,9; Broadview Sommi Decl. ¶ 4; SNiPLink Abate Decl. ¶¶ 18-19.

⁵⁰ Covad Comments at 69. *See also* OneEighty Johnson Decl. ¶ 5, GCI Comments at 29, TDI Jenn Decl. ¶ 9; Time Warner Comments a5 5.

below the capacity thresholds was extremely rare. Indeed, the ILECs did not even purport to show the existence of wholesaling on very many routes/locations.⁵¹

Thus, even efficient CLECs that need loops and transport below the capacity thresholds cannot readily deploy these facilities and will seldom have access to wholesalers providing these facilities. The Commission should therefore reaffirm the capacity thresholds as the line differentiating impairment and non-impairment on a national level.

If the Commission wishes to account for the small number of instances in which CLECs that have deployed loop and transport facilities above the capacity thresholds are wholesaling these facilities, it can do so by applying the wholesale trigger.⁵² The ILECs do not (and could not) assert that it would be infeasible for the Commission to apply this trigger (or the retail trigger for that matter). And AT&T explains one feasible way the Commission could apply the wholesale trigger.⁵³ If the Commission adopted this approach it would have eliminated access to UNEs in every instance in which a CLEC either could self-deploy facilities (because in all such instances, they would need facilities above the capacity thresholds) or could obtain access to facilities at wholesale from other CLECs. It would thus eliminate unbundling except in instances where it is indisputable that CLECs are impaired. Thus, there are absolutely no error costs in such an approach (except for error costs of too *little* unbundling).

In contrast, the ILECs' proposed approaches would eliminate unbundling on hundreds of thousands of routes and locations in which CLECs unquestionably are impaired. These proposals have no grounding whatsoever in *USTA II*, which remanded the decision to the Commission based on the fact it had delegated decision-making to the states and which did not

⁵¹ Covad Comments at 76.

⁵² There is certainly no need to do this for DS-1 loops, however, where there is no evidence of wholesaling.

⁵³ AT&T Comments at 64.

fault the Commission for the capacity thresholds it established, nor for the approach of using triggers. Nor do they have any grounding in the record here.

The ILECs propose a number of different approaches ranging from: (1) elimination of unbundling of all high capacity facilities everywhere; (2) unbundling of transport on any routes between central offices with specified line counts (more than 5,000 business lines in Verizon's and BellSouth's proposal; more than 5,000 lines in one central office in SBC's proposal and more than 10,000 lines in another for DS-1s); (3) and unbundling of loops connected to any central offices with more than 5,000 business lines in BellSouth's proposal, for example. What all of these proposals have in common is that they would eliminate unbundling below the capacity thresholds on a huge number of routes and locations in which no CLEC is today wholesaling transport/loops. They would do so on the theory that it might in the future be possible for some CLECs to deploy their own facilities on these routes/locations and make these facilities available at wholesale.

Even if the ILECs' theory were correct, however, it would be of no help to Covad on all of the routes/locations where it needs facilities below the capacity thresholds. Covad could not itself economically deploy facilities on these routes/locations. And even if other CLECs theoretically could obtain sufficient traffic to warrant self-deployment of facilities on these routes, this is absolutely no help to Covad until these facilities are actually available. In the absence of unbundling, Covad would have to withdraw from many markets. Thus, the ILECs' proposal would result in elimination of the significant facilities-based competition that Covad and other CLECs have brought to the broadband market. Alternatively, without access to unbundled loop and transport facilities, Covad's only remaining recourse would be much higher-priced special access transport links to reach its customers. In turn, so long as these special

access rates remain substantially above cost, Covad would remain subject to a price squeeze against the ILECs. In this scenario, the ILEC would have every incentive for (and little accountability for) worsening this price squeeze situation for its CLEC competitors, rendering them unable to compete.

There is no competing policy goal in the Telecommunications Act that suggests adoption of the ILECs' proposals would be warranted. The ILECs present no evidence that the current unbundling regime deters ILECs or CLECs from investing in their own loop and transport facilities. Nor could they, as the ILECs interoffice networks are long established, legacy facilities. The extensive deployment of loop and transport facilities by CLECs shows that unbundling did not deter such deployment even under the far broader unbundling regime that existed prior to the TRO, as the Commission concluded in rejecting the ILECs' attempt to prove a deterrent effect in the TRO.⁵⁴ And under the TRO unbundling rules, it would be farcical to assert that unbundling deters CLEC deployment, because any CLEC that even arguably could deploy its own facilities would not have access to UNEs under the capacity thresholds.⁵⁵ Indeed, the availability of unbundling below the capacity thresholds allows CLECs to begin acquiring traffic that they hope will eventually be sufficient traffic to warrant deployment of their own facilities on a particular route. It thus facilitates CLEC deployment of loops and transport. And if such deployment occurs and the CLECs that deploy these facilities make them available at wholesale, application of the wholesale trigger would then eliminate unbundling on the route in question even for other CLECs.

⁵⁴ TRO ¶ 178 & n. 575.

⁵⁵ Nor would a CLEC considering deployment of facilities with the purpose of wholesaling be deterred by the availability of UNEs below the capacity thresholds, because, “[a] competing carrier that is considering whether to deploy transport facilities for the purpose of providing a wholesale offering is likely to be encouraged to deploy if its deployment will eliminate transport priced at TELRIC. . . .” TRO ¶ 413.

There is thus no policy justification for denying CLECs access to UNEs below the capacity thresholds, and strong policy reasons not to do so. Elimination of unbundling will eliminate facilities-based competition that depends on access to UNEs below the capacity thresholds without any compensating advantages. And under a straightforward application of the impairment test, there can be no question CLECs would be impaired without access to these facilities.

B. The ILECs' Proposals Fail on Their Own Terms

The ILECs' proposals also fail on their own terms. The ILECs' proposals are based on the premise that unbundling should be eliminated for facilities below the capacity thresholds wherever it would be economic for any CLECs to deploy facilities above the capacity thresholds because these CLECs will then wholesale the facilities. As we have explained, potential wholesaling is irrelevant until it has actually occurred, however. In any event, the ILECs propose elimination of unbundling far beyond the routes and locations where multiple wholesalers potentially exist.

The ILECs point to evidence they have gathered as to the number of central offices with at least one fiber-based collocation. They apparently evaluated these offices to determine the minimum business line counts at which more than 50% of these offices had such a fiber-based collocation. They came up with 5,000 business lines. And they then extrapolated to the conclusion that CLEC deployment is economic between all offices with 5,000 business lines.

This reasoning is critically flawed. First, the evidence does not demonstrate that deployment of transport facilities would be economic even between those central offices that *already* have a fiber-based collocation in each office. It does not show that the same CLEC is collocated at both ends of the routes between these offices, much less that the CLEC has deployed transport on that route and is making it available at wholesale. It does not even show

that a CLEC collocated at one end of a route could economically collocate at the other end of each route to make wholesaling possible. It may have been economic for the CLEC to collocate in the first office only because it was close to the CLEC's Point of Presence or a large enterprise customer, for example.

Moreover, as Covad explained in its Comments, there many reasons why a CLEC will not deploy transport on a route (much less wholesale on that route) *even* where it is collocated at both ends of the route.⁵⁶ The empirical evidence in the QSI report supports this conclusion -- showing that there are many fiber-based collocators that do not wholesale even on routes where they are collocated at both ends of the route. QSI's analysis shows that in 11 states it analyzed, a total of 3 or more collocators were present at both ends of 961 routes -- a much higher number than the 40 routes in these states arguably meeting the wholesale triggers.⁵⁷ Thus, the existence of a single fiber based collocator in two central offices does not mean that it is economic for even a single CLEC to wholesale transport between those two offices (or even retail transport) particularly since it is likely not the same CLEC collocated at both offices. Indeed, the ILECs have offered no economic evidence suggesting that deployment of wholesale transport along a given route is economic for a particular fiber-based collocator collocated on both ends of that route. Instead, the ILECs merely offer an almost laughable analysis suggesting that unbundled transport should be removed whenever an end office exceeds 5,000 business access lines -- without any showing that alternative transport would actually be deployed and offered wholesale between all such end offices.

Second, even where a single CLEC *is* deploying transport on a particular route, that does not show that "multiple, competitive supply" is possible, which is the very reason the

⁵⁶ Covad Comments at 76-77.

⁵⁷ QSI Report at 21 (Table 10).

Commission required the presence of two wholesalers and three retailers to meet the triggers.⁵⁸ To begin with, it is generally *not* the case that when there is a single fiber-based collocator even at both ends of a route, a wholesale alternative already is available, as the QSI report shows. And even if it were the case, a single wholesaler is insufficient because, as Covad explained, wholesale prices only approach competitive prices when there are *several* CLEC wholesalers on a route.⁵⁹

Nor do the ILECs show that fiber-based collocation (much less wholesaling) would be economic for multiple CLECs wherever it would be economic for one CLEC. The ILECs' assertion that it is assumes that deployment was economic for the first CLEC. In many cases this is incorrect, as evidenced by the extensive overdeployment of transport facilities that occurred. Moreover, given all of the factors that affect whether deployment of transport is possible, including distance from a CLECs' network, topography between the central office and the CLECs' network, availability of rights of way between the central office and the CLECs' network, expected revenues, and many others, the economic calculus likely will be very different for the second CLEC than the first.⁶⁰ Indeed, SBC's data show that the offices with two fiber-based collocators typically have higher business line counts than those with one, and those with three presumably have even higher business line counts on average, although SBC does not provide this data.⁶¹ Thus, offices that attract multiple fiber-based collocators are different in important respects than those that attract one. It therefore cannot be presumed that fiber-based collocation would be economic for a second or third CLEC just because it is economic for one. Indeed, the very fact that there is not a second CLEC with a fiber-based collocation in a central

⁵⁸ TRO ¶¶ 407, 413.

⁵⁹ De Rodeff Decl at 25-26.

⁶⁰ See, e.g. TRO ¶¶ 371, 376.

⁶¹ SBC Comments at 78.

office after many years of competition is strong evidence that such deployment would *not* be economic for a second CLEC.

Finally, the ILECs' attempt to extrapolate beyond offices with a single fiber-based collocator to offices in which *no* CLECs have yet collocated has not a shred of justification. According to the ILECs' own data, 47% of offices that have 5,000 business lines do not have any fiber-based collocations. The fact that there is not a single fiber-based collocation in nearly half these offices eight years after passage of the Telecommunications Act should be dispositive evidence that it would not be economic for a CLEC to establish a fiber-based collocation in each of these offices, much less for multiple CLECs to do so. And, of course, the ability of multiple CLECs to collocate would not show that these very same CLECs could collocate in each of the other offices so that there would be multiple CLECs potentially capable of transporting traffic between each of these offices. And even this would not show that each of these CLECs would in fact establish transport facilities to each other office with more than 5,000 business lines and make them available at wholesale.

Thus, the ILECs' proposed tests would eliminate access to unbundled transport on hundreds of thousands of routes where no CLEC will ever be able to deploy transport facilities even above the capacity thresholds. In contrast, as we have seen, application of the capacity thresholds has no offsetting disadvantage. Application of these thresholds does not lead to excess unbundling because the only CLECs that have access to transport are those that lack sufficient traffic to economically deploy their own transport facilities.

C. The Availability of Special Access Does Not Eliminate Impairment

The ILECs alternatively argue that even if CLECs cannot construct their own facilities, they can rely on special access. In doing so, they ignore the statute. Covad explained that special access is irrelevant because the statutory question under Section 251(d)(2) is whether

CLECs would be impaired if the ILECs failed to provide these elements altogether. That statutory question is the right one because the policy goals of the Act would not be advanced by finding non-impairment based on special access. Even if CLECs could survive using special access facilities to compete (by, for example, being more efficient than the ILEC in providing other components of the retail service), CLEC reliance on special access would radically distort the effectiveness of competition in providing benefits to consumers given how far special access prices are above cost. The ILECs have presented no convincing rebuttal to the substantial evidence in the record that special access services are priced substantially above cost, and in fact, likely represent monopoly pricing power.

In any event, the ILECs ignore the evidence of the many CLECs that make clear they cannot compete using special access. Covad explained that it does not rely on special access (except for very short periods) and could not do so economically.⁶² And Covad is not alone in this regard. Other than the largest interexchange carriers, CLECs generally explain that they rely primarily on UNE DS-1s and DS-3s, rather than special access.⁶³ In their filings for a stay application at the D.C. Circuit, a number of other CLECs explained the dire consequences if they were forced to rely on special access.⁶⁴

The ILEC evidence does not suggest to the contrary. The ILECs provide virtually no evidence that any CLECs are profitably using DS-1 special access loops or DS-3 special access transport to provide the data services (or VoIP services) that Covad provides to small and medium sized business customers, for example. And Covad and other similarly situated CLECs show they cannot do so, even when operating in a reasonably efficient manner. So long as

⁶² Derodeff Decl. ¶ 44-45.

⁶³ *See, e.g.*, XO Tirado Decl. ¶ 44, Xspedius Falvey Decl. ¶ 36, ATI Wiggins Decl. ¶ 52; MTI Comments at 5-6..

⁶⁴ Covad Comments at 85-86 (citing CLEC affidavits).

special access rates are substantially above cost, facilities-based competitors relying on special access will always be subject to a price squeeze in competing against the ILECs. The ILECs will be able to compete based on obtaining interoffice facilities for their services at cost, while competitors are forced to obtain the same critical inputs to their services at rates far above cost. Indeed, now that they have section 271 authority, the ILECs have a strong incentive to raise special access rates to cause price squeezes. Moreover, in most areas of the country, the ILECs enjoy complete control over their ability to set rates for special access. Thus, if competitors were left with no alternative but special access, they would be left solely at the mercy of their primary retail competitor – the ILEC – for the pricing of the critical loop and transport inputs to their businesses. In this scenario, the ILEC would have every incentive for (and little accountability for) worsening this price squeeze situation for its CLEC competitors.

Instead, the ILEC present evidence that the larger IXCs are relying on special access facilities to provide interLATA services (perhaps in conjunction with other services), often to serve the largest enterprise customers. Indeed, that is the basis on which the ILECs argue that unbundling should be eliminated with respect to interLATA services, and with respect to services used to serve large enterprise customers. But the very most that this evidence could establish is non-impairment for those CLECs that are already using special access with respect to the particular services they provide. Thus, PaeTec, one of the ILEC poster-children for the ability of CLECs to rely on special access, explains that even assuming no increase in special access rates, it is able to serve only 15% of the large business market using special access and could not expand to serve small and medium sized businesses.⁶⁵ Outside of these particular CLECs and these particular services, assessing impairment based on special access would plainly

⁶⁵ PaeTec Comments at 5.

require an evaluation of special access rates and retail rates for the particular services provided. The ILECs do not even attempt such an assessment. Yet it is the ILECs that argue for a service specific impairment inquiry.

Nonetheless, the ILECs blithely assert that the Commission can make blanket findings of non-impairment without taking any account of widely varying special access and retail rates. They have no basis for such an assertion. But to attempt to account for this variance would be an administrative impossibility. As Covad explained in its Comments, there are thousands of special access tariffs with complex terms that often vary by geographic zones, by distance, and by the volume of facilities purchased. There are also thousands of retail rates for different services that also often vary by zone -- although the zones and distance sensitivity of the retail rates are different than those for special access, vastly complicating any comparison. Finally, the ILECs' ability to raise special access rates or lower retail rates would make it impossible to conclude that CLECs are not impaired even if retail rates were significantly above special access rates at a particular moment in time. Thus, there is no basis to find non-impairment for services or areas other than those where CLECs are actually relying on special access. Nor should the Commission even attempt to evaluate impairment beyond these services or areas given the insuperable obstacles to doing so.

The Commission also should not extrapolate non-impairment beyond the particular CLECs relying on special access even with respect to the very services these CLECs provide in the locations they provide them. The larger IXCs that are making the most significant use of special access can obtain substantial volume discounts when they purchase special access facilities. Indeed, the ILECs tout these discounts as what makes use of special access economic. But these discounts simply are not available to Covad or other CLECs that do not make use of

facilities in sufficient volumes to qualify for the discounts.⁶⁶ In order to determine whether these CLECs could provide similar services, the Commission would again have to compare retail and special access rates at every location. The evidence that does exist shows that these CLECs *cannot* generally rely on special access facilities.

Verizon suggests that smaller CLECs can purchase facilities from wholesalers that have obtained Verizon special access facilities at deep discounts and then resell them. But Covad has found that wholesalers typically offer discounts of only 20% off the extravagant ILEC special access rates, rates that remain far above cost, and far too high for Covad to use economically. This is presumably because, as Verizon suggests, many wholesalers are purchasing and then reselling special access facilities rather than wholesaling their own facilities. Even if these wholesalers obtain these special access facilities at significant discounts, by the time they incorporate their own costs to resell them, the rates return to close to the tariffed special access rates. Thus, even if it were possible for CLECs that have access to volume discounts to compete with special access, this would not help Covad or other similarly situated CLECs.

Finally, the context of the impairment determination has shifted dramatically in the last year making empirical evidence an inadequate basis to find non-impairment even with respect to those CLECs making use of special access today. As Covad explained, the ILECs' recent entry into the interLATA long distance market now provides an incentive for them to price squeeze retail competitors that they did not have before. Time Warner Telecom, another ILEC poster-child for the claim that CLECs can rely on special access, points to two other dramatic changes that will limit its ability in the future to rely on special access even where it has been able to do so to date. Time Warner explains that price flexibility has led to an increase in special access

⁶⁶ Derodeff Decl. ¶ 45.

pricing. It further explains that the *USTA II* decision, portending the possible elimination of UNEs has led to further increases in special access rates because UNEs have heretofore constrained special access pricing.⁶⁷ This trend would surely escalate dramatically if the Commission in fact eliminated UNEs.

The ILEC Comments only confirm the drastic shift that has occurred. Verizon explains, for example, that it could not compete seriously in the enterprise market until *last year* when it received 271 authority across its region.⁶⁸ Verizon explains that since that time it has obtained one third of the contracts for which it has competed.⁶⁹ One third is an extremely high number for a market Verizon has just entered. And this extremely high percentage would almost certainly be much higher if Verizon had looked only at contracts where it was competing against CLECs using special access facilities rather than their own facilities -- CLECs that were susceptible to a price squeeze. Moreover, Verizon explains that where it has been in its interest to do so, it has offered the retail customer special deals with which CLECs could not compete.⁷⁰ In other words, Verizon has the ability to drive CLECs out of the market when it chooses to do so and has already begun to exercise that power.

Under such circumstances, there is no basis for concluding that even CLECs that are currently using special access continue to be able to compete using special access. For the Commission to determine that they could do so in particular circumstances, it would have to undertake exactly the same comparison of special access and retail rates that we have shown to be all but impossible.

⁶⁷ Time Warner Comments at 8, 15-17.

⁶⁸ Bruno Decl. ¶ 16.

⁶⁹ *Id.* ¶ 20.

⁷⁰ *Id.* ¶¶ 26-28.

These same arguments demonstrate that the ILECs' proposed "no conversion" policy should not be accepted. As we have just shown, the ability of CLECs to use special access in the past does not show that even these CLECs can do so in the future now that the ILECs can provide interLATA services.

If the Commission were to adopt a non-conversion rule, however, it clearly should not be applied to Covad's limited use of special access facilities. Regardless of what may be true of CLECs who use special access as a regular part of their method of providing service, Covad's very limited use of special access does not remotely suggest an ability to rely on such facilities in the long term even where Covad has decided to do so in the short term. As Covad has explained, it only purchases special access facilities when UNEs are unavailable. And it does so on the presumption that it will then be able to convert these facilities to UNEs fairly quickly. In the Verizon region, for example, Covad purchases special access services in the many instances in which Verizon responds to UNE orders by saying facilities are unavailable. But Covad would not purchase these facilities at all if it could not convert them to UNEs. Thus, a flat no conversion rule would mean that Covad would have to reject customer orders because the ILECs could not effectively process UNE orders! The ILECs should not be rewarded in this manner for their inability or unwillingness to process orders.

In sum, the availability of special access does not eliminate the impairment that exists with respect to DS-1 loops or transport facilities below the 13 DS-3 threshold. It certainly does not do so for CLECs of Covad's size that are providing data services to primarily to residential and small business customers. Covad, like other CLECs, could not continue to provide the facilities-based data competition it now provides without continued access to UNEs.

V. CONCLUSION

For the forgoing reasons, as well as those reasons set out in Covad's initial comments and the comments of the many other industry participants that have filed comments supporting continued unbundling of incumbent LEC transmission facilities, the Commission should promptly revisit its decisions to deregulate access to loop and transport facilities and capabilities. In particular it should reconsider its decision to phase out line sharing and deny access to the broadband capabilities of hybrid fiber copper loops. The Commission should also reinstate the unbundling of high capacity loop and transmission facilities below the Commission's already established capacity thresholds.

Respectfully submitted,

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