

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

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

**OPPOSITION OF COVAD COMMUNICATIONS TO  
PETITIONS FOR CLARIFICATION AND PARTIAL RECONSIDERATION OF  
BELLSOUTH CORPORATION, SUREWEST COMMUNICATIONS, AND  
U.S. INTERNET INDUSTRY ASSOCIATION**

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## SUMMARY

Covad Communications, by its attorneys, herewith respectfully submits its opposition to the petitions for clarification and partial reconsideration of BellSouth Corporation (“BellSouth”), SureWest Communications (“SureWest”), and U.S. Internet Industry Association (“USIIA”) of the Commission’s *Triennial Review Order*.<sup>1</sup> The Commission’s decision to exempt mass market fiber-to-the-home (FTTH) deployments from unbundling requirements reflected the Commission’s attempt to draw a balance between the Commission’s stated goals of spurring next-generation facilities investment by incumbent LECs and allowing competitors access to last-mile transmission facilities. Unfortunately, in the *Triennial Review Order*, the Commission chose without adequate record basis to grant incumbent LECs excessive deregulation in the name of spurring broadband deployment. The Commission provided even further deregulation to the incumbent LECs than allowing them to monopolize only true greenfield FTTH deployments, by declining to allow competitors access to the broadband transmission capabilities of FTTH deployments in overbuild, or “brownfield,” situations, and even declining to allow competitors access to the broadband transmission capabilities of hybrid fiber-copper loops. Thus, the Commission’s *Triennial Review Order* has already gone too far in allowing incumbents to monopolize critical last-mile broadband transmission facilities.

Nonetheless, the Commission’s *Triennial Review Order* at least had the virtue of drawing a narrow, bright-line test for where such monopolization would be allowed. The petitions by BellSouth, SureWest and USIIA (collectively, “Petitioners”) would upset

that balance, blurring the line between FTTH deployments and hybrid fiber-copper loops, and leading further down the slippery slope towards remonopolization of the last-mile transmission facilities critical to the delivery of broadband services. Furthermore, while these petitions masquerade as requests for unbundling relief for mass market fiber-to-the-curb (FTTC) deployments, they would actually dramatically expand, far beyond their stated purport, the scope of the unbundling relief provided to incumbent LECs in the Commission's *Triennial Review Order* – by sweeping in facilities used to serve enterprise locations.

Covad urges the Commission to reject the Petitioners' demands for even further deregulation beyond the wide-ranging exemptions from unbundling requirements already granted in the *Triennial Review Order*. In the alternative, if the Commission decides nonetheless to proceed with providing incumbent LECs additional deregulation for FTTC deployments, the Commission must adopt the necessary limitations to narrowly tailor this deregulation to its stated goals. Otherwise, in the name of limited relief for FTTC loops, the Commission risks fully remonopolizing the critical last-mile transmission facilities on which mass market consumers and enterprise customers depend for competitive broadband services.

## **I. Introduction**

Covad is the leading nationwide provider of broadband connectivity using digital subscriber line (DSL) technology. Covad's nationwide facilities-based broadband network reaches nearly 45% of the nation's homes and businesses. As a facilities-based

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<sup>1</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

provider, Covad relies on ILECs to provide unbundled transmission facilities (loops and interoffice transport) and the operations support systems (OSS) necessary to facilitate ordering and provisioning of such facilities. In addition, in order to connect customers to its network, Covad is collocated in hundreds of central offices throughout the nation. Furthermore, as a facilities-based provider of broadband services in both the mass market and enterprise markets, Covad is uniquely affected by Petitioners' requests for further deregulation of last-mile transmission facilities used to provide mass market and enterprise broadband services.

The Petitioners argue that the Commission should expand the vast deregulation for broadband transmission facilities already provided in the Commission's *Triennial Review Order*. Lest the incumbents forget, however, in that order the Commission already provided wide exemptions from unbundling requirements for last-mile transmission facilities used to provide mass market broadband services. The Commission completely exempted incumbent LECs from providing access to the packetized broadband transmission capabilities of hybrid fiber-copper loops as UNEs.<sup>2</sup> The Commission completely exempted incumbent LECs from providing access to the broadband transmission capabilities of fiber-to-the-home loops as UNEs, in both new-build and overbuild situations.<sup>3</sup> Furthermore, the Commission eliminated even its limited existing UNE rules for packet-switching,<sup>4</sup> and limited competitors to accessing broadband transmission facilities in the enterprise market with legacy TDM-based

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<sup>2</sup> See *Triennial Review Order* at paras. 285-297.

<sup>3</sup> See *Triennial Review Order* at paras. 273-284.

<sup>4</sup> See *Triennial Review Order* at paras. 535-541.

interfaces.<sup>5</sup> Finally, the Commission even decided to phase out and ultimately eliminate the most widely deployed means of providing competitive broadband services in the mass market, namely the UNE high frequency portion of the loop.<sup>6</sup> By eliminating the line sharing UNE, the Commission decided to allow the incumbent LECs to *remonopolize* mass market broadband services for which competition had proven to be wildly successful. In sum, the Commission's *Triennial Review Order* already provides the incumbent LECs with a staggering amount of deregulation – for both mass market and enterprise loop facilities. Yet, despite winning such deregulation of critical last-mile transmission facilities, the Petitioners arrive at the Commission asking for even more deregulation.

## **II. There is No Evidentiary Support for Further Deregulation**

All of the petitions must fail on one simple ground: none of them provides any evidentiary support that further deregulation is warranted. None of the petitions sets forth any evidentiary record support for the costs of FTTC deployments as compared to FTTH deployments. None of the petitions sets forth any economic analysis quantifying the additional FTTC deployment consumers can expect if the incumbent LECs are allowed to maintain monopolies over these last-mile transmission facilities. Furthermore, none of the petitions present any economic analysis of the countervailing consumer surplus lost if the incumbent LECs obtain such monopoly deregulation, from the loss of access to service innovation and efficiencies brought about by competition. In fact, the only

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<sup>5</sup> See *Triennial Review Order* at paras. 298-342.

<sup>6</sup> See *Triennial Review Order* at paras. 255-269.

evidentiary record put forward, by BellSouth, suggests that no deregulation is warranted for FTTC deployments, because FTTC deployments cost less than FTTH deployments.<sup>7</sup>

### **III. Petitioners Seek to Open Up a Slippery Slope of Remonopolization**

The Commission must not allow itself to be fooled that the Petitioners seek limited, equivalent regulatory relief for functionally equivalent FTTC and FTTH facilities. Rather, the Petitioners seek to open up a slippery slope of deregulation, which would enable them to restrict competitors from accessing even the limited set of broadband facilities allowed them under the restrictive terms of the *Triennial Review Order*. Critically, none of the petitions even sets forth an ironclad definition of FTTC. Instead, the petitions refer to industry specifications, and the typical technical parameters of FTTC deployments. But none of the petitions offer up bright line tests to distinguish between FTTH, FTTC and hybrid fiber-copper loops. Indeed, what the petitions seem to aim at (without overtly saying so) is the deregulation of even the limited TDM access the *Triennial Review Order* provides over hybrid fiber-copper loop architectures.

#### **a. FTTC and Hybrid-Fiber Copper Loops are Indistinguishable**

BellSouth works itself into conundrums trying to distinguish between functionally equivalent “FTTC” and hybrid fiber-copper loop deployments. As BellSouth’s own descriptions make clear, both FTTC loops and hybrid fiber-copper loops (1) contain fiber and copper subloop elements; (2) contain transmission equipment to perform opto-electrical conversion of the signals traveling through these fiber and copper subloop

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<sup>7</sup> See BellSouth Petition at 5-6.

elements; and (3) terminate digital transmission traveling over the copper subloop segment into CPE. While claiming the differences between FTTC and fiber-fed DLC are “unmistakable,”<sup>8</sup> BellSouth points to the “average” length of the copper subloop element, and how far FTTC “typically” pushes fiber into the network, and the fact that in fiber-fed DLC systems the copper subloop segment “*may be* substantially greater.”<sup>9</sup> BellSouth also uses a bit of hollow semantics to distinguish between the functionally equivalent facilities used in FTTC and hybrid fiber-copper loops. Specifically, according to BellSouth, FTTC fiber terminates into “Optical Network Units,” while fiber-fed loop fiber terminates into Remote Terminals – neglecting to mention that both pieces of equipment perform the same function of converting optical digital transmission over fiber into electrical digital transmission over copper.<sup>10</sup> BellSouth also points to the fact that, in hybrid fiber-copper loop deployments, the copper subloop segment must travel through “Serving Area Interfaces” and “Serving Terminals” before reaching the customer, as compared to FTTC, where the copper subloop segment begins at the “Serving Terminal.”<sup>11</sup> What BellSouth neglects to mention is that all of these are merely a box where one set of copper pairs cross-connect to other copper pairs in the incumbent LEC outside plant – and that the interface in outside copper plant to which customer premise drop wires are connected is also commonly referred to as the “Serving Area Interface.”<sup>12</sup>

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<sup>8</sup> See BellSouth Petition at 5.

<sup>9</sup> See BellSouth Petition at 2, 4.

<sup>10</sup> See BellSouth Petition at 4.

<sup>11</sup> See BellSouth Petition at 4.

<sup>12</sup> See Newton’s Telecom Dictionary, 16<sup>th</sup> Ed., at 793 (2000) (“Serving Area Interface: A serving area interface is part of a phone company’s outside plant. It is a fancy name for a box on a pole, a box attached to a wall or a box in the ground that connects the phone company’s feeder or subfeeder cables (those coming from the central office) to the drop wires or buried service wires that connect to the customer’s premises.”).

In other words, the only difference between FTTC loops and hybrid fiber-copper loops is whatever BellSouth says it is.

#### **IV. These Petitions Are Really Backdoor Attempts to Deregulate Enterprise Market, Rather than Mass Market, Loop Facilities**

The Commission must ask itself why the Petitioners even bother in the first place to blur the line between FTTH, FTTC and hybrid fiber-copper loops. After all, as discussed above, the *Triennial Review Order* already provided incumbent LECs with staggering relief from unbundling requirements for facilities used to provide broadband services to mass market customers. The *Triennial Review Order* eliminates UNEs for line sharing and packet switching, and declines to adopt unbundling rules for the packetized transmission capabilities of hybrid fiber-copper loops. Thus, as far as broadband facilities used to serve the mass market are concerned, the incumbent LECs have essentially been freed from unbundling requirements in most respects. The Petitioners attempt to carve-out a new category of loop types, so-called FTTC loops, from the class of hybrid fiber-copper loops, so that FTTC loops aren't subjected to the presumably burdensome regulatory requirements attached to hybrid fiber-copper loops. Yet, even for hybrid fiber-copper loops, the Commission declined to require unbundling for broadband transmission capabilities used to serve the mass market. So what do the petitioners hope to achieve by carving out FTTC loops from hybrid fiber-copper loops anyway?

Of course, the most significant difference between unbundling requirements for FTTH loops and hybrid fiber-copper loops is that the Commission's *Triennial Review*

*Order* declined to require the unbundling of TDM transmission capabilities over FTTH loops, while it did require such unbundling for hybrid fiber-copper loops. So by the simple act of redefining hybrid fiber-copper loops as “FTTC” loops, Petitioners would render competitors unable to access the TDM transmission capabilities of these loops as UNEs. In other words, what the Petitioners are really after is not, as they claim, unbundling relief to serve mass market customers. Rather, in one form or another, what the Petitioners really seek is deregulation of the loop facilities used to serve enterprise customers.

**a. Locations Served with 48 Telephone Numbers Are Enterprise Locations, Not Mass Market Locations**

A closer look at the petitions reveals their primary intent to prevent competitors from accessing the TDM transmission capabilities of hybrid fiber-copper loops to serve enterprise customers – by the simple act of redefining them as “FTTC” loops. USIIA claims that, once the Commission creates the artificial deregulatory category of mass market FTTC loops, it should then extend that category to include “customer locations” with up to 48 numbers<sup>13</sup> – because, as everyone knows, mass market consumers routinely subscribe to 48 telephone lines! Petitioner SureWest is slightly – but only slightly – less coy than USIIA in its attempt to deregulate the TDM transmission capabilities of hybrid fiber-copper loops. SureWest’s petition openly acknowledges that it seeks the complete deregulation of FTTC loops used to serve enterprise customers.<sup>14</sup> Yet SureWest goes on to offer the Commission a “backdoor” means of reclassifying hybrid fiber-copper loop facilities serving enterprise customers as “mass market” FTTC

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<sup>13</sup> See USIIA Petition at 3.

<sup>14</sup> See SureWest Petition at 5.

loops – namely, redefining “mass market” to include customer locations with up to 48 telephone numbers. SureWest openly acknowledges that it is targeting loops serving small businesses for deregulation – although, in fact, the businesses swept into SureWest and USIA’s proposal would not necessarily be so small.<sup>15</sup> As an initial matter, as SureWest acknowledges, 48 voice lines is already equivalent to 2 DS1s of loop capacity.<sup>16</sup> Given that even a single full capacity T1 at retail often costs several hundred dollars, it is hard to imagine how customer locations served by 2 T1 loops qualify as part of the “mass market.” Furthermore, many businesses purchase enterprise loops such as DS1 loops for combined voice and data services. Thus, 48 telephone numbers, in conjunction with data services riding on the same facilities, may well in many instances amount to a large business purchasing significantly more loop capacity than simply 2 DS1 loops. It is easy to imagine an enterprise customer using 48 telephone numbers for its 48 employees – hardly the archetype of a mass market consumer.

Paradoxically, because the Commission’s FTTH unbundling relief is premised on such loops being used to serve mass market customers, Petitioners attempt to construct a paradigm under which the *lower* the loop capacity being used by a customer, the greater the appropriateness (in the Petitioners’ eyes) of deregulation. Thus, if a customer location is served with up to 48 numbers, the incumbent LECs get full unbundling relief. As the Commission’s *Triennial Review Order* makes clear, however, a single DS1 loop qualifies for unbundling to competitors, primarily because “the average revenue available per customer ... is very low relative to larger enterprise market customers using higher

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<sup>15</sup> See SureWest Petition at 6-7.

<sup>16</sup> See SureWest Petition at 7. A single DS1 has the capacity to carry 24 simultaneous voice conversations.

capacity loops” – not despite this feature.<sup>17</sup> The Commission was so convinced of the severe impairment competitors face without access to DS1 loops that it did not even delegate to the states the authority to conduct a location-specific analysis based on a self-provisioning trigger.<sup>18</sup> In other words, according to the Commission, DS1 loops have such a low capacity, compared to higher capacity loops such as OCn loops and DS3 loops, that there is simply no question that competitors are impaired without access to them.

To shroud the backwardness of their logic, Petitioners would have the Commission believe that customer locations served by 48 numbers are really mass market customers. Yet, as should be evidently clear, it would be the rare mass market customer indeed who purchases even a single DS1 loop. As the Commission’s *Triennial Review Order* found, “DS1 loops are typically used to serve small to medium-sized business customers associated with the enterprise market.”<sup>19</sup> As explained above, however, even with their lower capacity relative to DS3 and OCn loops, the cost of retail services over DS1 loops typically far exceeds the spending means of ordinary mass market customers. Retail DS1 services typically cost several hundreds of dollars per month, if not more. Thus, anyone buying 2 DS1s, let alone even a single DS1, is hardly a mass market customer.

**b. Enterprise Customers Are Typically Located in Multiunit Premises**

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<sup>17</sup> See *Triennial Review Order* at para. 326.

<sup>18</sup> See *Triennial Review Order* at para. 327.

<sup>19</sup> See *Triennial Review Order* at para. 326.

Petitioners would also have the Commission deregulate FTTC deployments to multiunit premises.<sup>20</sup> Yet, upon closer analysis, “multiunit premises” turn out to be just as shoddy a substitute for true mass market customer locations as 48 telephone numbers – because both rubrics are designed to sweep in enterprise customer locations. In fact, as the Commission recognized in the *Triennial Review Order*, “enterprise customers are more concentrated in urban locations, in *multiunit premises*, and demand greater variety and higher quality services than mass market customers.”

According to the Petitioners, the Commission should sweep in enterprise customer locations that are “likely to be mixed with residential premises,”<sup>21</sup> rather than “pick and choose locations based on arbitrary regulatory classifications.”<sup>22</sup> Of course, picking and choosing the locations for deregulation of last-mile transmission facilities is exactly what the Petitioners’ proposal would accomplish. Under either the Commission’s existing FTTH rules or the Petitioners’ proposed FTTH/FTTC rules, the status of a facility as regulated or deregulated for the purposes of competitor UNE access would depend on whether or not that location met the criteria for deregulation. Under any set of FTTH rules, whether those already in place or those proposed in the instant petitions, someone must determine whether a particular location meets the established criteria for deregulation. Furthermore, under either set of rules, the status of facilities as deregulated FTTH deployments would not “sweep an entire community,”<sup>23</sup> but would apply to particular facilities meeting particular established criteria. The Petitioners’ proposals

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<sup>20</sup> See BellSouth Petition at 9; SureWest Petition at 3-4.

<sup>21</sup> See SureWest Petition at 6.

<sup>22</sup> See BellSouth Petition at 9.

<sup>23</sup> See BellSouth Petition at 9.

would simply establish a broader set of criteria applying to a broader set of facilities – that sweep in facilities used to serve enterprise customer locations.

**V. The Commission Should Ensure that ILECs Do Not Reconfigure the Network to Deny Competitive Access to High Capacity Loops**

BellSouth asks that the Commission clarify that an ILEC need not (1) provide unbundled access to its next-generation network or design, reconfigure, or modify that network to facilitate an unbundling request for a TDM capability, or (2) deploy a new multiplexer that provides TDM functionality if it does not plan to do so for its own customers.<sup>24</sup> Removing ILEC obligations to make network modifications to provide TDM capability would allow the ILEC to reconfigure its network to eliminate competition.

The Commission recognized that CLECs are impaired without access to xDSL-capable, DS1, and DS3 loops and has required the ILECs to perform the necessary functions to reach customers using ILEC loop plant. The Commission has properly required ILECs to condition loops so that a CLEC may provide xDSL-based services to consumers even where the ILEC was not necessarily offering the service to the customer. Similarly, the Commission has concluded that ILECs must attach DS1 electronics to raw loop transmission facilities to allow CLECs access to certain capabilities of the loop not necessarily utilized by the ILEC.

BellSouth, however, appears to be asking for free reign to design their “next-generation networks” in such a way as to eliminate TDM access. This proposal would eviscerate the essential language on access to DS1s and other loops that the Commission labored over in the *Triennial Review Order*:

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<sup>24</sup> See BellSouth Petition at 16-17.

[W]e prohibit incumbent LECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs (either hybrid loops or stand-alone copper loops) provided to competitive LECs. 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.<sup>25</sup>

Like the recurrent problems that CLECs have experienced with obtaining DS1 loop based on ILEC claims that “no facilities” exist (when in fact it was simply a matter of attaching DS1 electronics), the ILEC could simply claim that it does not have to do something like add a multiplexer for TDM access if it would not do so for its retail customers that are served by packet-based technology, and the CLEC would be blocked from providing services in that market. This issue was analyzed in great detail in the *Triennial Review Order*, where the Commission concluded that CLECs, at a minimum, must be assured access to the legacy capabilities of the ILEC loop plant. There is no reason for the Commission to abandon its recent conclusion.

## **VI. These Petitions Are Backdoor Attempts to Obtain Forbearance from Section 271 Requirements**

The most audacious of the Petitioners’ proposals would have the Commission declare that section 271’s checklist requirements for local loop unbundling simply do not apply to FTTC loop facilities.<sup>26</sup> The Petitioners fail to explain, however, how section 271’s statutory requirements do not apply to facilities that are quite clearly local loops. Indeed, the Commission’s *Triennial Review Order* explicitly analyzes fiber loops, including FTTH loops and hybrid fiber-copper loops, in its review of mass market local

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<sup>25</sup> *Triennial Review Order* at para. 294.

<sup>26</sup> See BellSouth Petition at 10-11; USIIA Petition at 3-10.

loop unbundling obligations.<sup>27</sup> How these facilities are, therefore, anything other than “local loop transmission” is anyone’s guess.<sup>28</sup> In fact, contrary to the Petitioners’ “interpretations” of section 271, the Commission’s *Triennial Review Order* has already conclusively addressed the issue of the overlap and interplay between section 251 and section 271 unbundling obligations:

[W]e continue to believe 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.<sup>29</sup>

Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance 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.<sup>30</sup>

Thus, there is no question that, regardless of the Commission’s analysis of competitor impairment and corresponding unbundling obligations under section 251 for *incumbent LECs*, a Bell Company retains an independent statutory obligation under section 271 of the Act to provide competitors with unbundled access to the network elements listed in the section 271 checklist.<sup>31</sup> Moreover, there is no question that these obligations include the provision of unbundled access to loops under checklist item #4:

Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251.<sup>32</sup>

Without saying so, the Petitioners really seek a determination of forbearance under section 10 of the Act. Indeed, the Commission has already recognized as much in

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<sup>27</sup> See *Triennial Review Order* at paras. 273-284 and 285-297.

<sup>28</sup> 47 U.S.C. § 271(c)(2)(B)(iv) (Section 271 Checklist Item #4).

<sup>29</sup> See *Triennial Review Order*, para. 653.

<sup>30</sup> See *Triennial Review Order*, para. 655.

<sup>31</sup> See 47 U.S.C. § 271(c)(2)(B).

its solicitation of public comment on Verizon's newly revised petition for forbearance from section 271 unbundling requirements for the broadband functionalities of local loops.<sup>33</sup> Thus, Petitioners' requests that the Commission decline applying section 271 unbundling requirements to fiber loop facilities are really petitions for forbearance from the statutory requirements of section 271, similar to Verizon's pending forbearance petition. As the Commission has already stated, "Under section 10(d), the Commission may not forbear from applying the requirements of section 271 unless it determines that those requirements are 'fully implemented.'"<sup>34</sup> None of the Petitioners even attempts to make this exacting showing. Given the stark lack of evidentiary and legal support for section 271 forbearance, the Commission should decline making the finding the Petitioners request.

**a. There is No Restriction on "Commingling" Facilities Unbundled under Section 271 with Other Wholesale Facilities and Services**

Given that Petitioners' request for exemption (in fact, forbearance) from section 271 unbundling requirements lacks evidentiary and legal support, Petitioners suggest an alternate route for the Commission to use section 271 to close, rather than open, historically monopoly local telecommunications markets. Specifically, BellSouth suggests that the Commission should find that facilities unbundled under section 271 of the Act need not be "commingled" or "combined" with other wholesale facilities and

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<sup>32</sup> See *Triennial Review Order*, para. 654.

<sup>33</sup> See Public Notice, "Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271," FCC 03-263, released Oct. 27, 2003.

<sup>34</sup> See *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, Memorandum Opinion and Order, CC Docket No. 96-149, FCC 03-271, para. 5 (rel. Nov. 4, 2003).

services, including UNEs.<sup>35</sup> BellSouth’s proposal would effectively pay lip service to section 271, while robbing it of substance. Section 271 requires non-discriminatory access to the facilities unbundled pursuant to the checklist. At the very minimum, this must mean that competitors can access checklist items and use them in the same manner as the BOC – including “commingling” or “combining” them with the same other facilities and services with which the BOC routinely “commingles” or “combines” them.

BellSouth relies on the fact that section 271 contains no language requiring combinations, like the provisions of section 251(c)(3) do.<sup>36</sup> Yet BellSouth seems to be missing the point. The Commission addressed analogous issues in its analysis of “commingling” prohibitions for EELs in the *Triennial Review Order*. There, the Commission looked first not to the UNE combinations provisions of section 251(c)(3), but looked first to the Act’s general non-discrimination requirements in sections 201 and 202 of the Act, finding that a restriction on commingling UNEs and wholesale services “would constitute an ‘unjust and unreasonable practice’ under 201 of the Act, as well as an ‘undue and unreasonable prejudice or advantage’ under section 202 of the Act.”<sup>37</sup> This logic and legal standard applies with as much force to facilities unbundled under section 271 of the Act as it does to the wholesale interstate telecommunications services the Commission was examining in the *Triennial Review Order*.<sup>38</sup>

Certainly, BellSouth’s proposal should not mean that competitors would be precluded from ordering local loop transmission “unbundled from switching or other

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<sup>35</sup> See BellSouth Petition at 15.

<sup>36</sup> See BellSouth Petition at 15.

<sup>37</sup> See *Triennial Review Order* at para. 581.

<sup>38</sup> See *id.*

services”<sup>39</sup> and terminating such loops in a collocation arrangement, regardless of whether that collocation arrangement was purchased under state tariff, interconnection agreement, or interstate tariff. Indeed, BellSouth and other BOCs routinely use local loops terminated in collocation arrangements to provide broadband services, just as Covad does. Yet, by prohibiting competitors from “commingling” or “combining” section 271 checklist items with any other “wholesale services or ... UNEs,” BellSouth’s proposal would have the effect of prohibiting competitors from terminating local loop transmission facilities unbundled under section 271 of the Act into collocation arrangements, for example those purchased out of state or interstate tariffs (and therefore “wholesale services”). BellSouth and other BOCs might also take the additional extreme measure of precluding competitors from terminating UNEs or other wholesale services into collocation arrangements where facilities unbundled under section 271 were also terminated. Of course, either of these results begs the question of what competitors are supposed to do with local loops unbundled under checklist item #4 once they get them – an absurd result Congress certainly could not have intended in adopting the checklist.

Accordingly, BellSouth’s request that the Commission allow it to restrict “commingling” or “combining” facilities unbundled under the section 271 checklist with any other “wholesale services or ... UNEs” fails as a matter of both policy and law. In any event, the Commission should make clear that, at the very minimum, section 271 requires BOCs to unbundle local loop transmission that competitors can access from collocation facilities, regardless of whether those collocations are purchased under

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<sup>39</sup> 47 U.S.C. § 271(c)(2)(B)(iv).

interconnection agreement, state tariff, or interstate tariff, and regardless of what other UNEs or wholesale services also terminate into the same collocation arrangement.

**VII. Any FTTC Loop Relief Must Be Appropriately, Narrowly Limited**

For the reasons given above, Covad believes that the Petitioners have not provided sufficient support for the Commission to grant the relief they request on reconsideration. Accordingly, the Commission should immediately deny Petitioners' requests for reconsideration. If the Commission decides nonetheless to proceed with granting some form of FTTC loop unbundling relief, the Commission should be very clear in identifying a narrow set of clearly defined circumstances in which such deregulation would apply.

**a. Any Additional Deregulation Must Be Limited to Truly Greenfield, Mass Market Deployments**

Petitioners claim that they require additional relief for FTTC loops because of the need to incent additional fiber deployment in the mass market. Furthermore, they claim that CLECs face the same set of impairments as incumbent LECs in making FTTC deployments in the mass market. Accordingly, the Commission should adopt conditions designed to ensure that any additional FTTC relief is truly limited to mass market, greenfield deployments.

The Commission should reject outright the aspects of the Petitioners' proposals that would sweep in enterprise customer locations. Thus, FTTC deregulation cannot simply turn on whether the FTTC deployment is to a multiunit premises, and whether the FTTC deployment is to a customer location subscribing to a particular threshold of capacity (whether determined by the number of telephone numbers or some other capacity). The Commission should also limit any additional FTTC relief to previously

unserved customers in truly greenfield situations, *i.e.*, where the incumbent LEC retains no advantages of its legacy network (for example, access to existing rights of way, conduits, ducts, fiber or copper, for any portion of the FTTC loop).

In addition, the Commission should prevent incumbent LECs from unilaterally determining whether or not a particular loop facility qualifies for the additional deregulation it provides. Rather, consistent with the Commission's determinations for other unbundled network elements, the state commissions should conduct the necessary fact-finding to determine whether or not a particular FTTC loop deployment meets the incumbent LEC's claims for additional deregulation as a mass market, greenfield FTTC loop deployment. Specifically, state commissions must determine whether or not the customer location served by a particular FTTC loop deployment is truly a mass market customer, as opposed to an enterprise customer location. The state commission must also determine whether or not the incumbent LEC's FTTC loop deployment to that location was truly a greenfield deployment, in which the incumbent retained no advantages from its existing legacy network in whole or in part over competitive LECs to serve that particular location. In addition, the Commission should make clear that the burden of proof is on the incumbent LEC to establish that a particular loop facility qualifies for deregulation as an FTTC loop.

**b. Any FTTC Deregulation Should Adopt Clear Technical Parameters for Qualifying Loops and the Services Provided Over Those Loops**

Similarly, the Commission should not allow incumbent LECs to use additional FTTC deregulation to blur the line between deregulated FTTC loops and hybrid fiber-copper loops, which do not qualify for such deregulation. Accordingly, the Commission should adopt clear, rigid technical standards for the loops that qualify for deregulation as

FTTC loops. Specifically, the Commission should require that loops be deregulated as FTTC loops only where (1) the copper subloop segment of the loop actually falls below 500 feet in length;<sup>40</sup> (2) the FTTC loop actually delivers the same level of bandwidth to individual customer locations as a full FTTH loop, according to industry standards currently in place; AND (3) that a particular loop deployment is capable of and actually offered to customers as delivering the “triple play” of services made possible in a true mass market FTTH deployment, namely voice services, data services, and multichannel digital video services comparable to commonly available intermodal multichannel video services (*e.g.*, via cable and satellite television). The third requirement is particularly important to ensure that incumbent LECs do not blur the line between FTTC loops truly serving mass market customers (and therefore delivering mass market services such as multichannel video) with high capacity loops serving enterprise customers.

Again, to ensure that the incumbent LECs cannot unilaterally simply claim that a particular FTTC loop deployment meets these criteria, the state commissions should conduct the fact-finding necessary to establish conclusively whether or not these technical parameters are met by a particular FTTC loop deployment. Similarly, the burden of proof should be on the incumbent LEC to establish that a particular FTTC loop deployment individually meets these technical parameters.

**c. The Commission Should Reject Petitioners’ Other Requests for Relief, Extraneous to UNE Unbundling Obligations for FTTC Loops**

For the reasons addressed above, the Commission should reject Petitioners’ request for forbearance from the unbundling requirements of section 271, and for a finding that facilities unbundled under section 271 do not have to be combined or

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<sup>40</sup> See BellSouth Petition at 2.

commingled with other wholesale services or UNEs. The Petitioners fail to even address the requisite legal standard or develop the requisite evidentiary support for such forbearance. Moreover, these requests have little to do with what the Petitioners' reconsideration petitions are ostensibly about, namely relief from UNE unbundling obligations for FTTC mass market loops. Accordingly, the Commission should reject the Petitioners' requests for forbearance from section 271 unbundling obligations.

## VIII. Conclusion

The Commission's *Triennial Review Order* already grants the incumbent LECs wide-ranging deregulation for their facilities used to provide broadband services. Particularly in the mass market, incumbent LECs have been relieved of just about every requirement to provide UNE access to broadband transmission facilities already; in the mass market, competitors do not retain access to the broadband transmission capabilities of FTTH, hybrid fiber-copper loops, or even line sharing. Accordingly, there is no basis here for granting even additional mass market relief to the incumbent LECs. Certainly, the Commission must not allow the incumbent LECs to perpetrate the ruse of gaining additional deregulation for facilities used to serve enterprise customers, all in the name of "mass market" FTTC deregulation.

If the Commission decides, nonetheless, to grant the incumbent LECs additional FTTC relief, it must ensure that this deregulation is appropriately, narrowly tailored to achieve the Petitioners' ostensible aims, by adopting the limitations set forth herein.

Respectfully submitted,

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