BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	WC Docket No. 03-220
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	)	

OPPOSITION OF ALLEGIANCE TELECOM

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OPPOSITION OF ALLEGIANCE TELECOM

Allegiance Telecom ("Allegiance"), by its attorneys, hereby submits this opposition in response to the Public Notice[1] in the above-referenced proceeding seeking comment on the petition for forbearance of BellSouth.[2]

I. INTRODUCTION AND SUMMARY

In the *Triennial Review Order*[3] the Commission adopted sweeping unbundling exemptions for broadband loops. In doing so, the Commission purported to "balance" numerous factors, including the desire to promote competition, to account for the presence of intermodal competition, and to spur the deployment of broadband loops by incumbents and competitors. But it did nothing of the sort. The Commission ignored critical differences in markets and

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[1] *See Pleading Cycle Established for Comments on BellSouth's Petition for Forbearance From Application of Sections 251(c)(3), (4) and (6) in New-Build, Multi-Premises Developments,* Public Notice, DA 03-3146 (rel. Oct. 9, 2003).

[2] BellSouth Petition for Forbearance Under 47 U.S.C. § 160(c) in New-Build, Multi-Premise Developments, WC Docket No. 03-220 (filed Oct. 8, 2003) ("Petition").

[3] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

adopted a national exemption from unbundling for newly built and overbuilt fiber-to-the-home loops in the mass market and for the packetized capabilities of hybrid loops. The exemption applies regardless of whether incumbent loops in a market are natural monopolies, regardless of whether competitors would be "impaired" in the absence of unbundled access to incumbent loops, and regardless of whether an intermodal competitor such as a cable company provides consumers at least one other choice in the market.

The vastly over-inclusive nature of the broadband loop unbundling exemption is most obviously evident in the market for broadband loops normally demanded by small and medium-sized businesses. The Commission concluded that non-incumbent loops reach a tiny fraction of end user locations in which businesses are located ("between 3% and 5% of the nation's commercial office buildings are served by competitor-owned fiber loops" *Triennial Review Order* n. 856), it concluded that building new loops to these customer locations "generally does not present sufficient opportunities for competitors to recover their costs and, therefore, may not be economically feasible" (*id*. n.859), and the Commission has elsewhere found that cable operators, the only significant potential intermodal competitors, rarely serve business customers.[4] Nevertheless, the Commission decided to deprive competitors of the right to purchase packetized loops needed to serve small and medium-sized customers. The Commission's Faustian deal thus

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[4] *See 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*, Report and Order, 17 FCC Rcd 2844 at Appendix B, ¶ 23 (2002). The discussion of intermodal competition from cable providers in the *Triennial Review Order* reflects this fact since such competition is only discussed as relevant to the mass market.

offers incumbents the hope of reclaiming their monopoly in this market if only they upgrade their networks to incorporate packetized capabilities.

One would think that the incumbents would take this offer as is, but BellSouth, for one, thinks it left money on the table in the Triennial Review Proceeding. Less than a week after the broadband unbundling exemption took effect, BellSouth filed the instant petition for forbearance in which it seeks to expand the scope of the exemption so that no unbundling requirements apply to any business or residential customer in a multiple-occupant building or subdivision served by any new or overbuilt loops regardless of the technology used or bandwidth delivered. In BellSouth's view, any new loop should be free of unbundling requirements. After all, BellSouth contends, competitors have the same ability to build new loops as competitors.

But this is of course patently false, as BellSouth well knows, and, in any event, Congress wisely precluded the Commission from even considering petitions of this sort. Indeed, this petition need not even be addressed on the merits because Section 10(d) of the Act prohibits the Commission from forbearing from any requirement of Section 251(c) (under which all of the rules subject to the petition were enacted) until the requirements of that provision are "fully implemented." The Commission has not found that Section 251(c) has been fully implemented and there is no basis for reaching such a conclusion until a workable wholesale market for the inputs competitors need has developed.

But even if the Commission could consider the merits of the Petition, the analysis should be straightforward. BellSouth offers no relevant facts and virtually no analysis in support of its argument that incumbents and competitors are in the same position to build new loops to the

locations at issue. Nor is there any basis in either the facts or analysis (whatever its merits) set forth in the *Triennial Review Order* to further expand the scope of the broadband unbundling exemption. The fact is that, at least for multi-occupant buildings in which most small and medium-sized businesses reside, incumbent LECs possess powerful first-mover advantages that give them an unquestioned stranglehold over the market for constructing new loops. The Petition must therefore be rejected.

Instead, the Commission should focus its efforts on scaling back the over-inclusive broadband exemption to at least exclude the small and medium-sized business market. As Commissioner Copps explained in his dissent, loops are "the ultimate bottleneck facility."[5] The current exemption (and certainly any expansion of its scope) will only "perpetuate the bottleneck" (Copps Statement at 2). The end result will be stagnant monopolies and increased regulation needed to try to limit the harm to consumer welfare caused by those monopolies. Nothing could be further from the co-equal goals of competition and deregulation in the 1996 Act.

II. DISCUSSION

In its Petition, BellSouth asks the FCC to forbear under Section 10 of the Act from the application of the few remaining unbundling rules applicable to loops as well as from the collocation and resale rules that currently apply to what BellSouth calls "New Build, Multi-

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[5] *Triennial Review Order*, Separate Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part, Dissenting in Part, at 2 ("Copps Statement").

Premise Developments" or "MPDs." BellSouth's proposed definition of MPDs is as broad as it is vague. It includes all of the following:

> newly constructed, multi-subscriber properties, including single-family home subdivisions, Multiple Dwelling Units (MDU) residential properties, and multiunit premises as defined at 47 C.F.R. § 68.105(b) [which states only that multiunit premises "include, but are not limited to, residential, commercial, shopping center and campus situations"], including multi-tenant commercial buildings, mixed use developments, malls, industrial parks and other similar developments where the improvements, including the telecommunications infrastructure, will be new construction. New-Build, Multi-Premises Developments also includes re-developments of existing properties that are undergoing total rehabilitation where the communications facilities and infrastructure are being replaced entirely."

Petition at 2. Thus, if the FCC were to grant the Petition, BellSouth would no longer be obligated to (1) unbundle any part of its network "used exclusively to serve end user customers in MPDs;" (2) offer any retail telecommunications service to CLECs seeking to serve end user customers located in MPDs; or (3) provide physical or virtual collocation space to any CLEC "in any BellSouth premises used exclusively to serve end user customers in MPDs, such as remote terminals." Petition at 6.

The Petition is meritless and must be rejected for two fundamental reasons. *First*, it is barred by Section 10(d). That provision states in relevant part that "the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). Contrary to BellSouth's assertions (*see* Petition at 7), the Commission has never made such a determination, and may not do so on the basis of the record here. Consequently, Section 10(d) bars the Commission from

granting BellSouth's request that it forbear from enforcing the requirements of Sections 251(c)(3), (4), and (6).

As other parties in other proceedings have explained at length,[6] the requirements of Sections 251(c) cannot be said to be "fully implemented" for purposes of Section 10(d) unless and until (1) a stable regulatory regime implementing Section 251(c) is in place and (2) the Commission determines that in a relevant geographic area, a robust wholesale market exists that enables competing providers to obtain inputs they require to enter the market without the need for continued enforcement of Sections 251(c) or 271.[7] As Senator McCain noted during consideration of the 1996 Act, the requirements of Section 10(d) are satisfied "when markets are deemed competitive."[8] That is plainly not the case today. The Commission is yet to adopt a set of unbundling rules that have withstood judicial appeal and virtually every aspect of the *Triennial Review Order* is currently subject to appeal. Furthermore, key aspects of the *Triennial Review Order,* such as the state impairment proceedings, have not even been implemented.

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[6] *See, e.g.,* Opposition of MCI, WC Docket No. 03-157 (filed Aug. 18, 2003) at 23-28; Opposition of AT&T, WC Docket No. 03-157 (filed Aug. 18, 2003) at 24-29.

[7] Such an approach is fully consistent with the Commission's recent decision to reject Verizon's petition for forbearance from applying the OI&M sharing prohibitions under Section 272(b)(1) of the Act. *See In the Matter of Petition of Verizon from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, Memorandum Opinion and Order, CC Dkt. No. 96-149 (rel. Nov. 4, 2003). There, the Commission explicitly stated that its Section 10(d) analysis applied *only* to whether Section 271 is "fully implemented" with respect to the cross-referenced requirements of Section 272. *See id.* ¶ 6 (concluding that the Section 272 requirements cannot be deemed to have been "fully implemented" until a three-year period has elapsed). It did not address whether the critical Section 251 unbundling requirements at issue in the instant proceeding were "fully implemented."

[8] 141 Cong. Rec. S7956 (June 8, 1995) (statement of Senator John McCain).

More generally, local competition is in the very early stages of development and, as the Commission recognized in the *Triennial Review Order*, there are numerous parts of the incumbent network for which there is nothing close to a workable wholesale market.

Moreover, as others have explained,[9] the Section 10(d) forbearance analysis is unaffected by the fact that BellSouth has received approval to provide long-distance service in its service territory. The competitive checklist requirements in Section 271(d)(3)(A)(i) and the forbearance requirements in Section 10(d) serve two very different objectives. A determination that a BOC has "fully implemented" the competitive checklist reflects a predictive judgment that local competition *could* take root. Section 10(d), in contrast, requires a determination that such local competition *has* taken root. Conflating the two sets of requirements would lead to an absurd result. In particular, Congress could not have intended to permit the Commission to forbear from enforcing the market-opening requirements of Section 251(c) at the very instant the Commission granted a BOC long-distance authority premised on the BOC's continuing compliance with Sections 251(c) and 271. Rather, Congress required that, prior to forbearance, a BOC must "fully implement" *all* of the requirements of Section 251(c) on an ongoing basis, not just those on the competitive checklist.

While the BOCs have argued that the use of the phrase "fully implemented" in both Section 10(d) and in the standard for determining when a BOC has met the requirements of the

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[9] *See, e.g.,* Opposition of MCI, WC Docket No. 03-157 (filed Aug. 18, 2003) at 23-28; Opposition of AT&T, WC Docket No. 03-157 (filed Aug. 18, 2003) at 24-29.

Section 271 competitive checklist (Section 271(d)(3)(A)(i)) indicates that forbearance from Section 251(c) is allowed once a BOC meets the requirements of Section 271 in a particular state, this is unpersuasive. To begin with, the requirements of Section 251(c) include a number of critical ongoing obligations other than those referenced on the competitive checklist. *See, e.g.*, 47 U.S.C. 251(c)(1) (requiring an incumbent to negotiate in good faith); *id.* § 251(c)(5) (requiring an incumbent to provide reasonable notice of changes necessary for routing services). It cannot be, therefore, that a Commission finding that the competitive checklist has been "fully implemented" indicates that Section 251(c) is also fully implemented. Furthermore, the Commission and the courts have determined that the same term or phrase used in different sections of the same act should be interpreted differently, where, as here, the two sections serve two very different objectives.[10] Indeed, the D.C. Circuit has observed that "on numerous occasions, both the Supreme Court and this court have determined, after examining statutory structure, context and legislative history, that identical words within a single act have different meanings.[11] These same principles of statutory construction should apply here. The phrase

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[10] *See, e.g.*, *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 21438 (1998), *aff'd sub nom.*, *U.S. West Comm. Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999) (interpreting the term "provide" differently for purposes of Section 271(a) and Section 260(a). *See also U.S. West*, 177 F.3d at 1060 (finding that it was appropriate for "identical words" to have "different meanings where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different").

[11] *Martini v. Federal National Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999). *See also Cellular Telecommunications & Internet Ass«n and Cellco Partnership d/b/a Verizon Wireless v. FCC*, 330 F.3d 502, 510-11 (D.C. Cir. 2003) (rejecting the argument that the term "necessary" in Section 10(a) "has precisely the *same* meaning in every statutory context." (emphasis in original)). Courts have in some cases assigned the same meaning to a word or a phrase appearing multiple times in a particular statute, but those cases typically involve tax or other matters or circumstances very different from those presented here. *See, e.g.*, *Sorenson v. Secretary of the*

"fully implemented" is used in different contexts -- and in furtherance of very different objectives -- in Section 10(d) as compared to Section 271(d)(3)(A)(i), and reading them together would lead to the anti-competitive outcomes described above.

Second, even if consideration of the Petition were not barred by Section 10(d), there is no basis for concluding that BellSouth has or could demonstrate that forbearance is justified under the criteria set forth in Section 10. Section 10(a) gives the Commission the authority to forbear from a statutory requirement or a regulation where it is unnecessary to ensure that charges are just and reasonable, when the regulation is unnecessary to protect consumers, and when forbearance would be consistent with the public interest. 47 U.S.C. § 160(a). Section 10(b) states further that in assessing the public interest, the Commission must evaluate whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will promote competition among providers of telecommunications services." *Id.* § 160(b).

BellSouth has barely even attempted to meet these requirements. It asserts that its request for a sweeping exemption from the core market-opening requirements of the Act would actually stimulate competition for delivery of service to MPDs because BellSouth does not have "an inherent competitive advantage in installing facilities to serve these new customers." Petition at 3. BellSouth offers three purported bases to support this counterintuitive assertion.

Treasury, 475 U.S. 851 (1986) (concluding that the term "overpayment" in different provisions in the tax code should be given the same meaning).

First, in the Summary and Background section of the Petition, BellSouth casually mentions that it is "aware of" 109 residential and commercial developments in its region in which "BellSouth is unable to provide retail telecommunications services" because the development is served by a competitor. *Id.* at 1. It goes on to state that the number of new developments served "solely by competitive facilities" is "increasing." *Id*. at 2. This conclusion is apparently based on the prediction that there will be a significant number of new residential and commercial buildings (no doubt most of which fall within BellSouth's proposed definition of MPD) constructed over the coming years in the BellSouth region. *Id*.

These assertions offer no support for BellSouth's argument. Its statement that it is "aware of" some new developments served exclusively by competitors' facilities is hardly the kind of thorough factual demonstration needed to justify the extraordinary remedy of forbearance. BellSouth offers no supporting documentation for its assertion, as it must. In fact the D.C. Circuit has affirmed a Commission rejection of factual information supplied in support of a forbearance request where the petitioner fails to supply supporting data.[12] Without underlying data specifying the particular non-ILECs that have deployed facilities to new developments and what types of facilities they have built, it is impossible to assess the extent to which other competitors could reasonably be expected to make similar investments in other

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[12] *See AT&T Corp. v. FCC*, 236 F.3d 729, 730 (D.C. Cir. 2001) (holding that the FCC reasonably rejected US West's market share data filed in support of a Section 10 forbearance request because "US West failed to provide the underlying raw data on which its conclusions were based, and, as a result, US West's findings were not verifiable").

locations in the future. For example, there may be circumstances in which municipally-owned networks have constructed facilities serving a particular location within the limited scope of the municipality's network. In other cases, a cable operator may be in a unique position to overbuild a new subdivision of multiple single-occupancy residential buildings.

Similarly, BellSouth fails to describe the types of customers served in the 109 new developments. There is a significant difference between a multiple-occupant commercial office building and a collection of single-occupant homes in a new subdivision. Competitor success in serving one of the different kinds of possible properties offers no basis for concluding that similar success is likely in another setting. It was precisely to account for these differences that the Commission conducted a granular analysis of impairment in the *Triennial Review Order* (except for broadband loops).

BellSouth also fails to specify the time-frame in which the competitors purportedly serving the 109 new developments deployed the facilities in question or in how many new developments BellSouth constructed new facilities in the same timeframe. This information makes a significant difference to the analysis. For example, if competitors built facilities to 109 similarly situated developments but BellSouth during the same timeframe deployed facilities to 10,009 such developments, the logical inference is that the incumbent possesses a substantial advantage in building new facilities.

Moreover, the fact that there will be a significant number of new residential and commercial buildings constructed over the coming years in the BellSouth region (490,000 new housing starts and $36.5 billion in commercial construction in 2003 according to BellSouth, *see*

Petition at 2) only demonstrates the scope of the competitive harm that would be caused if BellSouth's request were granted. In fact, Allegiance estimates that approximately 58% of its prospective customer locations in the BellSouth region are currently housed in multi-tenant facilities. If it were unable to serve a significant percentage of these customers as a result of the BellSouth proposal, Allegiance would be severely harmed as a viable competitor.

Second, BellSouth submits as an exhibit to its petition a "sample" request for proposal ("RFP") that purportedly demonstrates developers' "interests and motivations" in seeking a "competitive negotiation process" among potential providers of telecommunications services. Petition at 3, Exhibit A. BellSouth's point here is apparently that the RFP supports the uncontroversial proposition that real estate developers would like their tenants to receive the best possible telecommunications service. But of course this just begs the question. Developers can only benefit from an open bidding process from telecommunications service suppliers if there are multiple, competitive suppliers that can efficiently deploy facilities to a particular location. BellSouth has offered no evidence that such competition exists for MPDs. In the absence of such competition, the best way to deliver the benefits of competition is, as Congress intended, to retain the unbundling and other requirements of Section 251(c).

Third, BellSouth asserts that the "facts and analysis" cited by the Commission in support of its adoption of the unbundling exemption for new build fiber-to-the-home ("FTTH") loops in the *Triennial Review Order* justify the same treatment for MPDs. Petition at 4. Nothing could be further from the truth. The "facts" and "analysis" in the FTTH and the loop section of the

Triennial Review Order demonstrate that the BellSouth forbearance request is utterly baseless and would affirmatively undermine core aspects of the framework adopted in the order.

In the *Triennial Review Order* (as modified by the subsequent *Errata*), the FCC adopted an exemption from unbundling for newly built and overbuilt fiber loops that extend to the premises of mass market customers. *See Triennial Review Order*, ¶¶ 273-284. The Commission adopted the FTTH exemption based on its conclusion that entry barriers associated with constructing such facilities "appear to be largely the same for incumbent and competitive LECs." *Id.* ¶ 275. For example, the Commission observed that competitive LECs had deployed "two-thirds or more of the FTTH loops throughout the nation." *Id.* In support of these conclusions, the Commission cited numerous filings by Corning and the High Tech Broadband Coalition. *See id.* nn. 809, 810.[13] Every one of these filings either was expressly or implicitly limited to the question of impairment for fiber loops built to residential customers or mass market customers. None of these filings addressed the extent to which competitive LECs had deployed loop facilities to small and medium-sized business customers and none expressly addressed the entry barriers faced by competitive LECs in building loops to multiple occupant buildings. The "facts" and "analysis" cited in the FTTH section could not therefore justify extending the unbundling exemption to the broad class of customers proposed by BellSouth.

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[13] The Commission also cited BellSouth's comments in footnote 808, but only for the proposition that "competitive LECs have 'a mandatory right to access the rights-of-way of [incumbent LECs] and presumptive rights to access other utility rights-of-way.'" *Triennial Review Order* n.808.

Nor could the FTTH section of the *Triennial Review Order* possibly be used to justify expanding the exemption to encompass anything other than loops consisting of fiber that extends all the way to the customer premises. The Commission's analysis in the order was expressly limited to those loops (*id.* n. 811) and the data it relied upon primarily addressed those loops. BellSouth, however, does not limit the scope of its forbearance requests to loops that consist of fiber that extends to the customer. It therefore seeks to expand the scope of the unbundling exemption to loops for which there is no basis in the "facts" or "analysis" regarding FTTH in the *Triennial Review Order*.

Indeed, the relief sought by BellSouth is foreclosed by several core conclusions in the *Triennial Review Order*. There, the FCC analyzed the extent to which competitive LECs are in the same position to deploy high-capacity loops, including DS1s, DS3s and new fiber connecting buildings to central offices. As the Commission observed, these loops are "generally provisioned to enterprise customers" and such customers "reside, most often, in multiunit premises." *Id.* n. 624. The Commission concluded that incumbent LECs have a clear advantage in constructing new loops to these locations. The Commission cited many reasons for reaching this conclusion. For example, the Commission explained that, "[w]hen a fiber build decision is made, carriers take advantage of the fact that they are already incurring substantial fixed costs to obtain the rights-of-way, dig up the streets, and trench the cable, to lay more fiber than they immediately need." *Id.* ¶ 312. Because of their huge embedded customer base, the incumbent LECs obviously have a greater opportunity to take advantage of these efficiencies than

competitors. The incumbent LECs therefore have a "'first-mover' fiber deployment" advantage which "sharply contrasts" with competitive LECs' diminished ability to deploy fiber loops. *Id*.

BellSouth has offered no basis for concluding that incumbents lack this advantage for MPDs. Indeed, it seems likely that ILECs would readily exploit their "'first-mover' fiber deployment" advantage in numerous ways for MPDs by, among other things, (1) relying on fiber constructed in the past in the feeder portion of the loop to reach an MPD location while a CLEC would likely need to construct an entirely new fiber loop; (2) exploiting its larger network footprint to share the "substantial fixed costs" of obtaining access to rights-of-way, digging up streets and trenching cable among several different locations (possibly all MPDs); and (3) offering developers with multiple development projects within their regions a volume discount that competitors without networks of the same size could never match.

Nor do these conclusions apply only to loops serving enterprise businesses in multi-unit buildings. The Commission concluded that "[w]hen customers typically associated with the mass market reside in multiunit premises, carriers seeking to self-deploy their own facilities to serve these customers face the same barriers as when serving multiunit premise-based enterprise customers." *Id.* n. 624. Thus, the Commission concluded that the "conclusions" reached with regard to DS1 and DS3 loops "apply equally to mass market customers in multiunit premises." *Id.*[14]

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[14] In footnote 624, the Commission mentioned, in particular, entry barriers associated with gaining access to end users in multi-unit buildings. It discussed those issues in greater detail in paragraphs 347 and 348 of the order. *Triennial Review Order* ¶¶ 347-348. The problems competitors continue to face in obtaining access to buildings to

Furthermore, if granted, BellSouth's forbearance request would subvert the few pro-competitive aspects of the *Triennial Review Order* applicable to loops. For example, the Commission concluded that eliminating unbundling obligations for the packet capabilities of hybrid loops would give competitive LECs the incentive to deploy fiber feeder plant. *See id.* ¶ 290. Even if competitive LECs had the large embedded customer base needed to justify such construction (which they do not), it would only be feasible if competitors could collocate at the incumbent's remote terminal and obtain access to incumbent LEC copper subloops that connect to end users. *See id.* ¶ 291. But under BellSouth's proposal, competitors would not be able to collocate at a remote terminal that serves exclusively MPD customers and in no event would competitors be able to unbundle newly deployed subloop facilities connecting to end user premises within MPDs.

In addition, in balancing what it saw as the competing goals of "promoting facilities-based investment and innovation" and "stimulating competition in the market for local telecommunications services" (*id.*, ¶ 200), the Commission deemed it necessary to preserve competitors' access to the TDM capabilities of hybrid loops. *Id.* ¶ 294. While insufficient in the long run, this requirement at least ensures that for the time-being competitive LECs will be able to compete in the provision of broadband services to small and medium-sized businesses that

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connect facilities to end users in multi-unit environments are highly relevant to the instant Petition. Specifically, if a competitor cannot obtain building access on equal terms with the incumbent, it will not be able to compete to replace existing loop facilities (a situation for which BellSouth seeks forbearance) on an equal basis with the incumbents. In any event, the Commission did not in any way limit its conclusion that mass market multi-unit buildings should be treated like enterprise multi-unit buildings to situations in which carriers compete to replace existing wiring.

rely on DS1 and DS3 loops. Yet even this right would be eliminated if BellSouth's request were granted since it seeks forbearance from *all* unbundling requirements applicable to loops serving exclusively MPDs.

Nevertheless, BellSouth insists that competition and consumer welfare will not be harmed because "a broad array of federal and state regulatory requirements will remain." Petition at 8-9. In support of this assertion, BellSouth cites to the requirements of Section 251(a) (the duty to interconnect without any applicable rate regulation) and 251(b) (the duty not to prohibit resale, to provide number portability, dialing parity, access to rights-of-way and reciprocal compensation) and the still-applicable provisions of Section 251(c) (the duty to negotiate in good faith, interconnect and provide notice changes in the network). But none of these requirements would constrain BellSouth's ability to deny, delay, degrade or overprice the *loops* it deploys to MPDs.

BellSouth also points out that the requirements of Section 201-205 would remain "unaffected" if its petition were granted, thus ensuring reasonable access and prices. But the FCC rejected almost precisely this argument when it ruled in the *Triennial Review Order* that the availability of incumbent LEC tariffed services (offered pursuant to Sections 201-205) is no substitute for unbundled network elements. *Triennial Review Order* ¶ 102. The Commission rightly concluded that the application of TELRIC pricing to unbundled elements, and not to tariffed services, and the greater control over the use of the facilities granted to a purchaser of unbundled network elements mean that offerings subject to the requirements of Sections 201-205 cannot be deemed substitutes for network elements offered pursuant to Section 251(c). *Id.*

Lastly, BellSouth suggests that Section 271 unbundling obligations adequately protect against harm to competition and consumers in the absence of Section 251(c) unbundling, collocation or resale. BellSouth neglects to mention that it is elsewhere aggressively seeking the elimination of unbundling obligations under Section 271 for any facility no longer subject to Section 251(c). *See* BellSouth Petition for Reconsideration and Clarification, CC Dkt. No. 01-338 at 12-15 (filed Oct. 2, 2003). In any event, unbundling under Section 271 cannot substitute for unbundling under Section 251(c) since the Commission has ruled that incumbents are not obligated to combine Section 271 network elements (*Triennial Review Order* n. 1990), and, as with tariffed services, it has held that prices for Section 271 network elements need only conform to the reasonableness standards in Sections 201 and 202 rather than the cost-based (TELRIC) standard in Section 252(d) (*Id.* ¶¶ 656, 663). Thus, Section 271 unbundled elements simply lack the characteristics of Section 251(c) network elements and cannot be relied upon as anything like a safety net for competition or consumer welfare.

All of this conclusively demonstrates that BellSouth's forbearance petition offers no basis for eliminating the few remaining unbundling rules that apply to the many customer locations that would qualify under BellSouth's vague and expansive definition of MPDs. If granted, the petition would only impose further unwarranted and anticompetitive restrictions on an already flawed regime for loop unbundling. Nor has BellSouth offered any basis for forbearing from collocation rules or resale rules applicable to MPDs. The Commission should therefore promptly deny this meritless petition and turn its energies to expanding loop unbundling in markets where

incumbent LECs have the incentive to deny, delay, degrade and overprice the loops competitors need to compete.

III. CONCLUSION

For the reasons described herein, the Commission should reject the Petition.

Respectfully submitted,

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