

**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

OPPOSITION AND COMMENTS

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BellSouth Opposition and Comments
CC Docket Nos. 01-338, 96-98 and 98-147
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OPPOSITION AND COMMENTS

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively “BellSouth”), pursuant to the *Public Notice* released in this docket on October 9, 2003,¹ opposes the various petitions for reconsideration of the *Triennial Review Order*² filed by wireless carriers

¹ Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, *Public Notice*, Report No. 2635 (Oct. 9, 2003); 68 F.R. 60391 (Oct. 22, 2003).

² *In the Matter of Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, (rel. Aug. 21, 2003) (“*Triennial Review Order*” or “*Order*”).

and their trade association,³ and by EarthLink.⁴ BellSouth supports those parties seeking clarification of certain portions of the *Triennial Review Order* with respect to broadband unbundling.⁵

I. INTRODUCTION AND SUMMARY

Commercial mobile radio service (“CMRS” or “wireless”) providers should not have access to UNEs because uncontested empirical evidence and economic analysis in the record establish that they are not, as a threshold matter, impaired in their ability to provide service. The Commission, moreover, reasonably concluded that no requesting carrier should have unbundled access to the transmission links that are established outside of an incumbent local exchange carrier’s (“LEC’s”) existing network, and thus properly redefined the unbundled dedicated transport element to encompass only those intra-network transmission links between incumbent LEC switches and wire centers, subject, of course, to a lawful impairment determination.

CMRS carriers cannot now be heard to assert that interoffice transport is a “last mile” local loop. In their pleadings in the proceedings below, CMRS carriers described these links as “dedicated transport,” or “middle-mile” facilities, and claimed they were needed as entrance facilities to backhaul traffic to base station aggregation points; the only discussion on the record pertaining to wireless loops was BellSouth’s un rebutted showing that unbundled loops are inapplicable to CMRS providers. And while CMRS providers now characterize these “middle

³ AT&T Wireless Services, Inc. Petition for Clarification or Reconsideration (filed Oct. 2, 2003) (“ATW”); Petition for Reconsideration or Clarification of the Cellular Telecommunications & Internet Association (filed Oct. 2, 2003) (“CTIA”); Nextel Communications, Inc. Petition for Reconsideration or Clarification (filed Oct. 2, 2003) (“Nextel”); Petition for Reconsideration of T-Mobile USA, Inc. (filed Oct. 2, 2003) (“TMU”).

⁴ Petition for Reconsideration of EarthLink, Inc. (filed Oct. 2, 2003) (“EarthLink”).

⁵ Petition for Clarification and Partial Reconsideration of SureWest Communications (filed Oct. 2, 2003) (“SureWest”); US Internet Industry Association Petition for Clarification and Partial Reconsideration (filed Oct. 2, 2003) (“USIIA”).

mile” transport links as analogous to “last mile loops,” in the proceedings below they correctly stated that the last mile loop link to the end user is the wireless loop between the mobile phone and base station, which has duplicated the wireline local loop. The Commission has in any event determined that CMRS competition serves as evidence of self-deployed loops, a determination unchallenged by the CMRS providers. There is no basis to characterize these inter-network transmission links as loops.

For these reasons, and because they concede they cannot satisfy Commission established eligibility criteria, CMRS providers are not entitled to EELs, elements for which they specifically disavowed interest in the record. CMRS arguments pertaining to impairment and the need for “fresh look” are merely restatements of the same arguments presented in the proceedings below, and constitute insufficient grounds for reconsideration.

The Commission should deny EarthLink’s petition for reconsideration of its decision to eliminate the line-sharing UNE. The Commission’s decision is amply supported by the goals of the statute, the guidance of the D.C. Circuit, and the record established in the proceedings below. The Commission should grant the petition of the United States Internet Industry Association, and should, as requested by SureWest, clarify that there is no obligation to (1) either deploy TDM features, functions and capabilities where the ILEC has not already done so or to modify a copper or fiber or packetized transmission facility to add TDM capabilities, or (2) remove or reconfigure packet switching equipment or equipment used to provision a packetized transmission path under rule 51.319(a)(8).

II. WIRELESS CARRIERS ARE NOT ENTITLED TO ACCESS UNES

To the extent the Commission’s new rules permit CMRS providers to access UNES (as in the case of ILEC interoffice transport facilities), they are fatally flawed because of the legal

deficiencies inherent in the Commission's general impairment analysis and because of the Commission's specific failure to consider the factual record of the lack of impairment of CMRS providers. Conversely, to the extent the new rules do not allow CMRS providers (or other requesting carriers) access to inter-network facilities, they are supported both by the express terms of the statute and substantial economic and technical record evidence.

A. The Commission Has Never Made a CMRS-Specific Impairment Determination

Each of the wireless petitions, and, indeed, the *Triennial Review Order* itself, begs the critical question – whether CMRS providers are impaired in their ability to provide service without access to ILEC network elements at TELRIC prices. The Commission has never made a fact-based impairment finding specific to CMRS providers resulting in a legally sustainable unbundling obligation. In its recent *Order*, the Commission defined the scope of the term “services” as used in section 251(d)(2) to mean “those telecommunications services that competitors provide in direct competition with the incumbent LEC’s core services,” or “qualifying services.”⁶ The Commission found that because CMRS services compete with traditional POTS services, CMRS providers offer qualifying services and, therefore, qualify for access to UNEs, subject to limitations described in that *Order*.⁷ This observation fails, however, to address the critical legal prerequisite to actually obtaining UNEs: whether lack of access to UNEs would impair the ability of CMRS providers to provide 251(d)(2) qualifying services.⁸ Had the Commission conducted that inquiry, it could not have found impairment.

⁶ *Triennial Review Order*, ¶ 139.

⁷ *Id.*, ¶ 140.

⁸ 47 U.S.C. § 251(d)(2)(B) (“In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the

The Commission, however, merely subsumed CMRS providers within its general assessment of “impairment” in wireline markets.⁹ To the extent, as CMRS providers have argued, that this market-blind approach is consistent with the Commission’s earlier attempts to establish unbundling rules,¹⁰ that approach has been rejected twice, first by the Supreme Court and most recently by the D.C. Circuit,¹¹ where the third appeal of over-broad unbundling rules is pending. To the extent that the Commission has failed to consider the extensive record evidence of lack of actual CMRS impairment, the Commission failed to follow its statutory mandate as articulated in two separate decisions of the D.C. Circuit: the *CompTel* Court’s endorsement of this Commission’s “essential and compelling reasoning” in its *Supplemental Order Clarification*¹² favoring a service-specific, fact based impairment inquiry prior to mandating unbundling,¹³ and the *USTA* court’s admonition to, among other things, take into account the

ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”). See Reply Comments of Nextel Communications, Inc. at 8 (filed July 17, 2002) (“Nextel Reply”) (the FCC is compelled by Section 251(d)(2) to determine whether competing carriers are “impaired”).

⁹ *Triennial Review Order*, ¶¶ 359, 365, 366, 368, 645, 647.

¹⁰ AT&T Wireless Services, Inc. and Voice Stream Wireless Corporation, Petition for Declaratory Ruling, CC Docket No. 96-98, at 10-12 (filed Nov. 19, 2001) (“CMRS petition” and “CMRS petitioners”) (having already determined that requesting carriers are impaired in their ability to provide telephone exchange service, there are no grounds for separately determining whether CMRS carriers are impaired without access to UNEs when they provided this same service); Comments of AT&T Wireless Services, Inc. (filed April 5, 2002) (“AWS Comments”) at 18; Comments of Arch Wireless, Inc. (filed April 5, 2002) (“Arch Comments”) at 2; Comments of the Cellular Telecommunications & Internet Association (filed April 5, 2002) (“CTIA Comments”) at 3-5; Comments of Dobson Communications Corporation (filed April 5, 2002) (“Dobson Comments”) at 4-5; Comments of VoiceStream Wireless Corporation (filed April 5, 2002) (“VoiceStream Comments”) at 11-12 (ILEC assertion that Commission has never conducted an impairment analysis for wireless carriers is erroneous even though impairment discussions in prior orders did not expressly mention CMRS carriers by name).

¹¹ *Iowa Utils. Bd.*, 525 U.S. at 391; *United States Telecomm. Ass’n v. FCC*, 290 F.3d 415, 430 (D.C. Cir. 2002) (“*USTA*”).

¹² *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587, 9595, ¶ 15 (2000).

¹³ *Competitive Telecomm. Ass’n v. FCC*, 309 F.3d 8, 14 (D. C. Cir. 2002) (“*CompTel*”).

extent of intermodal competition.¹⁴ Both decisions make clear that the Commission may not lawfully introduce UNEs into a market without any regard to the competitive context or any showing of impairment with respect to that market.¹⁵

B. The Unchallenged Record Demonstrates No Impairment

Although they repeat the arguments made in their comments, none of the wireless petitioners address the extensive record developed in response to those comments demonstrating that CMRS providers are not impaired without access to UNEs.¹⁶ The July 17, 2002 NERA Declaration, in particular, refutes specific claims made in initial comments that CMRS carriers are impaired without an ILEC UNE link between Mobile Switching Centers (“MSCs”) and CMRS base station cell sites; that CMRS carriers experience competitive harm by relying on tariffed special access transport services rather than ILEC UNEs; that ILECs enjoy an effective monopoly in the provision of transport facilities needed by CMRS carriers; that ILECs have frequently raised prices for transport services sold as tariffed special access services; and that the Commission should not consider the type of service that a requesting carrier seeks to provide in formulating its unbundling rules.¹⁷

¹⁴ *USTA*, 290 F.3d at 429.

¹⁵ *Id.*; *CompTel*, 309 F.3d at 14.

¹⁶ See National Economic Research Associates, Inc., Reply Declaration § III.G (“Response to the Economic Claims of Proponents of Continued Unbundling; Claim: “CMRS Carriers are impaired without the availability of dedicated transport on a UNE basis”), pp. 110-129 (Attachment 1 to BellSouth Reply Comments filed July 17, 2002) (“NERA Declaration”); UNE Fact Report 2002 § IV.B.2 (“Mobile Wireless as Substitute for Pots Loops”), pp. IV-12 - IV-14 (attached to BellSouth Comments filed April 8, 2002); UNE Rebuttal Report 2002 § I.C. (“Other Forms of Intermodal Competition Are Extensive and Growing Rapidly”), pp. 17-20 (submitted on behalf of Verizon, Qwest, SBC and BellSouth via letter from Dee May, Assistant Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated October 23, 2002).

¹⁷ NERA Declaration, § III.G., *passim*.

NERA considered a number of performance indicators of CMRS providers for the period 1985-2001, including reported and estimated subscribers, revenues, gross investment, direct employment and growth in total reported billable minutes-of-use.¹⁸ NERA examined the spectacular diffusion of CMRS services in the U.S. in recent years within the context of the overall trends in telecommunications growth, noting that growth in wireline telephony was flat during the period 1995-2001 while during the same period wireless subscribership doubled every 2.4 years.¹⁹ NERA showed that CMRS carriers have successfully provided service, including wireless local loop service, in rural areas, with one carrier being so successful in targeting those markets that it has become the designated eligible telecommunications carrier for universal service purposes in 12 states plus the Pine Ridge Indian reservation, offering a mix of CDMA, TDMA, and analog technologies (with GSM contemplated) through its network.²⁰

NERA also analyzed the specific performance indicators of the national wireless carriers that advocated in the CMRS petition and in their April 5, 2002 comments that the Commission extend its unbundling rules to ILEC transport facilities. Using those carriers' 10-K filings, annual reports, carrier press releases and analyst comments, NERA examined the same performance indicators as it did for the industry segment as a whole, as well as both the cost of domestic revenues and the wholesale cost of domestic service revenues, the wholesale cost per subscriber, and the carriers' operating income before income taxes and depreciation and amortization ("EBITDA"), expressed generally, and expressed as a percent of domestic service returns (EBITDA margin), and expressed as average cash flow per subscriber (EBITDA per subscriber),

¹⁸ *Id.*, ¶ 174, Table 18.

¹⁹ *Id.*, ¶ 175.

²⁰ *Id.*, ¶ 176.

as well as the average (per subscriber) margin between domestic service revenues and the wholesale cost of domestic service revenues.²¹

NERA summarized its economic evidence for the industry in general:

Technical or network issues aside, there are strong economic reasons for denying the CMRS carriers' request for unbundled ILEC transport. CMRS carriers cannot claim to be impaired in the face of clear evidence of their success as intermodal competitors. All of the available evidence points only to one conclusion about CMRS carriers, namely, that several years of strong growth and falling end-user prices have enabled the wireless industry to emerge as a viable intermodal competitor to ILECs and other wireline carriers. Judging by that evidence, the prognosis for continued strength and competitive progress by CMRS carriers remains promising. If, as they claim in this proceeding, CMRS carriers were impaired at the wholesale level without access to ILEC transport at UNE prices, then their remarkable success at the retail level simply could not have been possible. Significantly, having to obtain the requisite transport from ILECs in the form of special access services has done nothing to constrain either the growth and performance of individual CMRS carriers or of competition among those carriers.²²

And with respect to the national carriers specifically:

Collectively, these "facts" [robust subscriber growth, robust revenue growth, up trending service revenue per subscriber, flat or falling wholesale costs per subscriber, rapid upward trending EBITDA for AT&T Wireless and Nextel, increases in domestic net service revenue per subscriber for all three carriers all during the period 1999-2001, including the 2001 recession] about the financial performance of the three CMRS carriers point to one central fact: there is absolutely no evidence whatsoever that failure to provide ILEC transport facilities at (below-market) TELRIC-based prices caused substantial harm or, in any way, impaired the ability of the three carriers to acquire subscribers or grow despite difficult economic times. Taken together with the overall evidence about the financial performance of the entire CMRS segment of telecommunications, it is very hard to reach any conclusion supportive of the economic case made by CMRS carriers in this proceeding for being able to obtain ILEC transport on an unbundled basis. The only legitimate conclusion that can be reached, however, is that were such an unbundling request to be granted, the CMRS carriers that are already displaying the

²¹ *Id.*, ¶ 178, Table 19.

²² *Id.*, ¶ 173.

best performances in the telecommunications industry will only be handed a generous opportunity to augment their already handsome bottom lines.²³

Moreover, NERA demonstrated, by analyzing the public statements made by CEOs of the commenting national CMRS providers to their shareholders, the analyst community and the public, that these carriers never complained that they were prevented from achieving their financial and competitive goals by the failure to obtain dedicated transport. Instead, these statements identify the particular strengths that their companies have relied on to experience strong growth, namely, investment in new cellular technologies, additional spectrum purchases, product differentiation, new sales channels and marketing strategies – strengths that do not characterize “impaired” firms.²⁴

NERA also demonstrated that, if dedicated transport facilities were such an integral part of their networks, it would be in the long run economic interest of CMRS carriers to replace leased circuits with their own. The only economic explanation for not doing so is that self-provisioning cannot yield significant savings over leasing special access circuits from ILECs; thus, leasing frees those carriers up to pursue capital expenditures in other parts of their networks, for which economical leased options are not available from ILECs. Indeed, AT&T Wireless’ \$5 billion in capital expenditures in 2001 were allocated 20% to its nascent GSM/GPRS data network and the other 80% to its then existing TDMA network. While AT&T spent \$1.5 billion on next generation network and handset development, it spent only \$300

²³ *Id.*, ¶ 180. Information summarized in brackets is set out in summary at ¶ 179 and the data is presented in Table 19.

²⁴ *Id.*, ¶¶ 183-185.

million on dedicated transport lines leased from ILECs, representing only 7 percent of the nearly \$4 billion that AT&T Wireless incurred in wholesale costs to provide wireless service.²⁵

As NERA explained, the generalities that laced the economic arguments of the commenting CMRS providers (and which reverberate in their petitions for reconsideration) have no empirical support, and the CMRS providers have made no effort to provide any.²⁶ In the absence of any rigorous demonstration of how they have been impaired or competitively harmed by existing ILEC leasing policies, the incontrovertible financial and performance evidence undermines the claims raised in the proceedings below and repeated in their petitions for reconsideration. Finally, NERA explained that, in economic theory, if there is no gain from new competition in a particular downstream retail market, there is no reason to incur the costs of unbundling to support competitors in that market; and because there is likely to be no beneficial increase in competition among CMRS suppliers as the result of making transport available as a UNE (rather than as an ordinary tariffed service), consumers would ultimately be worse off if the unbundling requirements were to be extended to that market.²⁷

In the more than seven months that elapsed between the NERA Declaration refuting CMRS claims of impairment, and the open meeting in which the Commission announced its decision in the *Triennial Review* proceeding, the Commission received numerous written *ex parte* contacts, but no foundation empirical support for CMRS claims of impairment or

²⁵ *Id.*, ¶¶ 186, 187. NERA undertook a similar capital spending analysis with respect to Nextel (\$2.47 billion during the same period), which did not explicitly report its actual expenses on leased facilities, and concluded “there does not appear to be overt concern about how its [Nextel’s] spending on those [leased special access] facilities is threatening its ability to compete or offer the services of its choosing.” *Id.*, ¶ 188.

²⁶ *Id.*, ¶ 190.

²⁷ *Id.*, ¶ 191. The wireless carriers claim that because they compete with ILEC voice services, they are entitled to UNE access. The inquiry under *USTA*, however, is not whether wireless carriers compete with ILEC voice services, but rather whether wireless carriers are “impaired” in providing voice services without access to UNEs. 290 F.3d at 429.

principled response to the NERA declaration.²⁸ Thus, the petitions for reconsideration merely reiterate discredited claims of CMRS impairment, and provide inadequate grounds for reconsideration.²⁹

C. The Record Shows Inter-Network Links Are Not Transport UNEs.

While the CMRS providers readily accept bootstrapping their access to UNEs to a wireline impairment analysis, rather than a CMRS impairment analysis, they complain that the Commission's decision to exclude the cell-site link from the definition of unbundled dedicated

²⁸ None of the following *ex parte* notices filed by wireless carriers in the period after the NERA Declaration was filed address the NERA Declaration or do anything more than restate arguments established in the record before or during the comment round: Letter from Ruth Milkman, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 17, 2002); Letter from Howard J. Symons, counsel for AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 21, 2002); Letter from Suzanne K. Toller, counsel for AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 13, 2002); Letter from Michael H. Pryor, counsel for AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 18, 2002, redacted public version); Letter from Douglas G. Bonner, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 19, 2002); Letter from Douglas I. Brandon, VP-External Affairs & Law, AT&T Wireless, to Marlene H. Dortch (Dec. 20, 2002); Letter from Douglas G. Bonner, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 6, 2003, redacted public version); Letter from Douglas G. Bonner, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 8, 2003); Letter from Douglas G. Bonner, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 10, 2003); Letter from Michael H. Pryor, counsel for AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 16, 2003); Letter from Douglas I. Brandon, VP-External Affairs & Law, AT&T Wireless, to Marlene H. Dortch (Feb. 3, 2003); Letter from Laura H. Phillips, counsel for Nextel Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 5, 2003); Letter from Douglas I. Brandon, VP-External Affairs & Law, AT&T Wireless, to Marlene H. Dortch (Feb. 5, 2003); Letter from Diane J. Cornell, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 6, 2003).

²⁹ Indeed, recent events confirm the record. *See, e.g.*, Dvai Ghose, "Who Knew Wireless Could Be This Good? – Review of TELUS Q3/03 Results," Horan Equity Research (Nov. 3, 2003), available at www.cibcwm.com/research (TELUS reporting "exceptional" third quarter wireless results). *See also* Letter from Mary L. Henze, Assistant Vice President – Federal Regulatory, BellSouth to Marlene Dortch, Secretary, Federal Communications Commission, WC Dkt. 02112 (Oct. 21, 2003) (responding to requests for information regarding bundling or packaging of multiple services and trends in wireless substitution for wireline service usage).

transport “was not based [on] any analysis relevant to CMRS networks.”³⁰ The Commission’s analysis is fully supported in the record in this regard, conforms to the guidance of the Supreme Court and the D.C. Circuit, and is consistent with its own earlier definition of “dedicated transport.”³¹

The definition of dedicated transport adopted by the Commission in the *UNE Remand Order* broadly applied to all technically feasible capacity levels between incumbent LEC wire centers, or between switches owned by incumbent LECs or requesting telecommunications carriers.³² In its *Notice of Proposed Rulemaking* initiating the *Triennial Review*, the Commission noted CMRS carrier assertions that ILECs refused to provide unbundled dedicated transport because a CMRS cell site, or base station, is not a switch or a wire center under that then existing definition. The Commission specifically sought comment on “whether the facilities requested by CMRS carriers fit within our current definition for unbundled transport and, if not, whether we should modify our definition to include the unbundling of these facilities.”³³

In its *Triennial Review Order*, the Commission concluded that its previous definition of dedicated transport (which had since been vacated by the D.C. Circuit) was overbroad.³⁴ The

³⁰ ATW at 4. Yet when wireless carriers wanted the Commission to *include* the cell site link in the definition of unbundled transport they argued that no such analysis was necessary. CMRS petition at 7-9. Such unprincipled, simultaneous appeals to “technological neutrality” and “discrimination” are as unfounded in fact and law as any claim of impairment. The Commission’s revised definition is patently non-discriminatory and neutral with respect to technology – it applies equally to all intermodal competitors.

³¹ BellSouth Reply Comments at 68-70 (filed July 17, 2002) (“BellSouth Reply”).

³² *Triennial Review Order*, ¶ 362.

³³ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Notice of Proposed Rulemaking*, 16 FCC Rcd 22781, 22810, ¶ 63 (2001). The Commission also sought specific comment on alternatives available to CMRS carriers seeking to transport traffic between its MSC and base stations, and between base stations. *Id.* at 22811, ¶ 64.

³⁴ *Triennial Review Order*, ¶ 365.

Commission noted that in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere.³⁵ These transmission links, the Commission determined, are used both for interconnection and to backhaul traffic.³⁶ Because the Act does not require ILECs to unbundle inter-network backhaul links, which exist outside the ILEC's local network, the Commission narrowed its definition of the dedicated transport network element to include only those transmission facilities within an ILEC's own transport network, between an ILEC's own switches.³⁷

The Commission's new definition was based on record evidence that the economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an ILEC network to warrant different treatment, in light of the statutory ambiguity of the term "transport."³⁸ As such, the Commission's interpretation is entitled to deference.³⁹ Moreover, the reasonableness of the Commission's approach is supported by the agency's longstanding recognition, and the most recent record evidence demonstrating, that competing carriers have "some control" over the location of their own network facilities as opposed to ILEC

³⁵ *Id.*

³⁶ AT&T Wireless in fact states that it needs to obtain unbundled dedicated inter-network transport for the "purposes of backhauling traffic." Letter from Douglas I. Brandon, VP-External Affairs & Law, AT&T Wireless, to Marlene H. Dortch at 2-3 (Feb. 5, 2003).

³⁷ *Triennial Review Order*, ¶ 366.

³⁸ *Id.*, ¶ 367. The Commission noted that because the Act does not provide guidance on which transmission facilities should be included in the definition of a transport element, it has the discretion to adopt a definition that is in keeping with section 251's goal of opening the ILEC's local network to competition. *Id.*, ¶ 366.

³⁹ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

intra-network facilities,⁴⁰ and that competing carriers can control, “in part,” how they design and locate their networks.⁴¹ The record showed that competing carriers agree that the most competitive type of transport is the link between an ILEC wire center and a competitor’s network.⁴²

Moreover, the Commission explicitly took into account evidence provided by wireless carriers concerning point-to-point microwave transport links when it found that its “more limited definition of transport is consistent with the Act because it encourages competing carriers to incorporate those costs within their control into their network deployment strategies rather than to rely exclusively on the incumbent LEC’s network.”⁴³ The Commission applied the change in definition to all competitors alike, in a technology-neutral approach that “best comports with the statute, suits the development of intermodal competition, and recognizes the role of the requesting carrier in controlling the costs associated with where to locate its network.”⁴⁴ For all of these reasons, the Commission clearly “made choices reasonably within the pale of statutory possibility.”⁴⁵

Wireless petitioners mount several challenges to the Commission’s revised definition of dedicated transport. As an initial matter, AT&T Wireless’ claims that the Commission “left open

⁴⁰ *Triennial Review Order*, ¶ 367.

⁴¹ *Id.*

⁴² *Id.* n. 1122.

⁴³ *Id.*, ¶ 367. Indeed, the record shows that wireless carriers constructed their network infrastructure with the use of microwave facilities, and subsequently migrated to competitive ILEC-provisioned private line and special access circuits for reasons of efficiency and economy. BellSouth Comments at 58; *see* NERA Declaration at ¶ 186 (use of leased facilities is more efficient and economical and frees up capital for network upgrades). No wireless party responded to this record.

⁴⁴ *Id.*, ¶¶ 368, 369.

⁴⁵ *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467, 539 (2002) *quoted in* Arch Reply Comments at 4 (filed July 17, 2002) (“Arch Reply”).

the question of whether the transmission facility between ILEC wire centers and CMRS cell sites and base stations should be available as a UNE⁴⁶ and that CMRS carriers are, as a result of the new definition, relegated “to purchasing this element as a special access facility when every other qualifying carrier obtains it as a UNE⁴⁷ are directly refuted by the express terms of the *Order*:

We note that this change in definition applies *to all competitors alike*, including intermodal competitors. We find that *no requesting carrier* shall have access to unbundled inter-network transmission facilities under section 251(c)(3). Thus, assuming *arguendo*, that a CMRS carrier’s base station is a type of requesting carrier switch, CMRS carriers are ineligible for dedicated transport from their base station to the incumbent LEC network.⁴⁸

AT&T’s claim that the *Order* allows any requesting carrier to access these links as UNEs is preposterous.

D. ILEC to CMRS Inter-Network Transport Is Not a Local Loop.

For the duration of the *Triennial Review* proceeding, including the proceedings on remand subsequent to the *USTA* decision and up until the end of (both) sunshine periods, CMRS providers argued exclusively that links connecting ILEC switches to CMRS MSCs or base stations are dedicated transport. For example, in their petition for declaratory ruling that the Commission specifically incorporated into its *Triennial Review NPRM*, these carriers argued that the “transport that occurs between incumbent LEC wire centers or between incumbent LEC wire centers and the mobile switching center. . . . indisputably falls within the Commission’s

⁴⁶ ATW at 4.

⁴⁷ *Id.* at 7.

⁴⁸ *Triennial Review Order*, ¶ 368 (bold italics added for emphasis).

definition of dedicated transport.”⁴⁹ Specifically, these carriers argued that transport from ILEC serving wire centers to CMRS base stations qualifies as unbundled dedicated transport because base stations perform switch or end office functions.⁵⁰ Each and every wireless carrier made this argument exclusively; nowhere in the CMRS petition, in CMRS comments or reply comments, or in any CMRS *ex parte* filing, did any CMRS provider argue that the transmission link between an ILEC wire center and CMRS facilities constitute or should constitute a loop UNE rather than a transport UNE.⁵¹

Having apparently won the battle, but realizing that in the process they largely lost the war, CMRS providers for the first time fashion a claim that these links are not really dedicated transport, but rather are “more analogous to the transmission facility that CLECs obtain as unbundled local loops than to the CLEC entrance facilities that were the target of the Commission’s dedicated transport definition change.”⁵² BellSouth demonstrated in its initial comments that any loop functional equivalency argument is fundamentally flawed and inapplicable to CMRS providers.⁵³ Each relevant UNE loop definition (loop, subloop, network

⁴⁹ CMRS petition at 15.

⁵⁰ *Id.* at 19-27, *passim*.

⁵¹ AWS Comments at 3, 23-30; Arch Comments at 9-15; Arch Reply at 13, 17-18; CTIA Comments at 2-3, 7-9; Dobson Comments at 11-12; Nextel Reply at 5-6, 11; VoiceStream Comments at 5-17. *See also* each of the wireless carrier *ex parte* filings listed *supra*, note 28. Furthermore, as BellSouth noted in its April 8, 2002, comments (“BellSouth Comments”), and as no wireless petitioner has contradicted, no wireless carrier participated in the development of the Commission’s first two attempts to establish unbundling rules and definitions of network elements. Nor did any wireless carrier petition for reconsideration or appeal of the first two sets of loop definitions as unfairly excluding wireless providers. CMRS active participation in this docket began, coincidentally, with that industry’s first formal request for transport UNEs from BellSouth, five years after the first proceeding establishing UNEs and well into the economic downturn experienced by the country as a whole. *See* BellSouth Comments at 48.

⁵² ATW at 4. *See also* CTIA at 1-6, Nextel at 7, T-Mobile at 3. BellSouth maintains that these links have never qualified as UNEs under any previous or existing Commission promulgated UNE definition.

⁵³ BellSouth Comments at 53-55. No CMRS provider responded to this point on the record.

interface device) has always been defined to include an interconnection between an ILEC's central office and the end-user customer premises through that legacy plant of twisted-pair copper wire deployed prior to the opening of local exchange markets to other facilities-based competitors. As BellSouth explained, the radio frequency between mobile end-users' handsets and the particular cell site or tower from which they roam is the only appropriate "last mile loop" analogy, and it is inapposite.

BellSouth relies on the CMRS providers themselves for this proposition, for as they stated in their petition for declaratory ruling:

Typically, only the "last mile" link to the customer's mobile phone utilizes radio spectrum. This "last mile" connection between the mobile phone and base station may be thought of as the wireless loop.⁵⁴

Indeed, in its subsequent *Triennial Review* comments, AT&T Wireless referred to the facilities that they now analogize to "CLEC entrance facilities" as "middle mile" transport links.⁵⁵

Further, in the midst of its "inter-network transmission link as transport" advocacy, AT&T Wireless took great pains to describe CMRS cell sites as signal aggregation points for transport to the MSC, arguing the functional and technical equivalency of cell sites to wireline aggregation points such as CLEC collocation arrangements in an ILEC central office.⁵⁶ Now, however, in its new-found "inter-network transmission link as local loop" advocacy, AT&T Wireless argues the exact opposite, namely, "the cell site link is at the very edge of CMRS networks where traffic aggregation is at its most attenuated."⁵⁷

⁵⁴ CMRS Petition at 14.

⁵⁵ AWS Comments at 12.

⁵⁶ *Id.* at 28-29.

⁵⁷ ATW at 6.

As late as February 5, 2003, AT&T Wireless made clear in a letter sent to every Legal Advisor on the Commission staff that “CMRS carriers need only a piece of the local network to be made available, *i.e. unbundled transport*” and that they needed this unbundled transport “*for the purposes of backhauling traffic.*”⁵⁸ Just months before reversing its position, AT&T Wireless took pains in this letter to distinguish that portion of its network that is analogous to a LEC loop and that portion that is used to backhaul traffic to the loop:

In the case of CMRS carriers, we have undertaken the enormous expense of duplicating the local loop, through the purchase of spectrum and by building thousands of cell sites, and we have duplicated local switches. We cannot, however, also duplicate the thousands of interoffice transport facilities needed to link these cell sites to mobile switching centers. Nor should CMRS carriers be expected to do so. The replication of the incumbent LECs’ transport network for the purposes of backhauling traffic would not only be enormously expensive, but economically wasteful.⁵⁹

Therefore, the Commission should reject arguments that ILEC to CMRS inter-network transport links constitute “local loops.”⁶⁰ Doing so would dispose of the need to clarify CMRS eligibility for EELs, which, under the Commission’s current definitions, can only be comprised of wireline local loop and dedicated intra-ILEC network dedicated transport components. Indeed, as VoiceStream made clear in its advocacy during the *Triennial Review* proceeding, “CMRS carriers seek UNE rates for stand alone dedicated transport only, not loop/transport

⁵⁸ Letter from Douglas I. Brandon, VP-External Affairs & Law, AT&T Wireless, to Marlene H. Dortch (Feb. 5, 2003) at 2-3 (bold italics added for emphasis).

⁵⁹ *Id.*

⁶⁰ Indeed, the Commission itself has noted that wireless service providers provide their own loops and that competition from CMRS providers serves as evidence of entry using self-provisioned loops. *Triennial Review Order*, ¶ 446.

combinations (or enhanced extended links).”⁶¹ The Commission should also reject the CMRS providers claim that they should not, in any event, have to comply with the Commission’s newly established service eligibility criteria for EELs, whether provided as UNE or special access. That claim demonstrates why service eligibility criteria are necessary in the first place.⁶² Acceding to their requests would require ILECs to allow CMRS providers to obtain inter-network transport links outside of the ILEC network at TELRIC rates, in derogation of the Commission’s specific findings.

Finally, CMRS providers’ request for a fresh look, as advocated by Nextel, is mooted by the Commission’s proper disposition of the petitions. Nextel’s “fresh look” argument, in any event, raises no new facts or arguments and is an insufficient basis for a petition for reconsideration of the Commission’s determination of this issue in the *Triennial Review Order*. The Commission sought and received comment on “fresh look” and determined, on the record, that its earlier findings should not be disturbed, in part because of the competitive distortions that would result.⁶³

III. THE COMMISSION SHOULD NOT RECONSIDER ITS LINE SHARING DECISION

EarthLink requests that the Commission reconsider its decision to eliminate line sharing as a UNE.⁶⁴ As BellSouth, SBC, Qwest, USTA and Verizon have demonstrated in their Joint Opposition to Covad’s Motion for Stay Pending Judicial Review filed with the United States

⁶¹ VoiceStream Comments at 14.

⁶² It also demonstrates how impractical and unlawful the current eligibility criteria are.

⁶³ Cf. Nextel at 15-17 (seeking reconsideration of Commission’s fresh look determination) with AWS Comments at 32-37 (arguing in response to *NPRM* for fresh look for CMRS providers). The Commission’s determinations are found at ¶¶ 692-699 of the *Triennial Review Order*.

⁶⁴ EarthLink at 1.

Circuit Court of Appeals, the Commission's decision with respect to line sharing was fairly compelled by the record evidence and the Circuit Court's instructions.⁶⁵

BellSouth is certain that the D.C. Court will uphold the Commission's essential determination with respect to line sharing. In the meantime, however, EarthLink has provided no basis for the Commission to reconsider its determination, particularly its outrageous claim that the elimination of mandatory line sharing "is almost certain to eliminate all but incumbent local exchange carriers . . . as wholesale providers of broadband transport for Internet access."⁶⁶ Competitive providers have access to cable modem service, satellite, and wireless broadband solutions and do not require access to ILECs' loops to provide broadband to their customers. Although EarthLink claims that cable modem competition is "less relevant, if at all, in the impairment analysis,"⁶⁷ the Circuit Court of Appeals could not disagree more:

[P]etitioners primarily attack the Line Sharing Order on the ground that the Commission, in ordering unbundling of the high frequency spectrum of copper loop so as to enable CLECs to provide DSL services, completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite). We agree."⁶⁸

Mandatory unbundling and TELRIC pricing of BOC broadband services serves only the private interests of broadband competitors, not the public interest of promoting more and faster

⁶⁵ *United States Telcom Ass'n v. FCC*, No. 03-1310, Joint Opposition to Covad's Motion for Stay Pending Judicial Review at 6-9 (D.C. Cir. Filed Oct. 9, 2003) (excerpt attached); *see also* Joint Opposition to the Choice Coalition's Petition for Stay, CC Docket No. 01-338 at 6-18 (filed Sept. 3, 2003). *See United States Telecom Ass'n v. FCC*, No. 03-1310, Opposition of Federal Communications Commission to Covad's Motion for Stay Pending Review, at 13-17 (D. C. Cir. Filed Oct. 9, 2003) (addressing the merits). BellSouth incorporates the legal arguments addressing the merits of the Commission's most recent line-sharing decision in the Joint BOC briefs in this opposition.

⁶⁶ EarthLink at 1.

⁶⁷ EarthLink at 9.

⁶⁸ *USTA* at 428. The Court found that CLECs were not impaired without access to the HFPL because there is vigorous competition for broadband services.

broadband access, enhanced facilities-based competition and increased investment in telecommunications infrastructure. TELRIC-based UNE-P pricing, when applied to advanced services, becomes an even stronger disincentive when ILECs are obliged to lease to their competitors parts of their next generation networks. A carrier does not need the additional risk that the government will take its property and allow other providers to use its networks without adequate compensation and without shouldering any of the associated risks.

While EarthLink states that “the order provides no basis to deny access to the HFPL of the legacy local loop,”⁶⁹ the Commission could not have been clearer when it stated in the *Order* that “we disagree with the Commission’s prior finding that competitive LECs are impaired without unbundled access to the HFPL because purchasing a stand-alone loop would be too costly for carriers seeking to offer a broadband service.”⁷⁰ The Commission went on to state, correctly, that “we can no longer find that competitive LECs are unable to obtain the HFPL from other competitive LECs through line splitting.”⁷¹

EarthLink incorrectly claims that, “[t]he line sharing decision . . . strains the CLECs’ financial ability to provision a competitive wholesale alternative to the ILECs’ ADSL, and thereby directly diminishes wholesale broadband service in the market.”⁷² As the *Order* states, “competitive LECs are allowed to purchase the HFPL at a price of roughly zero. The result is that competitive LECs purchasing only the HFPL have an irrational cost advantage over

⁶⁹ EarthLink at 4.

⁷⁰ *Triennial Review Order*, ¶ 258.

⁷¹ *Id.*, ¶ 259.

⁷² EarthLink at 8.

competitive LECs purchasing the whole loop and over the incumbent LECs.”⁷³ Now, faced with the prospect of paying their fair share for the ILEC’s network, they claim that they are financially “strained.”

Finally, EarthLink incorrectly states, “ILECs do not have the necessary processes in place to support line splitting arrangements.”⁷⁴ In reality, BellSouth has had procedures in place for CLECs to order line splitting since June 19, 2001.⁷⁵ BellSouth worked with the Line Splitting Collaborative to prioritize the development arrangements from which to migrate to line splitting arrangements. Similarly, EarthLink’s self-serving statement that, “until the industry accepts a ‘hot cut’ process for intramodal wireline migration of DSL subscribers from one carrier to another [the Commission should] modify its line sharing rule by deferring the line sharing loop charges”⁷⁶ is unwarranted. BellSouth has developed a process in the Shared Loop Collaborative to allow end-users to migrate from one data provider to another. This process coordinates the wiring at the frame such that disconnect time is minimized. EarthLink’s appeals for a “hot cut” process are unwarranted and provide no basis for the Commission to reconsider its line-sharing decision.

⁷³ *Triennial Review Order*, ¶ 260.

⁷⁴ EarthLink at 11.

⁷⁵ See BellSouth Carrier Notification Letter, SN91082407, issued May 23, 2001, *available at* http://www.interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91082407.pdf.

⁷⁶ EarthLink at 14.

IV. THE COMMISSION SHOULD GRANT THE PETITIONS OF SUREWEST AND USIIA TO THE EXTENT THEY ARE CONSISTENT WITH BELLSOUTH'S PETITION

SureWest, out of concern that the Commission's policies promote maximum investment in broadband facilities, requests that the Commission take several steps to eliminate barriers in the deployment of fiber to multiunit premises.⁷⁷ The Commission can best do so by granting the relief sought in BellSouth's own Petition for Reconsideration.⁷⁸ Essentially, 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 should also clarify that fiber loops to multi-unit premises are considered fiber-to the-premises loops, equivalent to FTTH.

BellSouth agrees with SureWest and USIIA that that the Commission must clarify several aspects of the Commission's Part 51 rules relating to broadband deployment. First, the Commission should clarify that there is no obligation under Rule 51.319(a) to deploy TDM features, functions and capabilities where the ILEC has not already done so, nor are ILECs obligated to reconfigure a copper or fiber or packetized transmission facility to add TDM features, functions and capabilities. The Commission should also clarify that the definition of routine network modifications contained in rule 51.319(a)(8) does not require ILECs to remove or reconfigure packet switching equipment or equipment used to provision a packetized transmission path.⁷⁹ Finally, for the reasons set forth in its own petition, BellSouth fully supports

⁷⁷ SureWest at 2-5.

⁷⁸ BellSouth Petition for Clarification and/or Partial Reconsideration (filed Oct. 2, 2003) ("BellSouth Petition").

⁷⁹ SureWest at 8-9.

the USIA Petition clarifying that broadband services are not required to be unbundled pursuant to Section 271.⁸⁰

V. CONCLUSION

The Commission should deny the wireless petitions and the EarthLink petition. The Commission should grant the BellSouth and USIA petitions and the specific portions of SureWest's petition discussed above.

Respectfully submitted,

BELLSOUTH CORPORATION

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Date: November 6, 2003

⁸⁰ BellSouth Petition at 10-12.

ATTACHMENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES TELECOM ASSOCIATION, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	No. 03-1310
)	(and consolidated cases)
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
Respondents.)	

JOINT OPPOSITION TO COVAD’S MOTION FOR STAY PENDING JUDICIAL REVIEW

INTRODUCTION AND SUMMARY

In *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA*”), *cert. denied*, 123 S. Ct. 1571 (2003), this Court vacated the FCC’s *Line Sharing Order*,¹ which had required incumbent local exchange carriers (“ILECs”) to unbundle “the high frequency portion of copper loop spectrum . . . as to those loops on which ILECs are currently providing telephone service,” thereby permitting requesting carriers (competitive local exchange carriers or “CLECs”) to provide broadband service over such loops. *Id.* at 421; *see id.* at 429. The Court found that, in ordering such “line sharing,” the FCC “completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite).” *Id.* at 428. The Court held that the FCC’s “naked disregard of the competitive context” risked “inflict[ing] on the

¹ Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) (“*Line Sharing Order*”), *vacated and remanded*, *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

all. The *Order* requires incumbents to provision such new orders during the first year of the transition *only* on the condition that requesting carriers pay 25% of monthly recurring loop charges for access to the loop. *See Order*, App. B at 9 (§ 51.319(a)(1)(i)(B)). The FCC did not simply order that incumbents provision new orders for free, nor could it have done so in light of its determination that it could not require the unbundling of the high-frequency portion of the loop under the 1996 Act. To eliminate the requirement that requesting carriers pay some fraction of the loop cost for new line-sharing orders would therefore be tantamount to restoring the rule that this Court vacated. Such relief cannot be obtained by way of a “stay.”

II. COVAD CANNOT DEMONSTRATE ANY LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Commission’s Core Determination Is Consistent With *USTA* and Supported by the Record Evidence

Covad’s challenge to the FCC’s determination not to require incumbents to provide unbundled access to the high-frequency portion of the local loop is without merit in light of the uncontested record evidence and the legal principles established by this Court’s decision in *USTA*. In that case, this Court determined that the FCC’s prior decision to require ILECs to unbundle the high-frequency portion of the loop was fatally undermined by the FCC’s “naked disregard of the competitive context.” 290 F.3d at 429. As the Court found, “mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource.” *Id.* In ordering incumbents to engage in line sharing, the FCC had simply ignored the fact that cable modem service is the leading broadband product (with other competitive alternatives available); the FCC therefore had no valid reason to believe that mandatory line sharing “would bring on a significant enhancement of competition.” *Id.* In vacating those line-sharing rules, the Court directed the FCC to reconsider

the issue in light of the competitive context and the other considerations identified elsewhere in the Court's opinion. *Id.*

The FCC's core determination that it would "decline" to "make available the high frequency portion of the copper loop" (*Order* ¶ 255) was fully justified in light of the evidence in the record. Most important, the FCC noted that this Court had ordered the FCC "to consider the relevance of broadband competition coming from cable and, to a lesser extent, satellite providers." *Id.* ¶ 262. The FCC noted that, "nationally, cable modem service is the most widely used means by which the mass market obtains broadband service" and that "the gap between cable modem and ADSL subscribership continues to widen." *Id.* Consequently, the FCC could not find that there would be any competitive benefit to ordering line sharing: "the fact that broadband service is actually available through another network platform and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon" line sharing. *Id.* ¶ 263. Accordingly, "the costs of [line sharing] outweigh the benefits"; indeed, it is the *unavailability* of mandatory line sharing that "will encourage the deployment of new technologies." *Id.*

This conclusion is fully consistent with prior FCC findings that broadband services are in a separate market from traditional narrowband telephone service. *See, e.g.,* Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857, ¶ 18 (2000); Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, ¶ 48 (1999) ("*First Advanced Services Report*"). This finding has likewise been echoed by the Department of Justice and the Federal Trade Commission. *See* Department of Justice, Antitrust Division Competitive Impact Statement, *United States v. AT&T*

Corp. and MediaOne Group, Inc., No. 00-1176 (D.D.C. filed May 25, 2000); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, ¶ 63 (2001); Federal Trade Commission Complaint ¶ 21, *American Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989 (FTC filed Dec. 14, 2000). Moreover, the FCC has correctly found that the “preconditions for monopoly appear absent” in the broadband market. *First Advanced Services Report* ¶ 48.

In sum, based on the record before it and its prior determinations that the broadband market is both competitive and likely to remain that way, the FCC could not make a finding of impairment in the separate broadband market. *See Competitive Telecomms. Ass’n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (questioning whether FCC has power to order unbundling without market-specific impairment inquiry); *USTA*, 290 F.3d at 429. Indeed, the analysis calls into question any unbundling requirements that are designed to enable requesting carriers to provide broadband service.

In any event, the FCC did not limit its analysis to this point, but also offered two additional reasons for reversing its determination, in the *Line Sharing Order*, that CLECs would be impaired without access to line sharing. First, the FCC found that it was inappropriate to “focus . . . only on the revenues derived from an individual service” rather than on “all potential revenues derived from using the full functionality of the loop.” *Order* ¶ 258. CLECs are not impaired if they have access to the stand-alone loop – as they do under the *Order*, *see id.* ¶ 260 – because any increased costs “are offset by the increased revenue opportunities afforded by the whole loop” – including voice, voice over DSL, and video services. *Id.* ¶ 258. Second, the FCC found that requiring incumbents to provide access to the whole loop “creates better competitive incentives” than

requiring separate unbundling of the high-frequency portion of the loop. *Id.* ¶ 260. If requesting carriers are permitted to engage in line sharing “at a price of roughly zero” (as under the vacated rules that Covad seeks to restore), they gain “an irrational cost advantage over competitive LECs purchasing the whole loop and over the incumbent LECs.” *Id.* Thus, the FCC found that requiring line sharing threatens innovation and investment in new technology by “skew[ing] competitive LECs’ incentives toward providing a broadband-only service to mass market consumers, rather than . . . a bundled voice and xDSL service offering.” *Id.* ¶ 261.

B. Covad’s Counter-Arguments Are Without Merit

Covad challenges the FCC’s conclusions in only the most cursory way. Most important, Covad does not dispute the FCC’s determination that line sharing is without competitive significance in light of the existence of intermodal competition – and the leading position of cable modem service providers – in the broadband market.³ Covad’s failure to take issue with this fundamental point is fatal. The FCC, giving effect to this Court’s analysis in *USTA*, held that it could not order line sharing unless it found that there would be a significant benefit to competition *in the broadband market*. Given the FCC’s finding that intermodal competition, particularly from cable modem providers, ensures vigorous broadband competition – a finding that Covad does not challenge – the FCC plainly could not find that the impairment standard of 47 U.S.C. § 251(d)(2) was met. Moreover, the arguments that Covad does make are without merit.

1. Covad’s emphasis on its claim that the FCC failed to explain its departure from the conclusions it reached in the *Line Sharing Order* is paradoxical. The *Line Sharing Order* was vacated by this Court. The FCC’s refusal to adhere to a conclusion that had already been held *unlawful* hardly requires special explanation, particularly because the FCC *did* explain why its

³ Covad simply argues that *it* does not have access to cable plant (Mot. at 10-11), but this argument has nothing at all to do with the *competitive context* – *i.e.*, the alternatives available *to consumers*.

CERTIFICATE OF SERVICE

I do hereby certify that I have this 6th day of November 2003 served the following parties to this action with a copy of the foregoing **OPPOSITION AND COMMENTS** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

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