BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of Unresolved Issues in Interconnection Agreement with BellSouth Telecommunications, Inc.

Docket No. 001797-TP

Filed: May 23, 2001

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REBUTTAL TESTIMONY AND EXHIBIT OF

JASON D. OXMAN

ON BEHALF OF COVAD COMMUNICATIONS COMPANY

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Q. Please state your name, position and job duties.

A. My name is Jason D. Oxman, Senior Counsel of Covad Communications Company. I am based in Washington, D.C. I have held this position since September of 1999. In this position, I direct Covad's advocacy before federal regulatory agencies. I also advocate Covad's regulatory and policy issues before state PUCs and Congress. In addition, I have frequent interactions with incumbent local exchange carriers ("ILECs") in order to negotiate interconnection and other agreements.

Q. Please state your qualifications and experience prior to joining Covad.

Immediately prior to joining Covad, I spent over two years at the Federal Communications Commission, in two different capacities. I started at the Commission in September 1997 as a staff attorney in the Common Carrier Bureau. In that capacity, I had primary responsibility for several aspects of the long distance applications of BellSouth for Louisiana and South Carolina, both of which the FCC rejected. I also played a critical role in several of the rulemaking proceedings that the Commission undertook as part of its Advanced Services dockets, including the Commission's so-called Cageless Collocation order. In November 1999, I was named Counsel for Advanced Communications in the Office of Plans and Policy at the Commission. In that capacity, I advised the Commission on broadband-related legal and technical issues, including a broad range of local competition issues.

I served as a law clerk to the Maine Supreme Judicial Court from 1996 to 1997. I hold a Masters of Science in Mass Communications and a Juris Doctor from Boston University. I hold a B.A. *cum laude* from Amherst College.

Q. What is the purpose of your testimony?

A. In the first instance, I adopt as my own the testimony submitted by Thomas M. Koutsky of Covad on April 23, 2001, in this docket. Although his testimony as submitted remains valid and accurate, Mr. Koutsky is no longer employed by Covad, and it is necessary for me to replace him as a witness in this docket. As with Mr. Koutsky's testimony, my rebuttal testimony will cover the following Issues set forth in Covad's Petition for Arbitration:

- Issue 1: What limitations of liability, if any, should be included in the Parties' Interconnection Agreement?
- Issue 2: What should BellSouth's obligations be under this Interconnection Agreement in the event that BellSouth's workforce, or the workforce of its suppliers and vendors, engage in a work stoppage?
- Issue 3: Should there be a limitation of an ALEC's right to opt-in to an existing interconnection agreement that has only six months remaining before it expires?

I understand that other Covad witnesses will be addressing the other Issues presented in Covad's petition. Although my rebuttal testimony does not address all of the issues raised by Mr. Koutsky, I adopt the arguments he raised as to those issues for purposes of my testimony.

ISSUE 1: LIMITATION OF LIABILITY

Q. What is the limitation of liability language proposed by BellSouth in its negotiations with Covad?

A. The BellSouth proposal states:

> 8.4 Limitation of Liability.
>
> 8.4.1 Each Party's liability to the other for any loss, cost, claim, injury or liability or expense, including reasonable attorney's fees relating to or arising out of any negligent act or omission in its performance of this Agreement whether in contract or in tort, shall be limited to a credit for the actual cost of the services or functions not performed or improperly performed.

Q. What has Covad proposed?

A. Covad proposes that the parties retain the limitation of liability provision from their existing Interconnection Agreement, which has been approved by this Commission. It states:

> 7.1 Liability Cap.
>
> 7.1.1 With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by DIECA, any DIECA customer or by any other person or entity, for damages associated with any of the services provided by BellSouth pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and subject to the provisions of the remainder of this Section, BellSouth's liability shall be limited to an amount equal to the proportionate charge for the service provided pursuant to this Agreement for the period during which the service was affected. **Notwithstanding the foregoing, claims for damages from the gross negligence or willful misconduct of BellSouth and claims for damages by DIECA resulting from the failure of BellSouth to honor in one or more material respects any one or more of the material provisions of this Agreement shall not be subject to such limitation of liability.**

Q. Do you agree with BellSouth's statement that the limitation of liability language proposed by BellSouth is standard in the telecommunications industry?

A. No. In support of that statement, BellSouth quotes only from its own tariffs, which hardly establishes a standard for the industry. In fact, Covad's interconnection agreements with other Bell companies provide for liability should either party to the agreement act with willful or intentional misconduct. Covad's agreements with Bell Atlantic (NY) (Verizon), and Pac Bell contain such provisions. Furthermore, Covad has opted into the Interconnection Agreement between GTE California and AT&T in California, which likewise does not insulate GTE from liability for gross negligence, willful misconduct or material breaches of the contract. (Exhibit No. _____, JDO-1).

BellSouth will not even subject itself to liability for the willful and intentional misconduct of its employees or agents. Indeed, it seeks to avoid all such liability by arguing that it is "standard industry practice" for carriers to immunize themselves from such liability. As evidenced by Covad's agreements with other carriers, it is not.

Q: Do you agree with BellSouth's statement that limitations of liability issues are not proper for resolution by this Commission because section 251 of the Act does not address liability issues specifically?

A. No. Section 251 of the 1996 is literally only a few sentences long. The typical Covad interconnection agreement with an incumbent LEC is hundreds of pages

long. Clearly, section 251 does not spell out in detail each and every obligation of the contracting parties. Rather, the Act sets out in minimal detail the obligations on those carriers, and issues that do not reach resolution voluntarily are to be resolved, pursuant to section 252 of the Act, by the relevant state commission. For example, section 251(c)(3) of the Act imposes a required on incumbent LECs to provide unbundled network elements. It makes no mention of loops. If BellSouth were correct that an issue must be specifically mentioned in the language of the Act to be subject to Commission arbitration, Covad would not be able to bring any loop issues for arbitration. This is why the courts have found section 252(e) of the Act to require state commissions to "resolve" "any open issue" that the Commission chooses to arbitrate pursuant to Sections 251 and 252. Sections 252(b)(1), 252(b)(4)(C); *see MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286 (N.D. Fla. 2000).

Q. Is Covad seeking limitation of liability language that is any different from language that has existed in prior contracts with BellSouth?

A. No. Because Covad seeks to enforce its interconnection contracts with ILECs in a variety of settings, including breach of contract litigation before the courts, limitation of liability clauses are a focus of our negotiation strategy. In 1998, Covad and BellSouth specifically negotiated the limitation of liability clause to provide that BellSouth would not be protected by a limitation of liability clause if Covad were damaged "from the gross negligence or willful misconduct of BellSouth." In addition, the clause provided that if BellSouth failed to "honor in one or more material respects any one or more of the material provisions" of the

contract, no limitation of liability would apply at all. Covad has proposed that the next interconnection agreement between Covad and BellSouth contain the same clause.

Q. What has BellSouth proposed instead?

A. As set out in greater detail in Mr. Koutsky's testimony that I adopt, BellSouth has put forward a proposal that would shield it from any substantial liability for *any* breach of the interconnection agreement. In particular, BellSouth has proposed that it would *only* be liable to Covad for the "actual costs of the services or functions not performed or improperly performed." That is an entirely unacceptable limitation and would gut the other substantive provisions of the Agreement.

Q. Has BellSouth made additional offers regarding the limitation of liability provision?

A. Covad and BellSouth have been in ongoing negotiations in an attempt to reach resolution on this issue. Although BellSouth seems to be willing to accept liability for gross negligence or willful misconduct, it continues to seek to insulate itself from any liability for making "good faith" interpretations of contract provisions, which later turn out to be wrong. This proposal seems to create broad areas for disagreement between the parties and incorporates ambiguity and vagueness into a contract provision that should be simple and straightforward. Covad prefers that the limitation of liability provisions, quoted above, in its existing contract with BellSouth be incorporated into its new contract with BellSouth.

Q: Do you agree with BellSouth that the Florida Commission's decision in the MCI Order, where the Commission declined to impose a liability clause on the carriers, controls here?

A: No. In the first instance, that decision does not, as BellSouth suggests, stand for the proposition that the Commission need not rule on limitation of liability clauses in the section 252(e) context – that issue has been decided by the courts, and the answer is that the Commission must address the issue. Beyond that, the particular factual circumstances at issue in the MCI arbitration are inapposite here, where MCI is not a party.

ISSUE 2: STRIKE CLAUSE

Q: Do you agree with BellSouth's statement in its testimony that Covad is seeking "special treatment" in the event of a BellSouth work stoppage?

A: No. Covad learned the hard way from the lengthy Verizon strike that the Bell companies tend to put available resources on their retail arm before their wholesale arm. BellSouth has a legal obligation to treat Covad in a nondiscriminatory manner in providing UNEs, collocation space, and other network elements and facilities required by section 251 of the Act. As such, this issue is properly before the Commission in this arbitration – Covad simply seeks a contractual assurance that BellSouth will comply with its obligations under the Act. Because BellSouth refuses to provide such a term in its interconnection agreement with Covad, Covad has submitted the issue to the Commission for resolution.

ISSUE 3: SHOULD BELLSOUTH BE PERMITTED TO RESTRICT COVAD'S RIGHTS UNDER SECTION 252(I) OF THE TELCOM ACT BY IMPOSING AN ARTIFICIAL LIMITATION ON COVAD'S ABILITY TO OPT-IN TO THE INTERCONNECTION AGREEMENTS REACHED BETWEEN BELLSOUTH AND OTHER COMPETITIVE CARRIERS?

Q. What arguments does BellSouth make in support of its desire to limit Covad's ability to opt into an Interconnection Agreement with 6 months or less remaining on its term?

A. BellSouth makes several arguments that fail to justify its arbitrary decision to strip Covad of its full opt-in rights: specifically, BellSouth argues: (1) "most ALECs would not want to opt into an Interconnection Agreement with less than six months remaining" (Cox Direct, p. 10); (2) BellSouth needs time to negotiate with ALECs to avoid arbitration (Cox Direct, 12-13); (3) allowing Covad to opt into an Interconnection Agreement will be administratively burdensome. These arguments cannot and do not justify depriving Covad of substantive rights to opt into Interconnection Agreements of its choice.

First, Covad clearly wants the ability to opt into Interconnection Agreements with six months or less remaining on their term. Covad arbitrates this issue before the Florida Commission to ensure that its rights are protected. In the context of an arbitration for terms of the Interconnection Agreement between BellSouth and Covad, it does not matter what BellSouth believes "most ALECs want." It is clear

that this is an option that Covad seeks. Surprisingly, BellSouth attempts to position itself as an expert and opines about what "most ALECs want." Such opinions are questionable at best, especially in light of Covad clear statement of its intention to litigate for the right to opt into an Interconnection Agreement with six months or less remaining on its term. It is clear what Covad wants, BellSouth's comments notwithstanding.

Second, negotiations toward settlement of issues may actually be advanced when negotiation time tables are accelerated. In fact, agreement on issues between Covad and BellSouth accelerated dramatically after Covad filed its arbitration petition before this and other Commissions, as evidenced by the fact that there were 35 issues listed in Covad petition's and only 20 or so remain unresolved at this point.

Finally, BellSouth has offered no evidence whatsoever to substantiate its claims of an administrative burden resulting from handling Interconnection Agreements that were opted into within six months of duration. In fact, it is unclear to me why these contracts would be treated, maintained or administered any differently than any other Interconnection Agreement.

None of these arguments should distract this Commission from Covad's legal right to opt into any Interconnection Agreement at any time.

Q. Do you agree with BellSouth that a six-month limitation on Covad's opt-in rights is permissible?

A. No. In 1996, the FCC implemented Section 252(I) with 47 CFR 51.809. That FCC rule was affirmed by the United States Supreme Court in January 1999. Rule 51.809 specifically states:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in *any agreement* to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement.

Under Rule 51.809, the *only* restrictions upon this option are those set forth in 51.809(b). That rule restricts Covad's 252(I) rights only for cases in which the ILEC can demonstrate that its costs have changed or that such an arrangement is technically infeasible to provide to Covad.

Q. What restrictions has BellSouth proposed to place on Covad's legal rights?

A. BellSouth has proposed two significant substantive restrictions. The first would prevent Covad from exercising Section 252(I) rights for any interconnection, service or network element arrangement that is provided for in a contract that is due to expire within six months of Covad's decision to opt-in to that arrangement. The second would require Covad to agree to all "legitimately related" clauses that relate to any particular arrangement.

Q. Is either restriction contemplated for or provided for by FCC Rule 51. 809(b)?

A. No. In fact, Rule 51.809(a), quoted above, explicitly states that an ILEC must provide "any individual . . . arrangement contained in any agreement."

Q. Do you agree with BellSouth that there is no reason why an ALEC would ever want to opt in to an agreement that will expire within 6 months?

A. No. There are several legitimate reasons why Covad, or another ALEC, would seek to do so. In the event an ILEC and an ALEC cannot agree on interconnection terms and an arbitration is begun, the ALEC also must await resolution of that arbitration before the arbitrated contract can be finished (a process that, pursuant to Section 252, can take up to 9 months). Because of this situation, it is common business practice for a ALEC to use its Section 252(I) rights to "opt-in" to an existing interconnection arrangement that it needs to do business while it begins or continues the process of negotiation or arbitration with the ILEC. ALECs routinely use these legal rights to get their business up and running in a state immediately. The fact that an arrangement may only have limited duration may actually be a reason for the ALEC to opt-in to that provision. In this manner, a ALEC will not be "locked-in" to a suboptimal arrangement for very long.

For example, in this arbitration, Covad is seeking a firm, 3-day loop installation interval from BellSouth. Covad expects that this arbitration will be completed in the next six months. Suppose that BellSouth enters into an agreement with one of Covad's competitors that would provide for a firm, 5-day loop installation interval for the next six months. Although Covad believes it will ultimately prevail on its request for a firm 3-day interval, it will still be able to use Section 252(I) to opt-in to the firm 5-day interval while its 3-day arbitration is pending. BellSouth's

proposal would prevent Covad from exercising this right, if the other ALEC's Interconnection Agreement were set to expire within 6 months.

Q. Would BellSouth's 6-month proposal significantly limit ALEC 252(I) options?

A. Yes. Most of BellSouth's interconnection agreements have a duration of two years. If you consider all of BellSouth's interconnection agreements as the pool of potential Section 252(I) candidates, at any particular point in time, BellSouth would exclude approximately 25% of all of BellSouth's interconnections, services, or UNE arrangements from the 252(I) process. That is a significant and arbitrary exclusion that has no basis in federal law.

Q. Does this conclude your rebuttal testimony?

A. Yes.

INTERCONNECTION AGREEMENT

Dated as of _____, 1998

by and between

BELL ATLANTIC - NEW YORK

and

COVAD COMMUNICATIONS COMPANY

26.0 LIMITATION OF LIABILITY

26.1 The liability of either Party to the other Party for damages arising out of failure to comply with a direction to install, restore or terminate facilities; or out of failures, mistakes, omissions, interruptions, delays, errors, or defects (collectively, "Errors") occurring in the course of furnishing any services, arrangements, or facilities hereunder shall be determined in accordance with the terms of the applicable Tariff(s) of the providing Party. In the event no Tariff(s) apply, the providing Party's liability for such Errors shall not exceed an amount equal to the pro rata monthly charge for the period in which such failures, mistakes, omissions, interruptions, delays, errors or defects occur. Except as otherwise provided in Section 25, Section 26.2, Section 27 and Section 29.4, recovery of said amount shall be the injured Party's sole and exclusive remedy against the providing Party for Errors, provided however that Errors shall not include grossly negligent or willful conduct.

26.2 Except as provided in Section 25, Section 27, and Section 29.4, or in instances of gross negligence or willful misconduct, neither Party shall be liable to the other in connection with the provision or use of services offered under this Agreement for indirect, incidental, consequential, reliance or special damages, including (without limitation) damages for lost profits (collectively, "Consequential Damages"), regardless of the form of action, whether in contract, warranty, strict liability, or tort, including, without limitation, negligence of any kind, even if the other Party has been advised of the possibility of such damages; provided, that the foregoing shall not limit a Party's obligation under Section 25.

26.3 The Parties agree that neither Party shall be liable to the customers of the other Party in connection with its provision of services to the other Party under this Agreement. Nothing in this Agreement shall be deemed to create a third party beneficiary relationship between the Party providing the service and the customers of the Party purchasing the service. In the event of a dispute involving both Parties with a customer of one Party, both Parties shall assert the applicability of any limitations on liability to customers that may be contained in either Party's applicable Tariff(s).

INTERCONNECTION AGREEMENT

BETWEEN

COVAD COMMUNICATIONS COMPANY

AND

PACIFIC BELL

continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties agree to commence negotiations on a new agreement no less than six (6) months before the end of three (3) years after this Agreement becomes effective.

24. EFFECTIVE DATE

This Agreement shall become effective upon approval by the Commission.

25. AMENDMENT OF AGREEMENT

Covad and Pacific may mutually agree to amend this Agreement in writing. Since it is possible that amendments to this Agreement may be needed to fully satisfy the purposes and objectives of this Agreement, the Parties agree to work cooperatively, promptly and in good faith to negotiate and implement any such additions, changes and corrections to this Agreement.

26. LIMITATION OF LIABILITY

Except as otherwise provided herein, neither Party shall be liable to the other in connection with the provision or use of services offered under this Agreement for indirect, incidental, consequential, special damages, including (without limitation) damages for lost profits, regardless of the form of action, whether in contract, indemnity, warranty, strict liability, or tort.

27. INDEMNITY

Each Party shall indemnify and hold the other harmless from any liabilities, claims or demands (including the costs, expenses and reasonable attorney's fees on account thereof) that may be made by third parties for:

27.1.1.personal injuries, including death, or

27.1.2.damage to tangible property

resulting from the sole negligence and/or sole willful misconduct of that Party, its employees or agents in the performance of this Agreement. Each Party shall defend the other at the other's request against any such liability, claim or demand. Each Party shall notify the other promptly of written claims or demands against such Party of which the other Party is solely responsible hereunder.

28. ASSIGNMENT

INTERCONNECTION, RESALE
AND UNBUNDLING

AGREEMENT

between

GTE CALIFORNIA INCORPORATED,
CONTEL OF CALIFORNIA, INC.
and

AT&T COMMUNICATIONS OF CALIFORNIA, INC.

The filing of this arbitrated Agreement with the Public Utilities Commission of the State of California in accordance with Ordering Paragraph No. 3 of the Commission's Opnion Approving Arbitrated Agreement (Decision No. 97-01-022 issued January 13, 1997) ("Decision No. 97-01-022") , with respect to In the Matter of the Petition of AT&T Communications of California, Inc. for Arbitration Pursuant to Section 252 of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with GTE California Incorporated, Application 96-08-041 (Filed August 19, 1996), does not in any way constitute a waiver by either AT&T Communications of California, Inc., GTE California Incorporated or Contel of California, Inc. of any right which any such Party may have to appeal, or to petition the Commission for reconsideration of, any determination contained in Decision No. 97-01-022 or any provision included in this Agreement pursuant to Decision No. 97-01-022.

Nothing contained herein shall be construed or is intended to be a concession or admission by either Party that any contractual provision required by Decision No. 97-01-022 or the language herein complies with the duties imposed by the Telecommunications Act of 1996, the decisions of the FCC and the CPUC, or other law, and each Party thus expressly reserves its full right to assert and pursue claims that Decision No. 97-01-022 does not comply with applicable law.

which GTE is responsible, and GTE shall reasonably cooperate with AT&T in obtaining and maintaining any required approvals for which AT&T is responsible.

8.2 GTE shall not file any tariff which supercedes or changes any term of this Agreement unless the Commission specifically orders GTE to file a tariff which controls over any conflicting term of any agreement between GTE and a competitive local exchange carrier.

8.3 If any final and nonappealable legislative, regulatory, judicial or other legal action, including a change in Applicable Law, materially affects any material terms of this Agreement, or the ability of AT&T or GTE to perform any material terms of this Agreement, AT&T or GTE may, on 30 days' written notice (delivered not later than 30 days following the date on which such action has become legally binding and has otherwise become final and nonappealable) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. If such new terms are not renegotiated within 90 days after such notice, the Dispute shall be referred to the Alternative Dispute Resolution procedures set forth in Attachment 1.

9. **Liability and Indemnity**

9.1 **Liabilities of AT&T** - AT&T's liability to GTE during any Contract Year resulting from any and all causes under this Agreement, other than as specified in Sections 7 and 9.4 below, shall not exceed an amount equal to the amount due and owing by AT&T to GTE under this Agreement during the Contract Year in which such cause accrues or arises.

9.2 **Liabilities of GTE** - GTE's liability to AT&T during any Contract Year resulting from any and all causes under this Agreement, other than as specified in Sections 7 and 9.4 below, shall not exceed an amount equal to any amounts due and owing by AT&T to GTE under this Agreement during the Contract Year in which such cause accrues or arises.

9.3 **No Consequential Damages** - NEITHER AT&T NOR GTE SHALL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, RELIANCE, OR SPECIAL DAMAGES SUFFERED BY SUCH OTHER PARTY (INCLUDING WITHOUT LIMITATION DAMAGES FOR HARM TO BUSINESS, LOST REVENUES, LOST SAVINGS, OR LOST PROFITS SUFFERED BY SUCH OTHER PARTIES), REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, WARRANTY, STRICT LIABILITY, OR TORT, INCLUDING WITHOUT LIMITATION NEGLIGENCE OF ANY KIND WHETHER ACTIVE OR PASSIVE, AND REGARDLESS OF WHETHER THE PARTIES KNEW OF THE POSSIBILITY THAT SUCH DAMAGES COULD RESULT. EACH PARTY HEREBY RELEASES THE

OTHER PARTY AND SUCH OTHER PARTY'S SUBSIDIARIES AND AFFILIATES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS FROM ANY SUCH CLAIM. NOTHING CONTAINED IN THIS SECTION 9 SHALL LIMIT THE PARTIES' INDEMNIFICATION OBLIGATIONS, AS SPECIFIED BELOW.

9.4 **Obligation to Indemnify**

9.4.1 Each Party shall, and hereby agrees to, defend at the other's request, indemnify and hold harmless the other Party and each of its officers, directors, employees and agents (each, an "Indemnitee") against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated, including without limitation all reasonable costs and expenses incurred (legal, accounting or otherwise) (collectively, "Damages") arising out of, resulting from or based upon any pending or threatened claim, action, proceeding or suit by any third party (a "Claim") (i) based upon injuries or damage to any person or property or the environment arising out of or in connection with this Agreement, that are the result of such Indemnifying Party's actions, breach of Applicable Law, or breach of reprsentations, warranties or covenants made in this Agreement, or the actions, breach of Applicable Law or of this Agreement by its officers, directors, employees, agents and subcontractors, or (ii) for actual or alleged infringement of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property right, now known or later developed (referred to as "Intellectual Property Rights") to the extent that such claim or action arises from the Indemnifying Party's or the Indemnifying Party's Customer's use of the Local Services, Network Elements, Combinations, Ancillary Functions or other services provided under this Agreement.

9.4.2 **Obligation to Defend; Notice; Co-operation** - Whenever a Claim shall arise for indemnification under this Agreement, the relevant Indemnitee, as appropriate, shall promptly notify the Indemnifying Party and request the Indemnifying Party to defend the same. Failure to so notify the Indemnifying Party shall not relieve the Indemnifying Party of any liability that the Indemnifying Party might have, except to the extent that such failure prejudices the Indemnifying Party's ability to defend such Claim. The Indemnifying Party shall have the right to defend against such liability or assertion in which event the Indemnifying Party shall give written notice to the Indemnitee of acceptance of the defense of such Claim and the identity of counsel selected by the Indemnifying Party. Except as set forth below, such notice to the relevant Indemnitee shall give the Indemnifying Party full authority to defend, adjust, compromise or settle such Claim with respect to which such notice shall have been given, except to the extent that any compromise or settlement shall prejudice the Intellectual Property Rights of

the relevant Indemnitees. The Indemnifying Party shall consult with the relevant Indemnitee prior to any compromise or settlement that would adversely affect the Intellectual Property Rights or other rights of any Indemnitee, and the relevant Indemnitee shall have the right to refuse such compromise or settlement and, at the refusing Party's or refusing Parties' cost, to take over such defense, provided that in such event the Indemnifying Party shall not be responsible for, nor shall it be obligated to indemnify the relevant Indemnitee against, any cost or liability in excess of such refused compromise or settlement. With respect to any defense accepted by the Indemnifying Party, the relevant Indemnitee shall be entitled to participate with the Indemnifying Party in such defense to the extent the Claim requests equitable relief or other relief that could affect the rights of the Indemnitee and also shall be entitled to employ separate counsel for such defense at such Indemnitee's expense. In the event the Indemnifying Party does not accept the defense of any indemnified Claim as provided above, the relevant Indemnitee shall have the right to employ counsel for such defense at the expense of the Indemnifying Party. Each Party agrees to cooperate and to cause its employees and agents to cooperate with the other Party in the defense of any such Claim and the relevant records of each Party shall be available to the other Party with respect to any such defense.

10. **Service Parity and Standards**

10.1 Notwithstanding anything in this Agreement to the contrary, GTE shall meet any service standard imposed by the FCC or by any state regulatory authority for any telecommunications services provided by GTE to AT&T under this Agreement.

10.2 GTE shall provide AT&T with Local Services equal in quality to to that provided to GTE retail local exchange services end users. The standards for service parity are described in Attachment 12.

10.3 GTE and AT&T agree to implement standards to measure the quality of the Local Services and Unbundled Network Elements supplied by GTE, in particular with respect to pre-ordering, ordering/provisioning, maintenance and billing. These quality standards are described in Attachment 12.

10.4 GTE shall provide AT&T with forty-five (45) days notice of any new or changed feature, functionality or price pertaining to pre-ordering, ordering/provisioning, maintenance and billing for Local Services necessary to ensure that AT&T can provide retail local exchange services which are at least equal in quality to comparable GTE retail local exchange services.

11. **Cooperation on Fraud Minimization** - The Parties shall cooperate with one another to investigate, minimize and take corrective action in cases of fraud. The Parties' fraud minimization procedures are to be cost effective and

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Rebuttal Testimony and Exhibit of Jason D. Oxman on Behalf of Covad Communications Company has been furnished by (*) hand delivery this 23rd day of May, 2001, to the following:

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