

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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SUMMARY

The Commission should reject the request of Petitioners BellSouth, SureWest and the United States Internet Industry Association to exempt fiber-to-the-curb (“FTTC”), fiber to multi-unit premises, and “new” dark fiber from unbundling obligations. These requests are not only clearly unsupported in the record, but Petitioners make no attempt to demonstrate that CLECs are not impaired in regard to said facilities.

Petitioners have not shown that CLECs would not be impaired without access to these facilities. In fact, CLECs would be significantly impaired without such access. CLECs are not in an equivalent position to ILECs in regard to deploying these facilities, and face significant operational and economic barriers in regard to these facilities. FTTC and fiber-to-the-multi-unit premises are also quite different to FTTH loops. FTTC loops are more akin to hybrid loops, are technically inferior to FTTH loops, and ultimately do not provide a long-term broadband solution. Moreover, the Commission would be mired in definitional issues, as any definition of FTTC would require the Commission to engage in arbitrary line drawing and would create significant operational issues. In regard to multi-unit premises, the Commission already found significant impairment in regard to CLECs serving both commercial and residential multi-unit premises and there is no basis to revisit this conclusion. Finally, there is no need for the Commission to extend this unbundling exemption as the goals of Section 706 are already being adequately met, and there is no basis for the Commission to ignore the impairment the CLECs face in regard to FTTC and multi-unit fiber. BellSouth, in particular, had significant FTTC deployment plans long before the

Commission's *Triennial Review Order*. Petitioners' attempts to arbitrarily extend the FTTH unbundling exemption highlights the problems raised by the Commission's redefinition of the FTTH exemption in its *Errata*. The Commission should return to its original language that limited the fiber unbundling exemption to FTTH deployed to *residential* premises. Despite the other infirmities of that rule, at least it provided a bright line rule.

The Commission should also reject Petitioners' request for permission to phase out TDM capability when they upgrade to packet switching technology. Commenters have no objection to ILECs' upgrading their network, and do not seek to freeze ILECs in a legacy technology, as long as an equivalent path is provided over an open-interface technology. The Commission explicitly provided a TDM path to mitigate impairment that CLECs would face, so an equivalent path must be provided to access the customer.

The Commission should also reject Petitioners' attempt to escape the independent unbundling obligations of Section 271. As the Commission has previously found, Section 271 applies unbundling obligations separate from Section 251, and the only way for the Commission to exempt ILECs from these obligations is via Section 10 of the Act. Even if the procedural infirmities of Petitioners' request are overlooked, Section 10(d) precludes the relief Petitioners seek since the requirements of Section 271 have not been fully implemented. There is also no basis to limit commingling in regard to facilities unbundled pursuant to Section 271, and such a limitation would lead to the inefficient use of networks that the Commission sought to avoid.

Finally, Petitioners have demonstrated no basis for the Commission to ignore the significant impairment CLECs face in regard to dark fiber facilities. This

impairment applies regardless of the date of deployment. Petitioners are merely seeking to sidestep the trigger mechanism the Commission implemented to evaluate non-impairment on a granular basis.

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

Allegiance Telecom, Inc., Cbeyond Communications, El Paso Networks, LLC, Focal Communications Corporation, McLeodUSA Telecommunications, Inc., Mpower Communications Corp., and TDS Metrocom, LLC (collectively “CLECs”), through undersigned counsel submit this opposition to the Petitions for Clarification and/or Partial Reconsideration (“Petitions”) of the *Triennial Review Order*¹ filed by BellSouth Corporation (“BellSouth”), SureWest Communications (“SureWest”) and the US Internet Industry Association (“USIIA”).

I. ILECS MUST PROVIDE TDM-EQUIVALENT UNBUNDLING

In the *Triennial Review Order*, the Commission declined to require unbundling of next generation packetized capabilities of hybrid loops, but did require the unbundling of the TDM capabilities of those loops where the Commission’s triggers show impairment.² The Commission prohibited under Section 251(c)(3) any ILEC practice, policy or procedure that has

¹ *Review of the Section 251 Unbundled Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. August 21, 2003) (“*Triennial Review Order*”).

² *Triennial Review Order*, at ¶¶ 288, 296.

the effect of disrupting or degrading access to TDM-based features, functions or capabilities of hybrid loops.³ BellSouth and SureWest now seek clarification that ILECs may add packet switching to serve an existing customer without an unbundling obligation even if TDM capability is lost.⁴

While the Commission's proposal to relegate CLECs to "legacy" technology is itself anticompetitive and unlawful, embracing to any extent requests that ILECs be permitted to phase out TDM technology without substitute unbundling obligations would constitute complete repudiation of the pro-competitive mandate of the Act. If CLECs may not obtain unbundled access to FTTH loops, hybrid loops employing packet technology, and ILECs may phase out TDM capability, notwithstanding impairment, CLECs will have no access to loops and transport necessary to serve customers. The Commission's attempt to promote broadband by harnessing ILECs' anticompetitive motivations to limit unbundling obligations is unlawful and diametrically opposed to the Act.⁵ The Commission has no choice but to emphatically reject the ILECs' requests, in effect, to completely phase out broadband unbundling obligations notwithstanding impairment.

Some clarification of ILECs' unbundling obligations in this area is warranted. CLECs' have no objection *per se* to phasing out of legacy TDM capability provided that ILECs provide a substitute equivalent path over packetized next generation networks. Furthermore, the FCC should also require that the substitute equivalent path be delivered over an open technology interface (*i.e.*, non-proprietary). This is essential if CLECs are to obtain the minimum unbundled

³ *Triennial Review Order*, at ¶ 294.

⁴ BellSouth Petition at 16-17; SureWest Comments at 8-9

⁵ It is worth noting that the fact that other ILECs, such as SBC, state that they plan to retain TDM-capability shows that removing TDM capability may not be sound as a matter of economics or engineering, but instead is motivated by a desire to limit unbundling obligations. Also retention of TDM-capability will not mitigate any

access to network elements necessary to attempt to achieve the competition intended in the Act. Accordingly, the Commission should state clearly that when ILECs phase out TDM capability, to the extent the Commission permits them to do so, they must provide equivalent access over next generation networks wherever the Commission's impairment standards for loops and transport are satisfied.

II. **FIBER-TO-THE-CURB SHOULD NOT BE TREATED LIKE FIBER-TO-THE - HOME**

A. Treating FTTC Like FTTH Would Exacerbate the Basic Errors of the Commission's Broadband Rules

1. Section 706 Does Not Support the Commission's Broadband Unbundling Rules

The Commission should not accord FTTC the same regulatory treatment as FTTH, first, because this would exacerbate the errors underlying the Commission's FTTH and broadband rules in general. CLECs have already described those errors to the D.C. Circuit in their Motion for Stay of the FTTH rules and will do so in more detail on appeal.⁶

To briefly reiterate, the Commission erred in a number of respects in relying on Section 706 to justify its broadband rules. The FCC's *only* obligation under Section 706 is to ensure that advanced capabilities are made available on a "reasonable and timely" basis. The Commission's pre-*Triennial Review Order* technology-neutral unbundling rules were fully compatible with promoting advanced telecommunications capability and resulted in unprecedented investment in advanced telecommunications capability since passage of the 1996 Act. In fact, the Commission has concluded that the goals of Section 706 are already being met.

benefits ILECs will experience due to deployment of packet-based technology. See CC Docket No. 01-338, *Ex Parte* Presentation of SBC Communications, Inc. at 3 (January 15, 2003).

In its *Third Advanced Services Report* the Commission unequivocally found that “advanced telecommunications is being deployed to all Americans in a reasonable and timely manner” and that “investment in infrastructure for advanced telecommunications remains strong.”⁷ Accordingly, Section 706 does not provide a statutory basis for limiting ILEC broadband unbundling obligations.

Moreover, having purportedly chosen to rely on Section 706, the Commission in the *Triennial Review Order* nonetheless ignored the clear limits imposed in that Section on the scope of its permissible actions if the goals of that section were not being met. Congress did not give the FCC the authority to grant ILEC’s a new monopoly over broadband telecommunications or to limit unbundling and/or to promise the preservation of an intramodal monopoly as a means of spurring investment in advanced services. Rather, Section 706 states that, in the event the Commission finds that advanced services are not being deployed on a reasonable and timely basis, it must take immediate action to accelerate deployment by removing barriers to investment “and” by promoting competition. (emphasis added). Thus, Congress prescribed enhancing competition, not limiting competition, as a means of promoting broadband. In addition to this express statutory language, Congress explained, that the 1996 Act was intended to provide for a “pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to

⁶ *Allegiance Telecom, Inc., et al. v. FCC, et al.*, Case No. 03-1316 and consolidated appeals, Motion for Stay (D.C. Cir. Oct. 8, 2003); *Allegiance Telecom, Inc., et al. v. FCC, et al.*, Case No. 03-1316 and consolidated appeals, Reply to Opposition to Motion for Stay (D.C. Cir. Oct. 28, 2003)

⁷ *Inquiry Concerning the Deployment of Advanced telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, FCC 02-33,17 FCC Rcd 2844, 2845, ¶ 1. (“Third Report”).

all Americans by opening all telecommunications markets to competition.”⁸ As the House

Commerce Committee Report noted:

Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.⁹

Therefore, the Commission’s approach of encouraging investment in broadband facilities by limiting competition flatly violates the Act.

The Commission also departed from Section 706 in choosing to promote fiber and packet networks without even an evaluation of whether other technologies could equally and more affordably serve broadband goals. Section 706 defines advanced services “without regard to any transmission media or technology.” The Commission’s discriminating among advanced technologies violates Section 706 and is arbitrary because it reached this result without any explanation.

2. The Commission’s Impairment Analysis Is Flawed

Apart from erroneously relying on Section 706, the Commission’s impairment analysis for broadband loops is internally inconsistent. In the case of fiber loops in general, the FCC held that deployment by competitors is, except in exceptional circumstances or for extremely large enterprise customers, uneconomic.¹⁰ The Commission stated that the cost driver of the fiber

⁸ P.L. 104-104, Telecommunications Act of 1996, S. Conf. Rep. 104-230 at 1 (1996). (emphasis added).

⁹ *Id.*

¹⁰ In fact, the Commission noted that fiber loops, as with other loops, are the exact type of “very expensive to duplicate facilities” that ILECs are required to unbundle. *Triennial Review Order*, ¶ 205. The Commission found that CLECs were impaired without access to various types of high-capacity loops, which include fiber loops. In regard to high-capacity loop facilities, the Commission found impairment based on the huge sunk costs in deploying loop facilities, the inability to obtain reasonable and timely access to customer’s premises, both in laying the fiber and getting access to the building, as well as convincing customers to put up with the attendant delay of six to nine months to deploy the facilities. In addition, ILECs possess a “first mover” advantage. *Triennial Review Order*, ¶¶ 304, 312, and 323. The Commission also found national impairment in regard to high-capacity loop facilities because there was “limited record evidence of self-deployment.” *Triennial Review Order*, ¶ 323.

facility is the fiber infrastructure itself, and the attendant costs of deploying that fiber. The attached electronics are a less significant component of the cost.¹¹ The Commission noted that CLECs face “extremely high economic and operational barriers in deploying [their own] DS1 loops,” and made a similar finding in regard to DS3 loops.¹² In fact, the Commission conceded in the *Triennial Review Order* that FTTH loops display the same economic and operational barriers that other loops display, *i.e.*, fixed and sunk costs, and expensive deployment.¹³ Nevertheless, the FCC found that CLECs were not impaired without access to broadband FTTH loops, despite the fact that these are the same fiber loops for which the Commission already found impairment.¹⁴ The fact that FTTC loops will contain a few hundred feet less of fiber will not reduce the deployment costs.

Further, no impairment analysis was conducted in the *Triennial Review Order* for FTTC loops and BellSouth proffers none in its Petition. There is no evidence that CLECs are deploying FTTC loops, or that they are in the same position as ILECs in regard to such deployment. In short, the basis on which the Commission established its unbundling exception for FTTH loops is not present for FTTC loops. Accordingly, there is no basis in the record for the Commission to extend its FTTH rules to FTTC loops.

CLECs cannot stress strongly enough that they do not stand in an equivalent position to ILECs in constructing FTTC. Presumably, BellSouth and the other RBOCs would pursue an overbuild strategy whereby they would run fiber to the optical network units and then connect the fiber loop to their existing distribution pairs running to the customer’s premises. In addition,

¹¹ See *Triennial Review Order*, ¶¶ 243, 381-382.

¹² *Triennial Review Order*, ¶ 325.

¹³ *Triennial Review Order*, ¶ 274.

¹⁴ Among other unbundling requirements applicable to fiber loops, the FCC required incumbent LECs to unbundle dark fiber loops (*i.e.*, those that are not “lit” by optronic equipment) and required incumbent LECs to

many ILECs will already have deployed significant amounts of fiber feeder facilities and remote terminals so that in the vast majority of cases they will not need to deploy a new loop from the central office to the ONU in order to build FTTC, but instead only have to replace the copper distribution subloop with a fiber facility. For instance, BellSouth's FTTC deployment will be routed through remote terminals. BellSouth already has thousands of remote terminals in place, and has been deploying exclusively fiber feeder since 1996.¹⁵ Thus, BellSouth can simply extend its existing fiber feeder to the distribution portion of the loop. Such a strategy would leverage the economies of scale of the RBOC and increase the sunk costs associated with the network which in turn would result in a huge first mover advantage.¹⁶ Given this, in a brownfield FTTC deployment, the ILEC will possess tremendous advantages in regard to their ability to deploy FTTC. These same advantages would extend to greenfield FTTC, and FTTH, deployment as well. Again, it is simply a matter of extending the fiber the ILEC already has in its network. For instance, SBC notes that "economic deployment of FTTH requires efficient utilization of dark fiber."¹⁷ The Commission has already determined that CLECs are significantly impaired in regard to dark fiber.¹⁸ The economies of scale and first mover advantages ILEC possess do not disappear in a greenfield situation because the ILEC is able to leverage these advantages in regard to its new deployment.

Under BellSouth's proposed rule, however, a CLEC would have to build fiber all the way to the customer's premises, because since the FTTC would no longer be a hybrid loop it could not collocate at the ILEC's service terminal. Thus, the cost savings BellSouth would obtain from

unbundle DS1 and DS3 capacity loops without regard to whether those circuits are delivered over fiber or copper. *Triennial Review Order*, ¶¶ 311-314; *Triennial Review Order*, ¶¶ 320-323, 325-327.

¹⁵ CC Docket No. 01-338, *Ex Parte* Presentation of BellSouth at 5 (Sept. 29, 2003).

¹⁶ *See, e.g., Triennial Review Order*, ¶¶ 205, 237, n. 716-717, 238, 239.

¹⁷ CC Docket No. 01-338, *Ex Parte* Presentation of SBC Communications, Inc. at 10 (January 15, 2003).

¹⁸ *Triennial Review Order*, ¶¶ 311-314.

FTTC would not be experienced by the self-provisioning CLEC which would be burdened with substantial incremental cost because it would have to deploy the fiber all the way to the customer's premises from the central office. Deploying its own service terminals would not be an option for the CLEC unless it achieved a significantly greater penetration than the 8-12 customers per ONU that BellSouth has determined to be the point at which FTTC is cost-efficient for it in a given area. A CLEC would need more customers since it is unable to leverage the existing deployment of copper distribution pairs and remote terminals that BellSouth possesses.¹⁹ The main advantage, however, would be the ILEC's existing fiber feeder deployment. The ILEC, in both brownfield and greenfield deployments, will be able to extend fiber from its existing fiber feeder to the ONUs. Because CLECs cannot install FTTC merely by extending fiber as is the case with the ILECs, they do not face equivalent barriers as ILECs. In fact, it is precisely because a CLEC cannot leverage an existing fiber feeder network that CLECs face a significantly greater barrier to entry when compared to ILECs.

Even if duplicate terminals were feasible, this would lead to numerous redundant service terminals with every CLEC having to build its own terminal. It is also unlikely that communities will permit the deployment of multiple networks and the constant destruction and rebuilding of roads, sidewalks and individual property that overbuilding would entail. It is difficult enough to convince communities to allow construction of transport networks and fiber builds to large business customers, much less for the deployment of a widespread, redundant distribution network.

¹⁹ BellSouth, and other ILECs, are also able to leverage their existing network of conduits and poles, and their current rights-of-way access, to extend fiber further into their network. CLECs do not have these access advantages.

3. FTTC Is Not Technically Equivalent to FTTH

One of the main advantages that BellSouth postulates in regard to FTTC is that it offers comparable performance to FTTH, at a substantially reduced initial cost. Neither point of this argument is entirely true. While FTTC does offer the potential for higher capacity data transmission it is not at all clear that its capabilities are either: (1) necessary to satisfy current customers demands for bandwidth, or (2) sufficient to satisfy long-range customer demands. BellSouth has tried to paint a picture to show that when fiber reaches 500 feet from the customer premise under FTTC, that it hits a magical threshold allowing a massive jump in capabilities including the ability to provide video services. This is misleading. A continuum of speeds exists whereby current technology can coax up to 52 Mbps over nearly 1000 feet of copper, 26 Mbps at 3000 feet , 13Mbps at 4500 feet and 5Mbps out to 12,000 feet. In many cases small carriers have already been able to provide video services over hybrid loop architectures as opposed to FTTC or FTTH. If this Commission decides to exempt FTTC from unbundling requirements it will essentially have arbitrarily determined that a certain copper length and a certain capacity is the cut-off points for the type of broadband facility it wants built.

If the Commission instead wants to provide incentives for network deployment to meet the long range potential for demand, then FTTC is not the answer. While capacity levels are high, they do not provide the long-term prospects that FTTH loops do. There are concerns that FTTC architectures may not be able to adequately handle multiple bandwidth intensive applications. The layering of applications on top of each other will already be pushing the bandwidth limitations of FTTC. When the next applications come along, like telemedicine, more peer to peer file sharing, etc., FTTC will inevitably have to be upgraded to the capabilities of FTTH. That will require another round of investment in more fiber and different equipment.

FTTC is simply an interim step and an inferior architecture. While CLECs disagree with the Commission's broadband unbundling policy, if it had any validity, the ultimate incentive of no unbundling should be held out for the most desirable long-term solution – FTTH, not FTTC.

BellSouth's argument that FTTC requires much less initial investment is also not completely accurate. Under a FTTC architecture, the savings from the reduced cost of fiber to the home and the equipment at the premise is offset by the cost of additional equipment within the network, at the serving area interface (“SAI”) and at the central office. Furthermore, the added electronics and the network equipment increase the cost of maintenance over the life of the investment. Taking these extra costs into account causes FTTH to be at least as cost effective, if not more cost effective, over time. This again shows the FTTC is properly characterized as a type of hybrid loop, inferior to the full fiber connectivity that appears to be the Commission's preferred end goal.

4. The 500 Foot Proposal Is Unworkable

The proposed FTTC exemption will also create definitional issues not found with FTTH loops. Treating FTTC hybrid loops differently than other hybrid loops for unbundling purposes will be an operational nightmare. CLECs already have incredible difficulty in determining where RBOCs have deployed hybrid loop architecture because of limited access to plant records. An arbitrary copper loop length cut off will only exacerbate this. If the FTTC rules specify a limit of 500 feet, then CLECs will need to know where loops are 499 feet versus 501 feet. If ILEC systems exist that accurately provide such information, few if any CLECs have ever been given access to them. Most ILEC prequalification tools provide estimated loop lengths that may differ wildly from actual measurements. The BellSouth petition will also have implications for areas currently served by hybrid loops. Since remote terminals are generally placed in close proximity

to the neighborhoods they serve, many of the copper loops behind remotes are shorter than 500 feet. Are these loops then to be considered FTTC if ONA equipment is collocated with the remote terminal? If certain loop behind RTs are off limits for unbundling, how will CLECs know this? ILEC systems are not set up to provide such information. How will CLECs be able to develop business plans when they have no idea what their addressable market will be?

Additional aspects of the BellSouth proposal also render it even more unworkable. For instance, BellSouth states that a loop will qualify for the exemption if it has the “capacity to deliver voice, multi-channel video, and data services to the mass market customers.” It is hard to imagine a rule more fraught with undefined terms. This rule does not define the amount of channels and whether they are analog or digital. The rule does not define threshold capacity for data services – *i.e.*, 10 Mbps, 50 Mbps, 100 Mbps? The rule does not discuss if the mass market is limited to residential. Moreover, given the constantly evolving technology, whatever definitions the Commission does set will inevitably skew engineering and technical decisions which are best left ungoverned by FCC regulations. For all the reasons supporting the Commission’s policy of technology neutrality, the Commission should avoid picking particular technologies.

For all these reasons, the Commission should not compound the fundamental errors underlying its broadband unbundling rules by extending FTTH treatment to FTTC.

B. BellSouth Is Seeking Unbundling Relief for Its Existing Network

BellSouth deployed the first FTTH network in [the U.S.]1986.²⁰ It began using fiber for all new feeder placements beginning in 1996. Already 50% of its loops can support 5 Mbps

²⁰ CC Docket No. 01-338, *Ex Parte* Letter from Glenn Reynolds, Counsel for BellSouth to Marlene H. Dortch, Secretary for the Federal Communications Commission at 3 (Sept. 17, 2003).

service.²¹ BellSouth already has 1 million homes passed with fiber, and an additional 14 million with fiber to a nearby distribution point.²² While CLECs do not have complete information on its FTTC deployment, BellSouth already has plans to serve 43% of new homes in its territory with FTTC,²³ and it is well understood that BellSouth is the leader in deployment of FTTC. In addition to showing that the pre-*Triennial Review Order* rules were not a disincentive to deploying FTTC, and that unbundling relief in addition to being unlawful, is unnecessary, this deployment shows that BellSouth is now merely trying to obtain unbundling relief for its existing FTTC and FTTC that it will deploy regardless of Commission action. Therefore, if for no other reason, the Commission should reject BellSouth's FTTC reconsideration request because it does nothing to address the Commission's broadband goals and would cripple competition.²⁴

C. The FTTH Rules Are Impermissibly Vague

The Commission also should not accord FTTC the same regulatory treatment as FTTH because the FTTH rules themselves are already impermissibly vague. The Commission's rules define a FTTH loop as "a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving an end user's customer premises." Rule 51.319(a)(3). This overbroad definition could encompass not only DS1 and DS3 loops, but also dark fiber loops, for which the Commission not only found a significant level of impairment, but also relies upon in the impairment triggers for DS1 and DS3 loops.²⁵ Elsewhere in the *Triennial Review Order*, the

²¹ *Id.*

²² Vince Vittore, *Bill Smith, BellSouth*, Telephony (June 2, 2003).

²³ BellSouth September 17th Ex Parte at 10.

²⁴ It is also ironic that BellSouth asks the Commission not to "regulate technology" by picking a winner between FTTH and FTTC when the entire underpinning of the broadband rules is promotion of packet-switched fiber technology over TDM-based copper technology. Thus, the Commission has already "regulated technology" contrary to its prior precedent.

²⁵ *Triennial Review Order*, at ¶ 313 ("because it is generally not economically feasible to deploy duplicate fiber loop facilities the record reflects that a number of facilities based competitive LECs rely on incumbent LEC

FCC required incumbent LECs to unbundle dark fiber loops and to unbundle DS1 and DS3 capacity loops without regard to whether they are delivered using fiber to the premises. The FCC did not in any way limit these obligations to a particular class of customers. The exemption was adopted in the context of the Commission’s discussion of “mass market” loops, but the FCC never defined specifically what it meant by mass market loops. The change to the FTTH rules established in the *Errata* only made matters worse by eliminating the previous clear application of those rules only to residential customers. Thus, the Commission’s unbundling rules are internally inconsistent and will engender numerous disputes in regard to application.

D. FTTC Loops Are Properly Classified As Hybrid Loops

As BellSouth itself concedes, the Commission explicitly rejected treating FTTC as FTTH because FTTC is an intermediate fiber deployment architecture.²⁶ Despite BellSouth’s protestations, it is clear that FTTC is an intermediate fiber deployment architecture, and the best evidence of this is BellSouth’s own deployment. BellSouth already has fiber feeder deployed to its remote terminals. BellSouth will simply deploy ONUs and extend these fiber facilities from the remote terminal to the ONU. As the Commission noted, several ILECs “pursue their construction and network modification projects in incremental ways – first, deployment of fiber in the feeder plan and associated equipment like DLC systems . . . followed by fiber-to-the-curb, followed by FTTH.”²⁷ This is exactly the type of incremental deployment BellSouth is engaging in, and not the type of deployment the Commission intends to promote through its FTTH rules.

unbundled dark fiber.”); *Id.* At ¶ 337 (including the use of UNE dark fiber obtained from the ILEC to provide loops on a wholesale basis).

²⁶ *Triennial Review Order*, ¶ 276, n. 811.

²⁷ *Triennial Review Order*, ¶ 285.

SBC also unequivocally states that the “hybrid network is a transition technology” and that “[t]ransition to FTTH starts with hybrid network.”²⁸

The Commission’s entire premise in providing a broader unbundling exemption to FTTH loops as opposed to hybrid loops is that impairment declines with the increased deployment of fiber.²⁹ While Commenters strenuously dispute the lack of logic in this conclusion, the Commission’s premise requires the treatment of FTTC as hybrid loops, because a significant amount of legacy copper will still remain in these loops. The Commission has not conducted any analysis on whether the revenue capabilities of FTTC will allow CLECs to overcome the impairment they face, nevertheless BellSouth asks this Commission to exempt FTTC based essentially on faith.

While the Commission’s overall broadband policy is flawed, the Commission’s application of additional unbundling obligations for intermediate fiber deployment architecture such as hybrid loops vis-à-vis FTTH loops has some logic to it within the context of that policy. Hybrid loops allow ILECs to leverage their monopoly control over their existing loop deployment in order to extend fiber deeper into the network. BellSouth already has numerous copper distribution pairs and remote terminals in place so it is merely a matter of connecting the dots. The CLEC, on the other hand, has to deploy entirely new facilities. Contrary to BellSouth’s contention, ILECs do possess an economic advantage over CLECs in the deployment of FTTC. These same advantages apply to FTTH. Thus, CLECs, once again, face the same obstacles they face in regard to deploying FTTH while ILECs will simply be able to extend their existing facilities. The Commission recognized this fact in noting that in an

²⁸ *SBC January 15th Ex Parte* at 10.

²⁹ *Triennial Review Order*, ¶ 286.

overbuild FTTH situation, a CLEC could face additional obstacles to provide the service it seeks to offer.³⁰

The Commission in the *Triennial Review Order* correctly understood that FTTC loops are hybrid loops. BellSouth describes FTTC loops as a deployment of fiber to a serving terminal that serves 8-12 households, and is within a range of 500 feet to customer premises. From this terminal, a copper distribution pair runs to the customer premises. The Commission defined a hybrid loop as any loop consisting of fiber optic and copper cable.³¹ Thus, FTTC loops are clearly within the definition of a hybrid loop. The FTTC diagram submitted by BellSouth also demonstrates that these loops are hybrid loops. The FTTC fiber loop runs from the central office to a remote terminal which typically serves 50 to 150 optical network units, and is within 12,000 feet of the ONU.³² From the remote terminal the loop runs to a serving terminal/ONU where it is distributed to 8 to 12 homes via copper wires. In contrast, the FTTH architecture diagram shows fiber running directly to the customer premises without any reference to use of a remote terminal and the fiber goes to the house.³³ Accordingly, FTTC loops are appropriately classified as hybrid loops and no further unbundling exemption is warranted.

III. THE COMMISSION SHOULD RETURN TO ITS INITIAL DETERMINATION THAT LIMITED FIBER UNBUNDLING EXEMPTIONS TO RESIDENCES

In light of the uncertain application of its FTTH rules, and conflicts in its impairment analysis for broadband loops, the Commission should return to the original language in the *Triennial Review Order* that limited fiber unbundling exemptions to residences.. Under this approach, CLECs could obtain unbundled broadband access over any ILEC loop, including fiber

³⁰ *Triennial Review Order*, ¶ 277.

³¹ *Triennial Review Order*, ¶ 276, n. 811.

³² BellSouth Sept. 7th Ex Parte at 6.

³³ *Id.* at 7.

loops, to serve business customers, subject to impairment triggers, but not to some defined residential customers served by FTTH.

This approach appears to be reflected in the Commission's rules to some extent. The term "fiber-to-the-home," at the very least suggests that the rules apply to fiber loops to residential customers. The source of the Commission's definition of the FTTH loop, Corning, defined the FTTH loop as running to a "residential" customer.³⁴ Moreover, residential customers were the focus of the Commission's impairment analysis in regard to FTTH because the evidence of FTTH deployment evaluated the number of "homes" passed.³⁵ Similarly, the FTTH revenue analysis in the *Triennial Review Order* focused *exclusively* on revenues from residential customers.³⁶ Finally, BellSouth's Petition and related *Ex Partes* in this proceeding have focused on single-family homes, apartments, condominiums and town homes.³⁷

Further, the evidence of intermodal competition, if taken as true, only supports application of unbundling relief to FTTH facilities used to serve residential customers. There is limited deployment of non-ILEC loops to all but the very largest business customers by either intramodal or intermodal competitors. Cable facilities do not generally reach business districts because the cost of infrastructure is a major obstacle to cable companies seeking to serve business customers.³⁸ Thus, even assuming *arguendo*, significant competition in the residential

³⁴ *Triennial Review Order*, ¶ 273, n. 802, *citing*, Corning Nov. 20, 2002 Ex Parte Letter at 2.

³⁵ Corning October 16, 2002 Ex Parte Letter at 7.

³⁶ *Triennial Review Order*, ¶ 274, n. 807, *citing*, Corning Nov. 26, 2002 Ex Parte.

³⁷ *See, e.g., BellSouth September 15th Ex Parte* at 10.

³⁸ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, Appendix B, ¶ 23 (Feb. 6, 2002); CC Docket Nos. 02-33, 95-20, 98-10, 02-52, *Ex Parte Letter* from L. Barbee Ponder IV, Counsel for BellSouth Corporation to Marlene Dortch, Secretary, FCC, Attachment A at (July 29, 2003) (Noting that "cost of infrastructure is a major obstacle" to cable operators serving business customers and that "[t]hrough the [cable] industry spent billions upgrading fiber networks, the improvements were largely limited to residential areas."); CC Docket Nos. 01-338, 96-98, 98-147, 02-33, 01-337, *Ex Parte Letter* from Edward Shakin, Counsel for Verizon to

broadband market, no such competition was demonstrated in the non-residential broadband market. RBOCs do not need unbundling relief to compete with competitors in the non-residential broadband market.

The Commission, in the D.C. Circuit appeals addressing the *Triennial Review Order*, has unequivocally stated that nothing in the FTTH rules is designed to deny CLEC access to DS1 and DS3 loops.³⁹ The best way to ensure this is to apply a residential/business distinction. Otherwise, the Commission's FTTH rules will be in direct conflict with its DS1/DS3 loop rules.

The Commission must reject the proposal by SureWest and the US Internet Industry Association that the Commission define the mass market as any business or customer locations which use up to 48 telephone numbers.⁴⁰ SureWest's proposal, in addition to being absurd on its face, would seriously harm numerous CLECs. No support is presented for this approach and there is no plausible basis for that definition of mass market customers. In fact, this proposal directly conflicts with the Commission's finding that CLECs would be impaired without access to DS1 loops in the mass market since customers served by DS1 loops will frequently have far fewer than 48 telephone numbers.⁴¹ In this connection, many CLECs target customers well below 48 lines.⁴²

Marlene Dortch, Secretary, FCC (Jan. 15, 2003)(Observing that Credit Lyonnais estimates that only 2.5 million small-to-medium-sized businesses (SMBs) out of a total of 10.5 million SMBs nationwide are passed by cable infrastructure.) Of course this does not even address the extent to which that infrastructure supports services demanded by SMBs. See, CC Docket No. 01-338, Comments of Allegiance Telecom, Inc. at 3 (Apr. 5, 2002); CC Docket No. 01-338, Reply Comments of Allegiance Telecom, Inc. at 33-36 (July 17, 2002);

³⁹ *Allegiance Telecom, Inc., et al., v. FCC, et al.*, No. 03-1316 and consolidated appeals, Opposition of the Federal Communications Commission to Allegiance Telecom's Motion for Stay Pending Review at 12 (Oct. 21, 2003).

⁴⁰ CC Docket No. 01-338, Petition of SureWest Communications for Clarification and Partial Reconsideration (October 2, 2003); see also, CC Docket No. 01-338, Petition of US Internet Industry Association for Clarification and Partial Reconsideration (October 2, 2003)

⁴¹ *Triennial Review Order*, ¶ 326.

⁴² For instance, Cbeyond's average customer has seven lines.

For these reasons, the Commission should return to the original language in the *Triennial Review Order* that limited fiber unbundling exemptions to residences.. At a minimum, if the Commission does not do so and decides to give FTTC the same treatment as FTTH, the Commission should establish a residential/business split for FTTH. Consistent with its statement to the D.C. Circuit, the Commission should clarify that CLECs may obtain unbundled access to DS-1 and DS-3 loops to serve mass market customers served by FTTH or FTTC.

IV. FIBER LOOPS TO MULTI-UNIT PREMISES SHOULD NOT BE CONSIDERED FIBER-TO-THE PREMISES LOOPS.

BellSouth asks that the Commission include fiber to multi-unit premises in the apparently limitless list of facilities that it would like to see fall within the definition of FTTH loops. Once again, as a threshold matter, the Commission should deny the request because BellSouth has failed to demonstrate that CLECs are not impaired without access to multiple dwelling units. As discussed above, BellSouth has not shown that CLECs are in the same position as ILECs in regard to deploying new FTTH, FTTC, or other loops generally. In fact, the record demonstrates that CLECs are not in the same position as ILECs in regard to MDUs since the Commission found CLECs are impaired in regard to both commercial and residential multi-unit premises. BellSouth is conveniently asking the Commission to overlook the fact that in two separate parts of the *Triennial Review Order* the Commission explicitly found impairment in regard to these facilities. As the Commission noted:

When customers typically associated with the mass market reside in multi-unit premises, carriers seeking to self-deploy their own facilities to serve these customers face the same barriers as when serving multi-unit premise-based enterprise customers. Because we find that the barriers faced by requesting carriers in accessing customers in multi-unit premises are not unique to enterprise market customers residing in such premises but extend to all classes of customers residing therein, including residential or other mass market tenants, the

conclusions we reach for high-capacity loops in the enterprise market apply equally to mass market customers in multi-unit premises.⁴³

Later in the *Triennial Review Order*, the Commission once again reiterated that “competitive LECs serving customers residing in multi-unit premises typically associated with the mass market face the same economic and operational barriers as serving customers residing in multi-unit premises typically associated with the enterprise market.” *Triennial Review Order*, ¶ 347, n. 1040. Even in the most densely populated commercial districts, CLECs are far behind ILECs in regard to ability to access multi-unit buildings. For instance, in LATA 132, which is in lower Manhattan, and which the Commission has found to be the most competitive area in the nation, Verizon’s network serves 7,364 buildings and CLECs serve fewer than 1,000.⁴⁴

Thus, contrary to BellSouth’s contentions, there is nothing unclear about the rules concerning treatment of fiber loops serving multi-unit premises. The Commission unequivocally determined that CLECs are impaired without access to such loops. BellSouth offers nothing to alter the Commission’s determination of impairment. Instead, BellSouth reverts to the thinly-veiled threat that it will not deploy fiber to a new community unless the entire community is shielded from unbundling requirements. This once again demonstrates the folly of the Commission’s approach. By ignoring impairment in favor of the already satisfied goals of Section 706, the Commission opens the door to the RBOCs’ insatiable quest to bring all facilities within the unbundling exemption regardless of the impairment CLECs face. Already the FTTH loop exemption has spiraled out of control moving from a discrete exemption for residential premises to all end-user premises and now perhaps all multi-unit premises. It is significant to note that BellSouth places no residential restriction on its proposed multi-unit extension, thus business multi-unit premises could fall within the scope of this rule with no defined parameters.

⁴³ *Triennial Review Order*, ¶ 197, n. 624.

BellSouth suggests that such an extension of the FTTH rule is necessary to promote uniformity in a community such that BellSouth will not have to pick and choose which locations it will serve by fiber. There is no mandate that all locations in a particular area have to be exempt from unbundling, nor has there ever been such a mandate. Moreover, the whole premise of the Commission's granular approach in the *Triennial Review Order* is focusing on the impairment for particular locations and customers. BellSouth's extensive fiber deployment and plans for FTTC demonstrate the emptiness of the RBOC rhetoric. The Commission should not ignore its findings of impairment merely because the RBOC threatens to withhold service. BellSouth's filings have indicated that it already has, and will continue, to deploy fiber regardless of the scope of the unbundling exemption. It has deployed both FTTH and FTTC extensively under the previous rules without broadband exemptions from unbundling requirements.⁴⁵

CLECs serving multi-unit premises, either business or residential, will have to deploy high-capacity facilities to serve these facilities. Self-provisioning would entail all the attendant costs of adding an off-net building to their fiber network as well as all the attendant delays caused by rights-of-way and access issues. For these reasons, the Commission correctly found impairment in regard to the fiber loops leading to these multi-unit premises. BellSouth, and SureWest who echo BellSouth's request, have provided no reason for the Commission to depart from this determination.

⁴⁴ AT&T Comments at 158; WorldCom Comments at 17.

⁴⁵ BellSouth September 30, 2003 Ex Parte at 3, 10.

V. THE COMMISSION SHOULD AFFIRM ITS CONCLUSION THAT SECTION 271 CREATES AN INDEPENDENT UNBUNDLING OBLIGATION REQUIRING UNBUNDLING OF BROADBAND FACILITIES.

The Commission should reject BellSouth's and USIIA's request for clarification that ILECs are not required to unbundle broadband services and capabilities under Section 271.⁴⁶ The Commission has already considered this issue and, based on the self-evident fact that Section 271 is a separate statutory requirement, concluded that Section 271 creates an unbundling obligation for Bell Operating Companies ("BOCs") independent from Section 251(c)(3) obligations. The Petitioners have not offered any new evidence or other reason for the Commission to change its findings. Petitioners ignore the Commission's analysis of the statutory language that supported the Commission's conclusion that Section 271 imposes a separate unbundling requirement.⁴⁷ The Commission may and should summarily dismiss Petitioners' claims on this issue.

The only way in which the Commission could modify the requirements of Section 271 would be through forbearance. In that regard, Section 10(d) of the Act⁴⁸ specifically precludes the Commission from forbearing from the requirements of Section 271 until it determines that the requirements of that section have been fully implemented. In fact, Petitioners have separately requested forbearance from application of Section 271 broadband unbundling obligations, although there is no basis for granting those petitions either.⁴⁹

The Commission should also reject BellSouth request that the Commission "clarify" that transmission, switching, transport, or signaling unbundled under Section 271 need not be

⁴⁶ BellSouth Petition at 10-15; USIIA Petition at 3-9.

⁴⁷ *Triennial Review Order*, at ¶ 654, 655.

⁴⁸ 47 U.S.C. § 160(d).

⁴⁹ WC Docket No. 03-220, Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of Sections 251(c)(3),(4) and (6) In New-Build, Multi-Premises Developments (Oct. 8, 2003).

combined with wholesale services or combined with UNEs.⁵⁰ All of the policy and legal justifications presented in the *Triennial Review Order* for requiring commingling of Section 251(c)(3) network elements with other services apply with equal force to network elements obtained pursuant to Section 271. As recognized by the Commission, restrictions on commingling would lead to the impractical and competition-thwarting result of CLECs being required to establish two separate networks. A "commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them ... to operate two functionally equivalent networks."⁵¹ Further, commingling does not place any additional burdens on ILECs. And, the Commission has ample authority under the nondiscrimination provisions of Sections 251(c)(3) and Section 201 to require commingling of wholesale services with network elements obtained pursuant to Section 271.⁵²

Accordingly, to the extent any clarification is necessary, the Commission should determine that ILECs must provide network elements pursuant to Section 271 and must permit commingling of them with Section 251(c)(3) UNEs or tariffed services.

VI. THE UNBUNDLING REQUIREMENT FOR DARK FIBER APPLIES TO ALL DARK FIBER, INCLUDING NEW FIBER.

The Commission should reject BellSouth's request to exempt dark fiber deployed after the effective date of the order from unbundling requirements.⁵³ In the *Triennial Review Order*, the Commission found that on a national basis CLECs are impaired without access to dark fiber loops⁵⁴ and transport⁵⁵ and that, therefore, ILECs are required to provide unbundled dark fiber loops and transport unless a state determines that CLECs are not impaired with respect to a

⁵⁰ BellSouth Petition at 15-16.

⁵¹ *Triennial Review Order*, at ¶ 581.

⁵² *Id.*

⁵³ BellSouth Petition at 18-19.

⁵⁴ *Triennial Review Order*, at ¶ 311.

specific customer location or on a specific route.⁵⁶ In making this determination, the Commission cited the high sunk costs associated with deploying dark fiber, the lack of suitable alternatives, and other barriers that prohibit CLECs from self-deploying dark fiber.⁵⁷ The Commission's finding was not limited in any way to dark fiber deployed as of the time of the order. Indeed, such a limitation would have been inconsistent with the Commission's national finding of impairment. All of the reasons articulated by the Commission for finding that CLECs are impaired without access to dark fiber apply equally well to dark fiber deployed in February 2002 and dark fiber deployed on October 3, 2003. Contrary to the implications of BellSouth's Petition, impairment does not magically disappear with respect to a particular strand of dark fiber simply because it is deployed after the effective date of the *Triennial Review Order*.

In addition, the Commission has already articulated the standard by which dark fiber to a specific location or on a specific route may be removed from the unbundling requirements. Specifically, the Commission stated that if a state commission determines that the self-provisioning or potential deployment triggers set forth in the Commission's rules are satisfied with respect to a specific customer location (for dark fiber loops) or on a particular route (for dark fiber transport), the ILEC does not have to unbundle dark fiber to that location or on that route.⁵⁸

In effect, BellSouth's proposal would treat all dark fiber deployed after the effective date of the *Triennial Review Order* as if it satisfied these triggers for non-impairment, regardless of whether impairment actually existed. Such an interpretation would arbitrarily remove an entire category of dark fiber – dark fiber deployed after October 2, 2003, from the unbundling

⁵⁵ *Triennial Review Order*, at ¶ 381.

⁵⁶ 47 C.F.R. § 51.319(a)(6).

⁵⁷ *Triennial Review Order*, at ¶¶ 311-314, 381-385.

requirements without any regard to the impairment standard or any other criteria. This is directly contrary to the granular approach required by the D.C. Circuit, and applied by the Commission. BellSouth has not demonstrated, nor can it demonstrate, that October 2, 2003 has any significance as to whether CLECs are impaired without access to dark fiber or, more specifically, that CLECs are somehow not impaired without access to dark fiber deployed after October 2, 2003. The Commission should reject BellSouth's attempt to limit prospectively its ongoing unbundling obligations under the Act.

Assuming for any reason that the Commission chooses to limit dark fiber unbundling beyond the triggers adopted in the *Triennial Review Order*, which it should not, the Commission should establish a residential/business split as described above in this Opposition.

⁵⁸ See 47 C.F.R. §§ 51.319(a)(6) and 51.319(e)(3).

VII. CONCLUSION

For the foregoing reasons, the CLEC Coalition respectfully requests the Commission deny BellSouth's, SureWest's and USIIA's petitions for clarification and reconsideration.

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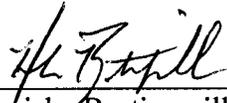
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November 6, 2003

CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on November 6, 2003, I caused to be served upon the following individuals the Opposition to Petitions for Reconsideration in CC Docket Nos. 01-338, 96-98, and 98-147.



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