

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251)	
Unbundling Obligations of)	CC Docket No. 01-338
Incumbent Local Exchange Carriers)	
)	
Implementation of the Local)	
Competition Provisions of the)	CC Docket No. 96-98
Telecommunications Act of 1996)	
)	
Deployment of Wireline Services Offering)	
Advanced Telecommunications Capability)	CC Docket No. 98-147

PETITION FOR EMERGENCY STAY

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PETITION FOR EMERGENCY STAY

Pursuant to sections 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a) of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a), Allegiance Telecom, Inc., Cbeyond Communications, LLC, El Paso Global Networks, Focal Communications, Corp., McLeod USA, Inc., TDS MetroCom, LLC ("Petitioners") hereby jointly request that the Commission stay pending appeal the fiber-to-the-home ("FTTH") and other mass market broadband rules adopted in the *Triennial Review Order*,¹ particularly in light of the modification to those rules by the *Errata*² that deleted the explicit confinement of most of those rules to residential applications. The exemption from broadband unbundling established in those rules is unlawful and will result in immediate, irreparable harm to petitioners and their customers. If the

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 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, FCC 03-36, (rel. Aug. 21, 2003) ("*Triennial Review Order*" or "*Order*").

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 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, *Errata*, FCC 03-36, (rel. Sep. 17, 2003) ("*Errata*").

Commission fails to resolve this petition by September 29, 2003, petitioners will seek a stay from the Eight Circuit pursuant to Rule 18 of the Federal Rules of Appellate Procedure and 28 U.S.C. 2342(1).

ARGUMENT

It is well settled that in reviewing a petition for a stay of its rules, the Commission applies the precedent of United States Court of Appeals for the D.C. Circuit. The applicable standard for granting a stay under D.C. Circuit precedent states that “[a]n order maintaining the *status quo* is appropriate when a serious legal question is presented, when little harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.” *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); see also *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Although this standard requires the Commission to examine “whether: (1) petitioners are likely to succeed on the merits; (2) petitioners will suffer irreparable injury absent a stay; (3) a stay would substantially harm other interested parties; and (4) a stay would serve the public interest,” *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Holiday Tours, Inc.*, 559 F.2d at 843, these factors relate on a “sliding scale,” such that when “the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas” are less compelling. See *Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998). This is particularly true where, as here, a stay request simply seeks to preserve the *status quo* pending judicial review. Indeed, the Commission itself has indicated that a stay maintaining the *status quo* should be granted “when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious

harm.” *Florida Public Serv. Comm’n*, 11 FCC Rcd 14324, 14325-26 & n. 11 (1996). Because the four factors originally established in *Virginia Jobbers* are applied on a sliding scale, there is no rigid requirement that petitioners demonstrate “a mathematical probability of success.” *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d at 844.

I. PETITIONERS WILL SUCCEED ON THE MERITS

Petitioners will succeed on the merits because, among other reasons, the Commission made a seismic shift in the scope of its FTTH and apparently other mass market broadband rules through the arbitrary and capricious device of an “Errata.” Although errata are commonly employed to correct typographical errors they are not available to the Commission to effect substantive change to its rules, even rules that have yet to take effect. The Commission lacks any express power in its rules to modify its orders on a substantive basis without providing proper notice and comment and justifying its decision with reasoned analysis. To the extent the Commission can amend recently enacted rules before those rules take effect the Commission must do so through the reconsideration process. *See* 47 C.F.R. §1.108 (2002). At a minimum, a reconsideration would require the Commission to elaborate and explain the reasoning for the modification, relate such modification to its statutory authority and the record of the proceeding and explain its impact upon the parties it will affect. *See e.g.* 5 U.S.C. § 553(b), 706(2); *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 375-376 (D.C. Cir. 2003); *MCI Telecommunications Corp. v. F.C.C.*, 10 F.3d 842 (D.C. Cir. 1993). Absent this, the major substantive changes established by the *Errata* are arbitrary and capricious. Petitioners also question in certain respects whether the Commission’s decision-making concerning broadband has comported with all the requirements of the Administrative Procedures Act.

In addition, the Commission's new broadband unbundling policy will not be sustained on appeal because its decision to limit unbundling in order to promote the supposed goals of Section 706 is irrational and, therefore, unlawful because the Commission has found repeatedly that the goals of Section 706 are already being met. In its *Third Advanced Services Report* the Commission unequivocally found that "advanced telecommunications is being deployed to all Americans in a reasonable and timely manner" and that "investment in infrastructure for advanced telecommunications remains strong." *Inquiry Concerning the Deployment of Advanced telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Third Report, FCC 02-33, 17 FCC Rcd 2844, 2845, ¶ 1. ("Third Report")*. The Commission considered "levels of investment and projections of future growth with advanced telecommunications capability and various advances in advanced services technology," *Id.* at ¶ 6 and, with respect to the small and medium-sized business markets, the Commission acknowledged that "there has been appreciable growth in deployment of high-speed services to residential and small business consumers in the past eighteen months," and that investment in infrastructure for most advanced services markets remains strong" *Id.* at p. 5-6. The Commission found that carriers "continue to invest in facilities capable of supporting advanced telecommunications for residential and small business customers." In the *Second Advanced Services Report*, the Commission noted that "industry investment in advanced telecommunications infrastructure "increased dramatically since 1996." *Inquiry Concerning the Deployment of Advanced telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 15 FCC Rcd.*

20983. The Commission's radical FTTH and other mass market broadband rules are flatly unlawful in light of the Commission's own determinations, in effect, that they are unnecessary to achieve the purposes of Section 706. It is noteworthy that Congress, through section 706(b) intended that the Commission take action if it determines that such capability is not being deployed to all Americans. Telecommunications Act of 1996 § 706(b) Since Section 706 goals are already being met there is no rational basis for the Commission to limit unbundling obligations.

The Commission's broadband decision is also nonsensical because is the Commission applied its rules purportedly designed to promote infrastructure investment to existing broadband facilities and to facilities the ILECs will build in any event for efficiency reasons. Obviously, there is no need to promote investment in such facilities since they already exist or will exist anyway. Further, assuming it were lawful for the Commission to compromise the competitive goals of Congress in order to support additional investment in broadband, there could be no justification for doing so to a greater extent than absolutely necessary. The Commission's unbundling approach is unlawful if for no other reason because it is overly broad.

Further, even if it otherwise made sense, nothing in the statute authorizes the Commission to limit unbundling notwithstanding impairment. Rather, the Act requires unbundling where impairment is found to exist. Nothing in Section 706 authorizes the Commission to write the competitive unbundling provisions out of the Act based on broadband goals, especially when the Commission has previously found that that provision does not provide any basis for limiting unbundling obligations. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24032, ¶ 41. ("Advanced Services

Order”)³ The D.C. Circuit agreed with the Commission’s reading of Congressional intent and found that “Congress did not treat advanced services differently from other telecommunications services.” *Association of Communications Enter.*, 235 F.3d 662, 668 (“ASCENT”); see *Worldcom v. FCC*, 246 F.3d 390 (D.C. Cir. 2001) and that “the Commission may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services.” *ASCENT*, 235 F.3d at 668.

The Commission’s error in limiting unbundling for “mass market” loops is particularly egregious because loops are precisely the type of elements that are hard to duplicate and for which unbundling is appropriate and necessary. The Supreme Court explicitly referenced loop facilities as hard-to-duplicate facilities for which unnecessary competitive provisioning would be wasteful. See, *Verizon Communications, Inc., et al., v. Federal Communications Commission, et al.*, 122 S.Ct. 1646, 1672, n. 27 (2002). Even the D.C. Circuit in *United States Telecom Association v. Federal Communications Commission*, 290 F.3d 415 (D.C. Cir. 2002) (“USTA”) recognized that loops should remain unbundled, citing the Supreme Court’s statement in *Verizon* that “entrants may need to share some facilities that are *very expensive to duplicate* (say, loop elements) in order to be able to compete in other, *more sensibly duplicable* elements (say, digital switches or signal-multiplexing technology).” *USTA*, 290 F.3d at 426, *citing, Verizon*, 122 S.Ct. at 1672, n. 27 (emphasis in original). The D.C. Circuit also invoked the Supreme Court’s suggestion that elements to be unbundled are those “the duplication of [which] would prove

³ The full caption of this case reads as follows: *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996; Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. Sec. 160 for ADSL Infrastructure and Service*

unnecessarily expensive.” *USTA*, 290 F.3d at 426, *citing*, *Verizon*, 122 S.Ct. at 1672, n. 27. The record amassed in the Triennial Review proceeding supports the conclusions of the Supreme Court and the DC Circuit with regard to loop unbundling. While the Commission in other sections of the Order suggests that “actual marketplace evidence is the most persuasive and useful kind of evidence,” *Order* ¶ 93, the section regarding mass market loops determines that marketplace evidence requires a finding of impairment then unlawfully proceeds to ignore it. Again, nothing in the Act authorizes the Commission to jettison this degree of impairment and the consequent harm to the pro-competitive goals of the Act based on broadband goals, even if there were some rational basis to assume that this would promote broadband.

If this were not enough, the broadband rules are also irrational because the Commission has apparently abandoned without even thinking about it its long standing policy of “technology neutrality.”⁴ In choosing to promote packet switching and fiber, the Commission has simply ignored this policy without explanation. The Commission has violated a core principle of the act to not pick technology winners and losers.

For these reasons, Petitioners will prevail on appeal and the Commission should stay the broadband portions of the *Triennial Review Order*.

II. PETITIONERS WILL EXPERIENCE IRREPARABLE INJURY

In applying the irreparable injury prong of the test for granting a stay petition, the Commission must find that the “injury is certain and great; it must be actual and not theoretical.” *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (DC Cir. 1985). Further, the injury must be

⁴ Since enactment of the 1996 Act, the Commission has consistently held that the Act requires that its rules be technologically neutral. See *Order* ¶ 369 (“We find that this technology-neutral approach best comports with the statute”); ¶ 647 n. 1960 (“our interoffice transport rules are technology neutral,”); *UNE Remand Order*, 15 FCC Rcd at 3790, ¶¶ 207, 234, 312 (“we will define unbundled network elements, to the extent practicable, in a technologically neutral manner.”)

imminent such that “there is a clear and present need for equitable relief.” *Id.* (internal citations omitted).

Petitioners are competitive local exchange carriers (“CLECs”) that variously provide small, medium, and large-sized business customers with a variety of telecommunications services. Petitioners serve large numbers of customers by using UNEs provisioned over hybrid loops and may do so by FTTH. The *Errata* highlights that apparently the Commission’s unbundling relief for “mass market” customers will apply not only to FTTH but to customers served by hybrid loops as well. Petitioners will be irreparably harmed by implementation of the new rules because the very purpose and intent of unbundling relief is to promote infrastructure investment by ILECs by permitting them thereby to avoid unbundling obligations. Thus, ILECs may avoid unbundling obligations for mass market business customers by constructing FTTH or even converting from TDM to packet switching. Therefore, the Commission’s mass market broadband rules will inherently involve harm to Petitioners. This would only be exacerbated if the Commission, as requested by BellSouth, expands its FTTH policy to fiber-to-the-curb.⁵

Petitioners will be harmed because they will no longer be able to obtain broadband UNEs to serve mass market business customers. In many cases, absent UNE access, CLECs would need to relinquish the customer. And, even if CLECs do not lose existing customers, being unable to serve new mass market business customers at broadband levels will result in loss of customer goodwill because customers will come to realize, in part based on ILEC education efforts, that Petitioners will not be able to serve their needs. The Eighth Circuit Court of Appeals established that the Commission’s proposed rules should be stayed when the petitioners

⁵ Letter from Glenn Reynolds, BellSouth, to Marlene H. Dortch, CC Docket No. 01-338, filed September 17, 2003.

demonstrate a “potential loss of consumer goodwill.” *Iowa Utils Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996).

Moreover, assuming *arguendo* that the ILECs do not force petitioners off FTTH loops but simply raise the price of such loops, that economic loss still qualifies as irreparable, because the loss is unrecoverable. *Iowa Utils Bd. v. FCC*, 109 F.3d 418, 426. In *Iowa Utils. Bd.*, the ILECs argued that if they were forced to provide competitors UNEs at the proxy rates set by the Commission, and those proxy rates were later overturned on appeal, they would be unable to recover the lost revenue. *Id.* at 426 The exact same logic applies in the instant case. Like the ILECs in 1996, petitioners, prevailing on the merits of their appeal invalidating the FTTH loop rules, the petitioners “would not be able to bring a lawsuit to recover their undue economic losses if the Commission’s rules are eventually overturned, and...would be unable to fully recover such losses merely through their participation in the market.” *Iowa Utils. Bd.*, 109 F.3d at 426.

Moreover, these harms are imminent because they will begin as soon as the rules take effect because ILECs will continue their ongoing FTTH and network upgrades. Without a doubt, petitioners will be irreparably harmed during the likely 2 or more year appellate process. It would be a pyrrhic victory at best, if petitioners prevail on appeal, but in the meantime have lost mass market business customers or have been irreparably harmed due to lost goodwill among this class of customers.

Thus, the petitioners have made the requisite showing of irreparable injury.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR A STAY

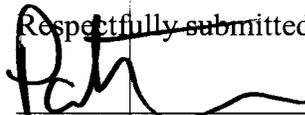
The Commission should grant the requested stay and maintain the *status quo* because “little if any harm will befall other interested persons.” *Holiday Tours at 844*. In particular, as

noted, the Commission itself has repeatedly found that the goals of Section 706 are already being met under the current, broader unbundling rules. Thus, mass market customers will not be harmed by maintaining the *status quo*, even if the Commission were correct that the new rules would better promote broadband. Nor would ILECs be harmed by a stay of the mass market broadband rules since at most they might not have as great as incentives to build broadband, again assuming the Commission is correct that unbundling relief will promote broadband. On the other hand, CLECs and their current mass market customers will be significantly harmed by implementation of the new rules. In addition, it is worth emphasizing that as the Eighth Circuit found in 1996 in granting a stay, “it would be easier for the parties to conform any variations in their agreements to the uniform requirements of the Commission’s rules if the rules were later upheld than it would be for the parties to rework agreements adopted under the Commission’s rules if the rules were later struck down.” *Iowa Utils. Bd.*, F.3d at 426. Accordingly, a balancing of equities requires maintaining the *status quo* for mass market broadband rules pending appeal.

CONCLUSION

For these reasons the Commission should stay its mass market and broadband rules pending appeal.

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