

BEFORE MISSOURI THE PUBLIC SERVICE COMMISSION

In the Matter of a Commission Inquiry into §
the Possibility of Impairment without § Case No. TO-2004-0207
Unbundled Local Circuit Switching When §
Serving the Mass Market §

COVAD'S RESPONSE TO SBC'S RESPONSE TO ORDER DIRECTING FILING

Comes Now DIECA Communications, Inc. dba Covad Communications Company ("Covad") pursuant to Commission order herein and 4 CSR 240-2.080(15) and for its Response to SBC Missouri's ("SBC's") Response¹ to Order Directing Filing respectfully states to the Commission as follows.

Covad is a leading national provider of high-speed Internet and network access utilizing Digital Subscriber Line ("DSL") technology. Covad partners with several unbundled network element platform ("UNE-P") carriers, including MCI and AT&T, to provide a package of voice and data services to Missouri customers through an arrangement known as line splitting. As currently configured, this package of line split services requires the availability of unbundled local switching from the incumbent local exchange carriers ("ILECs"), including SBC. The future of competition in the Missouri residential voice market will hinge upon the ability of competitors to provide a bundled voice and data product—via line splitting—in competition with the voice and data bundles currently being provided by SBC. Accordingly, this Commission should examine and analyze line splitting issues as they relate to the Commission's responsibility to implement the FCC's Triennial Review Order.

¹ To the extent CenturyTel's Response overlaps SBC's Response, Covad's position is the same.

I. Response to Impairment Issues

Covad respectfully offers the following responses to the impairment issues that the Commission identified in Paragraph 8 of its Order Creating Case and Establishing Initial Filing Deadlines:

- a. The incumbent local exchange carrier's ("ILEC's") proposal for geographically defining the market;

Covad supports the positions of MCI and AT&T on this issue.

- b. The ILEC's proposal for defining the appropriate DS0/DS1 cross-over between the mass market and the enterprise market;

Covad supports the positions of MCI and AT&T on this issue.

- c. The geographic areas where the ILEC will be challenging impairment based on its response to Nos. 1 and 2;

SBC has failed to meet its burden for challenging the Federal Communications Commission's ("FCC's") national impairment finding for switching in the geographic areas that SBC identified in its November 12th filing. Specifically, SBC alleges without proper evidentiary support that the FCC's triggers have been met in the specified markets. Therefore, Covad respectfully urges the Commission to affirm the FCC's finding that competitive local exchange carriers ("CLECs") are impaired without access to unbundled local switching for the mass markets in Missouri.

- d. The competitor(s) that the ILEC asserts satisfies the impairment triggers for mass market switching in each geographic market;

SBC fails to provide proper evidentiary support to establish that competitors satisfy the FCC's impairment triggers in the specified geographic markets. Therefore, the FCC's national impairment finding for unbundled local switching for the mass markets applies in Missouri.

- e. The specific routes where the ILEC will be challenging the finding of impairment for dedicated transport;

SBC has failed to meet its burden for challenging the FCC's national impairment finding for dedicated transport for the routes that SBC identified in its November 12th filing.

Specifically, SBC alleges without proper evidentiary support or explanation that the FCC's triggers have been met in the specified routes. SBC's pleading is ambiguous as to the specific relief that it seeks (i.e. SBC has improperly lumped together different types of transport that are subject to different standards under the FCC's order). Therefore, Covad respectfully urges the Commission to affirm the FCC's finding that CLECs are impaired without access to dedicated transport in Missouri.

- f. The identity of the competitor(s) that the ILEC asserts satisfies the impairment triggers for dedicated transport; and

SBC fails to provide proper evidentiary support to establish that competitors satisfy the FCC's impairment triggers in the specified routes. For example, SBC fails to identify carriers for the specified routes. (A general list of carriers that allegedly provide transport in Missouri is insufficient.) Therefore, the FCC's national impairment finding for dedicated transport applies in Missouri.

- g. The specific customer locations where the ILEC will be challenging the finding of impairment for enterprise loops.

SBC has failed to meet its burden for challenging the FCC's national impairment finding for enterprise loops for the customer locations that SBC identified in its November 12th filing. Specifically, SBC alleges without proper evidentiary support that the FCC's triggers have been met in the specified customer locations. SBC's pleading is ambiguous as to the specific relief that it seeks (i.e. SBC has improperly lumped together different types of loops that are subject to different standards under the FCC's order). Additionally, SBC fails to identify carriers for the

specified locations. Therefore, Covad respectfully urges the Commission to affirm the FCC's finding that CLECs are impaired without access to enterprise loops in Missouri.

II. Response to SBC's Batch Hot Cut Proposal

SBC's Batch Hot Cut ("BHC") proposal is the same proposal that SBC has presented in Texas (prior to being ordered to consider revisions by the Texas PUC). Covad objects to the limited scope of SBC's proposed BHC process and respectfully urges SBC to revise the scope of its proposed BHC to include the migration of an unbundled stand alone loop used to provide an end user with both voice and data service. In the alternative, Covad respectfully urges the Commission to require SBC to revise its proposed BHC process and to require SBC to propose and to prove the sufficiency of a BHC process that includes the migration of an unbundled stand alone loop used to provide an end user with both voice and data service.

SBC's proposed BHC process limits the scope of this investigation in a manner that fails to satisfy the FCC's mandate in the *Triennial Review Order*, and does not reflect the reality of the marketplace in which carriers compete with SBC by offering voice and data bundles. SBC proposes:

Scope of Batch - Applies to Mass Market Customers with limited number of analog DS0 POTs Service (plan assumption of 3 or less DS0 POTs lines per end user) like for like service:

UNE-P to UNE-Loop w/LNP
Resale to UNE-Loop w/LNP
SBC Retail to UNE-Loop w/LNP

(Does not include loop service via line splitting, line sharing, Broadband, DS1 and higher rate services).

SBC's unilateral decision that its proposed BHC need not include "loop service via line splitting, [and] line sharing," does not reflect the FCC's instruction in the *Triennial Review Order* that state commissions must approve a batch cut migration process for *all* unbundled local

loops. For example, the FCC stated, “As an initial matter, state commissions should adopt a batch cutover ‘increment’ for migrating customers served by *unbundled stand-alone loops*. In other words, states should decide the appropriate volume of *loops* that should be included in a batch.”² Nowhere in its *Triennial Review Order* does the FCC limit the investigation required of state commissions to voice-only loops. Accordingly, compliance with the FCC’s *Triennial Review Order* requires approval of a BHC process that includes the migration of all unbundled stand-alone loops, including those used to provide an end user with both voice and data service.

Likewise, SBC’s proposed BHC process does not reflect the reality of the marketplace in which carriers compete with SBC by offering voice and data bundles. Specifically, many mass market customers obtain a bundled voice and data service, and hence, need a seamless migration of both voice and data services. CLECs will continue to be impaired without access to unbundled local switching even should state commissions conclude that SBC’s proposed BHC process is sufficient (which it is not) because SBC’s proposed BHC does not support: (a) migrating an end user from a line splitting arrangement incorporating unbundled local switching (UNE-P) to a line splitting arrangement incorporating self-provisioned local switching (UNE-L), or (b) establishing line splitting arrangements incorporating self-provisioned local switching (UNE-L).

Attached for consideration is a recent scoping order from the California Public Utilities Commission (“CPUC”) in its *Triennial Review*-implementation proceeding. In response to the same concerns raised by Covad here, the CPUC concluded: “we agree with Covad that

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, para. 489 (2003) ("*Triennial Review Order*") (emphasis added).

provisioning of line splitting arrangements should be among the migration scenarios examined in considering an acceptable batch cut process.” *Order*, at 8. Covad respectfully requests that SBC propose a unified BHC process, including line splitting and line sharing, across its 13-State operating territory. If SBC refuses to agree to do so voluntarily, Covad requests that the Commission require SBC to do so.

Covad reserves the right to respond to any change in position presented by SBC under the various reservation of rights found throughout SBC's Response. Further, given the high-level perspective offered by the legal conclusions in SBC's Response, Covad reserves the right to respond to any more specific arguments that may be presented.

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Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 17th day of November, 2003, by placing same in the U.S. Mail, postage paid.

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own
Motion into Competition for Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the Commission's Own
Motion into Competition for Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

**ASSIGNED COMMISSIONER'S AND
ADMINISTRATIVE LAW JUDGE'S RULING
ON SCOPE AND SCHEDULE FOR NINE-MONTH
FCC TRIENNIAL REVIEW PROCEEDING**

This ruling sets the preliminary scope and schedule for the nine-month proceeding as to impairment of competition in serving "mass market" customers³ pursuant to the Federal Communications Commission (FCC) Triennial Review Order. The FCC allotted a nine-month period from the effective date of the FCC Order to conclude state-mandated proceedings relating to impairment of local exchange competition. This nine-month period concludes on July 2, 2004. The adopted scope and schedule take into account parties' written comments and oral argument at the prehearing conference (PHC) on September 30, 2003.

³ As defined by the FCC Order, mass market customers consist of analog voice customers that purchase only a limited number of traditional phone lines, and can only be economically served via DS0 loops.

Service List for the Nine-Month Review Phase

A separate service list shall be created exclusively for purposes of the FCC Triennial Review nine-month phase of this proceeding. The separate service list for this phase shall consist initially of parties that entered appearances at the PHC held on September 30, 2003, as attached to this ruling as Appendix A. The instant ruling shall be mailed to the broader service list covering all parties of record in R.95-04-043/I.95-04-044. If any of additional parties beyond those identified in Appendix A hereto wish to be on the service list for matters relating to the nine-month proceeding, they must submit a request to the Commission's Process Office to have their name added. Otherwise, subsequent service of matters relating to the nine-month proceeding shall be limited to the separate service list created only for this phase of the proceeding.

Scope of Proceeding: Overview

As prescribed by the FCC, the Commission must complete a market-by-market analysis within nine months as to the extent that competitive carriers are impaired in their ability to enter the market without access to specified unbundled network elements. These elements consist of switching for mass market customers,⁴ high capacity loops (dark fiber, DS3, and DS1); and dedicated transport in certain configurations (dark fiber, DS3, and DS1). Findings must incorporate analysis of designated triggers. The Commission will also consider operational and economic barriers on competitive entry. The Commission must also adopt a "batch cut" process for transferring large volumes of mass market customers or issue detailed findings explaining why such a batch cut process is unnecessary in a particular market.

Proceedings on Mass Market Switching

Scope of Inquiry

The FCC found that "competing carriers are impaired without access to unbundled local circuit switching for mass market customers."⁵ The FCC, however, requires state commissions to conduct a market-by-market "granular review" of the national finding based on analysis of

⁴ Switching for enterprise customers was the subject of a separate phase of this rulemaking in a 90-day proceeding. *Order* ¶ 451.

⁵ FCC Order ¶ 473.

prescribed triggers: (a) the number of carriers self-provisioning and (b) the extent of wholesalers offering independent network element capacity.

Parties disagree as to whether the market definition for the mass market switching impairment analysis should be decided in one phase or two. The ILECs believe that market definition should be addressed in an initial phase based only on analysis of the triggers, with operational and economic barriers treated in a second phase. Other parties believe that operational and economic barriers should concurrently be considered in one consolidated phase before the Commission defines the markets.

The determination of whether to schedule one or two procedural phases for mass market switching issues shall be made in a subsequent ruling. The schedule for mass market switching will be set based on disposition of that issue. In any event, parties shall proceed without delay in propounding necessary discovery on all relevant mass market switching issues, including operational and economic barriers.

Proceedings on Loops and Transport

Scope of Inquiry

The FCC found that carriers are impaired at most customer locations on a nationwide basis without access to dark fiber,⁶ are impaired on a customer-location-specific basis without access to unbundled DS3 loops,⁷ and are generally impaired without access to unbundled DS1 loops.⁸ The FCC also found that requesting carriers are impaired on a nationwide basis without access to unbundled dark fiber, DS3, and DS1 transport facilities.⁹ The FCC requires state commissions to conduct a granular analysis of high capacity loop and transport impairment only for specific customer locations or routes for which sufficient relevant evidence has been presented.¹⁰

The Commission shall consider factual claims that competing carriers are not impaired without access to enterprise market loops only with respect to specifically identified customer

⁶ *FCC Order*, ¶ 311.

⁷ *FCC Order*, ¶ 320.

⁸ *FCC Order*, ¶ 325.

⁹ *FCC Order*, ¶ 359.

¹⁰ TRO at ¶ 417, and note 1289.

locations.¹¹ The FCC criteria to be used in assessing impairment are: (1) a “Self-Provisioning Trigger,” i.e., “where a specific customer location is identified as being currently served by two or more unaffiliated [CLECs] with their own loop transmission facilities at the relevant loop capacity level,” and (2) a “Competitive Wholesale Facilities Trigger,” i.e., where two or more unaffiliated competitive providers have deployed transmission facilities to the location and are offering alternative loop facilities to [CLECs] on a wholesale basis at the same capacity level.”¹²

This Commission must likewise undertake a granular impairment examination regarding dedicated transport,¹³ and make findings on a route-specific basis taking into account the Self-Provisioning and Wholesale Facilities Triggers. A party seeking to overcome the national finding of impairment shall therefore be required to present *prima facie* evidence showing non-impairment based on triggers or, failing that, based on the potential deployment test on a customer-by-customer (for loops) or route-by-route (for transport) basis.

Schedule for Loops and Transport Issues

CLEC parties generally believe the loop and transport phase of the proceeding can be resolved through collaborative workshops without evidentiary hearings. The ILECs assume that evidentiary hearings will be required, but also propose treating transport and loop impairment issues in a separate procedural track from mass market switching.

SBC and Verizon shall serve opening testimony on loop and transport issues on November 20, 2003. Opening testimony shall identify the loops (by customer location) and transport (by route) where the ILECs seek to challenge the national findings of impairment. In the interests of facilitating consensus on loops and transport issues, a collaborative workshop, to be moderated by TD staff, shall be scheduled for December 4, 2003. A workshop report shall be jointly filed and served by TD staff in cooperation with workshop participants within 5 business days indicating agreements reached and remaining issues in dispute. Any disputes that remain in this phase after the collaborative workshop shall be addressed in reply testimony due on December 30, 2004. Reply testimony will be presented by loop or transport element under the trigger(s) or potential deployment test for which a *prima facie* case has been made of no impairment. Only where a *prima facie* case is presented for a particular customer-by-customer

¹¹ *FCC Order*, ¶ 328.

¹² *FCC Order*, ¶ 329.

¹³ *FCC Order*, ¶ 360.

location by loop type or transport route for any applicable trigger or potential deployment test will further proceedings be necessary.

To the extent evidentiary hearings are deemed needed, they shall be scheduled for the week beginning January 12, 2004. A further scheduling for briefing shall be set at a later time.

Proceedings on Batch Hot Cut Process

Scope of Inquiry

The FCC has found that operational and economic factors associated with the current hot cut process used to transfer a loop from one carrier's switch to another's serve as barriers to competitive entry in the absence of unbundled switching. As directed by the FCC, in each of "the markets in which it will evaluate impairment," this Commission must either "approve and implement" a "batch cut" process to make the hot cut process more efficient and reduce per-line costs for transferring large volumes of mass market customers or else, issue detailed findings that the current hot cut processes do not give rise to impairment in a market and that a batch cut process is therefore unnecessary.¹⁴ The nine-month proceeding shall thus address the "batch cut" process concurrently with the review of impairment relating to loop, transport, and switching access.

Issues to be addressed with a "batch cut" process include deciding the appropriate number of loops to include in each batch and specific processes in performing a batch cut including a timetable for implementation and performance metrics for evaluation. The FCC's national finding of impairment is based on the combined effect of all aspects of the hot cut process on competitors' ability to serve mass market voice customers.¹⁵ The hot cut impairment analysis must therefore include consideration of all relevant sources of revenues derived from the loop, including both voice and data sources. Accordingly, we agree with Covad that provisioning of line splitting arrangements should be among the migration scenarios examined in considering an acceptable batch cut process.

The batch cut process must be undertaken for separately each ILEC that asserts that there is no impairment in its particular geographic market or markets in order to "tak[e] into account

¹⁴ FCC Order ¶ 460.

¹⁵ FCC Order ¶ 473.

the incumbent LEC's particular network design and cut over practices.” 47 C.F.R. § 51.319(d)(2)(ii)(A)(2).

Procedural Schedule for Batch Hot Cuts

As an initial procedural step, the ILECs shall present their proposals concerning the specific processes to be used when performing a batch cut. The FCC states that the batch cut process is expected to produce efficiencies related to performing tasks once for multiple lines that would otherwise have been performed on a line-by-line basis.¹⁶ SBC and Verizon shall present opening testimony on November 7, 2003, concerning their proposed batch cut processes.

Several parties agree that issues relating to the batch cut process lend themselves to at least partial resolution through a separate collaborative workshop that will hopefully obviate the need for evidentiary hearings. SBC reports that it is currently enhancing the batch cut process to “scale up” the existing hot cut process to meet required mass market volumes for implementation in the areas the Commission deems necessary.

A collaborative batch hot cut workshop shall be set for November 17, 2003 for parties to seek consensus and narrow areas of dispute as to appropriate batch hot cut processes. The workshop will also provide a forum to discuss the means by which appropriate “Total Element Long-run Incremental Cost” (TELRIC) rates can be identified for those batch cut processes on which parties may reach consensus, or those requiring further litigation. The FCC requires that state commissions adopt TELRIC rates for the batch cut activities that are approved to the extent such rates are not already adopted. A workshop report shall be jointly filed and served by TD staff in cooperation with workshop participants on November 24, 2003, indicating any agreements reached and remaining issues in dispute as to the batch cut process and related TELRIC pricing thereof.

To the extent unresolved issues remain concerning batch cut issues, a further schedule shall be set following receipt of the workshop report. Findings must also be made concerning in which markets, if any, the absence of a batch cut migration process is not causing impairment. Any further procedural schedule to address this issue shall be integrated with the schedule for market determination in connection with the mass market switching analysis. To the extent evidentiary hearings are deemed needed on batch cut processing issues, they shall be scheduled

¹⁶ FCC Order ¶ 489.

following receipt of the workshop report in coordination with any evidentiary hearings on switching, loops and transport issues.

Discovery Issues

Role of The Commission in Discovery Process

In view of the broad scope of entities from whom data must be collected in connection with the analysis of triggers, the Commission staff will facilitate discovery workshops to reach consensus on a standardized template of data requests. Coordination issues include reaching consensus on the categories of data that need to be collected, and identifying the entities from whom specific data must be collected. Coordination and consolidation will avoid duplication of requests and responses, and will promote uniformity.

The Commission shall prepare a transmittal letter under the signature of Commissioner Kennedy to be sent to all carriers from whom trigger data must be collected, and directing the prompt production of the requested data. Individual parties may also issue their own discovery where interests and questions diverge from the standardized data request template. Even if a party has asked questions that are not part of the global data request, other parties may be interested in the questions or responses, and should have access to such information, to the extent desired. The Commission staff shall also facilitate procedures for the prompt transmittal of data responses to designated active parties in the proceeding.

To the extent parties can't reach their own resolution, the Commission will adjudicate discovery disputes through its law and motion process. The burden of proof remains on each party to make its case, conduct discovery, and produce evidence.

Treatment of Confidential Data

Parties agree on the need to protect confidential data to be collected during the course of this proceeding. Some parties, however, offer a nondisclosure agreement template as previously used in the OANAD proceeding while other parties proposed a Protective Order be used, as authorized by the Commission. The Commission shall adopt a Protective Order applicable to discovery in this phase, rather than simply having parties execute their own nondisclosure agreement. Particularly because discovery may involve entities that are not active participants in the proceeding, a Protective Order is preferable to enforce compliance. At the PHC, parties were directed to meet and confer to resolve differences over language in the draft Protective Order

submitted. We shall direct that the draft Protective Order be amended accordingly, and resubmitted for approval to the assigned ALJ no later than close of business on October 9, 2003.

IT IS RULED that:

1. A separate service list is established for the nine-month phase of the FCC Triennial Review, as attached hereto as Appendix A. Any party that is not on the attached service list but that seeks to be added to the service list, either as an active party or on an “information only” basis must file a request with the Commission’s Process Office to be so added. Subsequent filings relating to the nine-month proceeding shall only be served using this separate service list.
2. The preliminary schedule for the nine-month phase is adopted, as discussed above.
3. The schedule to address mass market switching impairment issues shall be set in a subsequent ruling pending determination as to whether to use a single-phased or two-phased proceeding for making findings on this issue.
4. SBC and Verizon shall present opening testimony on November 7, 2003, concerning their proposed batch cut processes.
5. A collaborative batch hot cut workshop is set for November 17, 2003, starting at 10:00 a.m. in the Commission’s Courtroom, 505 Van Ness Avenue San Francisco for parties to seek consensus as to appropriate batch hot cut processes
6. SBC and Verizon shall serve opening testimony on loop and transport issues on November 20, 2003.
7. A collaborative workshop to seek consensus on loop and transport issues, to be moderated by TD staff, shall be scheduled for December 4, 2003, starting at 10:00 a.m. in the Commission’s Courtroom, 505 Van Ness Avenue San Francisco.
8. A workshop report shall be jointly filed and served by TD staff in cooperation with workshop participants within 5 business days after each of the workshops indicating agreements reached and remaining issues in dispute.
9. Any loop/transport issues in dispute after the collaborative workshop shall be addressed in reply testimony due on December 30, 2004.
10. To the extent evidentiary hearings are needed for loop/transport issues, they shall be scheduled for the week beginning January 12, 2004.
11. To the extent unresolved issues remain concerning batch cut issues, a further schedule to address these issues shall be set following receipt of the workshop report.

12. A transmittal letter under the signature of Commissioner Kennedy shall be sent to all carriers from whom trigger data must be collected, directing the prompt production of the requested data.

13. The draft Protective Order previously submitted by parties shall be amended to reflect joint consensus of participating parties, and resubmitted for approval to the assigned ALJ no later than close of business on October 9, 2003.

14. The scope, schedule and procedures set forth above are hereby adopted.

Dated October 8, 2003, at San Francisco, California.

/s/ SUSAN P. KENNEDY
Susan P. Kennedy
Assigned Commissioner

/s/ THOMAS R. PULSIFER
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Administrative Law Judge

APPENDIX A

**SERVICE LIST FOR THE NINE-MONTH PHASE
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CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioner's and Administrative Law Judge's Ruling on Scope and Schedule for Nine-Month FCC Triennial Review Proceeding on all parties of record in this proceeding or their attorneys of record.

Dated October 8, 2003, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.