

**Before the
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE**

In response to

Request for Comments Concerning
Compliance with Telecommunications
Trade Agreements

COMMENTS OF COVAD COMMUNICATIONS GROUP, INC.

Trade Agreement Discussed:

Fourth Protocol to the GATS
(WTO Basic Telecommunications Agreement)

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COMMENTS OF COVAD COMMUNICATIONS GROUP, INC.

Covad is the leading United States national broadband services provider of high-speed Internet and network access utilizing Digital Subscriber Line (DSL) technology. It offers DSL, IP and dial-up services through Internet Service Providers, telecommunications carriers, enterprises, affinity groups, PC original equipment manufacturers and Application Service Providers to small and medium-sized businesses and home users. Covad services are currently available across the United States in 112 of the top Metropolitan Statistical Areas (MSAs). Covad's network currently covers more than 40 million homes and businesses in the United States, reaching approximately 40 to 45 percent of all US homes and businesses. Covad Communications and its affiliates, doing business as Covad Communications Company, are wholly owned subsidiaries of Covad Communications Group, Inc. (Nasdaq: COVD). Corporate headquarters is located at 2330 Central Expressway, Santa Clara, CA 95050. Telephone: 1-888-GO-COVAD. Web Site: www.covad.com. Through affiliate companies in which it holds investment interests, Covad now has an operational presence in India, Japan, and Spain, and holds requisite licenses in several additional countries. Covad seeks to benefit all its affiliated end-users through its increasingly interlinked global network.

Covad's comments address the operation and effectiveness of – including implementation of and compliance with – the WTO Basic Telecommunications Agreement in the European Union.

Covad's interest and concern center on the timely and effective implementation of the obligations of the European Communities and their Member States contained in the WTO Basic Telecommunications Agreement and the Additional Commitments attached thereto.¹

The Reference Paper provides that "interconnection with a major supplier will be ensured at any technically feasible point in the network" and that such interconnection is to be provided, among other things:

"under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided..."

Covad believes the European Communities and their Member States, in accepting this commitment and other commitments contained in its schedule, have undertaken an obligation to unbundle local loops and provide line sharing upon request. Additionally, as "non-discriminatory terms, and conditions" are required to support the provision of "like services", Covad believes that committed countries must require major suppliers to provide inputs essential to the competitive provision of DSL services on the same basis as major suppliers self-provision.

As the United States Trade Representative is aware, on December 5, 2000, the European Parliament and the Council promulgated the Regulation on unbundled access to

¹ <http://www.wto.org/wto/new/sc31s3.wp5> The document known as the "Reference Paper" in the United States is referred to as "Additional Commitments" in the Schedule of Specific Commitments of the

the local loop (2000/0185) (the “Unbundling Regulation”).² Based on its analysis of the text, Covad tentatively concludes that the Unbundling Regulation is congruent with the obligations assumed in the Schedule of Specific Commitments of the European Communities and their Member States, including the Reference Paper. However, the Unbundling Regulation is brief, not dispositive of the barriers to market entry that Covad has experienced in the United States at the hands of incumbent local exchange carriers, nor dispositive of comparable practices that appear in evidence today throughout the European Union. The Unbundling Regulation allows National Regulatory Authorities (“NRAs”) great discretion in the implementation of its terms. While the objective of the regulation is clear,³ its future implementation on an effective and timely basis by individual NRAs is far less predictable. At present, by way of illustration, Covad perceives important shortcomings in the competitive environments in the following European Union Member States.

Spain

The Ministry of Science and Technology has completed its initial review of Telefónica’s Reference Interconnection Offer (“RIO”) submitted pursuant to the Unbundling Regulation. Additional modifications are now within the purview of the Comisión del Mercado de las Telecomunicaciones (“CMT”). Covad identifies the following concerns as among the current shortcomings of Telefónica’s RIO.

European Communities and their Member States.

² See, <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/regullfin-en.pdf> .

³ “This Regulation aims at intensifying competition and stimulating technological innovation on the local access market, through the setting of harmonised conditions for unbundled access to the local loop, to foster the competitive provision of a wide range of electronic communications services.” Article 1, Aim and Scope.

Telefónica offers only discriminatory collocation. Telefónica currently requires new entrants to locate their equipment in separate caged collocation spaces. This practice delays entry and raises rivals costs. Telefónica also intends to restrict the type of equipment that can be collocated, thereby imposing network inefficiencies on its rivals that it does not impose on itself. Additionally, the government of Spain has sanctioned a gradual roll-out of Central Offices wherein collocation will become available. Telefónica is under no such restriction with regard to the country-wide introduction of its own DSL services.

Telefónica has devised a non-transparent loop management scheme whereby it establishes itself as the sole decision-maker regarding the use to which a loop can be put. Based on its experiences in the United States, Covad believes Telefónica will exercise its discretion in a manner that greatly restricts the number of loops that are available to new entrants providing DSL services, ostensibly (but incorrectly) claiming that the efficient DSL services of new entrants cause harm to Telefónica's existing services, irrespective of the spectral inefficiency of those existing services. In the United States, action by the FCC was necessary to eliminate such market foreclosure schemes by incumbent carriers.

Contrary to the precepts of the Unbundling Regulation, Telefónica severely restricts access to necessary information. The list of Central Offices in its RIO is woefully incomplete. There is no information on the condition or availability of loops provisioned from the listed Central Offices. There is no binding deadline for the availability of an Operational Support System ("OSS") interface to new entrants, nor is there a commitment that such interface will be sufficient to support appropriate order entry, provisioning, repair, maintenance, and billing functions.

The provisioning intervals Telefónica has on offer are slow and cumbersome. In light of the low targets it has set for itself for the numbers of orders to be processed per day, there is a high risk that Telefónica is planning to dedicate woefully insufficient resources to the administration of local loop unbundling. Telefónica has been obliged to provision both fully unbundled loops and line shared loops in 15 days. Prior to regulatory intervention, Telefónica had originally intended to offer 37 day (full loop) and 52 day (line shared loop) installation intervals. (Such delays are incredibly long even by monopoly standards, and a longer install period for a line shared loop makes little sense.)

Covad's experience with US incumbents, pursuant to the oversight activities of the FCC and various state regulatory commissions, leads to the conclusion that a fully unbundled loop can be provisioned within 3 business days if facilities exist and within 5 to 8 business days if facilities do not exist. Line shared loops are even easier to provision since implementation involves only changing cross-connects in the Central Office. While Covad believes no line-sharing end-user should wait more than a day for provisioning, a three-day delay is certainly adequate for Telefónica to take appropriate actions in its Central Offices.

Decisions regarding pricing of unbundled elements now rest within the prerogative of the CMT. At their present levels, the Telefónica prices would place new entrants in the price squeeze situation prohibited by the Unbundling Regulation (and illustrated in the following section).

Germany

On January 22, 2001, Deutsche Telecom AG (“DTAG”) filed an application for new prices for fully unbundled local loops. DTAG proposed to charge new entrants DM 34, instead of the current DM 25.40, an *increase* of over 33%. DTAG, through its in-house internet service provider, currently offers ADSL retail service (T-Online dsl) for the non-introductory price of DM 49 per month.⁴ A DTAG customer can already obtain an analog line for DM 24.81 per month. Line sharing is not currently on offer and it remains open when it will be offered in Germany. In order to provide a comparable ADSL retail product in a sustainable competitive market, a new entrant would have to charge an end-user DM 49 while paying DTAG DM 34 per month for a loop (in addition to apportioned payments for collocation, transport, and OSS, as well as amortizing the increased non-recurring loop charge of DM 357), while simultaneously amortizing its own investments in equipment, network infrastructure, and internal OSS, while paying salaries, marketing and customer procurement costs, and providing ISP functionality, yet also making sufficient profit to justify its on-going enterprise.

The tension between DTAG’s retail prices and what it would charge new entrants for essential inputs is becoming even more obvious. DTAG now intends to raise the up-front charges for switching a DTAG customer to a competitive carrier using an unbundled loop from DM 191.64 (US \$91) to DM 248.47 (US \$ 118). If the lease of the

⁴ For end-users that are already ISDN customers of DTAG, DTAG offers its T-DSL service for only an additional DM 14.90. This has important implications. First, it demonstrates that DTAG is line sharing not only with POTS, but with ISDN. Second, DTAG is offering a retail IP service (using ADSL over ISDN) at a price of only DM 14.90 (US \$6.90) per month. Covad perceives this price to be possible only if DTAG is allocating precisely zero cost to the line shared loops, the Central Office cross-connects, the collocation necessary to support the equipment that separates the ISDN from the ADSL signals, and the equipment that performs that separation. Covad looks forward to receiving such non-discriminatory pricing upon its entry into the German market.

line is terminated, DTAG wants to charge another DM 204.21 (US \$97) (instead of the current DM 107.70 -- US \$51).

Covad cannot conceive how the “competitive” environment in Germany is consistent with the Unbundling Regulation’s strictures against price squeezes, let alone with the Reference Paper’s requirement that rates available to new entrants for unbundled elements shall be no less favorable than those DTAG allocates for its own like services or the like services of its subsidiaries or affiliates.

DTAG did not produce a new, conforming RIO after the promulgation of the Unbundling Regulation. Instead, new entrants will have to endure the expense and delay associated with regulatory proceedings before the Regulierungsbehörde für Telekommunikation und Post (“RegTP”) in an attempt to obtain an RIO that is in conformity with internal European Union law. RegTP is currently facing mounting pressure from the German Federal Government, DTAG’s largest shareholder. On December 4, 2000, Klaus Barthel, a Member of the German Federal Parliament and the ruling SPD Party, as well as the Chairman of its Telecommunications Sub-Committee, released a Position Paper on the future telecommunications policy of the German Government with the goal to protect DTAG against competition. The Paper is clear evidence of the mounting political pressure on RegTP and on DTAG’s competitors which has reached a new stage since the release of the Position Paper of the Federal Ministry of Economics last summer.

Like Telefónica, DTAG offers only discriminatory collocation. Space in separate rooms for new entrants with attendant discriminatory costs and delay are required. In certain cases, new entrants are forced to pay DTAG upfront for the build-out of collocation

space without a firm delivery date being in sight. (Unlike Telefónica, DTAG does not appear to prevent new entrants from collocating ATM equipment.)

Covad understands that DTAG has represented to new entrants that no more than 10% of its loops can be used to provide their DSL services. Interestingly, Covad can find no indication on DTAG's web site that an applicant for DTAG's "T-online dsl" has only a one-in-ten chance of obtaining DTAG's retail service.

Finally, quite apart from issues raised by DTAG's current standard contract and representations to new entrants, Covad advises USTR that its plans for entry into the German market have been adversely affected by the excessive license fees charged by the German government.

France

France Telecom ("FT") provided new entrants with a draft Local Loop Access Agreement on January 5, 2001. Covad understands that France Telecom refuses to sign any interconnection/operations agreement with a new entrant that does not already hold an L 33.1 license (i.e., a telecommunications infrastructure license). This is highly problematic. A new entrant needs the information contained in the draft Local Loop Access Agreement in order to formulate the business plan required by the license application. Since a license application typically takes the Autorité de régulation des télécommunications ("ART") four months to process, FT's refusal to deal appears designed to delay competitive entry while FT continues to build market share for its ADSL product.

Like Telefónica and DTAG, FT offers only discriminatory collocation. Not only must a new entrant absorb the cost and delay of separate, specially constructed space, FT's draft agreement forbids new entrants from collocating ATM equipment and IP routers. This equipment is essential to the efficient functioning and monitoring of a DSL network.

Covad understands that FT refuses to provision circuits to new entrants for their services even though the infrastructure to do so exists. This discriminatory misconduct did not exist during the first phase of the unbundling trials. During the trials, FT would provision an unbundled loop to support Covad DSL service even though the existing copper was not currently in use. In other words, in order to serve a Covad end user during the trial, FT would provision a local loop using a twisted copper pair that existed in the distribution plant but was unused (in the sense that it was a "spare" pair, installed to support future growth). At present, FT refuses to provision circuits for new entrants using existing spare copper pairs, while simultaneously using such existing copper infrastructure to provision circuits for its own retail customers.⁵ Not only is such a refusal discriminatory, it hardly advances the objectives of the Unbundling Regulation – to enhance competition, ensure economic efficiency, and bring maximum benefit to the users.⁶ Rather, FT's conduct is an excellent example of the pattern of behavior of European incumbents to "deny, delay, and degrade" the provisioning of essential inputs to new entrants. It is for precisely this reason that the European Parliament and Council

⁵ Covad can only guess at the rationale FT would offer for its refusal to provide non-discriminatory access to existing infrastructure. Our guess is that FT would offer a perverse interpretation of the following text in the preamble: "The obligation to provide unbundled access to the local loop does not imply that notified operators have to install entirely new local network infrastructure to meet beneficiaries' requests." See paragraph (9). If such an interpretation of the Unbundling Regulation were to prevail, Covad believes the Unbundling Regulation, as implemented, would violate the WTO commitments of France and the European Union.

observed in the preamble to the Unbundling Regulation that “experience shows that in most cases regulatory intervention is necessary due to imbalance in negotiating power between the new entrant and the notified operator...”⁷

Despite requests from new entrants over a period exceeding 6 months, despite orders from ART, FT – until days before the submission of this document – has refused to provide even fundamental information regarding the location of its Central Offices, and the geographical coverage area of the Main Distribution Frames located in those Central Offices. Even now, FT provides only partial information regarding the addresses of Central Offices in a limited number of large cities. The information that has only recently been released is available in paper format only, and requires yet an additional non-disclosure agreement. FT’s continuing refusal to provide information as required is an affront to non-discriminatory competition and to the good order associated with a functional regulatory regime.

Lastly, but of critical importance for sustained competitive entry, FT’s current pricing structure for unbundled loops and associated facilities (by which Covad means to include collocation, transport, and electronic bonding to incumbent OSS functionality), like Telefónica’s and DTAG’s, clearly puts new entrants in a price squeeze situation when compared to the retail prices for DSL service offered by FT’s ISP affiliates.

United Kingdom

Last year, Covad’s contribution to USTR’s Section 1377 proceeding focused entirely on the United Kingdom and decisions of OFTEL that, in practice, conferred on

⁶ See, paragraph (2) of the Preamble.

⁷ See, paragraph (11) of the Preamble.

British Telecom (“BT”) a monopoly in the provision of DSL services running through July 1, 2001. In the intervening year, OFTEL has undertaken a series of follow-on proceedings as listed in USTR’s Federal Register notice of the current Section 1377 proceeding. Covad participated formally in some, but not all, of these follow-on proceedings.

However well intentioned OFTEL staff may be, the result of two years of inquiry is a telecommunications environment that is neither stable, predictable, nor non-discriminatory.

MCI WorldCom, Global Crossing, Telewest, and RSL.com, among others have withdrawn from participation in the unbundling “process” in the UK. Why?

U.K. telecoms operators told members of parliament on Tuesday that British Telecom was continuing to obstruct competition for high-speed Internet services, and slammed regulator Oftel for allowing BT to build a potentially unstoppable lead in the technology.

Appearing before the cross-party trade and industry select committee, companies including Thus, Energis and Cable & Wireless said BT was still threatening their plans to compete on DSL (Digital Subscriber Line) Internet services despite recent intervention by Oftel.

They accused BT of allocating insufficient resources to unbundling of the local loop, the process that will allow rival operators to install broadband Internet equipment in BT local exchanges, and of withholding the information they needed to construct business plans.

Anne Machin, head of carrier relations at Energis, said the problems were forcing her company to reduce its ambitions for DSL, which accelerates the speed of Internet connections over normal telephone lines by a factor of about 10.

"They're certainly being scaled back somewhat because of the uncertainties and the difficulties we're having," she told the 10-member committee, which is investigating criticism of Oftel's handling of unbundling.

The companies savaged Oftel in written evidence to the committee. C&W said Oftel had failed to devise the right regulatory structure or to get sufficiently involved in implementing unbundling.

"It has become apparent that the failure on the part of Oftel to become closely involved in the process has been a major factor in the current state of affairs," it said.

Thus said it supported the move towards joint regulation by Oftel and the industry, "but experience to date shows that co-regulation in the UK means regulation by Oftel and BT".

C&W and Kingston Communications expressed concern that it was too late for them to catch up with BT's head start in launching DSL services to customers. Machin told the committee it would take Energis up to four months from getting the keys to the first exchanges to launching services, although Kingston and C&W said it should take no longer than four weeks once they gained experience in the process.

Emma Gilthorpe, C&W's vice president for European public policy, said it would be hard to prove BT was deliberately obstructing unbundling. "But they are doing very little to facilitate this process," she said.

She questioned BT's claims that there was insufficient space in some exchanges for their equipment, saying one of C&W's engineers had seen two empty rooms in an exchange listed as full.

"It appears from the way that BT is deploying DSL at sites blacklisted to other operators that the criteria restricting space being allocated to BT Ignite are considerably less onerous than is being applied to other operators," Energis said in its written submission.⁸

The foregoing report does not appear to be unique.⁹

Non-discriminatory collocation, "cageless collocation" in the US terminology, where a new entrant locates its equipment in the most efficient available location in a Central Office, even if that means placement alongside incumbent equipment without physical separation, has never been offered in the UK.

⁸ "U.K. operators still unhappy over BT's DSL head start", by Richard Baum, Reuters, December 19, 2000, <http://www.totaltele.com/view.asp?ArticleID=35026&Pub=tt>.

⁹ See also, "SURVEY – FT TELECOMS: BT accused of foot Dragging: THE UK SCENE by Andrew Ward: Despite firm denials to the contrary, would be DSL service providers allege BT is still obstructing access to the last mile," Financial Times January 17, 2001, <http://globalarchive.ft.com/globalarchive/articles.html?id=010117001410&query=OFTEL>

Those potential new entrants that remain interested in collocation now face unpredictable increases in collocation costs. While they may have agreed to a collocation regime that placed all new entrant equipment in a separate collocation room (naively, in Covad's view), their individual potential financial liabilities have greatly increased as companies have withdrawn from the unbundling "process", apparently after having learned how BT's program to "deny, delay and degrade" will raise their total cost of entry.¹⁰

Although OFTEL is reportedly redesigning its "Bow Wave" collocation regime because of initial lack of take up, the collocation environment in the UK does not allow a new entrant immediate access to those Central Offices (local exchanges) from which BT presently offers its DSL service, let alone the ability to pick and choose its Central Office locations with complete freedom as BT was encouraged to do as quickly as possible in the summer of 1999. Of course, the standard for non-discriminatory treatment is the treatment the incumbent accords itself or is accorded by the NRA, rather than the treatment accorded one new entrant vis-à-vis another new entrant.

While the monthly recurring charge for fully unbundled local loops approved by OFTEL does not appear unreasonable on its face, Covad is unaware of any evidence that it is non-discriminatory when compared to the cost that BT allocates to its own wholesale and retail DSL services.

With collocation prices unpredictable, and the prices of other essential inputs unclear (at least when compared to the non-discriminatory standard of the costs BT imputes to its own like services of those of its affiliates or subsidiaries), it is uncertain (at

¹⁰ Covad understands that OFTEL received a complaint on behalf of Sun Telecom in October 2000, alleging the existence of "a centralized policy entitled 'Walking Backwards Slowly' that is intended to slow

best) whether new entrants will face the price squeeze situation in the UK the Unbundling Regulation seeks to prevent, let alone be afforded the non-discriminatory conditions required by the Reference Paper.

Action Requested

The views Covad has expressed with regards to competitive entry conditions in Spain, Germany, France, and the United Kingdom are summaries only, not intended to describe Covad concerns in full. For purposes of brevity, Covad has generally not repeated in detail a pattern of misconduct in one country if its analog has been reasonably portrayed in the section dealing with another country.

Covad's overall conclusion is that although an appropriate legal framework seems to have been devised by the European Commission, and approved on the political level by the European Parliament and Council, it is by no means certain that timely implementation will be adequately enforced by individual NRAs.

Accordingly, Covad respectfully requests that the Office of the United States Trade Representative fully consider Covad's foregoing views in its review of the efficacy of U.S. trade agreements pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988; that it fully investigate the matters raised; and, if deemed appropriate, take up with appropriate European Union and Member State authorities the issue of whether the Unbundling Regulation is being implemented in a timely manner consistent with the WTO commitments of the European Union and Member States.

Respectfully submitted,

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