Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

RESPONSE OF VERIZON TO PETITIONS FOR RECONSIDERATION

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TABLE OF CONTENTS

Page

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Introduction and Summary

Various parties have filed petitions for reconsideration addressing four categories of rules in the *Triennial Review Order*[1]: new broadband facilities, commercial mobile radio service ("CMRS") issues, line sharing, and the unbundled element platform ("UNE-P"). As discussed below, Verizon[2] urges the Commission to clarify it rules governing new broadband facilities in certain respects. The remaining petitions for reconsideration, which merely rehash the same arguments that the Commission has already considered and rejected, should be denied in their entirety.

New Broadband Facilities. The Commission should grant the petitions for reconsideration or clarification by BellSouth, SureWest Communications, and the U.S. Internet Industry Association ("USIIA"), which seek to make the Commission's rules governing broadband facilities consistent with the Commission's stated goal to "eliminate most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire." *Order* ¶ 4. The *Order* contains a number of ambiguities that could be interpreted to require broadband unbundling in a number of circumstances, and these ambiguities risk creating a patchwork of broadband unbundling requirements, with obligations varying from state-to-state, neighborhood-to-neighborhood, building-to-building, and even customer-to-customer. Such requirements can impact the design, efficiency, and, ultimately, the viability of deploying broadband networks. And, even where

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, FCC 03-36 (rel. Aug. 21, 2003) ("*Order*"), *petitions for review pending, United States Telecom Ass'n v. FCC*, Nos. 03-1310 *et al*. (D.C. Cir.).

[2] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc. listed in Attachment A.

these requirements do not apply directly, they impede the ability to design a uniform and efficient network, which makes the already risky economics of making significant investment in this new technology even more difficult. As a result, such requirements undermine the incentives to deploy broadband facilities and increase costs to consumers where they are deployed.

The Commission itself has found that the application of unbundling obligations "to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent [local exchange carriers ("LECs")] and the incentive for competitive LECs to invest in their own facilities, *in direct opposition to the express statutory goals authorized in section 706 [of the Telecommunication Act of 1996* ("1996 Act")]." *Id.* ¶ 288 (emphasis added). Accordingly, the Commission must ensure that 47 U.S.C. § 271 is not used to impose independent unbundling obligations for broadband facilities that do not arise under 47 U.S.C. § 251, because such obligations would have precisely the same negative effects on broadband deployment that the Commission correctly concluded would result from an unbundling requirement under section 251. The Commission should also clarify that ILECs need not combine facilities or services unbundled pursuant to section 271 with network elements unbundled pursuant to section 251. In addition, the Commission should clarify that mass-market customers in multi-unit premises are part of the mass market and that deploying fiber to such buildings qualifies as fiber to the premises if the fiber extends to the basement of the building. The Commission should adopt a national bright-line test that defines the mass market broadly in order to promote broadband deployment or, better yet, should eliminate unbundling requirements on dark fiber loops in the enterprise market to encourage deployment and competition to the greatest possible extent.

CMRS Issues. AT&T Wireless, T-Mobile, and Nextel, along with the Cellular Telecommunications and Internet Association (collectively, the "CMRS Carriers"), seek reconsideration of three aspects of the *Order*. The Commission should deny their petitions. First, the Commission correctly held that the dedicated transport UNE includes only facilities *within* an ILEC's network; for this reason, the link between an ILEC's central office and a CMRS carrier's base station does not qualify as dedicated transport. Nor do the CMRS Carriers provide any basis for the Commission to modify its definition of either the dedicated transport or local loop UNEs to provide CMRS carriers with unbundled access to this link – they make no attempt to show that they are impaired without unbundled access to this link. Second, if the CMRS carriers wish to obtain combinations permitted by section 51.318 of the Commission's rules, they should comply with the service eligibility requirements in that section just as CLECs must do. Again, the CMRS Carriers have provided no justification for crafting special rules for their benefit – the few requirements they take issue with are equally applicable to CLECs and CMRS carriers. Third, the Commission correctly concluded that it should not apply a "fresh look" to relieve carriers from their long-term special access contracts. Only Nextel challenges the Commission's determination in this regard, but it simply repeats the same tired arguments that the Commission previously found unpersuasive.

Line Sharing. EarthLink seeks reconsideration of the Commission's decision not to require incumbent LECs to offer access to the high-frequency portion of the loop ("HFPL") on an unbundled basis at zero (or near-zero) cost. Its petition should be denied. In vacating the Commission's previous line-sharing rules, the D.C. Circuit directed the Commission to reconsider the issue in light of the competitive context – including, critically, the presence of intermodal competitors. In light of the record evidence that cable companies serve nearly two-

thirds of the market and that line sharing has never been a significant competitive factor in the marketplace, the Commission was fully justified in finding that the costs of line sharing outweigh the benefits and that the *unavailability* of mandatory line sharing will encourage the deployment of new technologies.

EarthLink itself has agreements to provide service over cable networks operated by Charter, Comcast, and Time Warner, thus belying any suggestion that it has no alternative to digital subscriber line ("DSL") service. Moreover, the absence of line sharing does not impair CLECs even in their provision of DSL because most CLEC DSL customers are served via stand-alone copper loops rather than by line sharing. And, even with regard to wholesale DSL service, Verizon is committed to dealing with independent Internet service providers ("ISPs") like EarthLink on negotiated, commercially reasonable terms – but not to allowing ISPs to ride its network for free.

The Commission appropriately based its impairment analysis on the availability of revenues from a full range of services that can be provided using a loop, because rules requiring line sharing would skew competitive LECs' incentives away from making efficient use of the entire loop. Although EarthLink questions the viability of video-via-DSL services, it does not question the availability of revenues from other sources, including from voice telephony.

The Commission has already established a generous three-year transition period for the transition from line sharing to paying full loop costs. Nevertheless, EarthLink proposes that the Commission defer the increase in line-sharing loop charges indefinitely – a proposal that the Commission should reject as a shameless delaying tactic. The Commission's findings that carriers are not impaired without unbundled access to the HFPL and that mandatory line sharing

would produce skewed entry incentives preclude the open-ended extension of the previous, *vacated*, line-sharing regime that EarthLink seeks.

UNE-P Issues. The National Association of State Utility Consumer Advocates ("NASUCA") urges the Commission to ignore the mandate of the D.C. Circuit in the *USTA* case[3] and to embrace the policy of "maximum unbundling" even more directly than it has already done. The petition simply cannot be squared with the governing legal standard and should be denied.

Discussion

I. The Commission Should Eliminate All Remaining Regulatory Disincentives To The Deployment Of Broadband Facilities

If the *Order* makes one point clearly with respect to broadband, it is the importance of freeing the ILECs from any unbundling requirement that would dampen "incentive[s] to deploy fiber (and associated next-generation network equipment, such as packet switches and [digital line carrier ("DLC")] systems) and develop new broadband offerings." *Order* ¶ 290. With respect to the provision of broadband to *mass-market* customers, the Commission found that cable operators, not local telephone companies, are the incumbent providers, with cable modem service the "most widely used means by which the mass market obtains broadband service." *Id.* ¶ 262. The *Order* also makes clear that there is no legal basis for imposing unbundling requirements on broadband facilities, because "competitive LECs have demonstrated that they can self-deploy" such facilities and are in fact "currently leading the overall deployment." *Id.* ¶¶ 275, 279; *see id.* ¶¶ 538-539.

[3] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), *cert. denied*, 123 S. Ct. 1571 (2003).

Consistent with these findings, the *Order* aims to "eliminate most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire." *Id.* ¶ 4. The Commission's goal is to provide ILECs with "certainty that their fiber optic and packet-based networks will remain free of unbundling requirements," so that they "will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market." *Id.* ¶ 272. This approach best fulfills the goals of the 1996 Act, particularly section 706, which "requires the Commission to encourage deployment of advanced telecommunications capability." *Id.* ¶ 290. As the Commission notes, applying unbundling obligations "to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, *in direct opposition to the express statutory goals authorized in section 706*." *Id.* ¶ 288.

Despite these holdings, the *Order* contains a number of ambiguities that, if not clarified, would create uncertainties that could, at the very least, slow broadband deployment and, at worst, could be interpreted to require broadband unbundling in a number of circumstances and thereby undermine the Commission's goal of promoting broadband deployment. Verizon accordingly agrees with the petitions that urge the Commission to resolve these ambiguities and make clear that *Order* does not require unbundling of broadband facilities. *See* SureWest at 2-9; USIIA at 3-10; BellSouth at 9-10, 12-15, 16-17. As demonstrated below, this approach is consistent both with the law and with the factual record developed in this proceeding. Moreover, this approach is essential in order to preserve the incentives for carriers to invest in broadband facilities to the greatest possible extent.

A. The Commission Should Not Impose Any Independent Broadband Unbundling Obligations Pursuant to Section 271

The Commission based its determination to "eliminate most unbundling requirements for broadband" on its finding that, under section 251(d)(2), competing providers would not be impaired without access to those broadband facilities. *See, e.g.*, *Order* ¶¶ 4, 273, 288, 537. The Commission further concluded that requiring broadband unbundling would be affirmatively harmful and contrary to the goals of the 1996 Act because it would deter broadband deployment by both incumbent and competing carriers alike. *See, e.g.*, *id.* ¶¶ 3, 272, 278, 290, 541.

A different section of the *Order*, however, construes section 271 to impose unbundling obligations that are independent of those under section 251 and that continue to apply when particular elements do not meet the impairment standard under section 251. *See id.* ¶¶ 653-655. Nothing in this section of the *Order* actually states that broadband facilities are in fact subject to independent unbundling obligations under section 271. While not addressing section 271 specifically, the public statements on broadband unbundling by the Commissioners (including those who opposed the Commission's decision) suggest that the *Order* requires no broadband unbundling at all.[4] Although the *Order* discusses the relationship between sections 251 and 271

[4] *See, e.g.*, Separate Statement of Chairman Michael K. Powell at 1 (Feb. 20, 2003) ("I have long stated that broadband deployment is the most central communications policy objective of our day. . . . [The *Triennial Review*] decision makes significant strides to promote investment in advanced architecture and fiber by removing impeding unbundling obligations."); Press Statement of Commissioner Kathleen Q. Abernathy at 1 (Feb. 20, 2003) ("I strongly support the Commission's decision to exempt new broadband investment from unbundling obligations."); Commissioner Kevin J. Martin's Press Statement on the Triennial Review at 1 (Feb. 20, 2003) ("The action we take today provides sweeping regulatory relief for broadband and new investments. It removes unbundling requirements on all newly deployed fiber to the home."); Press Statement of Commissioner Michael J. Copps at 2 (Feb. 20, 2003) ("[A]s incumbents deploy fiber anywhere in their loop plant – a step carriers have been taking in any event over the past years to reduce operating expenses – they are relieved of the unbundling obligations that Congress imposed to ensure adequate competition in the local market."); Separate Statement of

at some length, *see id.* ¶¶ 649-667, nowhere does it even mention broadband, let alone confront the special need to protect broadband investment incentives from any unbundling obligations that might persist under section 271 even after the Commission has ended them, as harmful to competition, under section 251.

As USIIA and BellSouth correctly urge, the Commission must resolve the uncertainty that arises from the sharply different approaches taken in these two different sections of the *Order*. *See* USIIA at 5-6; BellSouth at 10-12. Imposing unbundling obligations under section 271 would have precisely the same negative effects on broadband deployment that the Commission correctly concluded would result from an unbundling requirement under section 251.[5]

First, any obligation to provide access separately to the various components of an integrated broadband network architecture necessarily would impose significant redesign requirements, result in suboptimal technology, and add cost, inefficiency, and delay to the already-risky deployment of these new technologies. Although it has been possible to compartmentalize legacy circuit-switched networks into highly distinct "loop," "switching," and "transport" elements, the same is not true of next-generation packet-switched networks. For example, an analog unbundled loop has a dedicated path or channel that can be routed directly to

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Commissioner Jonathan S. Adelstein at 3 (Feb. 20, 2003) ("[T]he portion of the [Commission's new rules] that does not require unbundling of fiber to the home loops for brand new builds may make a lot of sense.").

[5] Although the Commission decided that services or facilities unbundled pursuant to section 271 need not be sold at the rock-bottom TELRIC prices required for network elements unbundled pursuant to section 251, the prices are nevertheless subject to the requirements of section 201. *See Order* ¶ 656. These requirements create an opportunities for competing carriers to game the regulatory process, thereby imposing additional uncertainty and costs on the ILECs who deploy such facilities and services.

a CLEC's collocated facility. In a broadband system, the efficiency of the packetized technology derives in part from the fact that the packets from various end users flow over virtual channels, undifferentiated until they reach the destination packet switch. Consequently, imposing an obligation to provide access to individual components of a next-generation network architecture would require a costly redesign of the network to create access points for those various components. For example, in order to provide an unbundled loop that is directed to a competitor's facilities, Verizon would have to redesign the network and somehow insert additional equipment in the local office that is capable of performing an intermediate packet-switching function to direct the packets to another carrier. How, exactly, this could be done is far from obvious.

Second, there is much more to the deployment of next-generation networks than laying fiber or deploying packet switches, though those are obviously enormous tasks standing alone. One particularly critical aspect is the development and deployment of the new systems necessary to operate these new networks. These systems are one of the major cost components of deploying these new networks. Imposing unbundling obligations, even if only for a subset of customers, obviously would require the design and development of new systems to cope with the complex requirements of unbundled access to piece parts of next-generation technology – with all the attendant costs of "the tangled management inherent in shared use of a common resource." *USTA*, 290 F.3d at 429. If unbundling were required, these systems would have to provision, track, bill, accept orders, and provide maintenance access for multiple providers using these various individual broadband elements. Verizon alone already has spent hundreds of millions of dollars in modifying existing operations support systems ("OSS") to handle unbundling requirements for narrowband network elements. For broadband, the requirements

would both increase the costs of new systems and reduce their benefit by sacrificing efficiency and quality, all of which further undermines the incentives to deploy.

Third, experience has also shown that any unbundling obligation evolves over time as it is further defined and interpreted, which would add yet another new layer of uncertainty and financial risk that would only add to the cost and delay associated with the need to redesign the network and accompanying systems. Indeed, in the case of both narrowband and broadband facilities, ILECs have been subject to a constantly shifting range of requirements implementing the section 251 unbundling requirements, and there is no reason to believe that any section 271 obligations would be different in this respect. These changing requirements add still further costs and complexities as ILECs are forced to modify both their underlying networks and the accompanying network operations and support systems to comply. Transferring this experience to broadband would add yet another layer of uncertainty and financial risk that would undermine deployment. And, of course, these costs, risks, uncertainties, and delays would apply solely to the Bell operating companies ("BOCs") – and not to their cable competitors that currently dominate the broadband market.

Finally, imposing broadband unbundling obligations pursuant to section 271 would exacerbate all of these negative effects by subjecting companies like Verizon to different obligations throughout its network. Because a large part of Verizon's network consists of the former GTE territories that are not subject to section 271, Verizon would face a situation where some of its ILEC affiliates are subject to unbundling obligations while others are not. In some cases, these affiliates may serve adjacent territory or at least the same state. This could mean that Verizon would have to design and deploy two different kinds of broadband networks and systems to support those networks – one for the ILECs subject to 271, and one for the ILECs that

are not. This could add considerably to the costs of deployment and would prevent Verizon from taking advantage of the many efficiencies involved in purchasing, operating, and maintaining a single set of facilities and systems.

Given the significant costs associated with unbundling broadband facilities, and the Commission's silence on the application of section 271 in the broadband context, it is not clear from the *Order* whether the Commission actually intended to require unbundling of broadband facilities and services pursuant to section 271. It is also far from clear that any separate unbundling obligations that might be imposed under section 271 would properly apply to broadband facilities in the first place. In order to remove any ambiguity on this score once and for all, the Commission should forbear from applying any unbundling requirements that section 271 might be read to impose on broadband. Indeed, the *Order* already establishes the complete legal and factual predicate for the Commission to take this action. As noted above, the Commission eliminated broadband unbundling obligations on the grounds that they are both *unnecessary* (because ILECs generally are running well behind other carriers in the broadband rollout and have no inherent advantages in deploying these facilities) and affirmatively harmful (because the burdens of regulation create disincentives for ILECs and CLECs alike to invest in broadband infrastructure). Those determinations are equivalent to the three core findings required for forbearance under section 10(a) of the Communications Act of 1934: continued unbundling is unnecessary for the protection of either consumers or other carriers (47 U.S.C. § 160(a)(1), (2)), and forbearance is plainly in the public interest (*id.* § 160(a)(3)). Section 706(a) provides still further support by singling out broadband for special attention and by "direct[ing] the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services."

Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, ¶ 69 (1998).

Moreover, section 10(d), which conditions forbearance on a finding that "the requirements of section . . . 271" have been "fully implemented," 47 U.S.C. § 160(d), poses no obstacle to forbearance because the Commission has already made that very finding. The "requirements" at issue are those of section 271's competitive checklist. The Commission can grant section 271 authorization – as it has now done for 47 states and the District of Columbia – only after expressly determining that a Bell company has in fact "*fully implemented* the competitive checklist." *Id.* § 271(d)(3)(A)(i) (emphasis added). It is not mere coincidence that Congress used the exact same term in both section 10(d) and section 271 to describe the conditions for deregulatory relief. The " 'normal rule of statutory construction' " is " 'that identical words used in different parts of the same act are intended to have the same meaning.' " *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). There is no getting around that rule here, because section 10(d) not only coexists in the same legislative enactment as section 271, but explicitly *cross-references* section 271 in the very forbearance limitation at issue. It is inconceivable that Congress used the same language to mean two contrary things in these two interrelated sections of the 1996 Act.

Finally, it is particularly appropriate to exercise that authority to forbear from any stand-alone broadband unbundling obligations under section 271 – not just because unnecessary unbundling obligations are particularly counterproductive in the broadband context, but also because the section 271 checklist was never designed to interfere with the Bell companies' deployment of next-generation packet-switched networks. Instead, the checklist was designed to open up the local market by requiring the Bell companies to provide access to elements of the

legacy circuit-switched networks before entering the long-distance business, a concern that does not arise here. As the D.C. Circuit has noted, for example, the purpose of section 271 is to force "the BOCs to open their local markets to competition before allowing them to enter the long distance services market in-region, because, due to the unique infrastructure controlled by the BOCs, they could exercise monopoly power." *BellSouth Corp. v. FCC*, 162 F.3d 678, 689-90 (D.C. Cir. 1998). AT&T has likewise acknowledged that the purpose of the section 271 checklist is merely to "establish[] a 'safety net'" that, unlike section 251(c), "requires only access to a specific core group of elements" to deal with the "enormous monopoly power that the [BOCs] had accumulated over their local markets during the preceding several decades." AT&T Reply at 3, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c),* CC Docket Nos. 01-338 *et al*. (FCC filed Sept. 18, 2002). Consistent with this view, the Commission itself has repeatedly construed the section 271 checklist items *not* to require access to *broadband-related* categories of the loop and switching elements except where the Commission has independently "exercise[d] [its] rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access."[6]

[6] *See, e.g.*, Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, ¶ 327 (2000) (rejecting AT&T's complaints about denial of access to SWBT's splitters on the ground that, insofar as a splitter is "part of the packet switching element[,] . . . we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element"); Memorandum Opinion and Order, *Application by Qwest Communications Int'l, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado et al.*, 17 FCC Rcd 26303, ¶ 371 (2002) (rejecting AT&T's challenge under checklist item 6 on the ground, among others, that "Qwest offers competitive LECs unbundled packet switching in a nondiscriminatory manner when the conditions established by the Commission in the *UNE Remand Order* are met"); Memorandum Opinion and Order, *Application of Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, App. B, ¶ 1 (2001) ("To satisfy its obligations under this

B. The Commission Should Clarify That Any Facilities or Services Unbundled Under Section 271 Need Not Be Combined with UNEs

Verizon agrees with BellSouth that, to the extent that the Commission does require services or facilities to be unbundled – whether broadband or otherwise – under section 271, it should clarify that they need not be combined with network elements unbundled pursuant to section 251. In the *Errata*[7] to the *Order*, the Commission deleted the italicized words from the first sentence of paragraph 584: "we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including *any network elements unbundled pursuant to section 271 and* any services offered for resale pursuant to section 251(c)(4) of the Act." *See Errata* ¶ 27. The Commission's deletion of the reference to elements unbundled pursuant to section 271 confirms the Commission's statement elsewhere in the *Order* that there is no obligation to combine such elements – specifically, in footnote 1990, the *Order* makes clear that "items 4-6 and 10 of section 271's competitive checklist contain no mention of 'combining' and . . . do not refer back to the combination requirement set forth in section 251(c)(3)." *Order* ¶ 655 n.1990. In order to remove any remaining ambiguity about this point, however, the Commission should affirmatively state that the combining of items

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[section 271(c)(2)(B)(vi)], an applicant must demonstrate compliance with the Commission rules effective as of the date of the application relating to unbundled local switching . . . . In the *UNE Remand Order*, the Commission required that incumbent LECs need not provide access on an unbundled basis to packet switching except in certain limited situations."); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al., To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, ¶ 105 (2001) ("To the extent that AT&T and WorldCom in fact seek to expand SWBT's obligations to unbundle packet switching, this issue is the subject of proceedings currently pending before the Commission.").

[7] Errata, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, FCC 03-227 (rel. Sept. 17, 2003) ("*Errata*").

unbundled pursuant to section 271 with UNEs provided under section 251 is not required. *See* BellSouth at 15-16.

C. The Commission Should Ensure That There Are No Unbundling Obligations for Fiber Deployed to Mass-Market Customers

The *Order* states that the Commission will "decline to attach unbundling requirements to the next-generation network capabilities of fiber-based local loops, *i.e.*, those loops that make use of fiber optic cables and electronic or optical equipment capable of supporting truly broadband transmission capabilities." *Order* ¶ 272. The Commission finds that "with the *certainty* that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market." *Id.* (emphasis added). This, in turn, will cause competitive LECs "to seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market." *Id.*

Contrary to these findings, the rules actually adopted in the *Order* do not unambiguously apply to all "fiber-based local loops" supplied to mass-market customers and do not create "certainty that . . . fiber optic and packet-based networks will remain free of unbundling requirements." The rules prohibit unbundling of "fiber-to-the-home loops," which are defined as loops "consisting entirely of fiber optic cable, whether dark or lit, and serving a end user's customer premises." 47 C.F.R. § 51.319(a)(3). As SureWest and BellSouth explain, however, it is not entirely clear whether this definition actually includes fiber serving all mass-market customers. *See* SureWest at 4-5; BellSouth at 9-10.

As a result of this uncertainty, the *Order* threatens to impose significant broadband unbundling obligations on the fiber that ILECs hope to deploy to mass-market customers, thereby undercutting carriers' incentives and ability to deploy these facilities in the first place. Requiring unbundled access to broadband facilities would, as explained above, require a significant redesign of integrated fiber network architectures to create new and artificial points of access to individual components of the network architecture. Likewise, it would require the design and development of costly new systems to manage access at these new access points and development of new operations practices to correspond.

Moreover, imposing broadband unbundling obligations on fiber deployed to a segment of the population not only will make it economically unattractive to serve those affected customers, but also will have a negative effect on the economics of deploying broadband facilities to other customers as well. Given the enormous costs involved in deploying fiber-to-the-premises it is essential to be able to serve as large a customer base as possible. This improves the economies of scope and scale that can be achieved in everything from equipment purchases to the efficient utilization of customer service centers. It also enables Verizon to spread its enormous costs over as large a customer base as possible, while enabling it to earn more revenues by being able to market its services over this large customer base as well.

For all of these reasons, the Commission should clarify (or, if necessary, modify) its rules to ensure that there are no broadband unbundling obligations for fiber deployed to mass-market customers. In this regard, there are a number of important steps the Commission needs to take, each of which is outlined in detail below.[8]

[8] Verizon also supports BellSouth's proposal to eliminate broadband unbundling for fiber-to-the-curb architectures. *See* BellSouth at 1-8.

1. The Commission should adopt a consistent national definition of a mass-market customer for purposes of its fiber-to-the-premises rules

The factual record in the *Triennial Review* proceeding unambiguously establishes that broadband facilities deployed to mass-market customers are fundamentally different from the "legacy network" facilities currently serving those customers. First, the actual and potential competition for broadband facilities is much greater. In particular, cable companies are already competing aggressively in the broadband mass market not only for residential customers but also for business customers, and are the incumbent providers in the mass market. Six of the seven largest cable system operators (which, collectively, represent over 90 percent of consumer cable modem subscribers) already offer broadband services to businesses,[9] and analysts estimate that the number of businesses using cable broadband will more than triple to as many as 2.2 million by the end of 2006.[10] Furthermore, as the Commission notes, the deployment of next-generation broadband networks is "still in its infancy," "competitive LECs are currently leading the overall deployment" of these networks, and incumbent LECs "have no advantages" with respect to the provision of these all-new facilities. *Order* ¶¶ 274, 275.

A second major distinguishing feature of these new broadband networks is that they are used primarily for interstate services – in particular, connecting to the Internet. As the Commission notes, "the mass market has . . . seen competition increase in the provision of broadband services, largely fueled by the popularity of the Internet." *Id.* ¶ 51; *see also id.* ¶¶ 229, 292.

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[9] *See* M. Lauricella, *et al.*, Yankee Group, *Cable MSOs: Ready to Take Off in the Small and Medium Business Market* at 4 (Mar. 2002).

[10] E. Bergstrom & M. Paxton, In-Stat/MDR, *Broadband 2002: DSL & Cable Modem Services Fuel Worldwide Subscriber Growth* at 21 (June 2002) ("*In-Stat/MDR Report*") (613,000 business cable modem subscribers as of year-end 2002

For these reasons, the *Order* correctly made a nationwide determination that fiber deployed to mass-market customers should not be unbundled. In doing so, however, the Commission failed to establish a national definition of mass-market customers for this purpose and instead left considerable uncertainty as to the proper market definition. As initially released, the *Order* limited the definition of "fiber-to-the-home loops" as those "serving a *residential* end user's customer premises." In its subsequent *Errata*, the Commission removed the word "residential" from the definition, in order to make clear that the definition included fiber deployed to businesses as well, which the Commission has correctly concluded are part of the mass market. *See Errata* ¶¶ 37-38; *see also* Opposition of the Federal Communications Commission to Allegiance Telecom's Motion for Stay Pending Review at 13, *Allegiance Telecom, Inc. v. FCC,* Nos. 03-1316 *et al*. (D.C. Cir. filed Oct. 21, 2003) ("nothing in the Commission's discussion of FTTH loops indicates that the FTTH non-impairment finding was limited to residential end users," so the *Errata* "merely conformed the rule to the discussion in the text of the *Order*").

Although the clarification in the *Errata* was both necessary and proper, it does not resolve the uncertainty concerning the extent to which fiber deployed to business customers is subject to unbundling obligations. For one thing, the fact that the *Order* and the rules refer repeatedly to fiber-to-the-*home* loops is itself confusing, since the text of the rule makes clear that it is not limited to homes, but includes other premises where mass-market customers, including businesses, may reside. For another thing, the *Order* fails to define a cut-off or other threshold for including customers within the definition and provides no guidance as to how this determination should be made. *See* SureWest at 6-8; BellSouth at 9.

As to the first issue, the Commission may resolve this easily by globally replacing "fiber-to-the-home" and "FTTH" with "fiber-to-the-premises" and "FTTP." This change merely makes the terminology used in the *Order* and the rules consistent with the clarifications made in the *Errata* and with the factual record on which those clarifications were based.

As to the second issue, the Commission should adopt a consistent national definition of mass-market customers that makes clear that business customers are part of the mass market. In this regard, Verizon agrees with SureWest's proposal (at 7) "to define the mass market as any residence or business customer locations which use up to 48 telephone numbers," which is the equivalent of no more than two DS1 loops. Such a bright-line approach is easy to both apply and verify, and it is warranted for several additional reasons.

First, it is necessary to adopt a bright-line test to define mass-market customers in order to provide the "certainty" necessary to "promote the[] deployment of the network infrastructure necessary to provide broadband services" to these customers. *Order* ¶¶ 272, 278. Only a bright-line nationwide definition will ensure that mass-market customers are defined consistently throughout the country. This is necessary to avoid a patchwork regulatory environment from emerging in which some customers and locations are subject to unbundling, but other similarly situated customers and locations are not. As described above, this kind of regime will impose enormous hurdles and inefficiencies in the design and deployment of next-generation networks, and will have a negative effect on the economics of deploying such networks by reducing the ability of providers to spread costs and earn revenues over the largest possible customer base.

Second, eliminating broadband unbundling for businesses that use 48 or fewer telephone numbers is consistent with the factual record in this proceeding. As with fiber deployment to other mass-market customers, the deployment of fiber to business customers of this size "is still

in its infancy," *Order* ¶ 274, with neither incumbents nor competitive carriers currently providing fiber-based services to this segment of the market. Although incumbent LECs have extensive facilities in place to serve these customers today, those are typically copper facilities. Indeed, business customers of this size typically are at the same locations as and mixed in with residential and other business customers that use fewer numbers, areas where the Commission has acknowledged the ILECs are generally behind CLECs in the deployment of fiber. *See id.* ¶ 275; Ex Parte Letter from W. Scott Randolph, Verizon, to Marlene Dortch, FCC, CC Docket Nos. 01-338 *et al*. (Jan. 10, 2003) (showing that the small businesses that CLECs are serving with one or two DS1s are in the same geographic locations as larger business and residential customers).

Despite all this, carriers that seek to free-ride on the ILEC's future investment in fiber-to-the-premises are likely to claim that the Commission should adopt the same cut-off for the mass market as it has adopted in the context of the unbundled local switching rules. There is no basis for such an approach. To begin with, the Commission did not establish any specific cut-off to delineate mass-market customers for the purposes of the unbundled switching rules, but instead left it up to the states to make this determination. *See Order* ¶ 497; 47 C.F.R. § 51.319(d)(4). Whatever merit this approach may have in the unbundled switching context, it should not be applied in the broadband context. As the Commission has recognized, the need to establish uniform national rules is particularly critical with respect to broadband in order to preserve the incentives needed to spur new investment. Moreover, the whole purpose of establishing a cut-off in the switching context is to distinguish between those customers whose loops are typically not pre-wired to ILEC switches and do not require a hot-cut in order to migrate to a competitor's switch (*i.e.*, enterprise customers) and those customers whose loops *are* pre-wired to the ILEC

switch and do require a hot-cut. This distinction is simply irrelevant for purposes of the fiber-to-the-premises rules.

2. The Commission should clarify that mass-market customers in multi-unit premises are part of the mass market

The Commission correctly recognizes that a key goal of its broadband policy is to promote the "deployment of the network infrastructure necessary to provide broadband services *to the mass market*." *Order* ¶ 278 (emphasis added). The only approach that is consistent with this objective – and that also is consistent with the law and the factual record in this proceeding – is to exempt from unbundling *all* fiber deployed to *all* premises where mass-market customers are located, including multi-unit buildings. Consistent with this view, the *Order* states that the loop "unbundling obligations and limitations for such loops *do not vary based on the customer to be served*." *Id.* ¶ 210 (emphasis added).

In a footnote, however, the Commission appears to equate for purposes of its loop-unbundling obligations mass-market customers that "reside in multiunit premises" with "multiunit premise-based enterprise customers." *Id.* ¶ 197 n.624. The Commission states that "the conclusions we reach for high-capacity loops in the enterprise market apply equally to mass market customers in multiunit premises." *Id.* These conclusions are that lit OCn loops provided to enterprise customers are not subject to unbundling, but that states have the authority to determine on a location-specific basis whether to subject dark fiber loops to unbundling. *See id.* ¶¶ 314-315.

Although the Commission makes a distinction between lit and dark fiber in the context of the enterprise market, it makes no such distinction in its discussion of fiber provided to mass-market customers. Rather, the definition of a fiber-to-the-premises loop expressly includes both

dark and lit fiber, which makes it clear that both are excluded from unbundling. But the fact that the Commission appears to have classified mass-market customers that reside in multi-unit premises as enterprise customers suggests that dark fiber deployed to this significant segment of mass-market customers will be subject to broadband unbundling obligations.

The Commission should take two steps to resolve the ambiguity in the *Order*. *First*, it should make clear that mass-market customers in multi-unit premises are part of the mass market, rather than part of the enterprise market. *See* SureWest at 3-4; BellSouth at 9-10. *Second*, it should clarify that its definition of fiber to the premises applies to any situation where fiber is deployed to a multi-unit premises building, regardless of whether the fiber continues to the individual units within that building. These clarifications are necessary to fulfill the Commission's goal to "promote investment in, and deployment of, next-generation networks" to as broad a geographic base of customers as possible. *Order* ¶ 272.

a. According to the competing carriers engaged in the provision of broadband facilities to mass-market customers, approximately 30-35% of the population currently live in multi-unit premises.[11] It would be inconsistent with the Commission's goal of promoting broadband deployment to the mass market to treat this large segment of the population differently from those that reside in single-unit dwellings. As the Commission has recognized, doing so would reduce the incentives for incumbent carriers to deploy fiber to those customers.

[11] *See, e.g.*, Robert Currey, Vice Chairman, RCN Corporation, Prepared Statement Before the Senate Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, *Cable and Video: Competitive Choices*, 107th Cong., S. Hrg. 107-248, at 31 (Apr. 4, 2001) ("Currey Statement") ("About 30-35% of the total population lives in multiple dwelling units (MDUs), such as apartments, cooperatives or condominiums."); *see also* U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, *United States Summary: 2000; Summary Social, Economic, and Housing Characteristics; 2000 Census of Population and Housing*, Table 9: Units in Structure 2000 (issued July 2003) (27% of the total housing units in the United States are in structures with two or more units).

See, e.g., *Order* ¶ 278. Moreover, by making it less attractive to deploy fiber to a significant segment of the mass market, such obligations would reduce the overall revenues that ILECs could expect to earn from deploying fiber, which would in turn reduce the incentives to deploy fiber to all other customers as well. In addition, even where ILECs did decide to deploy fiber despite these increased obstacles, the costs of doing so would be greater and ultimately would be passed on to consumers in the form of higher prices.

Subjecting multi-unit premises, but not single-unit premises, to broadband unbundling also makes no sense as an economic matter – especially when the cable companies, which already dominate the broadband mass market, and which have strong economic incentives to focus on multi-unit premises, are subject to no comparable unbundling requirement. As the Commission has recognized, it is more economical for competitors to deploy fiber to mass-market customers in multi-unit premises – where customers are highly concentrated – than to deploy fiber to customers that are more dispersed. The Commission properly notes that competitive carriers "usually" target "multiunit premises" precisely because such premises have an aggregated base of customers that provide "sufficient demand . . . to generate a revenue stream that could recover the sunk construction costs of the underlying loop transmission facility." *Order* ¶ 303. Indeed, many of the competitors that have deployed broadband facilities to the mass market have specifically targeted multi-unit premises. For example, RCN has noted that "[t]he ability to serve this sector of the market is crucial because it is generally more profitable due to the large number of subscribers in each MDU."[12] Press reports confirm that RCN is deploying "mainly in apartment buildings."[13]

[12] Currey Statement at 31.

[13] M. Farrell, *Moody's Slashes RCN*, Multichannel News (July 21, 2003).

b. Once the Commission clarifies that no unbundling is required for fiber deployed to multi-unit premises generally, it should additionally clarify that this holds true in any situation where fiber is deployed to a multi-unit premises building, regardless of whether the fiber continues to the individual units within that building. *See* SureWest at 4-5; BellSouth at 9-10. The need for this additional clarification arises because, while the Commission's rules define a fiber-to-the-home ("FTTH") loop as one that consists "*entirely* of fiber optic cable," 47 C.F.R. § 51.319(a)(3) (emphasis added), in some multi-unit premises fiber may be deployed to a central serving terminal in the building's basement and connected from there to individual end user's units through copper wiring. Where the ILEC owns or controls this inside copper wiring, it could be construed to be part of the loop itself, and the entire loop in this scenario could be (mis)categorized as a "hybrid loop" and subject to the unbundling obligations applicable to such loops. This result would be inconsistent with the Commission's acknowledgement elsewhere in the *Order* that, in a multi-tenant building, the customer premises includes "not just the actual premises of end-user subscribers, but also the premises of the property owner," within which the end user's premises is located. *Order* ¶ 343 n.1021. In other words, fiber to the building *is* fiber to the premises and ought to be regulated as such.

Nor is there any reason to classify fiber to multi-unit premises differently depending on who owns the in-building copper wiring. On the contrary, to the extent that the Commission determines that other providers should have access to in-building copper wiring owned by the ILEC, it can and has addressed the issue separately. *See Order* ¶ 354. These rules eliminate any possible concern over the ability of competing carriers to gain access to the copper inside wiring in multi-unit premises and give competing carriers the same ability as ILECs to deploy fiber-to-

the-premises. There is accordingly no basis to distinguish unbundling obligations on these grounds.

Moreover, any approach that imposes unbundling obligations on fiber deployed to mass-market customers based on who owns or controls the inside wiring in that premises would result in rules with arbitrary distinctions between the buildings and locations subject to unbundling and those exempt from such requirements. This will impede the ability of LECs efficiently to design and build fiber networks. As SureWest puts it, the current rules "could lead to the perverse situation where two identical buildings next door to each other could have different regulatory protection based on who owns the in-building wiring." SureWest at 4; *see also* BellSouth at 10. And as SureWest notes, "[a]n efficient network cannot vary its design from building to building. Moreover, plans cannot be made if uncertainty and ambiguity exist about which buildings qualify for unbundling relief and which do not." SureWest at 4. The net effect of such policies will be to discourage ILECs from deploying fiber-to-the-premises in areas where there are multi-unit premises, including areas where there are single-unit premises that happen to be near multi-unit premises. And, as described above, this will impede the ability to serve all other customers as well, both by increasing the costs of any fiber deployment strategy and by decreasing the revenues that can be earned by such a strategy. This is a far cry from the "certainty" that the Commission's rules are meant to promote.

D. The Commission Should Clarify the Requirements Regarding the Unbundling Obligations of TDM Capabilities on Hybrid Loops

Just as the Commission must take additional steps to ensure that its rules do not permit unbundling of fiber-to-the-premises loops, it also must clarify its rules regarding hybrid loops. The *Order* "decline[s] to require incumbent LECs to unbundle the next-generation network,

packetized capabilities of their hybrid loops." *Order* ¶ 288. At the same time, however, the *Order* requires ILECs to continue to provide "the features, functions, and capabilities for TDM-based services over their hybrid loops." *Id.* ¶ 294. The problem is that in some cases ILECs may – for wholly legitimate engineering and economic reasons – deploy hybrid loops that do not have such features, functions, and capabilities, but instead provide *only* "next-generation network, packetized capabilities." Some parties may try to argue that, under the current rules, these sound engineering decisions should be interpreted as an effort to "engineer the transmission capabilities of its network in a manner, or engage in a[] policy, practice, or procedure, that disrupts or degrades access to . . . the time division multiplexing-based features, functions, and capabilities of a hybrid loop." 47 C.F.R. § 51.319(a)(9).

So long as such an interpretation is possible, this rule interferes with the ability of ILECs to design and deploy next-generation networks based on economic and engineering principles. As SureWest proposes (at 8-9), the Commission should accordingly clarify its rules to make clear that ILECs are permitted to deploy hybrid loops without TDM capabilities, and that when they do so there is no obligation somehow to add such capabilities either by reconfiguring its network or by deploying new equipment. *See also* BellSouth at 16-17. This approach is consistent with the Commission's policy of refusing to unbundle DS1 and DS3 loops where there is no TDM capability deployed for those loops. *See Order* ¶ 296. This and the other clarifications discussed above are necessary to "align[] business incentives with the explicit congressional goal of promoting the rapid deployment of advanced services." *Id.* ¶ 285.

E. The Commission Should Eliminate Unbundling Obligations for Fiber Deployed to Enterprise Customers

As noted above, the Commission's rules impose greater broadband unbundling obligations for enterprise customers than for mass-market customers. BellSouth suggests (at 18) that the Commission should merely limit the dark fiber unbundling obligation to enterprise dark fiber loops existing as of the effective date of the *Order*. But, as SureWest explains (at 5), the Commission also could – and should – go one step further and reverse on reconsideration its determination that dark fiber deployed to enterprise customers is subject to unbundling wherever a state commission so finds.

First, this is the only approach that gives meaning to the Commission's holding that its loop "unbundling obligations and limitations for such loops *do not vary based on the customer to be served*." *Order* ¶ 210 (emphasis added). As matters currently stand, the broadband unbundling rules are starkly different for mass-market customers than they are for enterprise customers, and this distinction is based *solely* on the "customer to be served."

Second, the Commission has already recognized that there is more competitive fiber deployed to enterprise customers than to mass-market customers, and that deploying fiber to enterprise customers is economically more attractive than deploying fiber to mass-market customers. For example, while fiber deployed to the mass market is still "in its infancy," *id.* ¶ 227, "the record shows that competitors have built fiber loops to buildings that carry a significant portion of the competitive traffic in certain [metropolitan statistical areas ("MSAs")]," and that "enables them to reach customers entirely over their own loop facilities," *id.* ¶ 298; *see also id.* ¶ 315 ("Competitive LECs have deployed OCn capacity to some commercial buildings nationwide, including Tier II and Tier III markets."). As an executive at one major competitive

fiber supplier, Time Warner Telecom, has recently stated, "while [BOCs] have [a] lot of fiber deployed, I don't know that they have more buildings connected than we do in all cases. In certain markets they may; in others they may not."[14] The Commission also has recognized that the cost of deploying fiber to enterprise customers typically is more attractive than deploying to mass-market customers because "the revenue commitment relative to the cost of constructing that loop facility may result in a positive profit margin for that single customer location." *Order* ¶ 303. Thus, "[i]n the enterprise market, companies are able to target individual buildings and customers." *Id.* ¶ 309. This is borne out by the fact that "there does not appear to be any evidence of demand for incumbent LEC OCn level unbundled loops." *Id.* ¶ 315.

Third, competitive carriers not only have demonstrated their ability to deploy fiber to the enterprise market, but also currently dominate the provision of broadband services to enterprise customers – and they do so with scarcely any reliance on unbundled access to fiber loops. As the Commission has recognized, the enterprise segment of the broadband market is different from other segments of the market in its national scope. It is comprised of customers that typically demand end-to-end services provided across LATAs, states, and often countries. *See, e.g., id.* ¶ 302 ("Enterprise market customers . . . prefer a single provider capable of meeting all their needs at each of their business locations which may be in multiple locations in different parts of the city, state or country."). Today, the largest providers of broadband services to enterprise customers by far are AT&T and MCI. These two carriers control nearly two-thirds of the nationwide market for Frame Relay and ATM, which are the primary broadband services used

[14] *A Conversation with Time Warner Telecom's Mike Rouleau*, Telephony Online (Oct. 29, 2003), *at* http://telephonyonline.com/ar/telecom_conversation_time_warner/index.htm.

by enterprise customers.[15] As one analyst has noted, these carriers "own the U.S. frame relay market, have scale economies and are best positioned to influence users and move the market."[16] These two carriers also dominate the enterprise market as a whole. According to a Merrill Lynch report, for example, AT&T and MCI now control approximately 59% of all corporate accounts.[17] AT&T's Chairman has recently boasted that the company is now "serving virtually all Fortune 1,000 companies"[18] While the Bell companies compete in the provision of these services as well, they are playing catch-up because they had been limited in the right to provide interLATA packet-switching services, despite the fact that customers typically desire a single carrier to provide both intraLATA and interLATA packet switching.[19] As Morgan Stanley has recently found, "the Bells do not yet have the capabilities to compete" in the "large enterprise market."[20]

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[15] *See* R. Kaplan, IDC, *U.S. Frame Relay Services Forecast and Analysis, 2001-2006*, Fig. 4 (Apr. 2002) (AT&T and WorldCom accounted for approximately 68% of the nationwide frame relay market in 2001); R. Kaplan, IDC, *U.S. ATM Services Forecast and Analysis, 2001-2006*, Fig. 4 (June 2002) (AT&T and WorldCom accounted for 44% of the nationwide ATM market in 2001; AT&T and WorldCom accounted for 63.3% of the combined nationwide ATM/frame relay market in 2001, based on revenue).

[16] Stratecast Partners, *ATM and Frame Relay Market Assessment* at 12 (Sept. 2001) ("*Stratecast ATM/Frame Relay Report*").

[17] A. Quinton *et al*., Merrill Lynch Capital Markets, Investext Rpt. No. 7207766, The Telecommunicator – WorldCom Survey Results – Industry Implications – Industry Report at *2-*3 (Feb. 6, 2003).

[18] David Dorman, Chairman and CEO, AT&T, Presentation at Goldman Sachs Communacopia XII Conference, at 4 (Oct. 1, 2003).

[19] As noted by industry analysts and CLECs alike, Bell companies had been limited in their broadband offerings due to restrictions on the provision of interLATA services. *See, e.g.*, *Stratecast ATM/Frame Relay Report* at 12 ("Thus far, the RBOCs have held a very small share of the frame relay market, primarily because they have only been allowed to offer intra-LATA services."); MCI WorldCom, *Metro Frame Relay Service* (WorldCom's Metro Frame Relay service "offers an aggressive price position compared to that offered by LECs. LECs can offer local (intraLATA) service, but they aren't able to cross LATA boundaries or move into other Regional Bell Operating Company (RBOC) territories. WorldCom is in the unique position to

Fourth, the same considerations that led the Commission not to require unbundling of mass-market fiber loops apply equally to the enterprise market. Refraining from unbundling would "promote investment in, and deployment of, next-generation networks," and the resulting "race to build next generation networks and the increased competition in the delivery of broadband services" would benefit enterprise customers just as the Commission found they would benefit mass-market customers. *Order* ¶ 272.

II. The Commission Should Deny The CMRS Carriers' Petitions For Reconsideration

A. The Link Between an ILEC Central Office and a CMRS Carrier's Base Station Is Not a UNE

The CMRS Carriers contend that the Commission should revise the rules it adopted so that they can obtain unbundled access to the link connecting their base stations (or cell sites) with an ILEC central office. The Commission correctly concluded that CMRS carriers cannot obtain this link as a dedicated transport UNE, because it is not within an ILEC's network. *See Order* ¶ 368. The Commission should adhere to that determination here, and it should also reject the CMRS Carriers' alternative claim – which is directly contrary to their arguments before the release of the *Order* – that this link should be available as part of the local loop UNE.

As an initial matter, not one of the CMRS Carriers claims that lack of unbundled access to this link – whether denominated as dedicated transport or a local loop (and, as explained below, it is neither) – "poses a barrier . . . to entry . . . that [is] likely to make entry into a market uneconomic." *Id.* ¶ 84. As the Commission has held, a finding of impairment must precede a

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provide both interLATA (IXC) and intraLATA frame relay service by capitalizing on our wholly-owned nationwide network."), *at* http://www.isp-select.com/MCI/Frame_Relay1.htm.

[20] Morgan Stanley Equity Research, Wireline Telecom Services – *Ice Age II: The Return of the Scenario Analysis* at 34 (May 12, 2003).

decision to order unbundling – it cannot "impose such obligations first and conduct [its] 'impair' inquiry afterwards." *Supplemental Order Clarification*[21] ¶ 16. For this reason alone, the CMRS Carriers' claims should be rejected.

Nor could the CMRS Carriers make a showing of impairment. Prior to the *Order*, CMRS carriers obtained this link, along with other facilities connecting their mobile switching centers to their base stations, through ILEC special access, third-party alternatives, and their own facilities – *not* as UNEs. There can be no serious claim that this lack of unbundled access posed a barrier to entry: there are currently six nationwide, facilities-based CMRS providers, as well as numerous large, regional providers, and 95% of the population can choose from among three or more providers. *See* T-Mobile at 1; *Eighth CMRS Report*[22] ¶¶ 18, 40. As of February 2002, CMRS carriers were serving about 130 million customers – that figure increased to nearly 142 million by December 2002. *See UNE Fact Report*[23] at II-34; *Eighth CMRS Report* ¶ 59. CMRS providers are investing in new facilities, adding customers, and increasing minutes of use, while prices to consumers continue to fall. *See UNE Fact Report* at II-34 to II-37; *Eighth CMRS Report* ¶¶ 59, 64, 70, 91. As these data demonstrate, and as this Commission has repeatedly concluded, the CMRS market is robustly competitive and there is "effective competition" throughout the market, including in rural areas. *Eighth CMRS Report* ¶¶ 12-13; *see* CTIA at 2; *UNE Fact Report* at V-20.

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[21] Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *petitions for review denied*, *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

[22] Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd 14783 (2003) ("*Eighth CMRS Report*").

[23] *UNE Fact Report* (2002), attached to SBC Comments, CC Docket Nos. 01-338 *et al*. (FCC filed Apr. 5, 2002).

Beyond this threshold failing in the CMRS Carriers' claims, their request for reconsideration of this portion of the *Order* should also be rejected because it is a naked attempt at price arbitrage. Indeed, as the CMRS Carriers make clear, they simply want to pay less for the same facility they are currently using, and argue that, in granting their wish, the Commission's analysis "need not be driven by the narrow question of whether the cell site link fits precisely within one of the existing UNE definitions." AT&T-W at 11. This result-oriented approach leads the CMRS Carriers to abandon their earlier insistence that their base stations are switches and that the link from a central office to a base station met the dedicated transport definition in the *UNE Remand Order*.[24] *See*, *e.g.*, AT&T-W Comments[25] at 27-30; VoiceStream Comments[26] at 8-11. Instead, they now adopt the diametrically opposed position that these same base stations are actually end-user premises, so that the link at issue is simply a type of local loop. *See* AT&T-W at 6; Nextel at 8-9. Neither version of their argument has merit.

1. The link between an ILEC central office and a CMRS carrier's base station is not dedicated transport

The definition of the dedicated transport UNE that the Commission adopted in the *Order* moots the prior debate about whether a base station is or is not a switch. *Compare* AT&T-W Comments at 27-20 *with UNE Fact Report* at V-21 toV-22. Because the link between a base station and an ILEC central office is not within the ILEC's network, that link is not part of the

[24] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *vacated and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[25] Comments of AT&T Wireless Services, Inc., CC Docket Nos. 01-338 *et al*. (FCC filed Apr. 5, 2002) ("AT&T-W Comments").

[26] Comments of VoiceStream Wireless Corp., CC Docket Nos. 01-338 *et al*. (FCC filed Apr. 5, 2002).

dedicated transport UNE no matter how the base station is characterized. *See Order* ¶ 368. The Commission's determination that Congress did not intend to require unbundling of elements outside of an ILEC's network, such as the link at issue here, is fully consistent with the basic purpose underlying section 251(c)(3) – that is, to make available on an unbundled basis only those elements of an incumbent's legacy network that are "unsuitable for competitive supply." *USTA*, 290 F.3d at 427. That cannot be said of facilities that are deployed *between* two carriers' networks, which, almost by definition, can be deployed either by the incumbent or by the other carrier. The Commission's threshold distinction between elements *within* the incumbent's network and elements *outside* the incumbent's network thus is fully consistent with the statutory language and purpose.

Only Nextel challenges the Commission's factual determination that the central office-to-base station link is outside of the ILEC's network, but its argument is incoherent. Nextel notes that the special access links that currently connect a CMRS carrier's mobile switching center ("MSC") and its base stations normally traverse "one or more ILEC . . . central office[s]" and that the links between two ILEC central offices might "occur on a number of [MSC-to-base-station] routes." Nextel at 13-14. Nextel then asserts that this fact yields the conclusion that the link between the last ILEC central office and the *CMRS carrier's* base station is "not [an] inter-network facility." *Id.* at 15. Nextel offers no explanation at all for this logical leap – let alone one that could explain how a facility connecting an ILEC's central office to *another carrier's* facility could be deemed to be a "transmission facilit[y] between incumbent LEC switches" or otherwise within the ILEC's network. *Order* ¶ 366.[27]

[27] AT&T Wireless claims (at 5) that certain factors that "buttressed" the Commission's conclusion that section 251(c)(3) does not require unbundling of facilities outside of an ILEC's

2. The link between an ILEC central office and a CMRS carrier's base station is not a local loop

Stymied in their attempt to expand the dedicated transport UNE, the CMRS Carriers now seek to expand the local loop UNE to include the links connecting their base stations to ILEC central offices. The Commission, however, has consistently defined the local loop UNE as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and *the loop demarcation point at an end-user customer premises*." *E.g.*, 47 C.F.R. § 51.319(a) (emphasis added). Under that long-standing definition, a base station is neither the loop demarcation (or termination) point nor an end-user customer's premises. Instead, the base station directs calls to their termination point – *e.g.*, to a wireless customer's phone, which is also the end-user customer's premises in a wireless call. In such calls, the CMRS provider is a carrier, serving its end-user customers, and not itself an end user. *See* Ex Parte Letter from W.W. Jordan, BellSouth, to Marlene Dortch, FCC, at 7, CC Docket Nos. 01-338 *et al*. (Nov. 27, 2002) ("BellSouth Nov. 27 Ex Parte").[28]

There is no merit to the CMRS Carriers' repeated assertions that the link connecting their base stations to the ILECs' networks is the proverbial "last mile," and thus is just like a copper loop to an end-user customer's home. *See* AT&T-W at 6, 9; T-Mobile at 8; Nextel at 8.[29] The

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network, *Order* ¶ 367, apply to links between ILEC and CLEC networks, but not to the link between a central office and a base station. Even if AT&T Wireless's claims were correct – and they are not, *see* Ex Parte Letter from Dee May, Verizon, to Marlene Dortch, FCC, at 3, CC Docket Nos. 01-338 *et al*. (Feb. 6, 2003) – those factors were not the basis for the Commission's statutory interpretation, *see Order* ¶¶ 365-366, which AT&T Wireless does not challenge.

[28] Thus, Nextel is wrong in asserting (at 9) that the Commission's definition of the local loop UNE "has little application to wireless carriers."

[29] The CMRS Carriers' suggestion that a base station is functionally equivalent to a private business exchange ("PBX"), *see* Nextel at 9; T-Mobile at 11, misdescribes the function that a base station performs in a wireless network. While a PBX actually *switches* calls, a base station

Commission properly recognized in the *Order* that the last mile in a wireless network is the "wireless local loop" that connects wireless customers to the CMRS carrier's network. *See Order* ¶ 446.[30] AT&T Wireless's reliance (at 10) on the Commission's definition of customer premises in the *Order* is also misplaced. The Commission simply recognized that, in a multi-tenant building, the customer premises includes "not just the actual premises of end-user subscribers, but also the premises of the property owner," within which the end user's premises is located. *Order* ¶ 343 n.1021. A base station, however, is not an apartment complex; nor is a CMRS carrier a landlord.[31]

Finally, there is no reason for the Commission to accept the CMRS Carriers' invitation to distort the local loop definition by amending it to include a facility that is not, by any stretch of the imagination, a local loop. As explained above, the CMRS Carriers' petitions are devoid of any assertion – which, in any event, could not be squared with the record in this proceeding – that the lack of unbundled access to the base station-to-central office link creates a barrier to entry.

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simply allocates a shared resource – wireless bandwidth – among multiple users of the CMRS network; it does not route calls *between* end users. *See* BellSouth Nov. 27 Ex Parte at 6-7; *UNE Fact Report* at V-21 to V-22.

[30] AT&T Wireless claims (at 8) that U S West's comments in the CMRS reciprocal compensation proceeding support the CMRS Carriers' present claims, but it is wrong. Like the Commission, U S West recognized that the "last mile" of a wireless network terminates at the wireless customer, not the CMRS carrier's base station. *See* Comments of U S West Communications, Inc. at 9, CC Docket Nos. 96-98 *et al.* (FCC filed June 1, 2000).

[31] The fact that CMRS carriers order some of the links at issue here from ILECs' special access as "channel terminations," *see* AT&T-W at 10-11, is irrelevant. Regardless of the type of special access purchased, the relevant question under the Commission's long-standing local loop definition is whether a base station is an end-user customer premises where calls terminate – it is not.

B. The Service Eligibility Requirements of § 51.318 of the Commission's Rules Should Apply CMRS Carriers Just As They Do To CLECs

Verizon has challenged in court the adequacy of the Commission's rules governing when a carrier is eligible to "commingle" UNEs with special access services, but for purposes of the present filing, Verizon assumes those rules to be valid. If those rules are to be enforced against CLECs, however, they should also be enforced against CMRS operators. On their face, the Commission's rules require CMRS operators that wish to combine unbundled transport with the link connecting a CMRS base station with an ILEC central office to meet the same service eligibility requirements as CLECs, regardless of whether the link to the base station is available as an unbundled loop (which it is not, and should not be, for the reasons discussed above) or as a channel termination service. *See* 47 C.F.R. § 51.318(b) ("An incumbent LEC need not provide access to . . . (3) an unbundled dedicated DS3 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, . . . unless the requesting telecommunications carrier certifies that all of the following [service eligibility] conditions are met."); *Order* ¶ 593. The CMRS Carriers seek a blanket exception to these eligibility requirements despite the fact that (1) they are in no way impaired without access to such combinations, and (2) they are capable of complying with the requirements, just as CLECs must do.

As discussed above, CMRS operators have flourished despite the need to buy dedicated transport at ordinary rates rather than at artificially depressed UNE prices. If CMRS carriers are to be eligible to obtain UNEs, then they may have access to UNEs on the same terms as their CLEC competitors. But the CMRS operators are seeking a degree of access to UNEs, and an ability to circumvent normal special access prices, that no other competitor enjoys.

As the Commission explained, the purpose of these requirements is to prevent "gaming" by "a provider of exclusively non-qualifying service obtaining UNE access in order to obtain favorable rates or to otherwise engage in regulatory arbitrage." *Id.* ¶ 591. Such gaming, if permitted, not only would eliminate an important source of revenues that enables ILECs to operate and maintain the local network, but also would serve as a substantial disincentive to further facilities-based competition in the special access market. Because the eligibility criteria of section 51.318 fail in their stated purpose, the *Order* creates and a major loss of revenue for ILECs, and a significant windfall price reduction for other carriers, by allowing those other carriers (including CMRS operators) to substitute transport at UNE rates for much of the special access service they currently use. Verizon estimates that the price reductions attributable to these new rules will result in a net revenue loss of between $ 168 million and $252 million from the time the order takes effect to the end of 2004.[32] The Commission should not exacerbate this effect by allowing CMRS operators an unwarranted blanket exemption from the applicable eligibility criteria. [33]

The CMRS Carriers do not dispute the need for such requirements for CLECs, but claim that there should be *no* limitations on their own ability to obtain these combinations. *See* AT&T-W at 14.[34] It is undisputed, however, that CMRS providers offer both qualifying and non-

[32] Declaration of John A. Torre ¶ 12 (Attachment 5 to BellSouth, Qwest, SBC, and USTA Joint Motion for Stay and Expedition, No. 03-1263 (re-docketed as No. 03-1310) (and consolidated cases) (D.C. Cir. filed Sept. 12, 2003)).

[33] Verizon does not agree that the eligibility requirements that the Commission adopted actually pose an impediment to such gaming and is challenging this aspect of the *Order* before the D.C. Circuit.

[34] Nextel and T-Mobile propose two criteria that a CMRS carrier would have to meet to obtain a combination described in section 51.318 – that it be licensed and have a single point of interconnection in the LATA where the service is offered – but these are no limitations at all.

qualifying services, including data and long-distance services. Despite this, the CMRS Carriers argue that because *some* combinations they obtain pursuant to section 51.318 would be used for local service, there should be no restrictions on their ability to obtain *any* combination under that section. *See, e.g.*, AT&T-W at 14-15; T-Mobile at 14-15. But the Commission rejected precisely this type of argument when it found that the service eligibility requirements should apply on a circuit-by-circuit basis. *See Order* ¶ 599. Such circuit-by-circuit analysis is necessary for CMRS providers as well, so that any combinations they obtain pursuant to section 51.318 are not used predominantly (or even exclusively) for data, long-distance, or other non-qualifying services. Avoiding abuse of the system by CMRS providers is particularly important in view of the predicted increase in wireless data traffic in the coming years.[35]

Nor are the CMRS Carriers correct that the Commission's service eligibility rules cannot be applied to CMRS providers. They take issue with just three of those rules – the state certification (*Order* ¶ 601), local number assignment (*id.* ¶ 602), and collocation (*id.* ¶ 604) requirements – and in each case they fail in their attempt to show that the rules are inappropriate for CMRS providers.

See T-Mobile at 16; Nextel at 13. The licensing requirement is meaningless because all CMRS carriers must be licensed by the Commission in any event. And the latter requirement does nothing to prevent the use of intraLATA combinations for non-qualifying services; it simply excludes combinations that cross LATA boundaries, which could never meet the definition of a qualifying service. *See Order* ¶ 135 (defining a qualifying service as one "offered . . . in competition with those telecommunications services that have been traditionally the exclusive or primary domain of incumbent LECs").

[35] *See, e.g.*, M. Shuper *et al.*, Morgan Stanley, Investext Rpt. No. 7411796, Asia/Pacific Wireless Telecommunications – Utilities in the Making – Industry Report at *7 (May 29, 2003) ("[r]elative to wireless operators in comparably wealthy markets, the US carriers have barely scratched the surface of their wireless data opportunity").

First, the CMRS Carriers note that states cannot issue certificates of authority to CMRS providers. *See* AT&T-W at 15-16 (citing 47 U.S.C. § 332(c)(3)). But the Commission already addressed issues such as this, finding that "certification is not mandatory" in states that do not offer such certifications. *Order* ¶ 601. That same exception would apply to CMRS providers.

Second, the CMRS Carriers assert that they "typically do not" assign local numbers to the transmission facility linking the base station to the ILEC central office. AT&T-W at 16. The CMRS Carriers, however, make no claim that they *cannot* assign local numbers to this facility. On the contrary, they implicitly admit that CMRS providers sometimes do assign such numbers to these facilities. As the D.C. Circuit found, compliance with the Commission's service eligibility rules is "plain[ly] . . . feasible" where "some carriers" comply with the rules. *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 17 (D.C. Cir. 2002) ("*CompTel*").

Third, the CMRS Carriers state that they do not have collocation arrangements "in every LATA." Nextel at 12; *see also* AT&T-W at 16; T-Mobile at 15. Again, they make no claim they are incapable of complying with the collocation requirement. Moreover, they explicitly admit that they already meet this condition in some LATAs, demonstrating that compliance with the Commission's rule is "plain[ly] . . . feasible." *CompTel*, 309 F.3d at 17. Moreover, the Commission rejected the argument, which underlies petitioners' claims, that the collocation requirement "would fail to recognize an alternative network arrangement that carries local voice and other services," finding instead that "collocation is a necessary threshold" to "prevent providers of non-qualifying services from improperly gaining access" and provides for "easy verification" of compliance. *Order* ¶ 606.

C. The Commission Should Deny Nextel's Request for a "Fresh Look"

In the *Order*, the Commission rejected claims that it should grant competitors a "fresh look," freeing them from the provisions of their long-term special access contracts, in particular the early-termination provisions. *See Order* ¶ 694. The Commission found that "abrogation of negotiated terms will [not] be in the public interest," based on the "likely marketplace disruption of adopting a fresh look policy along with the lack of specific evidence on the record." *Id.* ¶ 698. The Commission recognized that long-term contracts are beneficial to both parties, and that abrogating such contracts can result in a windfall to the purchaser. *Id.* ¶ 699. Nonetheless, the Commission left open the possibility that a carrier might "provide more specific evidence that incumbent LEC termination penalties are inappropriate" in a particular contract, in which case the Commission would "resolve such a matter through an enforcement proceeding." *Id.* ¶ 698.

Nextel is the only party – CLEC or CMRS provider – to challenge this decision. *See* Nextel at 15-17. Yet Nextel, in claiming that CMRS providers alone should obtain the benefits of a "fresh look," *see id.* at 16, simply repeats the same arguments that this Commission rejected. Indeed, Nextel provides none of the evidence that this Commission concluded would be necessary before relieving a carrier from its obligations under a particular contract – let alone what would be necessary to relieve every CMRS carrier from every contract. Moreover, Nextel's request proceeds from the erroneous premise that the Commission found that CMRS providers were entitled, under the now-vacated *UNE Remand Order* rules, to unbundled access to dedicated transport. *See id.* at 15. Notably, Nextel does not cite the paragraph where the Commission supposedly made this finding. In fact, the Commission held only that CMRS providers can obtain access to UNEs "as long as the CMRS provider meets the requirements outlined throughout *this Order*." *Order* ¶ 140 n.468 (emphasis added).

III. The Commission's Decision Not To Require Line Sharing Is Consistent With *USTA* And Supported By Record Evidence

A. The Commission Properly Declined To Require Unbundled Access to the High-Frequency Portion of the Loop in Light of *USTA*

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

The Commission's core determination that it would "decline" to "make available the high frequency portion of the copper loop" (*Order* ¶ 255) was fully justified in light of the evidence in the record. Line sharing is not and has never been a significant competitive factor in the marketplace, and it accounts for only a tiny fraction of the broadband market. According to the Commission's most recent report on high-speed Internet access, ADSL service provided by

CLECs represented approximately 1.6% of mass-market broadband connections (which the Commission defines as including residence and small-business customers) as of year-end 2002.[36] At year-end 2002, in the Verizon-East territory (*i.e.*, the former Bell Atlantic region) CLECs used line sharing to serve only about 20% of their DSL customers; the rest of their customers are served over stand-alone loops.[37] Applying this 20% use factor to the 1.6% CLEC share of the mass market indicates that line sharing represents only approximately 0.3% of the broadband mass market. Even if the share of CLEC customers served via line sharing in other parts of the country were double or even triple the 20% that Verizon has documented in its region, line sharing would still account for substantially less than 1% of the market.

In light of these stark facts, the Commission noted that the D.C. Circuit had ordered it "to consider the relevance of broadband competition coming from cable and, to a lesser extent, satellite providers." *Order* ¶ 262. The Commission noted that, "nationally, cable modem service is the most widely used means by which the mass market obtains broadband service" and that "the gap between cable modem and ADSL subscribership continues to widen." *Id.* "[T]he fact that broadband service is actually available through another network platform and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon" line sharing. *Id.* ¶ 263. Accordingly, "the costs of [line sharing] outweigh the benefits"; indeed, it is the *unavailability* of mandatory line sharing that "will encourage the deployment of new technologies." *Id.*

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[36] *See* Wireline Competition Bureau, Industry Analysis & Tech. Div., *High-Speed Services for Internet Access: Status As of December 31, 2002*, Table 5 (rel. June 10, 2003) ("*High-Speed Services Report*"). In considering the competitive impact of line sharing, it is appropriate to focus on ADSL because line sharing is technically incapable of supporting SDSL services.

[37] *See* Ex Parte Letter from Susanne Guyer, Verizon, to Marlene Dortch, FCC, at 1-2, CC Docket Nos. 01-338 *et al*. (May 19, 2003).

This conclusion is fully consistent with prior Commission findings that broadband services are in a separate market from traditional narrowband telephone service. *See, e.g.*, Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, ¶ 63 (2001); Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857, ¶ 18 (2000); Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, ¶ 48 (1999) ("*First Advanced Services Report*"). This finding has likewise been echoed by the Department of Justice and the Federal Trade Commission. *See* Department of Justice, Antitrust Division Competitive Impact Statement, *United States v. AT&T Corp. and MediaOne Group, Inc.*, No. 00-1176 (D.D.C. filed May 25, 2000); Federal Trade Commission Complaint ¶ 21, *America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989 (FTC filed Dec. 14, 2000). Moreover, the Commission has correctly found that the "preconditions for monopoly appear absent" in the broadband market. *First Advanced Services Report* ¶ 48.

In fact, since the Commission announced the end of line sharing, broadband prices have actually fallen. Verizon's DSL price cuts earlier this year marked the opening salvo in a "price war between telecommunications and cable companies as they fight for broadband customers."[38] Cable companies have responded with efforts to improve the quality and speed of their

[38] A. Latour & P. Grant, *Verizon May Set Off Price War*, Wall St. J., May 5, 2003, at B2.

offerings.[39] In sum, based on the record before it and its prior determinations that the broadband market is both competitive and likely to remain that way, the Commission could not make a finding of impairment in the separate broadband market. *See CompTel*, 309 F.3d at 14 (questioning whether the Commission has power to order unbundling without market-specific impairment inquiry); *USTA*, 290 F.3d at 429. Indeed, the analysis calls into question any unbundling requirements that are designed to enable requesting carriers to provide broadband service.

B. The Commission's Reasoning Regarding Line Sharing Is Consistent with Other Parts of the *Order*

EarthLink argues (at 2-4) that the Commission's decision, based in part on section 706 of the 1996 Act, to require unbundling of copper loops but not fiber loops somehow requires the Commission to "maintain the line sharing UNE," but this argument is doubly flawed. *First*, in the wake of the D.C. Circuit's *USTA* decision, there is no line-sharing UNE to "maintain." The court *vacated* the Commission's previous line-sharing rules, so the Commission's decision to apply what EarthLink calls "legacy rules" to the copper loops is in no way inconsistent with its decision not to require line sharing, as there are no "legacy" line-sharing rules to apply. *Second*, despite EarthLink's suggestion to the contrary, the Commission did not ignore its section 706 obligations in determining that the high-frequency portion of the loop should not be made available on an unbundled basis. On the contrary, as noted above, the Commission determined that the *unavailability* of mandatory line sharing "will encourage the deployment of new

[39] *Comcast's Focus on Internet Access Helps Fuel Growth*, Bloomberg News and Commentary (July 30, 2003) *at* http://quote.bloomberg.com/apps/news?pid=nifea&&sid=avSar33w45TI ("Cable companies aren't waiting around to see if DSL price cuts will significantly eat away at their market share. In the span of a week, national cable networks such as Comcast, Time Warner Cable, Charter Communications and Adelphia all announced plans to at least double their maximum speeds to 2mbps to 3mbps.").

technologies," as section 706 mandates. *Order* ¶ 263. This is in part because requiring incumbents to provide access to the whole loop "creates better competitive incentives" than requiring separate unbundling of the high-frequency portion of the loop. *Id.* ¶ 260. If requesting carriers are permitted to engage in line sharing "at a price of roughly zero" (as under the vacated rules that EarthLink seeks to restore), they gain "an irrational cost advantage over competitive LECs purchasing the whole loop and over the incumbent LECs." *Id.* Therefore, requiring line sharing threatens innovation and investment in new technology by "skew[ing] competitive LECs' incentives toward providing a broadband-only service to mass market consumers, rather than . . . a bundled voice and xDSL service offering," as well as "discourag[ing] innovative arrangements" between carriers and "greater product differentiation" among broadband offerings. *Id.* ¶ 261.

EarthLink also takes issue (at 5) with the Commission's citation of the fact that 43 (now 48) section 271 applications have been granted in support of the proposition that "significant strides have been made by competitors in the local [telephone] market." *Order* ¶ 259. EarthLink complains (at 5) that the Commission "refuse[d] to give similar weight to Section 271 grants" in other parts of the *Order*. This alleged difference in the weight accorded, however, has to do with the difference in the propositions in support of which the section 271 grants were invoked. For example, the Commission did not find that compliance with section 271 performance metrics could usefully inform the Commission's unbundling analysis because the record did not reveal that those metrics had a "significant, if any, direct relationship to the ability of competitive LECs to economically self-deploy local loops." *Order* ¶ 342. By contrast, the awarding of section 271 relief plainly *does* provide significant and direct evidence that local telephone markets have

become more open to competition, because such increased openness is the *sine qua non* of section 271 relief.

C. The Commission Properly Considered Intermodal Competition in Deciding Not To Require Line Sharing

EarthLink also purports to find an inconsistency between the Commission's statement of general principles that it would apply in interpreting the "impair" standard and the Commission's application of those principles in the line-sharing context. Specifically, EarthLink takes issue (at 9) with the Commission's conclusion that intermodal competition "helps alleviate any concern that competition in the broadband market may be heavily dependent upon unbundled access to the HFPL." *Order* ¶ 263. But EarthLink's argument fails for at least three reasons. *First*, the *USTA* decision mandates that the Commission consider the impact of intermodal alternatives, and, to the extent any of the principles enunciated by the Commission are inconsistent with the court's mandate, those principles must yield to the court-ordered imperative to consider the "competitive context." 290 F.3d at 429. *Second*, the Commission's own general principles require it to take intermodal competition into account in evaluating impairment, for three reasons: (1) the 1996 Act expresses no preference for the technology that carriers should use, (2) tying unbundling decisions to the presence or absence of a certain technology could prejudice market participants' business decisions about whether to deploy alternative facilities, and (3) intermodal alternatives "can be just as probative of a lack of impairment as the presence of traditional wireline 'telephone' deployment." *Order* ¶ 97. There is no inconsistency between the broad, general principles enunciated by the Commission and its fact-specific decision not to require line sharing – these principles will necessarily yield different results in different factual

settings. *Third*, the evidence of intermodal competition is particularly compelling in the broadband context.

Unlike other situations in which ILECs enjoy relatively high market shares that are being eroded by competition, the broadband market features incumbent cable companies that consistently serve some 60% of the market nationwide, while ILECs, the relative newcomers, have a collective national market share of only about 30%.[40] This is therefore not a situation in which the *competitive context – i.e.*, the alternatives available *to consumers* – depends on access to ILEC facilities.

Once the Commission considers the competitive impact of the dominant cable modem providers as well as other alternative technologies, there is no valid concern that ISPs will somehow be unable to reach their customers in the absence of line sharing. Providers of broadband access services, including local telephone companies and cable companies alike, have strong business incentives to provide consumers access to broadband ISPs that supply distinctive content.[41] As the Commission found in the *Fourth CMRS Order*,[42] "the increasing degree of

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[40] *See High-Speed Services Report*, Table 1 (documenting that cable modem providers serve 11.4 million customers, or more than 57% of the market, while DSL providers serve less than 6.5 million customers, or less than 33% of the mass market).

[41] For example, after years of failed attempts at reselling other carriers' DSL and cable modem service, AOL has recently adopted a "Bring Your Own Access" strategy to market unique broadband content that is available to any user with broadband access to the Web. *See, e.g.*, AOL Time Warner Press Release, *America Online Launches AOL for Broadband* (Mar. 31, 2003). Other ISPs – including EarthLink – have announced similar strategies. *See, e.g.*, C. Barrera Diaz, *EarthLink Loss Widens but Revenue Climbs*, Reuters (Apr. 22, 2003) (Gary Betty, EarthLink: "[W]e are likely to package a BYOA product . . . before the end of the year. We won't be left out."); J. Hu, *AOL's Broadband Crusade*, CNet News (Mar. 30, 2003) ("Microsoft and Yahoo[] have signaled plans to launch their own standalone subscription packages as a way to lure broadband users to their services."), *at* http://news.com.com/2100-1032-994629.html.

[42] Fourth Report and Order, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 15 FCC Rcd 13523 (2000) ("*Fourth CMRS Order*").

[broadband] competition should provide incentives for facilities-based [broadband] providers to agree to" provide wholesale access "to increase their revenues." *Fourth CMRS Order* ¶ 20. If a broadband provider fails to provide its customers access to a broadband ISP that is offering valuable content, consumers would flock to competing broadband platforms that did make such content available. Cable companies understand this and have been responding to these business incentives. EarthLink's own filings with the Securities and Exchange Commission reveal that it has contracts to provide service over the cable networks operated by Charter, Comcast, and Time Warner, thus belying any suggestion that it has no alternative to DSL. *See* EarthLink, Inc., Form 10-Q, at 18 (SEC filed Aug. 14, 2003). Accordingly, EarthLink's statement (at 10) that "no competitive alternatives exist for wholesale customers of ADSL services" is not only erroneous but also hypocritical.[43]

Even with respect to DSL transmission, EarthLink does not depend only on CLECs that engage in line sharing: it has entered into contracts directly with ILECs, including BellSouth, SBC, and Sprint. *See id.*; EarthLink Press Release, *EarthLink Widens Nationwide High-Speed Access Footprint* (July 17, 2003).

D. The Commission Properly Considered All Potential Revenues Derived from Using the Full Functionality of the Loop

EarthLink's claim (at 4-5) that the Commission has established an "incoherent line sharing unbundling standard" is wrong. The Commission found, as EarthLink notes, that requesting carriers would be impaired without access to the local loop no matter whether they

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[43] EarthLink (at 10) even goes so far as to call this a Commission "finding," but the Commission made no such finding. Paragraph 97 of the *Order*, cited by EarthLink, contains no finding at all about ADSL services.

seek to provide narrowband services, broadband services, or both – it did not find impairment solely for carriers that restrict the types of service they offer over the loop. That finding is entirely consistent with the Commission's determination to consider requesting carriers' revenue opportunities afforded by the "full functionality of the loop," *Order* ¶ 258, because the Commission's impairment analysis cannot depend on whether "carriers that pursue a particular business strategy are impaired without access to UNEs," *id.* ¶ 115.

The Commission appropriately based its impairment analysis on the availability of revenues from a "full range of services" that can be provided using a particular network element. *Id*. ¶ 115 n.396. To do otherwise would "disregard the availability of scale and scope economies" and "could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs." *Id.* ¶ 115. In particular, "rules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service," as well as discouraging innovation and product differentiation – results that would "run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." *Id.* ¶ 261.

EarthLink argues (at 5) that the Commission ought not to consider the availability of revenues from other services that can be provided over the loop because section 251(c) obliges incumbent carriers to provide UNE access to "any requesting telecommunications carrier" – including any carrier that does not wish to provide other services. By focusing erroneously on the effect of unbundling on a particular competitor rather than on its effect on competition in the broadband market as a whole, this argument repeats the error in the statutory construction advanced unsuccessfully by the Commission in *USTA*. There, the Commission had argued that, if a given carrier "seeks to offer" DSL, then the Commission could safely ignore the availability

of cable, wireless, and satellite competition to DSL because section 251(d)(2)(B) speaks of impairment of the ability to provide the services that a given telecommunications carrier "seeks to offer." *See* 290 F.3d at 429. The D.C. Circuit squarely rejected this argument and ruled that the Commission has no license under the Communications Act "to inflict on the economy the sort of costs" associated with mandatory unbundling "under conditions where it had no reason to think doing so would bring on a significant enhancement of competition." *Id.* The court's analysis forecloses EarthLink's statutory argument: regardless of whether a particular competitor with an idiosyncratic strategy would benefit from unbundling, the Commission cannot require unbundling absent a showing that competition in the broadband market as a whole would be significantly enhanced – a criterion that is impossible to meet when incumbent telephone companies represent less than one-third of the broadband market.

Furthermore, EarthLink's statutory argument fails on its own terms: *any* telecommunications carrier *can* get access to an unbundled stand-alone loop; there is no discrimination among carriers based on their business plans. But *no* carrier can get access to only part of the loop at zero cost, which is what EarthLink advocates. To allow that would, as the Commission properly found, give data-only CLECs an "irrational cost advantage." *Order* ¶ 260.

EarthLink quibbles (at 6-8) over whether video services over DSL can provide a viable revenue stream but does not (and cannot) question the availability of revenues from other sources, including from voice telephony. Accordingly, EarthLink presents no serious challenge to the Commission's conclusion that the whole loop provides opportunities to earn revenue other than through the provision of broadband Internet access. Moreover, as noted above, in the

Verizon-East region today, fully 80% of CLEC DSL customers are being served via stand-alone copper loops, so these loops plainly do afford a viable alternative to line sharing.

E. The Commission Should Reject EarthLink's Brazen Plea for Free Access to the HFPL

The *Order* properly acknowledges that the issue of allocating loop costs among the multiple services that may depend upon the loop is both complex and contested. *Order* ¶ 157. EarthLink notes (at 12) that the Commission found it appropriate to impose a cost allocation and separations "freeze" in an effort to address this and other similar accounting issues. Although EarthLink regards the freeze as evidence of laziness on the part of the Commission, *see id.*, just the opposite is true: The need for a freeze actually underscores the difficulty of the problem presented. EarthLink's glib assertion that, "if line sharing prices are a concern, it is one of the Commission's own creation," reflects a failure to acknowledge (or perhaps a failure to appreciate) the true complexity of the issue.

EarthLink's solution to the problem is for the Commission to require ILECs to give away the HFPL for free. *See* EarthLink at 13. "Here is air," EarthLink in effect says to the ILECs; "give me money."[44] EarthLink's brazen request should be rejected out of hand. *Somebody* has to pay for the loop, including the HFPL. It would unfairly skew competition to make incumbents and CLECs paying the full loop costs to compete head-to-head with free-riding CLECs using the very same facilities for nothing. The Commission correctly rejected creating a situation that would give data-only CLECs such an "irrational cost advantage." *Order* ¶ 260.[45]

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[44] *Cf. Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996) (invoking that Yiddish saying in the course of rejecting a statutory interpretation that would have required power plant operators to give up something for nothing).

[45] EarthLink miscites a Verizon ex parte letter as if it stood for the proposition that "ILECs charge themselves the same price (e.g., zero) for the use of the HFPL as line sharing CLECs

Moreover, as the Commission has recognized, a fundamental goal of the 1996 Act was to encourage competing carriers to deploy their own facilities in order fully to unleash the incentives of incumbents and competitors alike to develop innovative service and pricing options to the benefit of consumers.[46] There is no way to deploy *only* the high-frequency portion of a loop; facilities-based competitors would have to deploy (and pay for) the whole loop. By making available the same kind of facility that a CLEC would deploy itself in order to compete, unbundling the stand-alone loop supports Congress's goal of encouraging facilities-based competition. In contrast, allowing CLECs to free-ride (literally) on part of the loop would destroy any incentive carriers might have to deploy their own facilities.

F. The Commission Should Reject EarthLink's Request for an Open-Ended Transition Period

No valid FCC order has ever authorized line sharing, yet the Commission has put in place a transition mechanism that not only allows carriers to keep existing customers in place at zero cost indefinitely but also allows them to place new HFPL orders at 25% of loop costs for a full

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obtain it for." EarthLink at 13 (citing Ex Parte Letter from W. Scott Randolph, Verizon, to Carol Mattey, FCC, at 7, CC Docket Nos. 02-33 *et al.* (June 26, 2003)). In that letter, Verizon argued the very different points that, given the Commission's definition of universal service, distributions from the universal service fund should continue to be made, as they have always been made, on the basis of unseparated loop costs. This policy recognizes the simple fact that services within the definition of universal service cannot be provided without a local loop. But it does not follow from this that services falling outside the definition of universal service can be obtained for free.

[46] *See, e.g.*, *Order* ¶ 70 ("facilities-based competition serves the Act's overall goals"); *UNE Remand Order* ¶ 110 ("[T]he construction of new local exchange networks will not only lead to innovation by the new competitors, but should also spur [the incumbent LECs] to upgrade their systems and offer a broader array of desired service options to meet consumers' demands.") (internal quotation marks omitted; alteration in original); Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673, ¶ 4 (1999) ("only facilities-based competition" can "fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing").

year. *See Order* ¶¶ 264-265. The transition rules thus allow CLECs not just to keep but to expand their illegal windfall. But this deal is not sweet enough for EarthLink, which proposes (at 14) that the Commission "modify its line sharing rule by deferring the line sharing loop charges" indefinitely, until "the industry accepts a 'hot cut' process for intramodal wireline migration of DSL subscribers from one carrier to another" that is satisfactory to EarthLink. The Commission should recognize and reject EarthLink's proposal as a transparent and shameless delaying tactic. In view of the Commission's findings that carriers are not impaired without unbundled access to the HFPL, the Commission lacks authority under section 251(d)(2) to permit the indefinite continuation of the previous, *vacated*, line-sharing regime for which EarthLink is asking.

IV. NASUCA's Flawed Analysis Provides No Basis For The Commission To Reconsider Any Aspect Of The *Order*

The National Association of State Utility Consumer Advocates ("NASUCA") criticizes (at 6-9) the Commission for "ordering" the states to cure any switching impairment they may find, thus spelling doom for UNE-P. In fact, the flaw in the *Order* is not that it artificially hastens the demise of UNE-P, as NASUCA imagines; rather, the problem is that the Commission ignored record evidence in order to concoct a national "finding" of impairment in switching that preserves UNE-P indefinitely, then delegated control over the continued existence of UNE-P to the state commissions, which are even more committed to preserving UNE-P than the Commission itself.

The Commission erred by preserving unbundled switching in the face of a record that made clear that switching is suitable for competitive supply: More than 200 competitors had deployed in excess of 1,300 circuit switches that were being used to serve – in wire centers

covering 86% of Bell company lines – more than 16 million lines, including 3 million residential lines. *See Order* ¶¶ 436-437. NASUCA urges the Commission to embrace maximum unbundling even more directly than it has already done and complains that the *USTA* "Court's take on abstruse economic theory" is "clearly not a legitimate basis for overruling the Commission's findings in the *UNE Remand Order*." NASUCA at 15. But the court *did vacate* the *UNE Remand Order*, and the Commission has no discretion to ignore the court's mandate. At the very least, the Commission should decline NASUCA's invitation to compound its error by doing more to preserve the switching UNE than it has already done.

Conclusion

For the foregoing reasons, the petitions for reconsideration or clarification of BellSouth, SureWest Communications, and the U.S. Internet Industry Association should be granted, and all the other petitions should be denied in their entirety.

Respectfully submitted,

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November 6, 2003

Attachment A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of November 2003, copies of the Response of Verizon to Petitions for Reconsideration were served upon the following parties by overnight mail.

/s/ Shonn Dyer

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