



November 6, 2003

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms Dortch:

Please find attached a *Request for Waiver of Page Limitation* and *Opposition to Petitions for Reconsideration* filed on behalf of the Association for Local Telecommunications Services (ALTS) for submission in the above-referenced dockets.

Sincerely,

/s/

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

In the Matter of)	CC Docket No. 01-338
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers)))	
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

REQUEST FOR WAIVER OF PAGE LIMITATION

and

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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SUMMARY

These comments focus primarily on BellSouth's request to alter the substantive fiber loop conclusions reached in the *Triennial Review Order*. In petitioning the Commission to revisit issues that have been fully addressed in the *Triennial Review* proceeding, BellSouth is asking for a radical departure from the Commission's conclusions set forth in the *Triennial Review Order*. ALTS contends herein that adopting BellSouth's Petition for Reconsideration would add layers of confusion to loop unbundling and access rules, could derail the nascent facilities-based competitive telecommunications industry, would open the door to ILEC *de facto* dismantling of the loop unbundling rules, and would allow the ILECs to wield monopoly control over captive consumers, denying consumers the benefits of telecom competition.

Like BellSouth, ALTS takes issue with the loop access conclusions adopted in the *Triennial Review Order* (albeit for opposite, pro-competition reasons). ALTS, however, acknowledges that the Commission purportedly attempted to strike a delicate balance in crafting a rule that allows for some deregulation for new fiber deployment, while preserving competitive access so that consumers and small businesses would continue to have a competitive choice.

With regard to BellSouth's proposal to extend the fiber-to-the-home rule to fiber-to-the-curb (as well as fiber to multi-tenant environments) BellSouth's sole argument is that fiber-to-the-curb allows carriers to provide the same functionality as fiber-to-the-home. Fiber builders, themselves, belie this claim, and their input in the *Triennial*

Review proceeding was integral to the Commission's determination in the *Triennial Review Order* to relieve ILECs of unbundling obligations only in *bona fide* greenfield fiber-to-the-home situations. BellSouth, in touting the robust capabilities of fiber-to-the-curb, and likening it to fiber-to-the-home, fails to distinguish what service quality and capabilities might trigger exemption from unbundling rules. BellSouth's proposal begs the question: "What happens when someone develops a technology to draw as much capacity out of home-run copper?" Are these home-run copper loops miraculously immune from unbundling? Further, Corning and the Fiber-to-the-Home Council submitted some evidence, albeit scant and premature, of CLEC fiber-to-the-home deployment, upon which the Commission relied in establishing the fiber-to-the-home rule. BellSouth, however, provides no evidence, in this proceeding, of CLEC fiber-to-the-curb deployment.

While ALTS disagrees with the Commission's fiber-to-the-home conclusions and rule, ALTS contends herein that the Commission must not rewrite the current rule to further curtail competitor access to loops. BellSouth treats its proposal as little more than a minor clarification and extension of the existing rules just adopted in the *Triennial Review Order*; but, make no mistake, BellSouth, in fact, is proposing a brand new rule with potentially devastating consequences on facilities-based competition.

The Bell Cartel seems to be playing a juggling game with the Commission -- throwing as many balls at the Commission as possible in the hope that one of those balls will eventually drop. Between the multiple petitions for reconsideration and forbearance, the Commission, would-be competitors and consumers are compelled to be eternally vigilant to ensure not to drop the ball on any one of the anticompetitive Bell efforts, the

vast majority of which seek identical substantive ends – a process as arrogantly wasteful of Commission resources as of competitor and consumer resources.

Since passage of the 1996 Telecom Act, ALTS has always asked for one thing above all else – regulatory certainty providing a straight-forward interpretation of the pro-competitive provisions of the Act, so that CLECs can raise money, develop and implement business plans, and deploy networks and services to realize the promise of the Telecom Act. The Bells also claim to want regulatory certainty (but only if it means that competition would certainly be crushed). Absent anti-competitive certainty, the longer the Bells can maintain a layer of regulatory chaos, by challenging or reconsidering every Commission decision, the longer the Bells can thwart competition and preserve their stranglehold on captive consumers. The Commission has established UNE rules that should be respected until a reasonable period of implementation and assessment has elapsed, or until found legally infirm. In any event, because fiber-to-the-home deregulation is not fully supported by the record, it is ridiculous to expand further to fiber-to-the-curb, especially based on the record here.

BellSouth is playing a dangerous game of “Mother May I”¹ with the Commission. By requesting a series of seemingly minor baby steps, BellSouth is moving, then blurring, then erasing the bright-line established by the Commission to determine what must be unbundled and what need not be unbundled. This series of “baby steps” redounds in one monumental “giant step” backwards in the march towards local competition.

BellSouth’s proposal would essentially allow it to unilaterally determine what loop

¹ Or, perhaps, the game BellSouth is playing is, more accurately, “Red Light, Green Light, 1,2,3”, the object of which is to take as many steps as possible before the leader notices how far the line has moved. In any case, the baby Bell approaches these issues with the monopolist’s anachronistic sense of entitlement

facilities it will make available to its wholesale customers on whatever terms it dictates.

This series of “baby steps” would also allow BellSouth to unilaterally determine what services it will offer its captive consumers, with no choice of competitor services.

Without a bright-line fiber-to-the-home rule, there is no way for anyone but BellSouth to determine which loops are fiber-to-the-curb loops free of unbundling obligations and which are merely hybrid or copper loops subject to unbundling obligations.

and solipsism, as if the unbundling obligations and other market opening provisions of the 1996 Telecom Act were never adopted.

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of 1996)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

REQUEST FOR WAIVER OF PAGE LIMITATION

and

OPPOSITION TO PETITIONS FOR RECONSIDERATION

REQUEST FOR WAIVER OF PAGE LIMITATION

ALTS acknowledges that according to Rule 1.106(g) of the Commission's rules, oppositions to petitions for reconsideration shall not exceed 25 double-spaced type written pages.² ALTS, herein, is submitting comments in excess of 25 double-spaced pages and requests a waiver of rule 1.106(g) pursuant to Rule 1.3 of the Commission's

² 47 CFR 1.106(g).

rules. Rule 1.3 provides, “provisions of this chapter may be waived for good cause shown.”³

As ALTS pointed out in its request for an extension of time to file comments in response to the petitions for reconsideration to the *Triennial Review Order*,⁴ the petitions for reconsideration, particularly the petitions filed by BellSouth, SureWest, and the United States Internet Industry Association raise issues that would require the Commission to depart significantly from the rules, conclusions, and analysis just established in the *Triennial Review Order*. These issues cannot be resolved based on a limited record and within a constricted time frame. These issues require serious consideration by all parties and by the Commission. Any rewriting, clarifications or modifications of the rules will have dramatic impact upon the future of competition in the advanced services and other telecommunications markets, particularly on the ability of facilities-based CLECs to bring new services and technologies to end user customers using ILEC-provided loops.

The Commission spent more than a year building and digesting the record needed to craft the fiber-to-the-home rule adopted in the *Triennial Review Order*. The record reveals that, in adopting the current fiber-to-the-home rule, the Commission reviewed more than 70 sets of comments, more than 70 sets of reply comments, and amassed more than 3000 *ex parte* communications. In crafting the fiber-to-the-home rule, the Commission also reviewed studies on the economics and business case supporting fiber deployment and determined that its rule would strike the proper balance. By contrast,

³ 47 CFR 1.3.

⁴ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order Rejecting ALTS’ Motion for Extension of Time, DA No. 03-3430 (rel. Oct 28, 2003).

BellSouth is seeking to eviscerate the rule in the *Triennial Review Order* on an extremely thin pleading with nowhere near the kind of evidence that the Commission used to justify the rule in the *Triennial Review Order*. It is essential that the parties, particularly those that would be dramatically, negatively affected by the proposed rewriting of the rules, be accorded significant latitude in presenting comments that, by necessity, must exceed the 25-page limitation.

OPPOSITION TO PETITIONS FOR RECONSIDERATION

INTRODUCTION

The Association for Local Telecommunications Services (“ALTS”) hereby files its comments in the above-referenced proceeding in response to the Petitions for Reconsideration filed in CC Docket No. 01-338.⁵ ALTS focuses these comments primarily on the reconsideration petition filed by BellSouth.⁶ For the reasons discussed below, ALTS urges the Commission to reject BellSouth’s petition.

ALTS is the leading national trade association representing the interests of facilities-based competitive local exchange carriers (CLECs). ALTS member companies’ primary objective is to provide facilities-based competition in the telecommunications market, including voice and broadband and other advanced telecommunications services. ALTS members are the companies deploying the alternative facilities needed to offer

⁵ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, at ¶¶ 713-729 (rel. Aug. 21, 2003) (“*Further Notice*”). The entire Order shall be referred to herein as the *Triennial Review Order*.

⁶ ALTS notes that two other reconsideration petitions have been filed that seek remarkably similar relief as that sought by BellSouth. The US Internet Industry Association (“USIIA”) parrots BellSouth’s request for relief but does not present argument to support its requests. In an introductory paragraph to its petition, USIIA requests the FCC do the following: (1) confirm that broadband services not requiring unbundling under section 251 do not need to be unbundled under section 271; (2) eliminate the ambiguities that would pose barriers to deployment of fiber to multiunit premises; (3) clarify that mass market fiber-to-the-premises includes customer locations with up to 48 numbers; and (4) clarify that network upgrades and installation of broadband capability would not constitute a disruption or degradation of TDM capability. Except for arguing in support of the first item, USIIA devotes no time to consider the merits of the issues for which it has determined need reconsideration.

SureWest also seeks similar “clarification” as that proposed by BellSouth. This petition asks the FCC to do the following: (1) eliminate the ambiguities that would pose barriers to deployment of fiber to multiunit premises; (2) clarify that mass market fiber-to-the-premises includes customer locations with up to 48 numbers; and (3) clarify that network upgrades and installation of broadband capability would not constitute a disruption or degradation of TDM capability. Note that SureWest would have fiber-to-the-“premise” relief extend to locations with up to 48 numbers. This extreme, outlier, proposal makes BellSouth seem “reasonable” by comparison. One is forced to wonder whether SureWest’s obviously extreme, outlier proposal was orchestrated to make BellSouth’s own extreme proposals seem more moderate. We trust the Commission will view these petitions with appropriate skepticism.

differentiated services to consumers desperate for competitive choice. As acknowledged in order after order and statement after statement issued by the Commission, CLECs cannot currently provide, and are not required by law or policy to provide, all of their own facilities, particularly the essential, last-mile bottleneck loop facilities, needed to reach potential customers. The rules set forth in the *Triennial Review Order* are, arguably, the most important tools to ensure that facilities-based CLECs have fair access to the essential, bottleneck facilities needed to reach customers. Any divergence from those rules, particularly with regard to the rules setting forth access to the local loop – the essential, bottleneck facility and the element most difficult to replicate -- must be taken with utmost care so as not to destabilize the nascent competitive telecommunications industry.

In its Petition, BellSouth seeks reconsideration and/or clarification of vast and significant portions of the *Triennial Review Order*, claiming that it needs additional relief from providing access to loops, beyond that generously supplied by the Commission already, in order to have sufficient incentive to deploy additional fiber to deliver broadband services and technologies to mass market consumers. Specifically, BellSouth has asked the FCC to take the following anti-competitive action: extend FTTH relief to FTTC; extend FTTH relief to MDUs; exempt broadband services and capabilities from Section 271 oversight; relieve Bells of the obligation to combine UNEs with services; eliminate the Bell obligation to combine broadband services and facilities offered under 271 with UNEs offered under 251; eliminate the ILEC obligation to make network modifications to provide TDM capability; and eliminate the ILEC obligation to unbundle enterprise dark fiber if deployed after October 2, 2003. As considered in more detail

below, each of these actions would have dramatic, harmful consequences on the future of facilities-based competition and consumer access to innovative and affordable broadband and other telecommunications services. The Commission must not grant any of these anticompetitive requests, any one of which would work to deny CLECs reasonable access to the essential facilities needed to reach potential customers.

In the *Triennial Review Order*, the Commission purportedly attempted to strike the proper balance between maintaining competitive access while providing Bell Companies the incentive for new network investment. Although ALTS strongly disagrees with the Commission's decision to deregulate fiber loops as it has, surely the *Triennial Review Order* (along with the substantive changes effectuated by the Commission's *Errata*) provides more than ample relief for Bell Companies to continue to invest in the network, particularly in fiber loops and equipment needed to provide advanced services. "Extending"⁷ fiber-to-the-home ("fiber-to-the-home" or "FTTH") rules to fiber-to-the-curb ("fiber-to-the-curb" or "FTTC"), fiber-to-the-pedestal and fiber to multi-tenant premises will sabotage facilities-based CLECs, particularly those CLECs moving down market and trying to serve small and medium-sized business customers. Such an extension of the FTTH rule would permit the Bell Companies to reclaim their monopoly control over this market segment.

BellSouth fails to acknowledge that it and the other Bell Companies have deployed and will continue to deploy fiber, even without the relief granted in the *Triennial Review Order* and certainly without the relief being sought through the BellSouth Petition. BellSouth's business units repeatedly assure Wall Street that it has

every intention to continue fiber rollout regardless of regulatory constraint.⁸ Now

BellSouth is attempting to morph the definition of fiber-to-the-“home” to include BellSouth’s current investment in hybrid loops, including fiber-to-the-“curb”. If BellSouth gets its way, it will eliminate its competition while getting a free ride to offer whatever services it decides to offer its captive customers. There would be no requirement for BellSouth or the other ILECs to provide advanced services in order to receive regulatory relief. BellSouth would not even have to offer the most rudimentary xDSL-based data services, let alone advanced video services, until competitive pressure compelled it to do so.

CLECs entering a market must be accorded the same ability as the incumbent to offer service ubiquitously throughout the serving area. This is essential not only to allow the CLEC to draw upon as large a potential customer pool as possible, but to ensure that all consumers within the serving area have reasonable access to competitive alternatives.

⁷ We use the term “extending” because that is the term BellSouth has used in its pleading. Frankly, BellSouth is attempting to blowup the rule and rewrite it entirely.

⁸ See, e.g., *Are RBOCs Building ‘War Chest’ for FTTP?*, Xchange Magazine, September 9, 2003 (<http://www.xchangemag.com/hotnews/39h9131630.html>) (quoting William Smith, Chief Product Development and Technology Officer for BellSouth: “[T]here should be no doubt that BellSouth is serious about fiber to the home. That should be evident given that BellSouth by the end of this year will have more than 1 million FTTC lines deployed. If that’s not serious, I don’t know what is.”); comments of John Goldman, BellSouth Communications Manager, *New Push for Fiber-to-theHome*, Wired News, June 18, 1998, <http://www.wired.com/news/technology/0,1282,13094,00.html> (“The thing about fiber is that there's practically unlimited speed and capacity available. Essentially, you're attaching a big pipe to the side of the house. Then the customer takes whatever he needs. It's almost self-provisioning. Gigabyte speeds are easily possible over fiber, while substantially lower high-end speeds exist for copper”); comments of Dr. Dave Kettler, executive director for BellSouth Science and Technology, Joint Press Release of BellSouth and Lucent, *Atlanta is first North American site for Fiber-to-the-Home System*, June 3, 1999 (<http://www.lucent.com/press/0699/990603.cob.html>) (“BellSouth has long been a leader in fiber optic networking and fiber-to-the-home research. We first installed customer homes more than 10 years ago Since that time, and especially during the last several years, we’ve made fiber to the curb our preferred solution to providing telecommunications services for new subdivisions. Just this year, we initiated an ambitious program of replacing existing copper lines with fiber to the curb in some 200,000 homes in Atlanta and Miami. BellSouth's latest step provides the final link for an all-fiber connection from our switch all the way to the home, instead of terminating fiber at the curb. Fiber to the home is BellSouth's ultimate platform for satisfying our customers' voracious appetite for bandwidth, an appetite that is growing at exponential rates.”).

As such, CLECs must also be allowed to sell competitive services throughout an entire serving area, not just to those customer locations that, at least for the moment, are served over facilities subject to unbundling obligations. The CLECs cannot be compelled to guess which customers are served by FTTC loop facilities in order to determine whether that customer is eligible for CLEC service. As it is, it will be difficult enough for the CLEC to determine whether the customer is currently, or soon-to-be, served by home-run fiber.

It is critical for the Commission to understand that CLECs have persistent last-mile access problems that require vigilant regulatory oversight, because the CLECs' chief rivals are also their reluctant wholesale providers. The Commission must not allow the ILECs any more latitude to deny competition to captive consumers.

I. FIBER-TO-THE-CURB MUST NOT BE ACCORDED THE SAME LEVEL OF DEREGULATION AS FIBER-TO-THE-HOME.

BellSouth asks the Commission to decide that loop architectures, such as fiber-to-the-curb (*e.g.*, hybrid fiber-copper arrangements in which the fiber extends somewhere “near” the end user), that provide service-equivalence to fiber-to-the-home, will be treated the same as fiber-to-the-home for unbundling purposes in the mass market. Adopting this proposal would be extremely harmful to the CLEC industry, to would-be consumers, to the manufacturing industry, and to regulators. It cannot be adopted as part of an expedited reconsideration proceeding, and it should be rejected.⁹

⁹ ALTS' understanding is that BellSouth's proposal only applies to greenfield situations (though this is not made explicit in its Reconsideration Petition) and assumes for purposes of these comments that this is the case. In any event, no plausible case could be made for applying the BellSouth proposal to overbuilds/brownfields. The Commission justified its adoption of the current FTTH overbuild/brownfield

The relief requested in the BellSouth Petition is squarely inconsistent with the *Triennial Review Order* and the recent *Errata*. In the recently-released *Errata* in this proceeding, the Commission clarified that the exemption from unbundling for FTTH loops applies only to loops that consist “entirely of fiber optic cable” and that the exemption from unbundling in FTTH greenfield situations applies only “when the incumbent LEC deploys such a loop to a [sic] end user’s customer premises.”¹⁰ It would be utterly incoherent for the Commission to now turn around and reach the opposite conclusion, “clarifying” that what it really meant was that FTTH loops in fact include facilities containing fiber that only reaches a point “near” the end user’s premises.

Even if the Commission were to reverse course in this manner, basic principles of administrative law require that it justify its change of course based on the evidence in the record. There is no basis in the BellSouth filings or anywhere in the *Triennial Review Order* for doing so. In all events, the task of assessing the evidence pertaining to fiber-to-the-curb and responding to Bellsouth’s specific proposal implicates many complex issues that could not (contrary to some claims) be adequately addressed in an expedited reconsideration process.

rule based on its conclusion that competitors and incumbents “largely face the same obstacles” when overbuilding loops consisting entirely of fiber. *See Triennial Review Order* ¶ 276. Even if the Commission is correct with regard to fiber loops (which ALTS disputes), the same could never be said of loops that retain the last several hundred feet of legacy copper that the incumbents built and paid for while legally protected monopolists.

ALTS notes that the Commission relied in large part on Corning’s Comments to relieve the ILECs of unbundling obligations for greenfield fiber-to-the-home. *See Triennial Review Order*, at ¶¶ 273-282. Corning clearly indicated that relief must only be afforded in a *bona fide* greenfield situation. *See* Corning Comments, CC Docket No. 01-338 (filed April 5, 2002) at n. 2 (“‘New builds’ are defined as a fiber-to-the-home deployment in a greenfield situation.”). As such, it is essential that the Commission preclude the ILECs from gaming the fiber-to-the-home rule by shoehorning any brownfield buildouts into the greenfield scenario. The ILEC must not be relieved of its unbundling obligations when it has the ability to take advantage of any of its existing network, rights-of-way, or first-mover advantages. Under that scenario, the ILEC would clearly have insurmountable advantages over any new entrant attempting to compete without the ability to capitalize on such legacy monopoly advantages.

¹⁰ *See* Sept. 17, 2003 *Errata*, at ¶¶ 37, 38.

In the *Triennial Review Order*, the FCC exempted ILECs from their unbundling obligations for FTTH based on what it described as a careful “balancing” of factors, including the level of impairment experienced by CLECs, the promotion of the policy goals of Section 706 and the presence of intermodal competition.¹¹ In applying these factors to FTTH, the FCC only assessed the implications for fiber facilities that extend all the way to the end user’s premises. Thus, the evidence upon which the Commission relied concerned the merits of eliminating unbundling for “loops consisting entirely of fiber optic cable between the main distribution frame (or its equivalent) and the demarcation point at the customer’s premises,”¹² not for loops consisting merely of *some* fiber optic cable.

For example, in assessing impairment as it relates to FTTH, the FCC found that (1) the entry barriers associated with deploying FTTH are “largely the same” for incumbents and competitors; indeed it even gave credence to the possibility that competitors may have lower costs;¹³ (2) CLECs have deployed more FTTH loops than

¹¹ See *Triennial Review Order* at ¶ 234.

¹² See *id.* at n. 811.

¹³ See *id.* at ¶ 275, n. 808. Frankly, ALTS must take issue with this conclusion. The evidence on the record in the *Triennial Review* proceeding considered a nascent technology (FTTH) with a sampling of only about 34,000 homes, or roughly 0.03% of US households. See Corning Comments, CC Docket No. 01-338 (filed April 5, 2002), Attachment A (Cambridge Strategic Management Group, *Assessing the Impact of Regulation on Deployment of Fiber to the Home* at 5 (2002) (“*CSMG Study*”). Evidence submitted subsequently by Corning and the Fiber-to-the-Home Council estimate about 66,990 households served by FTTH as of October, 2002. Corning *ex parte* letter, CC Docket No.01-338, dated January 29, 2003.

Since their emergence, CLECs have always led the way in the deployment of new technology. During the early stages of DSL deployment, stand-alone DLECs like Covad, NorthPoint and RhythmsNet were providing more DSL than most of the BOCs. It would have been a tragic mistake for the Commission to have relieved the ILECs of their obligation to unbundled DSL-capable loops based on a miniscule, premature sampling of the nascent DSL industry, an industry spearheaded by forward-looking CLECs who took untested, idle Bell technology and created an industry. Without access to DSL-capable loops, the DSL market would not have developed as rapidly. The existence of DLECs certainly did not stifle ILEC deployment of DSL; in fact, the DLECs probably compelled the ILECs to deploy their own DSL-based services. Today, the BOCs control more than 90% of the DSL market.

As discussed *infra*, the Bells are committed to FTTH deployment, regardless of any unbundling obligations. Economics, technology, and competition compel it. In fact, Mike DiMauro, President of the

ILECs, thus purportedly confirming the lack of impairment;¹⁴ (3) the potential financial “rewards” for deploying FTTH loops are “significant” and “far greater than for services provided over copper loops,” purportedly allowing competitors to overcome entry barriers;¹⁵ and (4) the application of unbundling obligations to ILEC FTTH substantially diminished potential deployment.¹⁶ In support of these conclusions, the Commission relied primarily on the Corning Comments and several Corning *ex parte* letters.¹⁷ The information supplied by Corning in those documents applied only to loops consisting of fiber that extends all the way to the premises. In its Comments, Corning stated that all references to “fiber-to-the-home” “mean an entirely fiber optic cable transmission facility, between a distribution frame (or its equivalent) in an incumbent local exchange carrier central office and the loop demarcation point at an end-user customer premise.”¹⁸ Those comments and the *ex parte* letters relied heavily on a study prepared for Corning by Cambridge Strategic Management Group that was filed as an attachment to Corning’s comments. That study again provided information only as to FTTH loops as defined by Corning in its comments and later by the Commission in the *Triennial Review Order*.¹⁹ These factors have not been satisfied with regard to FTTC.

To justify adoption of the rule proposed by BellSouth, the FCC would need to conduct a careful “*re*-balancing” of all four of the factors assessed in the Triennial

Fiber-to-the-Home Council, predicts that “without a doubt, 2004 will be the year for FTTH.” (<http://www.convergedigest.com/DSL/lastmilearticle.asp?ID=8524>) Market research posted to the Fiber-to-the-Home Council’s Website, estimates that FTTH will pass 800,000 by 2004, 23 times the 34,000 household figure submitted in the record just last year in this docket. (http://www.opinionsnow.com/RVA/ftth_page2.html)

¹⁴ See *id.* at ¶¶ 275, 278, 279.

¹⁵ See *id.* at ¶¶ 274, 276.

¹⁶ See *id.* at ¶ 278.

¹⁷ *Id.* at ¶¶ 273-282.

¹⁸ See Corning Comments, CC Docket No. 01-338 (filed April 5, 2002) at n. 2.

Review Order in light of the available data regarding fiber-to-the-curb. For instance, with regard to entry barriers, the Commission and interested parties would need to reexamine Corning's assertion that incumbents and competitors face equivalent equipment costs when deploying new loops.²⁰ That assertion was based on the assumption that the "equipment being purchased is unique to fiber-to-the-home, and thus any discounts based on scale are dependent on the size of the build out, rather than the size of the carrier's pre-existing network."²¹ It is not at all clear that this holds true for BellSouth's proposed architecture in which significant amounts of copper and associated equipment (for which it enjoys substantial discounts as a result of the size of its "pre-existing network") would be used. With regard to CLEC deployment, the Commission would need to gather evidence concerning the amount of existing fiber-to-the-curb installations and the proportion of ILEC versus CLEC deployment. With regard to financial "rewards," the Commission and interested parties would also need to consider the revenue opportunities, since, again, the detailed information on these issues set forth in the Cambridge Strategic Management Group Study and relied upon by the Commission concerned only situations where the fiber extends all the way to the customer premises. The same is true of assessments regarding the purported effect of unbundling exemptions on the incentives of ILECs to deploy fiber-to-the-curb.²²

¹⁹ See *id.*, Attachment A, *CSMG Study*, at 7.

²⁰ See Corning Comments at 25.

²¹ *Id.*

²² For instance, the *Triennial Review Order* also recommended that states consider adjusting the cost of capital upward for fiber deployment. The Commission ought to await making further changes to the unbundling rules for fiber until it has a chance to assess the impact of this pricing change on the ILECs' fiber deployment.

BellSouth has simply not provided the information on these issues to warrant a new, more expansive rule.²³

Even without the benefit of a full examination of the data needed to perform a cost-benefit analysis, however, it is clear that the BellSouth proposal suffers from several fundamental and unfixable flaws. BellSouth proposed in a September 17, 2003 *ex parte* that the FCC extend the FTTH unbundling exemption to any loop with capacity to deliver voice, video, and data services that consists of a fiber optic cable connection or transmission path, whether lit or dark, between a distribution frame (or its equivalent) in the central office and the loop demarcation point or serving terminal at or near the premises.²⁴ Most obviously, BellSouth failed to adequately define such important concepts as the provision of “video” or “data” service or what it means to be “near” the premises. This proposal was extremely vague, and there was some expectation that BellSouth would flesh out this concept in its Petition for Reconsideration. BellSouth, in its Petition, however, has failed to provide any more sufficient an explanation that would allow carriers, consumers or regulators any more certainty over which loops would be subject to unbundling and which loops would not. As competitors have learned through bitter experience, vague rules offer ILECs opportunities to engage in self-help to deny inputs their competitors need.

It is not clear how the rules could be clarified in a sensible way. If the Commission were to establish specific service criteria that a facility would need to meet to qualify for the unbundling exemption, those criteria would likely quickly become

²³ Again, as noted above, the record does not even support this result for FTTH; there is nothing that even addresses FTTC.

²⁴ BellSouth Sept. 17, 2003 *ex parte* letter at 11.

obsolete, forcing the Commission to update them again and again. The Commission could also try to establish a precise measure of what it means of to be “close” to the end user customer, but there is every reason to think that this too would soon be overtaken by technological innovation (*e.g.*, by technology that allows more copper to be used to deliver the same level of service) forcing the Commission again to reassess its rules. In addition, disputes would inevitably arise as to whether a particular facility in a particular location meets the relevant service and distance criteria. ILECs would also likely seek waivers in order to gain relief in particular areas where geography or some other factor prevents them from meeting the requirements. For example, what would the Commission do if an ILEC missed the proximity criterion by 20 feet? How is a customer or a CLEC ever to know whether the loop plant is a FTTC loop or simply a hybrid or home-run copper loop? Is the CLEC supposed to assume the loop is subject to unbundling, put in an order, and wait for the ILEC’s determination that the loop is not subject to unbundling?²⁵ The FCC would undoubtedly be forced to adjudicate these disputes (or leave it to the states to do so) and to fashion appropriate remedies.²⁶ In other words, defining “near to the premises” will require regulators to engage in line-drawing that will be inherently arbitrary and difficult to justify, and which will consume substantial regulatory resources. As anticompetitive as the FTTH rule currently is, at least it’s a bright line.

²⁵ BellSouth would have the Commission adopt an arbitrary length limitation to distinguish some hybrid loops from other hybrid loops for regulatory purposes. Whatever speeds and services that could be provided over a 500 foot copper distribution subloop today, will likely be available over a 1000 foot copper subloop next year. Is the Commission inclined to extend relief further and further away from the customer premises, every time the ILEC demonstrates that the same speeds and service offerings could be achieved by longer copper subloops?

The current unbundling exemption for FTTH is anticompetitive and unnecessary to promote fiber deployment for reasons that exceed the scope of these comments, but there is at least no dispute that, to qualify under that rule, fiber must extend all the way to the end user premises. There is no need for service quality or fiber proximity criteria. This at least limits substantially the problems otherwise created by the BellSouth proposal. In light of this fact, and given that ILECs other than BellSouth (*e.g.*, Verizon) are apparently planning to deploy fiber to the end user premises, there is simply no basis for pursuing the BellSouth proposal any further.

Even BellSouth has acknowledged that “deep fiber deployments offer the only future proof architecture.”²⁷ Fiber deployment affords a longer planned service life with less ongoing maintenance and a rapidly narrowing cost differential compared with copper. BellSouth has been pursuing a fiber-to-the-curb architecture since 1995 (even without deregulatory incentive) and plans to continue with that strategy. Nearly one million homes have been fiber-passed out of a market of 14 million homes in BellSouth territory. BellSouth will soon begin testing Fiber-to-the-Premises and plans field trials in the second half of 2004.²⁸ All of these plans will go forward regardless of any FCC conclusions in the *Triennial Review Order* or any reconsideration orders thereto. Economic and technological efficiency require it.

BellSouth has apparently said that exempting FTTC would allow it to deploy FTTC to more homes. BellSouth apparently claims that the economics of deploying

²⁶ Of course, one should not lose sight of the fact that the courts may not recognize the Commission’s jurisdiction to make these decisions if the Commission reclassifies the inputs used by ILECs to provide broadband Internet access as unregulated Title I services.

²⁷ Remarks of Peter Hill, VP Technology Planning & Deployment at BellSouth, USTA Telecom ’03 (<http://www.siliconinvestor.com/stocktalk/msg.gsp?msgid=19409549>).

²⁸ *Id.*

FTTC do not work unless exempt from unbundling. The Commission must not succumb to BellSouth's extortion tactics. Competitive pressure, improved efficiency and economics will compel BellSouth to deploy additional fiber in the loop plant. Adopting a policy that allows for deregulation for incremental fiber deployment does nothing to bring robust broadband capabilities to consumers. Rather, it encourages ILECs to deploy incremental amounts of fiber to be free of unbundling obligations and to be free to unilaterally determine what services they choose to offer captive consumers and at whatever monopoly rates they can extract. BellSouth is threatening to hold its retail customers, its wholesale customers, vendors and regulators hostage until it is granted additional relief to buildout the last-mile loop and subloop facilities needed to deploy broadband.

Further, BellSouth's proposal will undermine the Commission's FTTH conclusions. There is no logic in allowing BellSouth and the other ILECs a loophole you could drive a datastream through. Relieving the ILECs of unbundling obligations for FTTC loop architectures would unnecessarily encourage each ILEC to forgo FTTH deployment, deploy copper/fiber hybrid loops with the most minimal, incremental amount of fiber and broadband functionality as possible, and claim its loop plant is free of unbundling. As it is, the ILECs have essentially moved their "wire center" to the "remote terminal". As such, it is essential that CLECs be accorded the same access to loops served via remote terminal, pedestals, and other feeder/distribution interface points as CLECs are guaranteed in central offices pursuant to the FCC collocation rules. The ILECs cannot be allowed to reconfigure their networks to prevent competitor loop access simply by deploying FTTC. CLECs are guaranteed access to copper loops connecting

end users with ILEC central offices, and are guaranteed access to fiber connecting ILEC end offices. Why should a CLEC be denied access to a shorter portion of copper connecting end users from ILEC pedestals and other remote access points (equivalent to a very short UNE loop), and be denied access to shorter fiber connecting the remote access point to the central office (equivalent to very short inter-office transport)? The ILECs cannot be allowed to reconfigure their networks to prevent competitor access simply by moving the end office to the pedestal or other remote terminal or access point.

Finally, ALTS must note that there are serious qualitative differences between FTTH and FTTC that BellSouth does not acknowledge in its Petition. It is true that FTTC can provide a very high capacity level over short pieces of copper, but FTTH is as economical to deploy because to get the same speed from FTTC more equipment is needed within the distribution network. The cost of that equipment versus the extra fiber and labor to get to the home make it a wash. The equipment necessary for FTTC increases maintenance costs and makes FTTH a lower cost proposition in the long run.²⁹ While the capacity levels with FTTC are large, only FTTH has adequate capacity to provide high quality video transmission. In order to realize the economic benefits of fiber deployment, LECs will need to obtain revenue from voice, data and video services. If the LEC FTTC technology cannot offer the video quality needed to compete against cable and satellite, FTTC could very well be inadequate and need further investment, and the only consequence of denying unbundled access to FTTC loops would have been that

²⁹ Peter Hill, Vice President of Technology for BellSouth, in *FTTP: Hype or Reality? Perspectives from Verizon, BellSouth, Alcatel*, Convergence Network Digest (<http://www.convergedigest.com/DSL/lastmilearticle.asp?ID=8766>) (about 315,000 new homes will be built in BellSouth territory this year and about a third of them will be equipped with direct fiber connections; the initial cost of fiber is higher, but that ongoing maintenance costs are lower; the potential new revenue should be greater for fiber).

consumers would have been denied a choice of competitive LECs.³⁰ Even if BellSouth were correct that FTTC is equivalent with FTTH, BellSouth only faces last-mile deployment competition from cable and satellite companies in the residential market. BellSouth has no incentive to deploy video to business and would likely deny small and medium-sized business customers access to affordable advanced services unless and until competition somehow emerged miraculously without early CLEC entry via ILEC-provided loops.

Extending FTTH relief to FTTC would deny consumers the promise of broadband. America's broadband future is only guaranteed by a viable competitive marketplace. A monopolist does not innovate or offer service at any price other than a monopoly or regulated rate. If, however, CLECs are allowed to connect their smart technology to ILEC-provided dumb pipes, CLECs will dramatically increase the capability of the local loop infrastructure and bring consumers heretofore unimagined services. Furthermore, moving the bright-line established by the FTTH rule to FTTC loop architectures could have drastic anticompetitive consequences up-market – sabotaging small and medium-sized business access to competitive alternatives by opening the door to ambiguity and gaming.

II. THE COMMISSION MUST PRESERVE COMPETITIVE ACCESS TO MDUs.

BellSouth petitions the Commission to “clarify” that fiber loops to multi-unit premises are considered “fiber-to-the-premises” loops and should be free of unbundling

³⁰ At the very least, the record is not complete with respect to these issues since FTTC was not part of the

obligations. The rules adopted in *the Triennial Review Order* properly do not include fiber loops to buildings with multiple dwelling units (“MDUs”) in the definition of loops that receive fiber-to-the-home treatment. Like hybrid loops, the fiber does not extend all the way to the end user premise and cannot afford the quality of service, particularly video, that FTTH affords and must not be considered a comparable technology to fiber-to-the-home, simply because it can offer more functionality than home-run copper or a hybrid loop that does not extend fiber to the building.³¹

It is not economical for a LEC to deploy anything other than fiber to a building with multiple dwelling units, thus it is entirely disingenuous for BellSouth to claim it needs this additional deregulatory incentive to deploy fiber to apartment buildings. Conversely, if the FCC were to adopt BellSouth's request, the ILECs would be able to unilaterally dictate what services are available to captive building owners and their tenants. Building owners and their tenants need the ability to obtain services from the carrier(s) of their choice. If BellSouth's requested relief is granted, building owners will have no choice but to use the services made available by the ILEC at whatever monopoly rates the ILEC could extract. More competitors with access to the bottleneck access lines connecting to the building would give building owners greater bargaining power to negotiate rates and services from multiple parties and realize the benefits of a competitive marketplace.

BellSouth asks the Commission to clarify that fiber loops to multi-unit premises are considered “fiber-to-the-premises” loops subject to the same deregulated status as

record.

³¹ ALTS must reiterate its concern about going down the road of comparing technology and allowing a regulator or, worse, the ILEC to determine whether a sufficiently robust service might be provided on the line such that the loop need not be unbundled.

fiber-to-the-home loops. The current FTTH rules do not expressly include fiber loops to these multi-tenant environments. Extending the FTTH definition to include buildings serving MDUs would deny building owners and tenants in MDUs access to competitive telecommunications services, where it is especially difficult for competitors to obtain equal access and compete with the incumbent and its first mover advantages. Furthermore, extending loop unbundling relief to multi-tenant environments might arguably subsume strip malls, office parks, and business located within other multi-tenant environments where much of the small business market resides thus denying small and medium-sized businesses the opportunity for competitive alternatives. Without the CLEC ability to access the ILEC's last-mile transmission facility, small business customers will be captive to a monopoly provider. Moreover, these businesses do not have access to a cable modem alternative, which may be available to residential consumers. The RBOCs typically point to the availability of competitive alternatives to ILEC loops when attempting to free themselves of unbundling and other access obligations. By and large, there are no loop alternatives serving the small and medium-sized business market. BellSouth must not be allowed to shoehorn its argument that a cable modem alternative exists in the residential space to deny CLECs access to bottleneck facilities to serve business customers. Nor should the RBOCs be able to point to other intermodal loop alternatives, unless they in fact exist and satisfy the "impairment" analysis required by the Section 251(d)(2) and the Commission's implementation rules set forth in the *Triennial Review Order*. The Bell Companies point to speculative technologies like satellite and power line provisioning. First of all, there is no evidence that these technologies are, or are soon to be, viable substitutes for ILEC-

controlled loops. Further, to the extent that these entities provide *bona fide* substitutes for the ILEC-controlled loop, then the impairment analysis will adequately account for them. Until that time, the ILEC loop, be it copper, fiber, or some hybrid thereof, is the essential bottleneck facility serving MTEs and must be made equally available to CLECs.

The Bell Companies and other ILECs typically have facilities in -- and serve -- virtually every building in their service areas. Where the ILECs do not directly serve a new building, the ILEC still wields insurmountable first mover advantages and access to rights of way within the serving area. The ILEC is generally afforded free access to buildings not guaranteed to new entrants. This free and ubiquitous building access is one of the important legacies of monopoly that gives the BOCs and other ILECs tremendous economic advantage over CLECs for voice, broadband and other telecommunications services and creates a significant barrier to facilities-based competitive entry to serve multi-tenant environments. The Commission explicitly recognized this reality in the *Triennial Review Order*.³² In its discussion on access to multi-tenant premises, the FCC acknowledged that ILECs have first-mover advantages with respect to access to customers in multiunit premises and that no third-party wholesale alternatives to these loops and subloops are available.³³ The FCC wisely stated that, based on the record, the barriers faced by requesting carriers in accessing customers in multiunit premises are not unique to customers typically associated with the enterprise market residing in such premises but extend to all customers residing therein, including residential or other mass market customers.³⁴

³² *Triennial Review Order*, ¶¶ 343-358.

³³ *Triennial Review Order* ¶ 348.

³⁴ *Id.* at ¶ 347.

The building access problems faced by potential competitors to the ILECs play a serious role in preventing facilities-based competition, and ultimately curtail customer choice among a variety of providers. The Commission must not allow BellSouth to deny CLECs access to facilities to serve the vital market base residing in multi-tenant environments.

III. ACCESS TO FACILITIES TO DELIVER COMPETITIVE BROADBAND SERVICES MUST BE PROTECTED PURSUANT TO SECTION 271

BellSouth asks that the Commission clarify that broadband services and capabilities are not subject to unbundling under Section 271, *i.e.*, that the Commission state that Section 271 does not create an independent “unbundling” obligation. Alternatively, BellSouth asks that, if the Commission does not hold that the Section 251 and Section 271 unbundling obligations are co-extensive, it should clarify that services “unbundled” only under Section 271 need not be combined with either other services or UNEs. Removing broadband services and capabilities from 271 oversight would allow ILECs monopoly control over broadband capable loops and could deny CLECs access to broadband loops/services even at non-TELRIC rates. Certainly, the Commission cannot adopt a policy that would deny consumers access to competitive alternatives in those circumstances where the ILEC has been relieved of its 251(c) unbundling obligation, but where there is no alternative loop facility. The only issue for the Commission to consider, under this circumstance, would be to establish a fair procedure to set the price of the loop. Any such procedure, of course, must account for the unfair bargaining power wielded by the monopoly carrier controlling the essential, bottleneck facility.

The Commission concluded in the *Triennial Review Order* that the Act establishes an “independent and ongoing access obligation” for the BOCs to provide access to checklist items under section 271(c)(2)(B) that is separate and distinct from an ILEC’s unbundling duties under section 251.³⁵ In reaching this conclusion, the Commission expressly ruled that under section 271’s “competitive checklist,” the BOCs must continue to “provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under the section 251.*”³⁶ In short, any action by the Commission with respect to an ILEC’s obligation to unbundle access to broadband facilities under section 251 does not affect a BOC’s unbundling obligation with respect to those network elements pursuant to section 271.

BellSouth essentially is claiming that its obligation to offer unbundled access to broadband under section 271 somehow compromises the Commission’s decisions affecting broadband under section 251(c).³⁷ BellSouth’s view apparently is that the Commission intended in the *Triennial Review Order* to eliminate any ILEC obligation to provide wholesale access to broadband and, consequently, BellSouth should be relieved of its obligation under section 271 to do so. In fact, the plain text of the *Triennial Review Order* refutes this baseless claim. Moreover, BellSouth’s argument clearly shows the RBOCs’ resistance to unbundling at any price, despite their claim that they support competition but only want to gain an adequate return on their investments. If they truly supported competition, they would not further resist unbundling requirements under Section 271, but would welcome the opportunity to provide such wholesale services at

³⁵ *Triennial Review Order* ¶ 654.

³⁶ *Id.* ¶ 653 (emphasis added).

³⁷ See Verizon Memo at 1.

fair and reasonable rates. However, now that the Commission has begun its way down this slippery slope, there is no telling where the RBOCs might stop.

Contrary to BellSouth's suggestion, the *Triennial Review Order* expressly contemplated that after modifying the section 251(c) unbundling obligations with respect to fiber subloops, ILECs would make broadband service offerings available on a wholesale basis on just, reasonable and non-discriminatory terms and conditions:

we expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act.³⁸

While the Commission seems a bit naïve and idealistic in its belief that the ILECs would, without much regulatory oversight, offer broadband loop access pursuant to sections 201 and 202, the Commission clearly (and correctly) saw no inconsistency between its determinations regarding the unbundling of fiber network elements under section 251 and the ILECs' provision of broadband access in accordance with the requirements of sections 201 and 202. Similarly, the FCC's section 251 unbundling conclusions plainly are not "compromised" by the BOCs' continuing obligation to offer access to broadband pursuant to section 271 via the same just, reasonable and non-discriminatory terms under sections 201 and 202. In fact, the Commission assumed that wholesale service offerings by ILECs would continue even after an item is "de-listed" from section 251(c) requirements, albeit pursuant to a different legal standard; for Bell operating companies, section 271 in fact mandates that result for particular, specifically-enumerated items.

BellSouth argues that section 706 of the Act compels a rule precluding any obligation under section 271 to unbundle broadband elements that are exempt from

unbundling under section 251.³⁹ To the contrary, section 706 is irrelevant to the scope of a BOC's access obligations under section 271. In the *Triennial Review Order*, the Commission found that section 706 was relevant to its unbundling analysis under section 251 only because the "at a minimum" clause of section 251(d)(2) granted the FCC authority "to take Congress's goals into account" in deciding which network elements must be unbundled.⁴⁰ Section 271, however, does not contain an "at a minimum" clause. Indeed, section 271 explicitly prohibits the Commission from "limit[ing] or extend[ing] the terms used in the competitive checklist set forth in subsection (c)(2)(B)."⁴¹ Consequently, in contrast to its assessment of unbundling issues under section 251, the Commission is barred from weighing the goals of section 706 in enforcing a BOC's obligations under the competitive checklist of section 271.

IV. THE COMMISSION MUST CONTINUE TO REQUIRE ILECs TO COMBINE UNEs WITH SERVICES.

BellSouth has asked that the Commission clarify that services made available to carriers pursuant to Section 271 need not be combined with other services or UNEs. This conclusion certainly violates the letter and spirit of the Telecom Act and the *Triennial Review Order* and would serve no legitimate policy objective.

Simply because a network element is not subject to unbundling, a CLEC must not be denied the ability to serve end user customers. Rather, the CLEC should still be

³⁸ *Triennial Review Order* ¶ 253 (citing Verizon's support for such wholesale broadband offerings).

³⁹ Verizon Memo at 8.

⁴⁰ *Triennial Review Order* ¶ 176.

⁴¹ 47 U.S.C. § 271(d)(4).

entitled to serve the customer, albeit not necessarily at end-to-end TELRIC-based pricing. Allowing CLECs to connect, combine, or commingle UNEs with services will ensure that CLECs can offer services throughout a calling area using its own facilities, as well as combining its own facilities with Bell provided UNEs and services where its own network has not yet been deployed.

This scenario allows for a reasonable hierarchy of access rights and obligations at varying cost gradations (or degradations, if you will). Where the CLEC has its own facilities, it will experience the cheapest costs and the most control; where the CLEC has to rely on some combination of its own facilities and Bell-provided UNEs, it will experience somewhat higher costs and somewhat less control; where the CLEC has to rely exclusively on Bell-provided UNEs, it will experience even higher costs and even less control; where the CLEC has to rely on some combination of Bell-provided UNEs and Bell-provided services, it will experience even higher costs and even less control; and where the CLEC has to rely exclusively on Bell services, it will experience the highest costs and least control. Each configuration, with varying degrees of control and price, works to the advantage of all parties -- the CLEC, the ILEC, and the customer.

The ability to combine UNEs and services thus ensures that the CLEC can reach all customers, albeit at a relatively higher price and with somewhat less control over the facilities and the customer than if the CLEC had all customers on its own network. For example, the carrier formerly offering service via UNE-P would still be able to deliver service to the same customer even after unbundled switching has been removed as an unbundled element. The carrier would simply combine the UNE transmission with the

switching provisioned pursuant to Section 271, but would pay the Bell Company a higher service rate for access to the Bell switch.

Under this scenario, there is sufficient incentive for the CLEC to move customers over to its own facilities, to bring down costs and increase control, while still ensuring that CLECs can serve a wide array of customers, even those not directly on its own network. Similarly, the Bell Company is rewarded by somewhat higher prices to the extent that a portion of the combined facilities is made available at service, rather than UNE, rates.

With regard to fiber-fed loops capable of delivering broadband services, the Commission seems to have contemplated a similar regime. CLECs are entitled to obtain unbundled copper subloops at TELRIC pricing and combine them with the packetized capabilities of fiber feeder plant priced pursuant to Sections 201 and 202.⁴² The biggest problem here is that the ILEC has little incentive to deal fairly with its wholesale customer to provide access to the packetized fiber feeder that has been removed from the UNE regime. The Commission, consumers, and competition would be well served if the Commission were to state more explicitly the ILECs' obligation to provide just and reasonable access to the packetized channel of the fiber feeder plant, and state more explicitly the ILECs' obligation to connect, combine, and commingle this required service with UNE distribution subloop plant.

The RBOCs claim that they do not want competitors dependent on their network; however, ideally, the RBOCs would prefer that competitors do remain dependent, and so

⁴² *Triennial Review Order* ¶ 253 (“We expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act.”) (citing Verizon’s support for such wholesale broadband offerings).

much so that they are compelled to access the Bell network at whatever rates and terms the Bells dictate.⁴³ What the Bell Companies really want is for everyone to remain on the Bell Network, but at whatever rates and terms the Bells dictate. If the RBOCs are allowed this extreme latitude and control over the last-mile bottleneck facilities, this price point will be at a price where the Bell Company is completely indifferent to whether it provides the retail services to the end user customer, or the wholesale facilities/services to the wholesale customer. Unfortunately, this pricing control makes it uneconomic for any competitor to make use of the essential bottleneck.

V. THE COMMISSION SHOULD ENSURE THAT ILECs DO NOT RECONFIGURE THE NETWORK TO DENY COMPETITIVE ACCESS TO DS-1 AND DS-3 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. 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

⁴³ The Commission must not lose sight of the fact that, whatever the Bells might want, Congress made clear in the 1996 Telecom Act that competitors were to have access to the Bell Network, most particularly local

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 could very easily eviscerate the essential language on access to DS1s and other loops that the Commission labored over in the *Triennial Review Order*. 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*; the Commission concluded that CLECs, at a minimum, must be assured access to the legacy capabilities of the ILEC loop plant, and there is no reason for the Commission to abandon its recent conclusion.

VI. THE COMMISSION SHOULD ENSURE THAT CLECS ARE AFFORDED ACCESS TO DARK FIBER LOOPS.

BellSouth asks that the obligation to unbundle enterprise dark fiber loops be limited to loops that existed as of the effective date of the *Triennial Review Order*.

BellSouth argues that whatever sunk costs and entry barriers exist are the same for all

loops, where the economics of overbuilding the ILEC network simply do not add up.

potential providers, and that both the ILEC and the CLECs face identical revenue opportunities. Removing ILEC obligations to unbundle dark fiber, however, would violate the conclusions and logic adopted by the Commission in ensuring competitive access to enterprise customers. In adopting the dark fiber rules, the Commission clearly recognized the advantages of incumbency and intended to guard against monopoly control over captive business customers that would serve to deny them affordable, innovative services offerings that competition promises. The Commission properly applied the 251(d)(2) impairment analysis and set forth a procedure by which ILECs would be relieved of unbundling obligations where competitive alternatives exist. The ILECs should only be relieved of unbundling obligations for dark fiber once the impairment analysis is satisfied. Otherwise, without competitive alternatives or the ability to build alternative loop facilities, enterprise customers will not experience the benefits of a competitive marketplace.

The Commission's rules ensure that CLECs have access to DS1 and DS3 loops to serve the enterprise market until a demonstration is made that the CLEC would not be impaired without unbundled access. In contrast to inter-office transport facilities, the Commission acknowledged the paucity of alternative loop facilities. In limiting CLECs to 2 DS3s per customer location, the Commission concluded that the CLEC could attach its own optronics to ILEC-provided dark fiber once the CLEC had a customer that needed more than 2 DS3s. To realize this ability for the CLEC to reach customers to deliver more than 2 DS3, the CLEC must have access to dark fiber. The CLEC simply needs the ability to realize the full potential of otherwise fallow loop facilities. The only purpose that could be served by the ILEC's desire to deny the CLEC access to spare fiber strands

is to stifle competition. The Commission must not deny CLECs the ability to attach their “smart” optronics onto ILEC-provide “dumb” fiber strands so that business customers can realize the promise of competitive broadband service and technology.

Alternatively, BellSouth argues that if the Commission does not grant this relief, it should consider defining “end user customer’s premise” for purposes of the fiber loop rule in order to preserve investment incentives and remove uncertainty as to the scope of ILECs’ dark fiber unbundling obligations. The Commission has done just that by indicating in the *Triennial Review Order* and its accompanying rules that FTTH relief applies only in the context of the mass market loop unbundling rules. The Commission has made very clear that these rules are not intended to deny CLECs full access to fiber to deliver DS1s, DS3 and dark fiber to business customers.

VII. THE COMMISSION MUST ENSURE COMPETITOR ACCESS TO LOOPS TO SERVE BUSINESS CUSTOMERS.

Under no circumstances should the Commission allow any relief granted to deploying fiber to residential consumers to contaminate the growing competitive marketplace for business customers. Small and medium business customers will not have a choice of competitive carriers if CLECs do not have equal access to ILEC-controlled loops. Wireless is nowhere near being a competitive option to offer integrated voice and data services to small and medium sized business customers. Certainly, cable does not offer the ubiquity and quality required to serve the small/medium business market. If small/medium business customers are lumped in with residential consumers, they will simply end up subsidizing FTTH deployment for the benefit of residential users.

Extending FTTH relief to the small/medium business market would essentially eviscerate any competition in this market sector. These small and medium-sized businesses are desperate for competitive alternatives. Without the CLEC ability to access the ILEC's last-mile transmission facility and drive innovation, small business customers will be captive to a monopoly provider with no incentive to innovate. Note that the Bells rarely point to cable as a viable substitute in the business MTE space. The Bell Companies historically pointed to the success of alternative last-mile providers like Winstar, Teligent, ART, and other fixed-wireless carriers as evidence of competition in small/medium/MTE space. These services are no longer viewed as such a threat to ILEC monopoly service to small and medium-sized businesses. As such, we do not see many references from the Bells to these intermodal competitors. Now the Bell Companies are forced to grasp at straws, pointing to speculative technologies like satellite and power line providers of telecom services.

There are a large number of assumptions and requirements to make a FTTH model work; however, whether or not a carrier must have to unbundle those facilities is not critical to the business plan. No ILEC wants to provide access to its network to its competitors, but that is not a factor in determining the viability of a fiber deployment proposal. The key requirement is that convergence in the industry will take hold and that a carrier can gain a significant market share of three revenue streams - voice, video and high speed data. Without all three, fiber deployment might not be viable. There must be significant household density per mile of fiber. The demographics of the potential customer base are important – high speed data users along with high spenders on video entertainment. Capital costs have just recently come down enough to make this possible.

When one looks at the requirements for profitability, what sticks out is how important the video piece is, making FTTH squarely a residential play. The dry cleaner in the middle of a residential neighborhood is not going to subscribe to HBO and does not need the huge bandwidth levels that are needed for video. Why push FTTH to them when they would be much better off if there is competition in the voice and high speed data markets to help lower costs and improve quality?

VIII. THE COMMISSION SHOULD ENSURE THAT CUSTOMERS DO NOT LOSE EXISTING COMPETITIVE SERVICES WHENEVER THE ILEC MIGRATES A CLEC CUSTOMER ONTO FIBER.

In the event the Commission decides to revisit the FTTH rules adopted in the *Triennial Review Order*, ALTS suggests that the Commission consider clarifying a single, very limited aspect. In the *Triennial Review Order*, the Commission gave ILECs that overbuild with fiber the option to either (1) keep the existing copper loop connected to a particular customer after deploying FTTH; or (2) in situations where the ILEC elects to retire the copper loop, to provide unbundled access to a 64 kbps transmission path over its FTTH loop.⁴⁴ However, ALTS is convinced that the Commission's rules on copper retirement and the 64 kbps capacity limitation on fiber-to-the-home overbuilds allow the ILECs too much latitude and will cause serious disruption to existing consumers of competitive services. Surely the Commission did not intend to allow ILECs to dislocate the embedded base of CLEC customers now receiving services requiring more than a 64 kbps circuit. Thus, ALTS requests that the Commission make clear that the *Triennial Review Order* was not intended to deprive existing customers of their existing services.

While ALTS does not support the conclusions adopted in the *Triennial Review Order* related to access to fiber-fed loops, ALTS is not using this reconsideration proceeding to seek broad redress on these disturbing, anticompetitive conclusions. However, in order to ensure that CLEC customers are not unfairly denied continued access to the services they currently receive, ALTS would like to take this opportunity to request that the Commission make a minor clarification to a rule that will now drastically limit CLEC access to the functionalities of overbuilt fiber-to-the-home at the whim of the ILEC and with little or no warning to the CLEC or its customer.

With the inconsequential addition of minor changes to the network modification notification rule, the ILECs have been given *carte blanche* to dislocate existing CLEC customers. The ILEC need only determine that it wants to retire a copper loop, and the customer obtaining anything greater than a single POTS line is relegated to a voice channel if the customer chooses to continue its service with the CLEC. There is no end to the gamesmanship that the ILEC could play with such authority. For example, an ILEC simply has to pinpoint a valued CLEC DSL customer, notify the Commission that it intends to retire the copper loop, and, *voilà*, the DSL customer loses its competitive broadband service. Similarly, when an ILEC decides to overbuild FTTH to a location where a CLEC currently provides two POTS lines to a customer, , the CLEC customer would be relegated to a single POTS line. Moreover, as the notification process appears to be interpreted by ILECs, it is virtually impossible to determine which lines and which customers are, in fact, affected. Thus, the CLEC and its customer essentially have no forewarning of service discontinuance.

⁴⁴ *Triennial Review Order*, ¶ 277.

Whiles ALTS believes fair competition demands that CLECs continue to have access to ILEC-deployed fiber, clearly the ILECs should not be permitted to unilaterally disconnect CLEC customers with little warning. Even the High Tech Broadband Coalition proposal, which was used as the basis for the rule preserving access to existing copper, emphasized the need for CLECs to maintain access to existing non-packet loop capabilities.⁴⁵ This proposal intended to establish a copper retirement process that allowed the CLEC and regulators some leverage to negotiate fair access to the functionalities of new fiber, at least to ensure minimal disruption to existing CLEC customers. The minor revision to the network modification rules allow the ILEC to essentially blindside CLECs and their customers. The ILECs have recently begun filing network modification notices with the FCC that reveal no useful information to CLECs or their customers conceivably affected by the notices of copper retirement.⁴⁶ The notices are so vague that there is no way to tell if the retirement is customer affecting. In addition, the notices are sent via ordinary mail. As a result, CLECs usually get such notice long after any 9-day window would close. The only alternative for a CLEC would be to review daily each and every network modification notification filed and guess whether one of its existing customers is implicated. The ILEC will undoubtedly contend that such vague notification to the Commission without specific, timely notification to the CLEC and its customer, that a particular line will be retired, is sufficient to dislocate a CLEC customer. Such power to disrupt the services obtained by a CLEC customer

⁴⁵ See fn 815, citing Letter from Derek. R. Khlopin, HTBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Attach. 1 at 1 (filed Jan. 24, 2003).

⁴⁶ See, e.g., Public Notice, *Wireline Competition Bureau Network Change Notification filed by BellSouth*, Report No. NCD-839 (rel. September 29, 2003); Public Notice, *Wireline Competition Bureau Short Term Network Change Notification Filed by Qwest*, Report No. NCD-840 (rel. September 29, 2003); Public

cannot be what the Commission envisioned by preserving only a single 64 kbps channel in fiber-to-the-home overbuilds. This is certainly not the approach the Commission adopted in either the line sharing or UNE-P migration context. The Commission's rules with regard to continued competitor access to consumers dislocated by fiber overbuilds is entirely inadequate to ensure that CLEC customers continue to obtain access to the services they were receiving over copper loops.

Unlike the High Tech Broadband Coalition proposal, the Commission allows competitors and regulators virtually no say over when and how ILECs may retire copper. CLECs have at most a 9-day window to determine whether any of their existing customers are affected by an ILEC's decision to retire copper. After that point, it is entirely unclear what recourse the CLEC might have to convince the Commission to act to ensure that the consumer will continue to obtain the same service it had received over the soon-to-be-retired copper loop. Because of this, the ILEC inordinate power to dislocate existing CLEC customers who obtain anything more than POTS.

Even where the FCC has explicitly eliminated line sharing from the national list of unbundled network elements, the FCC made sure to minimize disruption to the customers that obtain xDSL service through line shared loops and to provide a reasonable glide path to CLECs currently availing themselves of the line sharing UNE.⁴⁷ In the context of the UNE-P analysis, the Commission established a mechanism to migrate existing customers off of ILEC-provided unbundled switches that would ensure minimal

Notice, *Wireline Competition Bureau Network Change Notification Filed by SBC Communications*, Report No. NCD-835 (rel. September 29, 2003).

⁴⁷ *Triennial Review Order*, at ¶ 277.

disruption of existing CLEC customers.⁴⁸ The FCC found it reasonable to allow CLECs to transition their mass market customers off of unbundled switching over the course of a three-year period.⁴⁹ The Commission also notes in the *Triennial Review Order* that it has required transition mechanisms in other contexts in the past. Most notably in establishing a three-year interim intercarrier compensation regime for ISP-bound traffic, the Commission stated that it would be “prudent to avoid a ‘flash cut’ to a new compensation regime that would upset the legitimate business expectations of carriers and their customers.”⁵⁰

The Commission applied a similar approach in the case of phasing-out the line sharing UNE and in UNE-P customer migrations, but neglected to apply the same logic when considering CLEC continued access to the capabilities of the copper loop in a fiber overbuild scenario. As with line sharing and UNE-P migration, it seems entirely appropriate to fashion a similar transition mechanism to enable CLECs to migrate their existing customers to alternative arrangements and modify their business practices and operations going forward. A flash cut to a single POTS line would cause dramatic and unnecessary disruption to CLEC customers. Furthermore, the mere specter of being downgraded to a single 64 kbps channel, possibly without warning or notice, could essentially chill would-be CLEC customers from obtaining CLEC services, when the prospect of continued service is so suspect.

⁴⁸ *Triennial Review Order*, at ¶ 532.

⁴⁹ Fn 1630 (“[P]roviding a sufficiently long transition for the embedded base of customers should have the effect of encouraging competitive entry and investment in the future. Without such a transition, potential entrants might fear that investments they make in facilities, office systems, and marketing would be stranded if future unbundling decisions suddenly made their business plans no longer viable.”).

⁵⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9186-87, ¶¶ 77-78 (2001) (*ISP Remand Order*).

Surely the Commission did not intend to dislocate CLEC customers (at least existing CLEC customers) obtaining services that require anything more than a 64 kbps channel. Optimally, the Commission should modify its rule to parallel its line sharing customer-grandfathering rule. Pursuant to such a rule, existing customers would have the ability to continue to receive the same services, or the functional equivalent, that they received prior to the ILEC's notification to retire copper.

Alternatively, the Commission should establish a glide path -- perhaps a three-year transition akin to that set forth in the UNE-P customer migration discussion -- to ensure minimal disruption to existing consumers of competitive services.

At a minimum, the Commission must ensure that CLECs and their customers are not blindsided by ILEC decisions to retire copper without an opportunity to contest such retirement or negotiate fair access after copper retirement. The current network modification notification rules do not ensure such contestation or negotiation opportunity, but rather leave consumers of existing CLEC customers at the mercy of the ILEC. At a minimum, the Commission should extend the period of time during which CLECs and their customers may contest copper retirement once they receive notice from the ILEC. Furthermore, the Commission should ensure that ILECs directly inform CLECs and their customers in a clear and timely manner of which copper lines are subject to retirement. Finally, the Commission should establish a more neutral procedure to allow CLECs and customers to challenge copper retirement and to allow CLECs to negotiate fair access to fiber facilities to, at least, preserve the level of service they have been offering the dislocated customer.

The current consumers of CLEC services are the courageous, early-adopters that have recognized the benefits of differentiated competitive offerings. These customers must not be penalized for their attempts to lead the way in fulfilling the promises of the market-opening provisions of the Telecom Act. The specter of losing CLEC-provided services requiring anything more than a 64 kbps channel does nothing to instill in American consumers the faith in a competitive telecommunications future.

IX. THE COMMISSION SHOULD COMPEL ILECS TO IMPROVE THE SUBLOOP ORDERING AND PROVISIONING PROCESS.

Although the *Triennial Review Order* requires ILECs to provide competitive access to subloops, CLECs have tried and failed to access subloop facilities. The Commission went into great detail in the *Triennial Review Order* establishing procedures to determine when loop cutover processes are sufficient to serve as a viable substitute for UNE-P. Conversely, the Commission devoted no time to considering how CLECs could access UNE subloops. If facilities-based competition is to take root in an environment where CLECs are not entitled to access to fiber feeder plant, the Commission must ensure timely, efficient, and cost-effective provisioning of unbundled subloops with some rules ensuring that CLECs can adequately use these subloops and connect, combine and commingle them with fiber feeder plant. ALTS suggests that the Commission, at a minimum, take this opportunity, while reviewing the fiber loop access rules, to ensure that CLECs are guaranteed fair access to copper subloops, particularly where ILECs do not provide fair access to the entire loop.

CLECs do not have adequate access to loop architecture data. Information on where remote terminals (“RTs”) are located and which customers are served by those remotes is impossible to come by. The minimal tools provided by the ILECs are inaccurate and incomplete. Even if a CLEC wanted to collocate at additional remote locations, it would be impossible without sufficient data on which to plan network configuration and identify affected customer areas to justify devoting resources to the effort. Ordering subloops from the RT is a painful process. In many cases the ILEC cannot even tell when a loop to specific customer address should be ordered from the host switch or the remote location. In other cases CLECs are instructed to order subloops but the ILEC is unable to provide the CLEC with appropriate paperwork. Without significant improvements in subloop information and ordering processes, CLECs will never be able to avail themselves of the Commission subloop rule, subloop access will never serve as a viable substitute for access to the entire loop, and CLECs will never be able to expand their networks beyond central offices. Furthermore, given that CLECs are not eligible for the packetized functionality of a fiber-fed loop, CLECs will not be able to serve customers where they cannot get fair access to the copper subloop.

CONCLUSION

For the foregoing reasons, the Commission should reject BellSouth's Petition for Reconsideration, as well as the petitions parroting BellSouth's anticompetitive proposals.

Respectfully Submitted,

/s/

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November 6, 2003