

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, DC 20554

In the Matter of)	
)	
Framework for Broadband Internet Service)	GN Docket No. 10-127
)	
)	

COMMENTS OF COVAD COMMUNICATIONS COMPANY

Covad Communications Company (“Covad”) respectfully submits its comments in response to the Notice of Inquiry released by the Federal Communications Commission (“FCC” or “Commission”) in the above-referenced docket on June 17, 2010 (“NOI”).¹

I. INTRODUCTION AND SUMMARY

Covad is a leading national provider of integrated voice and data communication services. The company offers a full suite of broadband access solutions, including DSL, T-1, bonded T1, Ethernet, and other high-bandwidth services, to small and medium sized business users. Covad’s broadband services are currently available in 44 states and 235 Metropolitan Statistical Areas, passing more than 57 million homes and businesses (over 50% of all homes and businesses).

The Commission has described the NOI as the beginning of “an open, public process to consider the adequacy of the current legal framework within which the Commission promotes investment and innovation in, and protects consumers of, broadband Internet service.”² Covad

¹ See *Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127 (rel. June 17, 2010 (“NOI”)),

² *Id.* at ¶ 1.

generally supports the “third-way” legal framework described by the Commission, which recognizes that the telecommunications component of broadband Internet service is in fact a telecommunications service. However, any legal framework governing the provision of broadband Internet service would be incomplete if it focused exclusively on the residential market, or if it focused solely on consumer protection while ignoring the framework’s effects on wholesale competition.

The National Broadband Plan (the “Plan”) recognizes that competition will play a vital role in the broadband networks of the future:

Competition is crucial for promoting consumer welfare and spurring innovation and investment in broadband access networks. Competition provides consumers the benefits of choice, better service and lower prices.

National Broadband Plan at 36.

The Plan also recognizes the importance of wholesale markets in the provision of broadband services to American businesses:

Residential broadband competition – as important as it is – is not the only type of competition we must foster to lay the foundation for America’s broadband future. Ensuring robust competition not only for American households but also for American businesses requires particular attention to the role of wholesale markets, through which providers of broadband services secure critical inputs from one another.

Id. at 47.

Four of the eleven recommendations in Chapter 4 of the Plan, entitled “Broadband Competition and Innovation Policy,” relate directly or indirectly to competition at the wholesale level.³ Any

³ Plan at 48-49. “Recommendation 4.7: The FCC should comprehensively review its wholesale competition regulations to develop a coherent and effective framework and take expedited action based on that framework to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers.” “Recommendation 4.8: The FCC should ensure that special access rates, terms and conditions are just and reasonable.” “Recommendation 4.9: The FCC should ensure appropriate balance in its copper retirement policies.” “Recommendation 4.10: The FCC should clarify interconnection rights and obligations and encourage the shift to IP-to-IP interconnection where efficient.”

action taken by the Commission in this proceeding must therefore both promote wholesale competition, as well as protect consumers. In fact, wholesale competition provides a vital check on the ability of the incumbent carriers to dictate service conditions because they provide the end users with a choice of providers.

II. THE COMMISSION SHOULD EXPRESSLY STATE THAT INCUMBENT LECS' BROADBAND TRANSMISSION SERVICE IS SUBJECT TO SECTION 251 AND 271 OBLIGATIONS.

Covad generally supports the “third-way” legal framework described by the Commission. As described in the General Counsel’s statement on the proposed framework,⁴ the third-way approach includes recognition that the telecommunications component of broadband Internet service (what the Commission calls “broadband Internet access”) is in fact a telecommunications service. The approach therefore recognizes that many broadband Internet service providers (including the providers of cable modem service in the *Brand X* case⁵), are making an offer of telecommunications service to the public, and therefore are carriers subject to Title II.

The General Counsel’s description of the third-way approach focuses on the regulatory framework that should apply to those providers of broadband Internet service that are not already subject to Title II. For those providers, the Commission would consider forbearing from applying all except a handful of Title II provisions to broadband access services.⁶ The Commission must be careful, however, not to impact existing obligations of the incumbent local exchange carriers (“ILECs”) to provide unbundled network element (“UNE”) access to competitive local exchange carriers (“CLECs”) under section 251(c) and section 271 of the

⁴ Statement of FCC General Counsel Austin Schlick, "A Third-Way Legal Framework for Addressing the Comcast Dilemma"(rel. May 6, 2010)("General Counsel’s Statement”).

⁵ *National Cable and Telecommunications Association v. Brand X Internet Services, Inc.*, 545 U.S. 967 (2005), dissenting opinion of Justice Scalia at 1008.

⁶ General Counsel’s Statement at 4. The General Counsel suggests that the Commission would not forbear from enforcing Sections 201, 202, 208, 222, 254 or 255.

Communications Act of 1934, as amended (the “Act”). In particular, the Commission should not forbear from section 251 or 271 as part of any reclassification.

The General Counsel’s Statement rejects the claims of the ILECs that reclassification of broadband Internet access service as a Title II service would give rise to new network unbundling obligations under section 251(c) of the Act. If broadband Internet access service is reclassified as a telecommunications service under the third-way approach, the ability of a CLEC to obtain interconnection, UNEs or special access from an ILEC would simply (and must) remain unchanged. The General Counsel’s Statement explains that

[T]he Commission’s adoption of its current information service classification accordingly did not lessen unbundling obligations or authority under section 251. In paragraph 127 of the 2005 *Wireline Broadband Order* (the order that extended the information-service classification to telephone companies’ broadband access) the Commission specifically explained that “nothing in this Order changes a requesting telecommunications carrier’s [unbundling] rights under section 251 and our implementing rules.”

General Counsel’s Statement at 7.

The key factor in whether a CLEC is eligible to obtain a UNE under section 251 is whether the CLEC will be using that UNE to provide a telecommunications service, not how the ILEC uses that network element.⁷

Additionally, the Commission must ensure that nothing in the third-way approach would preclude it from revisiting its prior determination that ILECs should not be required to offer competing carriers unbundled access to hybrid copper-fiber, fiber-to-the-curb and fiber-to-the-home loops. The third-way approach is inherently technology-neutral. Covad and many other parties have filed comments in support of the Cbeyond petition seeking access to the packetized

⁷ See General Counsel’s Statement, *supra*, at 7.

capacity of ILECs' hybrid and fiber loops pursuant to Section 251(c)(3).⁸ Covad and others have demonstrated that the rationale underlying the Commission's rollback of unbundling in the 2003 *Triennial Review Order* (namely, its expectation that ILECs would be spurred by intermodal competition to invest in new higher-capacity facilities if freed from the obligation to provide their competitors with unbundled access to hybrid and fiber loops to CLECs), has not borne fruit. In fact, the experience of most of the world's democratic, market economies (including Canada, Japan and New Zealand) has shown that unbundling plays an important role in facilitating competitive entry. The National Broadband Plan acknowledged this and urged the Commission to review its wholesale competition regulations to provide small and medium sized businesses more affordable access to broadband.

Likewise, there is nothing in the third-way approach that would preclude the Commission from adopting policies and rules requiring IP-to-IP interconnection, where that form of interconnection is efficient, as the National Broadband Plan recommends.

In determining whether to adopt a third-way legal framework, the Commission need not resolve the issues raised by the Cbeyond petition, nor address the arguments for and against IP-to-IP interconnection. However, it is important that the Commission reject any effort by ILECs to use this proceeding to limit the scope of their network element obligations to old or even current technologies. Rather, the Commission must anticipate ongoing technological change, and build into its regulatory regime the going-forward access to elements necessary to promote the competition that is essential to the success of the third-way approach.

⁸ See Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, filed Nov. 16, 2009 (WC Docket No. 09-223); see also Comments of Covad Communications Company in WC Docket No. 09-223, filed Jan. 22, 2010.

III. UNIVERSAL SERVICE REFORM MUST LEVEL THE PLAYING FIELD

Covad supports the Commission's efforts to bring clarity and much needed reform to the Universal Service Fund through the creation of a level playing field and a requirement that all broadband Internet access service providers contribute into the fund equitably. The shift from a high-cost access fund to a broadband fund acknowledges the increased use of broadband Internet services as compared to traditional legacy wireline service. Contributions into the Universal Service Fund, to be equitable and non-discriminatory, must be technologically and carrier agnostic.

The third way approach should expand the contribution base to all broadband Internet access service providers, thereby strengthening the fund as well as ensuring a more level playing field which promotes competitive efficiencies and lowers costs for all consumers.

IV. CONCLUSION

Consistent with the National Broadband Plan, the Commission should maintain competitive markets for transmission services over the ILECs' networks and make certain that competitive providers can interconnect to the ILEC networks pursuant to nondiscriminatory and reasonable terms and conditions. Policies that make available wholesale last-mile and middle-mile transmission facilities will spur additional investment by both ILECs and CLECs in competition with one another and lead to job creation throughout the telecom industry. Whatever framework the Commission adopts in this proceeding, that framework must provide for ongoing CLEC access to unbundled network elements, particularly ILEC loops, without regard to whether the ILECs' loops are copper or fiber-based, or whether the services are analog, digital or IP-based.

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Respectfully submitted,

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