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

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 TO BELLSOUTH'S PETITION FOR CLARIFICATION AND/OR PARTIAL RECONSIDERATION

NuVox, Inc., Talk America Inc., and XO Communications, Inc., through their attorneys, oppose BellSouth's Petition for Clarification and/or Partial Reconsideration of the Federal Communications Commission's ("Commission") *Triennial Review Order.* The Commission should deny BellSouth's request to reconsider the treatment of fiber-to-the-curb ("FTTC"), and instead should maintain its bright-line distinction between FTTC and fiber-to-the-home ("FTTH"). BellSouth has not provided any evidence – nor can it – to support its request that the Commission move the impairment line from FTTH to FTTC. Granting BellSouth's request would not satisfy the Commission's goal of promoting broadband deployment, but instead, at a minimum, would have a particularly adverse impact on competitive entry for any greenfield intrastructure.

I. INTRODUCTION AND BACKGROUND

The Commission should deny BellSouth's petition to treat distinct loop types, such as FTTC, in the same manner as FTTH for unbundling purposes under Section 251. In its

petition, BellSouth notes that the FCC severely limited mandatory unbundling of both greenfield and overbuild FTTH facilities, and BellSouth argues that the Commission should treat "service equivalents to fiber-to-the-home, such as fiber-to-the-curb" in the same manner.[1] In other words, BellSouth wants to minimize its obligation to unbundle FTTC to requesting carriers.

If granted, BellSouth's petition would contravene the Commission's decision to distinguish between legacy narrowband and next-generation broadband infrastructure for purposes of unbundling under Section 251.[2] The FTTC configuration that BellSouth and other ILECs use is an integral part of their legacy narrowband local exchange infrastructure, and BellSouth uses FTTC primarily to provide garden-variety voice (TDM) and lower speed data services. Further, there is clearly no need to provide any additional incentive for the ILECs to roll-out FTTC, since Bellsouth and other ILECs have installed FTTC to serve over a million homes without the aid of massive unbundling relief and have indicated that they will continue deploying FTTC. Certainly, there is no evidence in the record, and BellSouth has added none, showing that FTTC should be treated the same as FTTH for impairment purposes.

Further, granting BellSouth's petition would have a particularly adverse impact on competitive entry for greenfield infrastructure. If FTTC is treated the same as FTTH for Section 251 purposes, BellSouth and the other ILECs would be able to extend their legacy narrowband networks via FTTC to serve new developments without any Section 251 unbundling obligations whatsoever. Even for overbuild infrastructure, BellSouth's petition would materially diminish the competitive opportunities available under the *Triennial Review Order* to requesting carriers who need access to ILEC-supplied loops in order to provide competing, innovative local voice and data services to subscribers. A 64 KBPS channel simply does not afford a requesting

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1 BellSouth Petition at 1.

2 *See Triennial Review Order* ¶ 272.

carrier the same opportunity as a home run copper or hybrid loop to provide multiple services (either alone or through line-splitting) to end-user subscribers on a package basis.

BellSouth's petition relies on a single, flawed assumption: that FTTC and FTTH are indistinguishable. In fact, as the Commission already has recognized in treating FTTC differently from FTTH, the opposite is true. FTTH and FTTC are distinctly different architectures at different stages of deployment that offer distinctly different capabilities, both now and in the future, to customers. Therefore, the Commission should maintain its bright-line distinction between FTTC and FTTH, and should reject BellSouth's attempt to broaden the definition of FTTH.

II. BELLSOUTH HAS NOT PRODUCED ANY RECORD EVIDENCE TO SUPPORT MOVING THE IMPAIRMENT LINE FROM FTTH TO FTTC

There is no record basis in this proceeding to justify BellSouth's proposed relief. After reviewing a massive record, the Commission conducted a full-blown impairment analysis in which it concluded that mandatory unbundling of FTTH – but not FTTC – should be severely curtailed. In order to support its petition, BellSouth must adduce sufficient evidence to permit the Commission to conclude that (i) the FCC's impairment analysis in the TRO is incorrect; ***and*** (ii) the impairment standard entails equivalent treatment of FTTC and FTTH for purposes of Section 251(c)(3). BellSouth has not even attempted to meet this burden of proof, and its petition must therefore be rejected summarily because it does not provide the evidentiary basis necessary for the Commission to modify the rule it adopted recently in the TRO.

BellSouth asks the Commission to adopt a rule that any fiber deployment approaching within 500 feet of an end-user customer's premises should be deemed to qualify as FTTH for unbundling purposes.[3] Even assuming that BellSouth is correct that FTTC may in

[3] *See* BellSouth Petition at 8-9.

some instances be equivalent to FTTH (and the commenting parties most certainly do not concede this), BellSouth has not offered any evidence that 500 feet is the appropriate line of demarcation for impairment purposes. In particular, there is no evidence to support the conclusion that impairment exists when fiber deployment exceeds 500 feet from the end-user's premises while impairment does not exist when fiber deployment is less than 500 feet from the premises. This is an arbitrary number that BellSouth has cynically selected solely to ensure that all of its own FTTC deployments qualify for minimum mandatory unbundling under the new FTTH rule it is proposing.

To the contrary, there are reasons to believe that the impairment analysis is significantly different for FTTC than for FTTH. In particular, while the commenting parties do not accept the conclusion that ILECs and CLECs face identical situations when rolling-out FTTH, their situations are certainly more similar than for FTTC. For FTTH, both the ILEC and the CLEC must install a new fiber transmission link all the way to the customer's premises and upgrade the network interconnection device ("NID") at the customer's premises. Putting aside certain right-of-way and other advantages, the ILECs have somewhat less ability to leverage their existing legacy local exchange network into an unfair competitive advantage. By contrast, FTTC offers the ILECs an opportunity to leverage their control of the existing copper that they will use for the last 500 feet to the customer's premises. A requesting carrier does not have the same access to this copper subloop as the ILEC, particularly given the difficulty of obtaining cost-based collocation arrangements at all ILEC remote terminals.[4] What we know about the differences between FTTH and FTTC shows that the impairment analysis is much more

[4] Because FTTC deployments appear to be just another variation of current network narrowband extensions, the advantages to the ILEC still would warrant a finding of impairment in the greenfield situation.

problematic for ILECs in the FTTC context, and BellSouth has offered no evidence to address that disparity.

A. The Commission Should Maintain its Bright-Line Distinction Between FTTC and FTTH

The Commission adopted a bright-line test in determining what qualifies as FTTH for purposes of the Section 251 unbundling rules: specifically, the Commission defined an FTTH loop 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)."[5] In adopting this definition, the Commission expressly excluded other "'fiber-in-the-loop network architectures . . ., such as 'fiber to the curb' (FTTC), 'fiber to the node' (FTTN, and 'fiber to the building.'"[6] Although the commenting parties strongly disagree with the FCC's decision to severely limit the ILECs' mandatory unbundling obligations for FTTH, we urge the Commission to maintain this bright-line for purposes of business certainty and regulatory stability, to say nothing of administrative convenience.

In addition, BellSouth is wrong when it asserts that FTTC is the same as FTTH. First and foremost, 500 feet of copper is not the functional equivalent of 500 feet of fiber. While all parties would concede that copper has a higher capacity threshold at shorter distances compared to longer distances, its total capacity is finite, whereas the capacity of fiber is limited only by the optronics on either end. Fiber offers significantly greater existing and future bandwidth, and fiber is a much more robust platform for the provision of a number of existing and to-be-developed high-bandwidth services. Also, the transmission speeds of fiber far exceed

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5 *Triennial Review Order* at note 802.

6 *Id.* at note 811.

those offered via copper, and fiber offers demonstrably increased reliability compared to copper, particularly when transmission links are strung on poles rather than buried in the ground. The FTTC configuration has not served to date as the type of advanced services platform envisioned by Section 706. It speaks volumes that BellSouth uses its FTTC configuration today largely to provide garden-variety voice and data services.

In addition, BellSouth understates the implications of the different architectures presented by FTTC and FTTH. Under the FTTC arrangement, the fiber extends only to the curb; it does not extend to the demarcation point at the customer's premises. As a result, when using FTTC architecture, carriers must take several steps to reach the customer premises. Specifically, as BellSouth's own diagrams illustrate, in an FTTC architecture, the carrier uses fiber from the central office to the remote terminal and then from the remote terminal to the optical network unit (ONU), which is located at or near the curb.[7] The carrier then uses a copper link to travel the distance from the ONU to the standard NID at the customer's premises. In contrast, FTTH is a direct fiber link from the central office to the customer's premises, and the standard NID typically is replaced with optical termination equipment, which entails greater service capabilities to the customer.[8]

The use of optical termination equipment at the customer's premises in the FTTH configuration, compared to the standard NID in the FTTC configuration, entails the conclusion that FTTC does not offer the same capabilities to end-user customers as FTTH. When using FTTC, carriers are not required to install an upgraded NID at the customer premises. By contrast, FTTH requires the installation of an optical NID at the customer premises, which

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7 *See, e.g.,* Peter Hill, BellSouth, Ex Parte Presentation (Sept. 16, 2003).

8 *Id.*

provides carriers with an opportunity to deploy a broader range of services both now and in the future.

In sum, there is no empirical basis to conclude that FTTC is the functional equivalent of FTTH, and BellSouth's petition should be denied.

B. The Rationale for Excluding FTTH from Unbundling Obligations is Inapplicable to FTTC

According FTTC the same treatment as FTTH for Section 251 unbundling purposes will not promote the policy goals underlying the Commission's FTTH rules in the *Triennial Review Order*. The Commission concluded that severely limiting the unbundling requirements for FTTH would create an incentive for ILECs to install FTTH, thereby furthering the policy goal of stimulating facilities-based broadband deployment.[9] The Commission noted that FTTH is in its infancy, and that most FTTH loops today have been installed by requesting carriers, not by ILECs.[10] The same policy analysis does not apply to FTTC. Contrary to FTTH, ILECs already have deployed FTTC extensively throughout their regions, and they will continue to do so without any artificial incentives in the form of additional unbundling relief.

1. *Excluding FTTC from Unbundling Obligations Would Not Satisfy the Commission's Policy Goals*

It is unnecessary to severely limit the unbundling obligations for a legacy network configuration such as FTTC in order to satisfy the Commission's policy goal of facilitating broadband deployment. As stated above, in excluding FTTH from unbundling obligations, the Commission noted that FTTH is in its infancy and concluded that "relieving incumbent LECs from unbundling requirements for [FTTH] networks will promote investment in, and deployment

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9 *See Triennial Review Order* ¶ 272.

10 *See id.* ¶ 275.

of, next-generation networks."[11] There is no need to limit the unbundling requirements applicable to FTTC in order to spur deployment of FTTC. ILECs, including BellSouth, already have deployed a substantial amount of FTTC absent the incentive of not having to unbundle it. Indeed, FTTC is precisely the type of network upgrade (for example, remote terminal configurations such as Project Pronto and digital loop carrier systems) that ILECs already have deployed without having any artificial incentive from the FCC to do so.

Furthermore, BellSouth's petition would affirmatively harm the Commission's goal of deploying more truly broadband infrastructure. As stated above, BellSouth currently has deployed over one million access lines served by FTTC,[12] but it uses those lines predominantly for voice – not broadband – services. Hence, FTTC is not a next-generation broadband infrastructure, and there is no need for synthetic regulatory incentives to prompt the ILECs to install more FTTC configurations. Moreover, requesting carriers – who today have installed the lion's share of FTTH configurations – would find it even more difficult to justify new FTTH roll-outs if the ILECs receive artificial incentives from the Commission in the form of unbundling relief to build out FTTC. Hence, providing artificial incentives for the ILECs to roll-out FTTC in even greater quantities would come at the direct expense of true broadband deployment by the only entities – competitive carriers, not ILECs – who have made significant FTTH investments to date.

2. *BellSouth's Proposed Definition Is Fundamentally Flawed*

The Commission should reject BellSouth's proposed new definition of FTTH loops. In addressing FTTH issues, the Commission adopted a logical test that distinguished

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11 *Id.* ¶ 272.

12 *See* Vince Vittore, Telephony.Online (June 2, 2003).

between loops that terminated at the customer premises and those that did not.[13] In its proposed definition, BellSouth would create an arbitrary line by defining any loop within five hundred feet of the customer premises as FTTH.[14] There is no legal or policy basis for this proposal. Rather, the sole purpose of this definition would seem to be to ensure that BellSouth's FTTC arrangements qualify as FTTH.

Furthermore, BellSouth's proposed definition is fundamentally in error because it does not specify what must be transmitted over the loop. Under BellSouth's proposed definition, any loop that provides the "capacity to deliver voice" and other services would be treated as FTTH for Section 251 unbundling purposes. BellSouth's proposed definition does not actually require the carrier to provide any broadband or advanced services over the loop. Accordingly, given that the primary purpose of relaxing the unbundling restrictions is to promote the deployment of broadband services, any definition that falls short of that potential – as BellSouth proposes – must be rejected.

Nor does BellSouth propose a mandatory or minimum delivery speed. If BellSouth truly intended to create a performance standard, or to define a loop based on what is capable of being transmitted over that loop, then it should have included a performance speed sufficient to take into account broadband services (such as 622 mbps downstream and 155 mbps upstream).[15] The fact remains, however, that FTTC continues to use a copper subloop, and, therefore, the capacity and transmission speeds of FTTC architecture are markedly inferior to FTTH.

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13 *Triennial Review Order* at note 802.

14 *See* BellSouth Petition at 8.

15 *See* David W. Faulkner & Yoichi Maeda, PON Systems Standards Developments in FSAN and ITU-T.

III. CONCLUSION

For the foregoing reasons, NuVox, Talk, and XO respectfully request that the Commission deny BellSouth's petition for clarification and/or partial reconsideration.

Respectfully submitted,

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November 6, 2003

CERTIFICATE OF SERVICE

I, Alice R. Burruss a legal secretary at Kelley Drye & Warren LLP, do hereby certify that on this 6th day of November 2003, unless otherwise noted, a copy of the foregoing Opposition to BellSouth's Petition for Clarification and/or Reconsideration was sent by U.S. mail postage prepaid to each of the following:

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