Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

SPRINT CORPORATION'S COMMENTS ON PETITIONS FOR RECONSIDERATION AND CLARIFICATION

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SUMMARY

Sprint agrees with AT&T Wireless, CTIA, Nextel, and T-Mobile that the Order falls short in its stated aim of eliminating discrimination based on technology. On reconsideration, the Commission should revise the definition of dedicated transport to confirm that wireless carriers are entitled to unbundled access to the links between cell sites or base stations and ILEC central offices. The Order gives wireline competitive LECs access to these same links at UNE prices, and there is no rational basis for excluding wireless carriers when impaired. The Order's new service eligibility criteria for high-capacity EELs also unfairly discriminate against CMRS carriers. They should be revised to ensure that any competitor providing a qualifying local service is able to secure high-capacity EELs. That includes CMRS and stand-alone local data services, as well as any other qualifying service. The Commission, however, should deny Nextel's request for "fresh look" for wireless carrier conversions to UNEs. It could unfairly prevent ILECs from recovering legitimate costs in their special access term rates. When term agreements expire, CMRS carriers should be able, however, to convert those facilities to UNEs with a simple records conversion.

Sprint opposes BellSouth's request to redefine fiber-to-the-end-user-premises ("FTTH"), to include fiber-to-the-curb ("FTTC"). Doing so would require a foundational change in the balance reflected in the Order. It would improperly expand the scope of the FTTH exception, and the Commission has no evidence in the record that could justify finding that fiber that comes within 500 feet of a premises (or any other distance) is equivalent to FTTH. The Commission should also reject BellSouth and

USIIA's request to expand the FTTH exemption to include any fiber loops reaching multi-unit premises, because much of that fiber loop plant may fail to reach the end user. Likewise, the Commission should reject SureWest and USIIA's request to define FTTH to include any locations with up to 48 numbers. It is a backdoor attempt to wall off non-mass market customers from competition. In light of SureWest's claim that the scope of FTTH is ambiguous, the Commission should modify section 51.319(a)(3) to make clear that FTTH includes only mass market end user premises. It should also confirm that, in applying the FTTH exemption, a mass market end user premises is to be identified by reference to the same criteria that govern local switching in a geographic market.

Sprint also opposes BellSouth's attempts to block access to the TDM voice channel on next generation or hybrid networks. Likewise, the Commission should reject BellSouth's attempt to limit unbundled enterprise dark fiber loops to those existing at the effective date of the Order. The Commission found that requesting carriers are impaired without access to dark fiber, subject to location-specific review by the states. The Commission should also reject BellSouth's request to extend the FTTH exception to new dark fiber.

In addition, Sprint opposes BellSouth and USIIA's requests to exclude broadband services and capabilities from section 271 unbundling for Bell Operating Companies ("BOCs"). As the Commission has repeatedly found, the statutory unbundling obligations of section 271 are independent of section 251. The elimination of any unbundling obligation under section 251 does not automatically remove a similar obligation under section 271, and this includes those facilities and services utilized to

support broadband services. The Commission should also reject BellSouth's request that BOCs need not combine services unbundled under section 271 with other UNEs. Instead, the Commission should clarify that ILECs may not "uncombine" UNEs that are currently or ordinarily combined. The Commission has recognized breaking apart UNEs is a purely anticompetitive practice, and it should be expressly disallowed.

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SPRINT CORPORATION'S
COMMENTS ON PETITIONS FOR
RECONSIDERATION AND CLARIFICATION

Sprint Corporation ("Sprint"), on behalf of its incumbent local exchange carrier ("ILEC"), long distance/competitive local exchange carrier ("CLEC"), and wireless divisions, submits these comments on various petitions for reconsideration and clarification filed in response to the Commission's *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC No. 03-36, released August 21, 2003 ("Order").[1]

[1] A summary of the Order appeared in the Federal Register on September 2, 2003. 68 Fed. Reg. 52,276. Petitions for reconsideration or clarification were filed on October 2, 2003.

I. CMRS LOOP/TRANSPORT ISSUES AND QUALIFYING SERVICES

A. The Commission should confirm that wireless carriers are entitled to unbundled access to the links between cell sites or base stations and ILEC central offices.

Sprint supports the petitions of AT&T Wireless, CTIA, Nextel, and T-Mobile in asking the Commission to clarify that wireless carriers are entitled to UNE pricing for the links between cell sites or base stations and ILEC central offices.[2] The Order confirmed that wireless carriers qualify for "access to UNEs" (¶ 140), subject only to the limitations applicable to any requesting carrier. The Commission specifically found that CMRS and fixed wireless carriers compete against ILECs in services that have been "traditionally within the exclusive or primary domain of ILEC services," and the Commission recognized that there is no basis in the Act for discriminating against wireless carriers based on their use of different technology. Id.

Accordingly, the Order properly determined that ILEC interoffice transport facilities must be made available on an unbundled basis and that ILECs could not exclude wireless carriers from the "ability to access transport facilities within the ILEC network pursuant to section 251(c)." ¶ 367. However, the Order narrowed its previous network element definition of dedicated transport to exclude entrance facilities between carriers – those ostensibly not within the ILEC local network – concluding that "no requesting carrier shall have access to unbundled internetwork transmission facilities under section 251(c)(3)." ¶ 368. The Commission then "extrapolated" that "CMRS carriers are ineligible for dedicated transport from their base station to the ILEC network," on the assumption "that a CMRS carrier's base station is a type of requesting carrier switch." Id.

[2] AT&T Wireless at 3-12; CTIA at 3-6; Nextel at 6-10; T-Mobile at 7-13.

The Commission is indeed mistaken if it bases this determination on equating CMRS transport from a base station to the ILEC central office with wireline network design. In changing the definition of transport to exclude "inter-network" facilities, the Commission assumed that CLECs can obtain alternate facilities or self-deploy at switch locations, where traffic is aggregated. This presumes that the "competing carriers have some control over the location of their network facilities." ¶ 367. This may generally apply for wireline carriers; it does not for wireless base stations. The placement of CMRS facilities is dictated by geography, subscriber density, zoning, and other issues beyond the carrier's control. Moreover, CMRS carriers typically must deploy large numbers of base stations in a metropolitan area, and thus cannot aggregate traffic at one facility.

Sprint agrees with the petitioners that the facilities at issue "do not fit neatly into the Commission's definition of either loops or transport because these definitions do not account for differences between wireline and wireless networks." Nextel at 6. Instead, "this critical last mile link in a wireless network is more appropriately classified as a loop for the purposes of ensuring intermodal parity." CTIA at 4. Thus, even if one assumes that backhaul transport to a CLEC's (or CMRS carrier's) switch need not be available on an unbundled basis from the ILEC, the links between ILEC end offices and cell sites or base stations should be. As AT&T Wireless rightly points out (at 9), the definition unfairly discriminates against wireless carriers if they cannot secure this link on an unbundled basis, when their wireline CLEC competitors are unquestionably entitled to unbundled access to the very same facilities as unbundled loops.

B. The Commission should modify service eligibility criteria for high-capacity EELS.

Sprint also agrees with the wireless petitioners that the Commission should modify the service eligibility criteria for high-capacity enhanced extended links ("EELs").[3] The eligibility criteria are indeed unreasonably and unfairly restrictive by precluding CMRS carriers access when clearly they offer a "qualifying local service." See ¶ 597. The Order's shortcoming here is not limited to CMRS carriers, however. There is no rational basis for excluding any "qualifying local service" in determining eligibility for high-capacity EELs.

Local data, in particular, represents a large and fast-growing portion of local telecommunications traffic, and local data service is among the "qualifying services" the furnishing of which permit a competitive carrier to obtain access to UNEs. ¶¶ 135, 140. The Order imposes a regulatory barrier on competitive carriers that would frustrate competition and hinder the ability of competitive carriers to provide stand-alone local data services, just as it would for CMRS services.

Assuming, arguendo, the lawfulness, and soundness from a policy perspective, of any service restrictions on UNEs, restricting requesting carriers from access to high-capacity EELs for provision of CMRS and local data services is clearly inconsistent with the Order's proper finding that both of these services are "qualifying services" entitling requesting carriers to access to UNEs, wherever impairment is found in a given market. ¶ 135.

[3] AT&T Wireless at 12-17; CTIA at 6-8; Nextel at 10-13; T-Mobile at 13-17.

The Order contends that "[a] central goal of the service eligibility criteria ... is to safeguard the ability of bona fide providers of qualifying service to obtain access to high-capacity EELs while simultaneously addressing the potential for gaming." ¶ 595. To prevent "abuse" of high-capacity EELs, the Order provides that access to high-capacity EELs is available only where "a provider is competing against the incumbent LEC's local voice offerings." ¶ 598. But the Order does not explain why the provision of one "qualifying service," but not another, is a necessary or lawful condition for access to high-capacity EELs. The effect of these restrictions is to preclude equally "bona fide providers" of other "qualifying services," namely CMRS and local data services, from accessing high-capacity EELs, thus frustrating the market-opening and pro-competitive directives of the Act.

The Order rationalizes that "focus[ing] on local voice service" is justified by "its verifiability and its role as the core competitive offering ... in direct competition to traditional incumbent LEC service." ¶ 595 (footnote omitted). The Order fails to articulate the verifiability problems, if any, with wireless or local data service – or any other "qualifying service," for that matter – or a rational basis for finding that some qualifying services are, in the words of George Orwell, more equal than others. On reconsideration, rather than merely exempt wireless carriers from "having to certify compliance" with these over-restrictive standards (AT&T Wireless at 17), the Commission should modify the eligibility criteria for high-capacity EELs to ensure that requesting carriers have access to high-capacity EELs for the provision of any "qualifying service." That includes CMRS carriers' combinations of dedicated transport

and last-mile cell site links, as well as loop-transport combinations for stand-alone local data services and any other qualifying service.

C. The Commission should deny Nextel's request for "fresh look" for wireless carrier conversions to UNEs.

Alone among the wireless petitioners, Nextel asks the Commission to grant "fresh look relief for CMRS carriers from any liability under contractual or tariff early termination clauses when CMRS carriers request conversion of special access circuits to UNEs." Nextel at 15. Sprint opposes this request.

Sprint understands Nextel's frustration over ILECs' denial of UNE access to CMRS carriers, and Sprint joined other wireless carriers in asking the Commission to remove uncertainty about wireless carriers' entitlement to unbundled network elements.[4] Nevertheless, there are legitimate cost recovery issues implicated by Nextel's request, which the Commission cannot and should not ignore. These dedicated transport facilities typically involve special construction,the costs of which may have been uncluded in the special access term charges. Thus fresh look poses a real risk of stranded investment. ILECs have every reason to expect time to recover the reasonable costs of providing those facilities over time.

Accordingly, wireless carriers should remain subject to the term agreements they currently face. When term contracts expire, wireless carriers should be permitted to convert these dedicated transport arrangements to UNE pricing with a simple records conversion. A wireless carrier should also be able to convert to UNE pricing before its term contract expires, if it chooses to incur the early termination penalty.

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[4] See Comments of Sprint Corporation (April 5, 2002) at 47-49; Reply Comments at Sprint Corporation (July 17, 2002) at 36-39.

II. FIBER TO THE END USER CUSTOMER PREMISES

A. The Commission should reject BellSouth's request to redefine FTTH to include FTTC.

Sprint opposes BellSouth's attempt to expand the FTTH exemption to encompass other loop architectures, such as (but not limited to) fiber to the curb. BellSouth at 1-9. The Commission expressly rejected the notion of extending FTTH treatment to FTTC. It "recognize[d] that other 'fiber-in the-loop network architectures exist, such as 'fiber-to-the-curb' (FTTC), 'fiber to the node' (FTTN), and 'fiber to the building' (FTTB)" (¶ 275 n.811), and it specifically "excluded such intermediate fiber deployment architectures." Id. "By 'FTTH loop,'" it added, "we mean a local loop consisting *entirely* of fiber optic cable … that connects a customer's premises with a wire center." ¶ 273 n.802 (emphasis added). In contrast, FTTC is no different from any other hybrid loop.

BellSouth seeks a profound change in this definition. It wishes to insulate itself from competition in new build areas, which it already dominates, by having the FTTH exemption expanded beyond "fiber to the end user customer premises," to include fiber loop plant that does not reach that end user premises, or the end user customer's building, or the curb, or indeed any building at all. More seriously, however, by pressing for the extension of FTTH treatment for FTTC overbuild loops, BellSouth hopes to evade unbundling obligations for hybrid loop plant overbuilds that it has already deployed, and would continue to deploy, even without any purported investment incentive in the unbundling rules. Sprint believes this ultimately is the purpose of BellSouth's petition, and it is contrary to the public interest and obviously anticompetitive.

BellSouth argues that "[t]here is no service distinction between [fiber to the curb] and FTTH," since both systems "can provide the same services to consumers."

BellSouth at 3-4. In fact, the Commission recognized that an all-fiber loop provides greater potential "advanced telecommunications capability" than hybrid fiber-copper loops. Although the Order, like the Act, did not fix minimum specifications for those services, the Commission noted it currently "considers services with upstream and downstream speeds in excess of 200 kbps to display 'advanced telecommunications capability,'" a standard that may already be obsolete. ¶ 173 n.557. The Order justified the limited FTTH exemption by emphasizing the benefits of bringing simultaneous voice, high-speed data, and full-motion video to mass market, particularly residential, end users. See ¶ 274 n.805. That FTTH capabilities are to be genuinely "advanced," and thus needing investment incentive, is also reflected in the Commission's finding that such "FTTH loop deployment is still in its infancy" (¶ 274), something that cannot be said of hybrid loop overbuilds. Although BellSouth claims weakly that "[s]ection 706 mitigates in favor of lifting unbundling on FTTC networks" (BellSouth at 7), there can be no public interest justification for incenting ILECs to invest in FTTC that they have already been deploying.

What BellSouth seeks would require a foundational change in the Commission's approach to unbundling obligations. The February 20, 2003 press release and accompanying statements reflect that, facing a split in views on the appropriate scope of unbundling, the Commission fashioned a compromise. Mass market fiber loop facilities would receive only carefully-measured relief from unbundling. Other loop elements remained subject to unbundling requirements. BellSouth's request would upset that balance.

Aware that its proposal to extend FTTH to FTTC is overreaching, BellSouth suggests that FTTH be expanded to include FTTC where there is fiber loop connecting to copper but having "a service drop length of not more than 500 feet." BellSouth at 9. Even this is grossly excessive, and would vastly expand the scope of the FTTH exemption without any finding that it is the public interest or that investment incentive is even warranted. There are no grounds for granting BellSouth's request, and there is no evidence in the record that could support a finding that FTTC within 500 feet of an end user premises can be equivalent to FTTH.

The Commission has already drawn the line for mass market FTTH treatment. It should adhere to it.

B. The Commission should reject BellSouth's request to expand the FTTH exemption to include fiber loops to multi-unit premises.

Sprint likewise opposes BellSouth's request to expand the FTTH exemption to include fiber loops to multi-unit premises.[5] BellSouth complains that the new unbundling rules do not expressly include fiber loops to multi-unit premises in the definition of loops that receive fiber to the premises treatment. BellSouth at 9. Actually, that is because – contrary to BellSouth's suggestion – fiber loops to multi-unit buildings do not fall within the Commission's rationale for FTTH.

The Order treats multi-unit buildings as enterprise customers, because multiple customers can be aggregated. Thus, the Order finds that CLECs are presumed impaired and can secure unbundled DS1 or DS3 loops or dark fiber to multi-unit buildings absent a contrary location-specific state finding (¶¶ 311, 320, 325, 328), as well as UNE access to ILEC inside wire subloop. ¶¶ 346-48; 47 C.F.R. § 51.319(b)(2). Redefining FTTH to

[5] BellSouth at 9-10. See also USIIA at 3.

include multi-unit buildings would prevent CLECs from providing DS0 level service to apartments, DS1 and DS3 service to mid-size businesses, and service over dark fiber to enterprise customers. That result explains why BellSouth seeks this change.

The Commission also makes it clear that multi-unit buildings are not mass market end user premises. Its discussion of section 706, in fact, is confined solely to the "mass market loop" section of the Order (see Section VI(A)(i)(4)(a). By definition, multi-unit buildings fall outside the scope of the Order's rationale for limiting unbundling of FTTH, which was to promote investment in mass market fiber to the premises. The Order does not invite, and the record does not support, any finding that broadband investment would be encouraged by exempting ILECs from unbundling the full capabilities of fiber loops serving multi-unit buildings.

Moreover, the very notion of FTTH is inconsistent with multi-unit buildings. By focusing on fiber deployed to the mass market end user premises, the FTTH rule requires that fiber must actually reach the demarcation point at the *end user customer premises* and be ready and available for service to that customer. The fiber must actually reach the customer, not merely the building in which that customer is located. ¶ 275 n.811. Any specific scenarios that do not incorporate fiber all the way to the *customer's* premises are not considered FTTH. 47 C.F.R. § 51.319(a)(3)(i). BellSouth shows the weakness of its position by asking that the Commission disregard ILEC ownership of inside wiring. BellSouth at 10.

Leaving aside whether the FTTH exemption is rational or wise policy, the Order was at least sensible in setting a bright-line between mass market and enterprise market.

The Commission should refuse the requests of parties, like BellSouth, to violate that line and to eliminate competition for customers in multi-unit premises.

C. The Commission should reject SureWest and USIIA's request to define FTTH to include any locations with up to 48 numbers.

Sprint opposes SureWest and USIIA's requests for "clarify[ing] the definition" of mass market fiber to the premises to cover any customer "location" with up to 48 numbers.[6] This proposed redefinition is entirely arbitrary. It has no basis in the order. Indeed, the petitioners do not even pretend that it does.

The number of lines in a multi-tenant building is irrelevant for assessing whether the FTTH exemption may apply. The number of tenants in a given building or "location" is also irrelevant. The exemption is based on a bright-line test: whether the ILEC fiber is provisioned all the way a mass market end user customer's premises. ¶¶ 278, 279. The petitioners seek to eliminate that bright-line test and instead introduce a layer of complexity that is undesirable and unwarranted. It is just another attempt to expand the scope of the FTTH exemption beyond what the Order provides and far beyond what the Commission surely intended.

A basic example shows how. By their redefinition, a building with two tenants – one with a single line and one with 47 lines – would be off-limits to competitors. Even where impairment is established, the CLEC would be prevented from serving the larger, enterprise customer with dark fiber. Of course, allowing ILECs to block competitors' access to such customers is entirely inconsistent with the dark fiber rules, which clearly provide that this dark fiber loop must be provisioned, unless a state finds no impairment

[6] SureWest at 7; USIIA at 3.

on a customer location-specific basis. ¶ 311; 47 C.F.R. §§ 51.319(a)(6). Moreover, the Order provides that DS1 and DS3 loops – even if provisioned over fiber facilities – are also available to the requesting carrier, unless a state commission finds no impairment. 47 C.F.R. §§ 51.319(a)(4)(ii), 51.319(a)(5)(i). There is no rational basis for the Commission to introduce an arbitrary and clearly unreasonable 48-line boundary, and SureWest's vague concept of a "location" is foreign to the FTTH exemption's focus on the single, mass market, end user premises. The Order also limits its section 706 rationale to mass market, DS0 loops.

SureWest (at 5) claims this change is warranted to resolve "ambiguities" in the rules. Instead, it and USIIA are pressing the Commission to introduce complexity intended to give ILECs a further excuse to block competition for business customers. The Commission should deny their request to expand the exemption to swallow major portions of the dark fiber and high-cap loop rules.

D. The Commission should reconfirm that FTTH includes only mass market end user premises.

In light of BellSouth, SureWest, and USIIA's attempts to inflate the FTTH exemption, the Commission should instead reconfirm that the FTTH exemption includes only *mass market* end-user premises. BellSouth implicitly acknowledges that FTTH is limited to mass market customers by proposing a definition of "FTTH loop" as "a fiber loop that provides a broadband transmission facility with capacity to deliver voice, multi-channel video, and data services *to mass market* customers." BellSouth at 8. SureWest, in contrast, insists there is a need to clarify whether "fiber-to-the-premises loops" eliminate "an obligation to unbundle dark fiber" to enterprise customers. SureWest at 5.

The Order "conclude[s] that requesting carriers are not impaired without access to FTTH loops," although "the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a pre-existing copper loop." ¶ 273. The Order then exempts "new build," mass market FTTH loops from unbundling altogether, and limits the unbundling obligation for "overbuild" FTTH loops to a TDM-equivalent voice channel. The Order defines FTTH as "a local loop consisting entirely of fiber optic cable (and the attached electronics), whether lit or dark fiber, that connects a customer's premises with a wire center (i.e., from the demarcation point at the customer's premises to the central office)." ¶ 273 n.802. As originally released, the Order limited the FTTH exception to *residential* and thus, obviously, *mass market* customers. In its *errata* issued on September 17, 2003 (FCC 03-227), the Commission altered the final rules by deleting the word "residential" in section 51.319(a)(3),[7] and by replacing "residential unit" with "end user's customer premises" in section 51.319(a)(3)(i).[8] Errata ¶¶ 37-38.

As SureWest noted, this change in definition -- which regrettably was not accompanied by any additional explanatory text -- may create some uncertainties that the Commission should resolve on reconsideration. First, the Commission should reject BellSouth, SureWest, and USIIA's calls for broadening the FTTH exemption and instead

[7] Previously, section 51.319(a)(3) stated that "[a] fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving a *residential* end user's customer premises." Order App. B at 13 (emphasis added).

[8] Addressing new builds, section 51.319(a)(3)(i) originally read, "An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC deploys such a loop to a *residential unit* that previously has not been served by any loop facility." Order App. B at 13 (emphasis added).

provide expressly that the FTTH exemption applies only to mass market end user premises. Second, since SureWest and USIIA see a need for clarification of what constitutes mass market, the Commission should confirm that, for purposes of applying the FTTH loop exemption, mass market end user premises are to be identified by reference to the same criteria that govern local circuit switching in that geographic market.

1. The Commission should modify section 51.319(a)(3) to reiterate that the FTTH exemption is limited to mass market end users.

The Commission's rationale for the FTTH exemption is based on a section 706 "direct[ive]" (Order at ¶ 213) to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 157 nt. The Order concludes that excluding "new build" FTTH loops from unbundling, and limiting unbundling of "overbuild" FTTH loops to a narrowband voice channel, will promote ILEC deployment of these facilities and the offering of advanced telecommunications capability to the mass market. However, the rules, as amended, do not expressly limit the FTTH exemption to mass market customers, even though they fall under a paragraph entitled, "fiber-to-the-*home*" loops. As the petitions of BellSouth, SureWest, and USIIA now show, the rules could be misused to preclude competitors' access to fiber necessary to serve non-mass market customers, frustrating requesting carriers' access to fiber where ILECs are otherwise obligated to provide such unbundled access elsewhere in the Commission's rules.

The Order, in text and in context, shows that this exemption is intended to apply only to mass market, DS0 customers. The Commission's justification for this policy is based on the express conclusion that "removing incumbent LEC unbundling obligations

on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services *to the mass market*." ¶ 278 (emphasis added). In addressing the impact on CLECs, the Order also limits the exemption to the mass market. The Order concludes that the "FTTH policy adopted herein should not adversely affect competitive LECs," because, among other reasons, they "can continue to use resale as a means for serving *mass market customers* after incumbent LECs deploy FTTH loops." ¶ 279. Moreover, the very label, "fiber-to-the-*home*," signals the mass market character of the loop at issue. The Commission should modify section 51.319(a)(3) to make clear that a FTTH loop is "serving a *mass market* end user premises."

2. The Commission should clarify that, in applying the FTTH exemption, a mass market end user premises is to be identified by reference to the same criteria that govern local switching in a geographic market.

Sprint agrees with SureWest (at 5) that the Commission "should clarify the definition of the mass market in this [FTTH] context." The Order, as modified by the *errata*, fails to explain how to determine clearly whether an end user premises is within the FTTH exemption. The Order does not define "mass market" as applied to local loop. This problem, at least, can be easily remedied by clarifying that, for purposes of applying the FTTH loop exemption, mass market end user premises are to be identified by applying the criteria that govern unbundling obligations for local circuit switching within the end user's geographic market.

Clarification is appropriate to ensure that requesting carriers have access to fiber to serve non-mass market customers. The Commission found "on a national basis that requesting carriers are impaired at most customer locations without access to dark fiber loops." ¶ 311. Clarification would avoid needless uncertainty and likely disputes over

the boundaries of ILECs' unbundling obligations for fiber to non-mass market end user premises.

Such clarification is easily provided. To provide a consistent, coherent regulatory framework, a determination of mass market for FTTH necessarily should parallel the guidelines for mass market local switching. SureWest (at 5) asserts that "[t]he facilities implicated by these rules [and] the definitions ... may and should be different from each other." Yet it offers no reasons why some new, "uniform" definition is necessary. The Order anticipates that such determinations will vary among states and within states by geographic market, depending on the "more granular analysis" to be conducted by each state commission. ¶ 188. Thus, for example, if a state determines that, in a given geographic market, the appropriate limit for an ILEC's obligation to provide unbundled local switching is eight lines or less, then the mass market for purposes of determining obligation to provide access to FTTH loop should be the same. Thus, an ILEC would be obligated to provide unbundled access to the dark fiber loop to allow a requesting carrier to serve an end user customer premises needing ten lines, but would not be obligated where the end user needed five lines.

III. "NEXT GENERATION" LOOPS AND DARK FIBER ENTERPRISE LOOPS

A. The Commission should reject attempts to block access to the TDM voice channel on hybrid plant and fiber overbuilds.

Sprint opposes the attempts of BellSouth, SureWest, and USIIA to block competitors' access to the TDM voice channel on hybrid loops.[9] BellSouth claims, to avoid supposed "conflicts between rules exempting next-generation networks from unbundling" and "the network modification rules," the Commission should eliminate an

[9] BellSouth at 16-17; SureWest at 8-9; USIIA at 3.

ILEC's obligation (a) to provide UNE access to its "next generation network," or (b) to "design, reconfigure, or modify those networks to facilitate" unbundling, or (c) deploy a new multiplexer that provides TDM functionality if it does not plan to do so for its own customers. BellSouth at 17. In fact, there is no conflict, as a review of the new rules shows.

First, the rules do not give ILECs the right to wholly prevent competitors' access to "next generation" network plant. The Commission has not exempted any loop plant from unbundling, except for new "greenfield" mass market FTTH. 47 C.F.R. § 51.319(a)(3)(i). For all other loops, including next generation hybrid fiber-copper plant and fiber overbuilds, the rules expressly require ILECs to make available a voice grade loop and full TDM functionality, if a comparable voice grade circuit cannot be provisioned through remaining copper plant. 47 C.F.R. § 51.319(a)(3)(ii). In addition, the Order also does not limit CLEC access to TDM functionality for upgraded DS1 or DS3 loops, something that BellSouth and SureWest overlook. In the Triennial Review, the BOCs made the very same arguments that BellSouth is making now, arguing the supposed promotion of deployment of these next generation networks warranted excluding all upgraded plant entirely from unbundling. The Commission rejected those arguments.

Second, the Order reiterates that ILECs must make reasonable network modifications to accommodate competitors' unbundling requests. 47 C.F.R. § 51.319(a)(8). Deploying a multiplexer to provide TDM functionality is already recognized as an acceptable, even routine, network construction or modification required

of any ILEC. ¶ 634. This remains true even in so-called next generation, hybrid technology local networks.

Third, the Order makes clear that an ILEC may not engineer its loop transmission capabilities in such a way as to disrupt or degrade CLEC access to local loop or sub-loop networks to frustrate competitors' access to unbundled network elements. ¶ 294.

> To ensure competitive LECs receive the transmission path within the parameters we establish, we determine that any incumbent LEC practice, policy, or procedure that has the effect of disrupting or degrading access to the TDM-based features, functions, and capabilities of hybrid loops for serving the customer is prohibited under the section 251(c)(3) duty to provide unbundled access to loops on just, reasonable, and nondiscriminatory terms and conditions."

There can be no rational basis for the Commission to backtrack on these findings now.

B. The Commission should reject attempts to modify the order to limit unbundled enterprise dark fiber loops to those existing at the effective date of the order.

Sprint opposes BellSouth request, supported by USIIA, that the Commission change the Order to limit unbundled enterprise dark fiber loops to those "existing as of the effective date of the Order."[10] BellSouth contends that none of the Commission's reasons for unbundling of dark fiber loops applies to fiber deployed after the effective date of the order. BellSouth at 18-19. BellSouth is attempting to block competition by stretching the Commission's already controversial exemption for greenfield, mass market FTTH to enterprise dark fiber.

BellSouth (at 19) is wrong to suggest that ILECs and CLECs are similarly situated. A BOC has enormous advantages of incumbency, including ubiquitous plant,

[10] BellSouth at 18; USIIA at 3.

contiguous service territories, and a customer base developed over years. Sunk costs, entry barriers, and revenue opportunities are not "identical" for ILECs and CLECs (id.), but that is irrelevant in any event. The Act does not exclude new facilities from unbundling obligations, and it does not envision that access to unbundled network elements is temporary. It does not require that new entrants construct any facilities. It does not limit requesting carriers' access to UNEs for a particular period of time, or to particular facilities. UNEs are to be made available wherever a requesting carrier is impaired without them.

BellSouth tacitly acknowledges that its request is overreaching. Thus, it asks, in the alternative, that the Commission change the definition of "end user customer's premises" to extend the FTTH exemption to dark fiber generally. BellSouth suggests this is appropriate "to preserve investment incentives" and eliminate "uncertainty" in the scope of ILECs' dark fiber unbundling obligations. BellSouth at 19. The Commission, however, expressly confined its section 706 rationale to mass market, greenfield FTTH, after rejecting the same "investment" arguments BellSouth is now making again. The Commission realized that there can be no "incentive" to install dark fiber, because in the enterprise market that is what all carriers are already deploying. Because the cost of building fiber facilities is prohibitive, the Commission concluded that ILEC dark fiber must be unbundled. Order at ¶ 311. As for supposed uncertainty, it is clear that dark fiber is not covered by the "fiber loop exemption." The restriction applies only to fiber to mass market end user customer premises. 47 C.F.R. § 51.319(a)(3). BellSouth's attempt to manufacture uncertainty, where there should be none, merely underscores that the

Commission should confirm that the FTTH exemption is limited to mass market customers.[11]

IV. SECTION 271 OBLIGATIONS

A. The Commission should reject BellSouth's and USIIA's requests to exclude broadband services and capabilities from section 271 unbundling.

Sprint opposes BellSouth's and USIIA's requests to exclude BOC broadband services and capabilities from unbundling under section 271.[12] These petitioners acknowledge that the Commission did not exempt BOCs from their obligations under section 271 even for broadband related facilities and services. However, BellSouth is mistaken to assume that Order "could not rationally conclude" that these section 271 obligations remain in place. BellSouth at 11.

BellSouth and USIIA argue that failing to exempt broadband facilities and services from section 271 obligations conflicts with the conclusion that "applying section 251(c) unbundling obligations to … next generation network elements would blunt the deployment of advanced telecommunications infrastructure." BellSouth at 11, quoting ¶ 288. However, even leaving aside the wisdom, from a legal and practical perspective, of exempting any broadband facilities, it is clear that unbundling obligations under section 271 are distinct from those under section 251.

The Order reiterates the Commission's prior finding "that the requirements of section 271(c)(2)(B) establish an *independent obligation* for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251." ¶ 653 (emphasis added). This finding, the Commission recognized, is

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[11] See section II(D), supra.

[12] BellSouth at 10-15; USIIA at 3-10.

required by "the plain language and structure of section 271(c)(2)(B)" and the statutory "balancing [of] the BOCs' entry into the long distance market with increased presence of competitors in the local market." ¶ 655.

Section 251(d)(2) instructs the Commission how to determine when and if individual network elements must be unbundled. Section 271(c)(2)(B) serves a different purpose and applies to a different and narrower group of carriers – BOCs, distinct from all other ILECs. Congress required both non-discriminatory access to network elements in accordance with Section 251(c)(3) and Section 252(d)(1), and unbundled loops, unbundled transport, unbundled local switching, access to 911/E911 services, directory assistance and operator services, and access to databases and signaling needed for call completion and to any information needed for local dialing parity. Congress required BOCs to provide these elements even if the Commission were to find that they did not satisfy the "necessary" and "impair" tests of Section 251(d)(2). These obligations were imposed not only as preconditions to in-region long distance entry by the BOCs, but also as continuing obligations on the BOCs after they receive their entry authority. See section 271(d)(6) (authorizing the Commission, inter alia, to revoke long distance authority if a BOC "has ceased to meet any of the conditions required for such approval....").[13]

[13] It is not coincidental that these requirements are grouped with other, ongoing market opening obligations, including, inter alia, interconnection under section 251(c)(2) and 252(d)(1); nondiscriminatory access to network elements under sections 251(c)(3) and 252(d)(1); nondiscriminatory access to BOC poles, ducts, conduits and rights of way; directory assistance and listings; interim number portability; dialing parity; and resale under Sections 251(c)(4) and 252(d)(3). 47 U.S.C. §§ 271(c)(2)(B)(i)-(iii), (vii)-(viii), (xi), and (xii-xiv).

The Commission has previously concluded (though mistakenly, Sprint believes) that network elements provided under section 271 need not be governed by TELRIC rates.[14] The Order further weakens the effectiveness of section 271 unbundling by "declining to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251." ¶ 655 n.1990. The Commission must reject, however, these petitioners' requests that it find that the section 271 unbundling obligation is "co-extensive" with section 251 obligations for purposes of exempting broadband facilities. BellSouth at 12. Although the petitioners believe "Section 271 cannot be read, as the Order suggests, to require unbundling in perpetuity" (BellSouth at 14), in fact the legislative history shows that section 271 unbundling requirements are to remain in place for "the reasonably foreseeable future."[15]

B. The Commission should reconfirm that BOCs may not "uncombine" UNEs required to be made available under section 271.

The Commission should also reject BellSouth's request that it eliminate any ILEC obligation to allow elements or services unbundled under section 271 to be combined with either other UNEs or services.[16] Instead, the Commission should reconfirm that that BOCs may not "uncombine" UNEs that are required to be made available under section 271. The Order acknowledges the Commission's long-standing prohibition against "separating network elements that ordinarily are combined," a practice it recognized is

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[14] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) ("UNE Remand Order") at ¶ 473.

[15] 141 Cong. Rec. S8,469 (June 15, 1995).

[16] BellSouth at 15-16.

strictly anticompetitive. ¶ 569. See Local Competition Order at ¶¶ 292-93. The Order does not, however, explicitly prohibit BOCs from "uncombining" UNEs provided under section 271. Accordingly, rather than entertain BellSouth's request to eviscerate section 271 unbundling obligations, the Commission should confirm that a BOC, when relieved of section 251 unbundling obligations, may not refuse to continue to provide section 271 UNEs that are currently combined, and may not thereafter refuse to make those UNEs available on a combined basis.

This should not be a controversial issue. BellSouth cannot point to any language in the Order that actually would entitle a BOC to disregard the Commission's existing, and long-standing, prohibition against separating UNEs that ordinarily are combined, whether those UNEs are provided under section 251 or section 271. The anticompetitive character of such action remains whether those UNEs are provided under section 251 or section 271.[17] This prohibition is also consistent with the Order's directive that an ILEC may not "engineer" its loops to frustrate competitors' use of unbundled network elements. ¶ 294.

Regardless, even taking it as given that a footnote in the Order removes a BOC's affirmative duty to combine UNEs made available under section 271, it does not follow that, where a BOC's section 251 obligation is lifted in a market, it may refuse to continue

[17] The Supreme Court upheld the Commission's prohibition of separation of UNEs provided under section 251, affirming its reasoning that it is necessary to "prevent[] incumbent LECs from 'disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'" Iowa Utils. Bd. v. FCC, 525 U.S. 366, 396 (1999), quoting Reply Brief for Respondents FCC and United States at 23.

providing UNEs that are already combined.[18] Concluding that the unbundling obligations of section 271 do not require combining UNEs, at a competitors' request, is far different than BellSouth's assumption that it would be a reasonable practice for a BOC to break apart network elements already combined. Doing so would only have the effect -- and indeed, could have only the purpose -- of thwarting competition in the local exchange market.

The Order recognizes that the "additional requirements" imposed on BOCs under section 271 "reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market." ¶ 655. After all,

> [s]ection 271 was written for the very purpose of establishing specific conditions of entry into the long distance [market] that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.

¶ 655. Indeed, the predicate for a BOC to receive section 271 approval to enter the in-region long distance market has been a Commission finding that it is in the public interest to do so, because local competition has been fully and *irreversibly* enabled. The Commission recognized this from among the first applications decided under section 271.[19] Underscoring the importance of preserving local exchange competitive market

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[18] It is one thing to "leav[e] open who should do the work of combination," Verizon Comms. Inc. v. FCC, 535 U.S. 467, 534 (2002) (discussing section 251(c)(3)). It is quite another to allow an ILEC to actively frustrate competition by separating network elements that ordinarily are combined.

[19] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-region InterLATA Services in Michigan, 12 FCC Rcd 20543 at ¶ 18 (1997) ("Although Congress replaced the MFJ's structural approach, Congress nonetheless acknowledged the principles underlying that approach

conditions, Congress imposed on the Commission an ongoing duty to protect against backsliding by BOCs. Section 271(d)(6) directs the Commission to take ongoing steps to police the BOCs' compliance with section 271 conditions, including access to unbundled network elements under section 271. It also requires 90-day action on any complaints of BOC noncompliance with section 271 conditions. See 47 U.S.C. §§ 271(c)(2)(B), 271(d)(3), 271(d)(6). Failing to confirm the prohibition against BOCs' separation of combined UNEs would only invite such backsliding.

Clearly, too, it would likewise be an unreasonable practice, and plainly would violate section 201(b), for any BOC to break apart elements previously combined, and which it uses in combination when providing service to its own customers. 47 U.S.C. § 201(b). Since the behavior itself is inevitably unreasonable and anticompetitive, the Commission has all the more reason to confirm that BOCs may not lawfully engage in this behavior.

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that BOC entry into the long distance market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition ... In order to effectuate Congress' intent, we must make certain that the BOCs have take real, significant and *irreversible* steps to open their markets.") ("Michigan 271 Order").

CERTIFICATE OF SERVICE

I hereby certify that a copy of Sprint Corporation's Comments on Petitions for Reconsideration and Clarification in CC Docket Nos. 01-338, 96-98 and 98-147 was sent to the parties below by electronic mail or First Class, postage prepaid, U.S. Mail on this 6th day of November, 2003.

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