

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:)	
)	
Review of the Section 251 Unbundling Obligations for 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

PETITION FOR CLARIFICATION AND/OR PARTIAL RECONSIDERATION

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Summary

BellSouth seeks reconsideration and/or clarification of the *Triennial Review Order* in six respects. The Commission should grant these requests in order to eliminate unnecessary obstacles to the deployment of broadband services and technologies to mass market consumers.

First, the Commission should state that loop architectures (such as fiber-to-the-curb (FTTC)) that provide service-equivalence to fiber-to-the-home (FTTH), will be treated the same as FTTH for unbundling purposes. The Commission adopted the correct policy goal of not unbundling next-generation networks that support “truly broadband transmission capabilities.” However, the Commission improperly excluded from unbundling only a specific type of loop architecture (FTTH) that advances this goal, even though other architectures deliver the same services and capabilities. Correcting this unwarranted disparity will encourage broadband deployment and allow the market, rather than regulators, to select the most efficient means of delivering next-generation broadband to the mass market.

Second, the Commission should clarify that fiber loops to multi-unit premises are considered fiber-to-the-premises loops. The rules currently do not expressly include fiber loops to these premises in the definition of loops that receive fiber-to-the-premises treatment. Without regulatory relief, deployment of advanced broadband to multi-unit premises – which house a significant portion of the population as well as numerous small businesses – will be constrained. And, there will be adverse spillover effects on broadband deployment generally, since efficient network upgrades must cover an entire community, not pick and choose locations based on arbitrary regulatory classifications. Relatedly, the Commission should clarify that fiber loops deployed to multi-unit premises qualify for fiber-to-the-premises treatment regardless of the nature or ownership of the in-premises wiring.

Third, the Commission should clarify as quickly as possible that broadband services and capabilities are not subject to unbundling under Section 271. The *Order* plainly intended to exclude all next-generation facilities from unbundling, recognizing that compulsory access would undermine investment incentives. More broadly, the Commission should state that Section 271 does not create an independent unbundling obligation. The contrary conclusion in the *Order* is inconsistent with a long line of Commission 271 decisions treating the unbundling obligations of Sections 271 and 251 as co-extensive, as well as the D.C. Circuit’s warning that unbundling should not be required in the absence of impairment.

Fourth, if the Commission does not hold that the Section 251 and Section 271 unbundling obligations are co-extensive, it should clarify that services “unbundled” only under Section 271 need not be combined with either other services or UNEs. This clarification reflects the Commission’s apparent intent, and it is effectively compelled by the plain language of Section 271.

Fifth, to avoid conflicts between the rules exempting next-generation networks from unbundling and the network modification rules, the Commission should clarify that an ILEC need not (1) provide unbundled access to its next-generation network or design, reconfigure, or modify that network to facilitate an unbundling request for a TDM capability, or (2) deploy a new multiplexer that provides TDM functionality if it does not plan to do so for its own customers.

Sixth, the obligation to unbundle enterprise dark fiber loops should be limited to loops that exist as of the effective date of the *Order*. (Mass market dark fiber loops need not be unbundled under the Rules.) None of the reasons underlying the Commission’s decision to require unbundling of enterprise dark fiber loops applies to fiber deployed to a new location after

the effective date of the *Order*. Whatever sunk costs and entry barriers exist are the same for all potential providers, and both the ILEC and the CLECs face identical revenue opportunities. If the Commission does not grant this relief, however, it should consider defining “end user customer’s premise” for purposes of the fiber loop rule in order to preserve investment incentives and remove uncertainty as to the scope of ILECs’ dark fiber unbundling obligations.

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PETITION FOR CLARIFICATION AND/OR PARTIAL RECONSIDERATION

BellSouth, pursuant to Section 1.429 of the Commission’s Rules, respectfully urges the Commission to clarify and reconsider several portions of the *Triennial Review Order* and its implementing rules. As explained herein, such action is necessary in order to eliminate unwarranted barriers to deployment of next-generation broadband networks, promote facilities-based competition, and create appropriate incentives for investment by ILECs and CLECs alike.

I. ARCHITECTURES THAT ARE SERVICE EQUIVALENTS TO FIBER-TO-THE-HOME, SUCH AS FIBER-TO-THE-CURB, SHOULD RECEIVE THE SAME TREATMENT UNDER SECTIONS 251(D)(2) AND 706.

The section of the *Order* dealing with fiber loop issues begins by stating that:

Although we require the unbundling of legacy technology used over hybrid loops, we decline to attach unbundling requirements to the next-generation network capabilities of *fiber-based loops, e.g., those loops that make use of fiber optic cables and electronics or*

optical equipment, capable of supporting truly broadband transmission capabilities based on the analysis earlier in this subsection. (¶ 272, emphasis added)¹

FTTC is a fiber loop architecture that deploys fiber to a serving terminal that provides voice, video, and high-speed data to eight-to-twelve households. *See* BellSouth *ex parte*, WC Docket No. 01-338, filed Sept. 29, 2003, at 6. In contrast to fiber to remote terminals, which often leave a mile-long copper connection to the end user, FTTC brings fiber to within 200 feet of the customer on average, with a maximum length of 500 feet. *Id.* At that short distance, the carrying capacity of copper is extremely large. *Id.* at 13 (graph depicting carrying capacity of copper at various distances). For this reason, FTTC, just like FTTH, is an architecture that brings “truly broadband” services to the mass market.

Nonetheless, in a footnote devoid of analysis,² the *Order* groups FTTC with other loop architectures that do not provide service equivalence to FTTH under a Commission-created umbrella of “hybrid” loops. The *Order* analyzes all of these loop types as a single, legacy architecture that is distinct from FTTH.³ This disparate unbundling treatment of FTTH and FTTC-type loops is unsupportable because FTTC satisfies the Commission’s impairment analysis that provides regulatory relief for FTTH.

Specifically, FTTC loop architecture “make[s] use of fiber optic cables and electronics or optical equipment capable of supporting truly broadband transmission capabilities.” *Id.* Indeed, from the perspective of a mass market end user, FTTC is indistinguishable from FTTH in its ability to deliver broadcast or better quality, multi-channel video along with high-speed data and

¹ Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Docket Nos. 01-338 *et al.*, Report and Order on Remand and Further Notice of Proposed Rulemaking, at ¶¶ 235, 247 (rel. Aug. 21, 2003) (“*Triennial Review Order*” or “*Order*”).

² *Id.*

³ *Triennial Review Order*, fn. 811.

voice services. Moreover, FTTC passes the impairment test on an equal footing with FTTH – simply put, ILECs have no economic advantage over CLECs in the deployment of FTTC. *See Order*, ¶¶ 274-280. Because FTTC and FTTH are equivalent technologies, treating them differently for regulatory purposes only incents the deployment of one technology over another, even where the disfavored technology may be more economical or has other advantages. *See Telcordia Notes on Fiber in the Loop* at 9-11 (describing FTTC as a “cost-effective alternative[] for all-optical [Fiber-to-the-Home] deployment”).

By disfavoring an economic alternative to FTTH, the Commission undermines one of its primary goals: the rapid, widespread deployment of next-generation broadband. *See Order*, ¶¶ 272-274. Should the same protection from the disincentives of Section 251 unbundling be accorded to service-equivalent, alternative fiber loop solutions, BellSouth would be able markedly to increase the number of new-build households that receive the benefits of true broadband. The Commission should quickly fix this handicap to investment in bringing consumers the benefits of true broadband by treating service-equivalent FTTC loop architectures the same as FTTH architectures.

A. There Is No Service Distinction Between FTTC and FTTH

The only stated rationale for the creation of the hybrid category, beyond the fact that those loops are neither all fiber nor all copper, is a determination that any architecture containing a copper element represents an “intermediate” step between legacy copper loops and FTTH loops in the process of broadband deployment. As an initial matter, that distinction is misleading in its implication that FTTH provides service without the “handicap” of copper. Even FTTH loops often contain copper – the inside wire leading from the network demarcation point to the jacks. Both FTTC and FTTH systems contain small amounts of copper and require optical-to-electrical conversion. There is no basis to separate these systems because they both can provide

the same services to consumers. What matters is that FTTC loops are more like FTTH loops than they are the hybrid loop architecture discussed in the *Order*.

FTTC loops differ substantially in terms of their architecture and performance capability from the fiber-fed DLC loops that the Commission used as its paradigm for analyzing the unbundling of hybrid loops. From an architectural standpoint, FTTC pushes fiber far closer to the home than fiber-fed DLC systems – typically, within 200 feet. In a FTTC system, fiber reaches all the way to the serving terminal, or Optical Network Unit (“ONU”), after which copper and/or coaxial drops carry voice, data and multichannel video to the customer. In contrast, fiber ends at the Remote Terminal (“RT”) in a fiber-fed DLC system, after which signals are carried over copper cable and must pass through Serving Area Interfaces and Serving Terminals before reaching the customer premises. The ONU in the FTTC serving terminal converts optical signals to electronic signals and allocates the signals to the proper household.

More importantly, however, the distance between the fiber and the customer is significantly shorter in a FTTC loop compared to a DLC system. Typically, the distance of the copper and cable service lines between the ONU and the customer premises in a FTTC loop is only about 200 feet, and does not exceed 500 feet.⁴ In contrast, the distance of the all-copper service lines in a fiber-fed DLC system may be substantially greater—the fiber feeder and the RTs in which it terminates in a fiber-fed DLC system may be as far as 12,000 feet away from the customer premises, twenty-four times the maximum distance between the fiber feeder and customer premises in a FTTC loop. The greatly reduced distance between the fiber and the customer in FTTC systems make FTTC far superior to fiber-fed DLC loops and comparable to FTTH. *See* BellSouth Sept. 29 *ex parte* at 13.

⁴ *See* Telcordia Notes on Fiber-in-the-Loop at 9-2 (cited in *UNE Triennial Review Order*, fn. 811) (“*Telcordia*”).

The difference between the capabilities of FTTC and fiber-fed DLC loops is unmistakable. As noted above, FTTC service lines can provide full-motion, multi-channel video carriage. Because fiber only extends to the RT in a fiber-fed DLC loop, the provision of broadcast-quality video carriage in such architecture currently would be technically and economically infeasible. The extended reach of fiber into the FTTC loop also allows for extremely high data speeds, which are consistent with the data rates available over FTTH.⁵

Notably, the Commission itself has distinguished FTTC loops from fiber-fed DLC loops and has recognized FTTC as equivalent to FTTH. In particular, in requesting comments on whether its rules should “treat different local exchange network architectures differently,” the Commission asked if it should “distinguish between the deployment of fiber optic facilities directly to the home (*i.e.*, “fiber to the curb”) and fiber optic facilities only to remote terminals?”⁶ In doing so, the Commission acknowledged the architectural design and capabilities of FTTC and equated them with those of fiber optic facilities directly serving the home (*i.e.*, FTTH). At the same time, the Commission contrasted the architecture of FTTH and FTTC to those of facilities, such as fiber-fed DLC loops, where fiber optics extends “only to remote terminals.”

While FTTC offers comparable performance to FTTH, it can do so at a substantially reduced initial cost. In a FTTC network, several homes share the cost of the optical network termination (ONT) equipment that terminates the optical signal. FTTH architectures require an ONT dedicated to each home. Accordingly, even when mass-produced, standardized equipment

⁵ Just as in FTTH, actual data rates are a function of the attached electronics.

⁶ Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Docket Nos. 01-338, Notice of Proposed Rulemaking, ¶ 50 (rel. Dec. 20, 2001) (*UNE Triennial Review NPRM*).

is available for FTTH, FTTC will retain an economic advantage from these shared electronics. The significance of this is obvious: many more fiber loops can be deployed given finite capital budgets and the increased opportunity to earn a reasonable return on investment. In addition, FTTC allows for network powering of the services delivered, unlike FTTH, which depends on consumer-supplied power. These economic and design trade-offs should be decided by the service provider and consumer, without a regulatory thumb on the scale.

The cost and performance characteristics of FTTC mean that this type of network architecture is different in kind, rather than in degree, from the Commission's perception of "hybrid" loops. The Commission characterizes a number of those "hybrid" technologies (such as fiber-fed DLC) as "transitional" technologies. *Order*, fn. 811. In other words, those network designs are stepping stones to future, more fiber-intensive architectures that deliver true broadband. FTTC, on the other hand, offers a level of broadband performance that (depending on the carrier's plans) can make it a final stage architecture, rather than merely transitional. This is true because, as explained above, FTTC can provide sufficient bandwidth to support any service or application that might be demanded by mass market customers in the foreseeable future.

B. CLECs Will Not Be Impaired Without Access To FTTC

There is no cognizable difference in impairment between FTTH and FTTC subloops. Just as with FTTH, a ILEC contemplating a FTTC buildout "ha[s] no advantages concerning the sunk cost" of any of the network components; nor does the ILEC "have a first-mover advantage that would compound any barriers to entry." *Id.* at ¶ 275. Again, as with FTTH, in a FTTC build:

both incumbent and competitive carriers must negotiate rights-of-way, respond to bid requests for new housing developments, obtain

fiber optic cabling and other materials, develop deployment plans, and implement construction programs. *Id.*

The only difference between FTTC and FTTH builds is that the latter uses 200-500 feet of additional fiber, whereas the former uses a copper subloop and coaxial cable for this last step. The presence of copper in these loops does not make them legacy technology or give the ILECs a competitive advantage, and the Commission should not create an artificial regulatory barrier between otherwise equivalent circumstances and technologies.

Similarly, given its service-equivalence to FTTH – and, in particular, the ability to offer multichannel, high-quality video – FTTC affords carriers the same revenue opportunities as FTTH. As the Commission noted, the “substantial revenue opportunities posed by FTTH deployment help ameliorate many of the entry barriers presented by the costs and scale economies.” *Order*, ¶ 274. Indeed, the case for impairment arguably is even less valid in the FTTC context, because these revenue opportunities come at a lower per-unit network deployment cost (given the shared ONTs) and the added benefit of network-supplied power.

C. Section 706 Militates In Favor of Lifting Unbundling on FTTC Networks

The *Order* recognizes that the Commission can consider factors beyond impairment when making unbundling decisions. *Id.* Although this flexibility is used “sparingly,” the Commission noted that “the goal of swift and ubiquitous broadband deployment is so important to the United States that [the agency] consider[s] the statutory goals outlined in section 706 and how they relate to broadband as additional factors when considering loops.” *Id.* The agency’s discussion of these factors in the *Triennial Review Order* focuses, in part, on “unleash[ing] the innovation that has been characteristic of the computer and software industries.” *Id.*, ¶ 241.

These statutory factors argue strongly in favor of eliminating the regulatory distinction between service-equivalent FTTC and FTTH loops. The Commission justifies treating loops

with copper components differently from loops consisting entirely of fiber by saying “with existing copper loops, all investment in advanced telecommunications capability is necessarily limited to the equipment, not the transmission facility.” *Id.*, ¶ 244. Rather than simply judging based on the type and amount of material that comprises the loop, however, the Commission should inquire whether the overall loop design represents deployment of next-generation, advanced telecommunications capabilities.

In the past, the Commission rightly has steered clear of regulating technology. For example, in the wireless context, rather than mandating that all PCS carriers utilize the same standard, the Commission made certain that a range of technologies could compete in the marketplace. The result was increased innovation and better customer service, as service providers were able to react quickly to changing market conditions without the need to continually seek the government’s imprimatur on technological changes.

The Commission should be equally hesitant to declare FTTH (or any other single technology) the “winner” in the race to provide broadband to the consumer. Eliminating the artificial regulatory schism between FTTC and FTTH unquestionably will promote broadband deployment, as contemplated by Section 706, because of the cost and performance factors set forth above. Moreover, regulatory parity will spur innovation, because it will allow companies to direct their resources toward the most efficient use of both new and existing technologies.

* * *

The Commission should add the following to its rules defining FTTH loops in order to: (i) treat FTTC-type architectures the same as FTTH, and (ii), as discussed in the next section, make clear that fiber to an MDU is an FTTH loop:

Section 51.319(a)(3) [] ... A FTTH loop includes a fiber loop that provides a broadband transmission facility with capacity to deliver voice, multi-channel video, and data services to mass market customers

consisting of a fiber optic cable connection and/or transmission path, whether lit or dark, between a distribution frame (or its equivalent) in the central office and the loop demarcation point and/or fiber serving terminal supporting a service drop length of not more than 500 feet. Loops provided over fiber that connects to a fiber serving terminal in an MDU shall also be treated as fiber loops. A fiber serving terminal is the network equipment that provides a point to connect service wires for individual customers to the shared network facilities providing their service. [Source: Telcordia, GR-909-CORE Issue 1, March 2000, Section 2.20]

II. THE RULES SHOULD BE CLARIFIED TO ELIMINATE BARRIERS TO DEPLOYMENT OF FIBER TO MULTIPLE-UNIT PREMISES.

In two respects, the rules are unclear with respect to the treatment of fiber loops serving multi-unit premises. First, by not expressly encompassing multi-unit buildings as customer premises, the rules create some measure of uncertainty as to whether or not fiber loops to these buildings receive the same or different treatment as fiber-to-the-premises buildings. Different treatment could result in additional unbundling obligations, which, as the Commission found throughout its broadband impairment analysis, inevitably will undermine investment incentives for broadband. Indeed, the negative effect on fiber deployment will spread even more widely, because new community developments increasingly include a mix of single family homes, stand alone businesses, and multi-unit buildings. Efficient broadband deployment must sweep an entire community and cannot pick and choose locations based on arbitrary regulatory classifications. Nor can ILECs rationally design a next-generation network that has holes because particular buildings are subject to differing unbundling obligations. The result is that there will fewer incentives to serve the entirety of such communities with new broadband services. The Commission should clarify, therefore, that multi-unit building premises are covered by its definition of fiber-to-the-premises loops.

Second, the Commission should clarify the definition of fiber-to-the-premises in an additional respect. Specifically, under the current rules, a fiber-to-the-home “loop” is one that

consists of fiber all the way from the central office to the network demarcation point. *See* Rule 51.319(a)(3). In many buildings, however, a fiber may run to a serving terminal in the building's basement, from which it is connected to individual units over LEC-owned or-controlled copper. Under the existing definition, where the network demarcation point is at the apartment and the LEC owns or controls the in-premises wiring, the loop would be characterized as a hybrid loop, creating additional unbundling obligations that apply to the fiber portion of the loop. Accordingly, under the current rule, two identical buildings – one next to the other – could be subject to disparate regulatory treatment based solely on the entity owning or controlling the inside wire.

This is irrational and unnecessary. To the extent there is a concern about providing access to the in-premises wiring, other portions of the *Order* already ensure that competing carriers may access in-building wiring owned by the incumbent carrier. *Order*, ¶¶ 347-48. The Commission could retain that requirement, but recognize that fiber leading to the building is exempt from unbundling under a new fiber-to-the-premises definition. This would encourage competing carriers to deploy their own fiber, and still allow them access to the wiring inside the building. The Commission accordingly should clarify that the fiber portion of a loop that extends to a multi-unit building and that connects to in-building copper cable owned or controlled by the LEC, is considered a fiber-to-the-premises loop.

III. THE COMMISSION PROMPTLY SHOULD CLARIFY THAT IT DID NOT INTEND TO REQUIRE UNBUNDLING OF BROADBAND UNDER SECTION 271.

The *Triennial Review Order* appropriately recognized that “broadband deployment is a critical policy objective that is necessary to ensure that consumers are able to fully reap the benefits of the information age.” *Id.*, ¶ 241. To assure that this objective is realized, the Commission decided to “refrain from unbundling incumbent LEC next-generation networks,”

id., ¶ 272, explaining that “applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706.” *Id.*, ¶ 288.⁷

In light of this definitive holding, the Commission’s intent to exempt fiber optic lines and packet-switching from unbundling cannot be challenged. At the same time, however, elsewhere in the *Order* – in a section that does not even mention broadband – the Commission concluded that Section 271 establishes an independent unbundling obligation. The next section of this petition demonstrates that this holding is legally erroneous. Regardless of that issue, however, BellSouth assumes that the Commission did not intend its observation about Section 271 unbundling to apply to broadband. Accordingly, the Commission promptly should clarify that BOCs do not need to unbundle broadband services or capabilities under Section 271.

All of the policy reasons that led to the sound conclusion not to require unbundling of broadband in the Section 251 context compel the Commission to make this clarification. The Commission could not rationally conclude that unbundling under Section 251 would “blunt the deployment of advanced telecommunications infrastructure,” but that unbundling under Section 271 would not have this pernicious effect.⁸ Any forced unbundling at potentially regulated rates would undermine incentives to deploy next-generation networks by forcing the BOC to share

⁷ See also *id.*, ¶¶ 278 (excluding FTTH loops from unbundling “will promote the deployment of the network infrastructure necessary to provide broadband service to the mass market”), 290 (limiting the unbundling obligation for hybrid loops “promotes our section 706 goals”), 541 (same for packet switching).

⁸ Indeed, the Commission observed that “the courts require” that it “consider whether unbundling will deter investment or whether unbundling is consistent with the goals of section 706.” *Id.*, fn. 556.

with its competitors the potential benefits of a risky investment. Moreover, such compulsory unbundling would force BOCs to redesign their networks in order to accommodate requests from competitors for individual piece-parts. Such re-design imposes considerable inefficiencies and added costs, precluding the BOC (which, like all competitors, has a finite supply of capital) from deploying broadband as extensively as it otherwise could.

Broadband services are provided in a highly competitive market, and access arrangements should be left to commercial negotiations in order to assure that all parties have appropriate economic incentives and that consumers reap the benefits of the “race to build next generation networks and the increased competition in the delivery of broadband services” that the Commission sought to unleash by excluding broadband from unbundling. *See Order*, ¶ 272. The Commission should, therefore, confirm as rapidly as possible that BOCs need not unbundle broadband facilities or services under Section 271.

IV. THE COMMISSION SHOULD STATE THAT ANY UNBUNDLING REQUIREMENT UNDER SECTION 271 IS CO-EXTENSIVE WITH THE UNBUNDLING OBLIGATIONS UNDER SECTION 251.

As noted in the preceding section, the *Order* concludes that Section 271 establishes an “independent and ongoing” unbundling obligation, even where particular checklist items no longer satisfy the statutory impairment standard governing access to UNEs. In so holding, the Commission argues that this interpretation is necessary to give meaning to checklist items 4-6 and 10 and that disparate treatment of BOCs and other ILECs is consistent with Congress’s intent. *Order*, ¶¶ 653-655. The Commission’s conclusion and reasoning cannot be reconciled with its own decisions in the Section 271 context or the D.C. Circuit’s direction in *USTA*. Accordingly, the Commission should state that BOCs have no obligation to unbundle particular checklist items when the corresponding network element no longer meets the Section 251(d)(2) standard.

First, the Commission’s twenty-three Section 271 Orders consistently have found that the checklist unbundling obligations are coextensive with those contained in its Section 251 unbundling rules. For example, the Commission held that Qwest satisfied checklist item six because it “properly implemented the Commission’s rule 51.319(c)(2), under which an incumbent LEC may be excused from providing unbundled local circuit switching in certain high-density areas to end users with ‘four or more lines.’”⁹ Likewise, the Commission stated that Qwest satisfied its packet switching obligation under checklist item six because it provided “unbundled packet switching in a nondiscriminatory manner *when the conditions established in the UNE Remand Order are met.*”¹⁰ Similarly, the Commission concluded that SBC satisfied checklist item six because it “comple[d] with ... its unbundled switching obligation *established in the UNE Remand Order.*”¹¹ The *Triennial Review Order* nowhere acknowledges, let alone distinguishes, this consistent practice in the Section 271 context. The Commission got it right in its Section 271 Orders, and got it wrong in the *Triennial Review Order*: unbundling is not required under Section 271 when it is no longer required under Section 251.

Second, the *Order* flies in the face of the *USTA* decision. The D.C. Circuit expressly held that unbundling should not be required in the absence of impairment because “[e]ach unbundling

⁹ *Application of Quest Communications International, Inc. for Authorization to provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, FCC 02-332, ¶ 359 (2002) (“*Qwest Nine-State Order*”).

¹⁰ *Qwest Nine-State Application*, ¶ 358 (citing 47 C.F.R. § 51.319(c)(2)); *see also Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, ¶ 248 (2001) (finding that SBC “provide[d] packet switching according to the rules set forth in the *UNE Remand Order*”).

¹¹ *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, ¶ 113 (2001).

of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”¹² Moreover, the court explained that Congress did not wish to perpetuate the “completely synthetic competition” resulting from overbroad reliance on UNEs.¹³ Requiring that BOCs provide unbundling in perpetuity under Section 271 defies the Act’s deregulatory imperative, overrides Congress’s and the Supreme Court’s direction that access to unbundled elements should be subject to limits,¹⁴ and blatantly disservices the Act’s fundamental goal of promoting facilities-based competition.

For this reason, Section 271 cannot be read, as the *Order* suggests, to require unbundling in perpetuity. It is nonsensical to suggest that Congress, recognizing the deleterious effect of unbundling on investment, would have imposed strict limits on forced access to UNEs in the provision that establishes the unbundling obligation, only to exclude carriers serving more than 80 percent of the nation’s access lines from those limits in another section of the Act. Although the Commission suggests that disparate treatment of the BOCs is not illogical because Section 271 reflects Congress’s finding that the BOCs should face additional hurdles before being allowed to provide interLATA service, that argument is unnecessarily broad. A better reading – which acknowledges the fact that items 4-5 and 10 must have meaning separate from item 2, but does not do violence to the statute – is that the former checklist items reflect Congress’s minimum expectations at the time the Act was passed, in case Section 271 applications were filed before the Commission adopted rules implementing Section 251. Unlike the logic in the

¹² *United States Telecommunications Association v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (“*USTA*”).

¹³ *Id.* at 424.

¹⁴ As the Supreme Court explained, Section 251(d)(2) must be read to apply “some limiting standard, rationally related to goals of the Act.” *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 391-92 (1999).

Order, that interpretation respects cardinal principles of statutory construction by furthering, rather than undermining, Congress’s intent. *See Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (explaining that the “cardinal rule” is “that a statute is to be read as a whole”) (*citing Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)); *see also United States v. Morton*, 467 U.S. 822, 828 (1984). Accordingly, the Commission should state that the unbundling obligations of Section 271 are co-extensive with those imposed under Section 251.

V. **THE COMMISSION SHOULD STATE THAT SERVICES “UNBUNDLED” ONLY UNDER SECTION 271 NEED NOT BE COMBINED WITH EITHER OTHER SERVICES OR UNES.**

For the reasons explained above, the Commission should reconsider its holding that Section 271 imposes an independent unbundling obligation (at least for broadband services, if not for all items covered by the checklist). If it declines to do so, however, then at a minimum the Commission should clarify that transmission, switching, transport, or signaling unbundled only under Section 271 need not be commingled with wholesale services or combined with UNEs.

The *Erratum* revised paragraph 584 and footnote 1990 of the *Order* to eliminate references to elements that no longer need be unbundled under Section 251. That change eliminated an inconsistency between those two provisions, but the resulting language nonetheless remains unclear.

The Commission should state definitively that services provided under section 271 need not be combined with UNEs. Footnote 1990 properly holds that BOCs need not “combine network elements that no longer are required to be unbundled under section 251,” noting that section 271, by its terms, does not “refer back to the combination requirement set forth in section 251(c)(3).” The same statutory language compels a determination that ILECs do not have to combine services provided under section 271 with UNEs. Providing further confirmation of this

point, section 251(c)(3) only requires ILECs to provide UNEs in a way that permits requesting carriers to combine “such elements” – that is, elements that must be unbundled under section 251. At bottom, therefore, the clarifications discussed in this section are needed to make sure that the Commission’s apparent intent – that ILECs do not have to combine any items unbundled under Section 271 with Section 251 UNEs – is realized.

VI. THE COMMISSION SHOULD ENSURE THAT ITS RULES ARE NOT MISCONSTRUED TO IMPOSE UNBUNDLING OR NETWORK DESIGN REQUIREMENTS ON NEXT-GENERATION NETWORKS.

The Commission properly has acknowledged that “upgrading telecommunications loop plant is a central and critical component of ensuring that the deployment of advanced telecommunications capabilities to all Americans is done on a reasonable and timely basis, and that, consequently, its “policies must encourage such modifications.” *Order*, ¶ 243. To that end, the Commission concluded that ILEC next-generation networks, including fiber-to-the-home, packet switches, and packet transmission capabilities should not be subject to unbundling, and it limited unbundling to existing, non-packetized TDM capabilities of hybrid loops. *Id.*, ¶¶ 288-297. The Commission also held that states do not have the authority under federal law to “create, modify or eliminate” unbundling obligations. *Id.* ¶ 187.

Unfortunately, ILECs have experienced firsthand CLEC unbundling requests and state unbundling decisions that are plainly contrary to the Commission’s rules. For example, a number of states disregarded the limited conditions that the Commission established for determining where ILECs are required to provide unbundled access to packet switching capabilities. Consequently, some CLECs could attempt to distort the Commission’s rules in a way that would seriously compromise the incentives to deploy next-generation networks.

It is vitally important, therefore, that the Commission’s unbundling rules clearly reflect its policy determination to promote ILEC and CLEC investment in next-generation networks, as

well as its impairment analysis in the *Order*. For example, the Commission should ensure that ILECs are not required to provide unbundled access to their next-generation networks or to design, reconfigure, or modify those networks to facilitate an unbundling request for a TDM capability. Nothing in the Commission's rules establishing parameters on engineering practices and network modifications should be read to produce such as result. A CLEC's access to an unbundled TDM functionality, such as a DS1 or DS3 loop, is properly limited to the legacy narrowband network and does not trump the Commission's well-defined unbundling exemption for next-generation networks.

The Commission also should clarify or reconsider its network modification rules to make clear that an ILEC is not required to deploy a new multiplexer that provides TDM functionality if it has no plans to do so for its own customers. Installation of a TDM multiplexer at a location where an ILEC plans to deploy a packet-based network is not something an ILEC would undertake for its own customers, and it gives the requesting carrier access to an "unbuilt superior" network, which is not required by Section 251(c)(3). Moreover, such an outcome would undermine the pro-investment incentives created by the unbundling exemption for next-generation networks. Not only would CLECs have less incentive to invest in their own facilities, but ILECs will be less likely to invest in new fiber facilities for their own next-generation networks if they are faced with the prospect of CLECs utilizing those newly deployed dark fiber facilities for TDM services.¹⁵ The Commission therefore should clarify this aspect of its network modification rules to eliminate any potential conflict with its next-generation network rules.

¹⁵ As explained in Section VII below, all newly deployed dark fiber should not be subject to unbundling in any event.

VII. THE COMMISSION SHOULD ENSURE THAT THE OBLIGATION TO UNBUNDLE ENTERPRISE DARK FIBER LOOPS DOES NOT CONFLICT WITH THE UNBUNDLING EXEMPTION FOR NEXT-GENERATION NETWORKS.

A. Only Enterprise Dark Fiber Existing as of the Order’s Effective Date Should Be Subject to Unbundling.

The *Order* (as clarified by the *Erratum*) provides that ILECs are not required to unbundle lit or unlit fiber to an end user’s premises. However, the *Order* also requires ILECs to unbundle dark fiber loops unless a state commission has found either that a self-provisioning trigger is met or requesting carriers would not be impaired without access to such loops. 47 C.F.R. § 51.319(a)(6).¹⁶ If not addressed, this apparent conflict could undermine the unbundling relief provided for ILEC next-generation networks (including fiber-to-the-premise) and thwart the statutory goal of encouraging ILEC and CLEC investment in these new networks. One way for the Commission to address the apparent inconsistencies in its rules would be to limit the dark fiber unbundling obligation to enterprise dark fiber loops existing as of the effective date of the *Order*.

In finding requesting carriers generally to be impaired without access to unbundled dark fiber loops, the Commission relied principally on the “high sunk costs” of deploying dark fiber – specifically, the “substantial sunk costs associated with physically laying the fiber cable.” *Order*, ¶¶ 311, 312. The Commission also cited other barriers, including the inability to obtain reasonable and timely access to the customer’s premises, and the need to convince customers to accept the delays associated with deployment of alternative loop facilities. *Id.*, ¶ 312. The Commission then observed that, “[i]t is only when a competitive LEC has sufficient demand for ‘lit’ fiber to a particular customer location to enable it to recover the fixed and sunk costs of the

¹⁶ Dark fiber loops serving mass market customers are not subject to unbundling; *see* 47 C.F.R. § 51.319(a)(3)

fiber deployment that it is economically feasible for that competitor to deploy fiber to that location.” *Id.*

Dark fiber should not be subject to unbundling at all, given the tremendous amount of competitive fiber already in the ground. Nonetheless, whatever the merits of the Commission’s analysis, it plainly does not withstand scrutiny with respect to newly deployed fiber. Where an ILEC is newly deploying loop fiber, there is no basis for finding impairment under any of the criteria identified in the *Order*. Whatever sunk costs exist are either the same for all potential providers or, more likely, are lower for CLECs because of its lower labor costs, as the Commission observed in the FTTH context. Both the ILEC and CLECs face identical revenue opportunities. And, customer access issues are the same regardless of the service provider: where a new location is at issue, any carrier seeking to serve that location must negotiate with the landlord and secure access rights, just as (in the FTTH context) any carrier seeking to serve a new development must win the right to do so. Under these circumstances, there is no legitimate basis for finding impairment.

B. The Commission Should Consider Defining “End User Premise” in Order To Preserve Investment Incentives.

The fiber-to-the-premise rule exempts from unbundling lit or dark fiber to an “end user’s customer premise.” 47 C.F.R. § 51.309(a)(3)(i). The Commission should consider defining “end user’s customer premise” in order to eliminate potential obstacles to deployment of next-generation networks.

Such clarification is necessary and appropriate because there currently is no clear understanding of the dividing line between fiber that need not be unbundled (under Rule 51.309(a)(3)) and fiber that does. That uncertainty inevitably will diminish deployment of next-generation networks, because ILECs will be unable to ascertain the potential revenues they can

expect to gain, and the costs they will incur, in upgrading their physical plant. Accordingly, the Commission should consider clarifying the meaning of “end user’s customer premise” for purposes of broadband relief.¹⁷

VIII. CONCLUSION

The Commission should reconsider and clarify the *Order* and implementing rules as described above.

Respectfully submitted,

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¹⁷ Potential criteria might include the number of lines, customer types, or network architecture.