

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

In the Matter of)	
Review of the Section 251 Unbundling)	
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 Capability)	CC Docket No. 98-147

**RESPONSE TO COMMENTS SUPPORTING WIRELESS PETITIONS FOR
RECONSIDERATION**

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively “BellSouth”), opposes the four comments filed supporting the petitions for reconsideration of the *Triennial Review Order*¹ filed by wireless carriers and their trade association.²

I. THE COMMISSION PROPERLY REJECTED ARGUMENTS THAT CLECS AND CMRS CARRIERS ARE ENTITLED TO ILEC-TO-CMRS BASE STATION TRANSMISSION LINKS AS UNBUNDLED LOOPS OR TRANSPORT

Four pleadings were filed in support of the claim that CMRS carriers should receive ILEC to CMRS point-to-point transmission links as local loops, each reiterating positions fully

¹ *In the Matter of Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, (rel. Aug. 21, 2003) (“*Triennial Review Order*” or “*Order*”).

² Supporting comments are not addressed by the Commission’s rules relating to petitions for reconsideration. See 47 C.F.R. § 1.429(f) (authorizing oppositions). BellSouth files this response separate from its own § 1.429(g) Reply to oppositions to its own § 1.429(a) petition, and does so pursuant to § 1.45(b) (authorizing oppositions to any motion, pleading or request within 10 days of filing of original pleading). If this is not the proper procedural basis, BellSouth respectfully requests that the Commission accept this Response as an *ex parte* filing.

briefed in the record and subsequently considered and rejected by the Commission. One CMRS carrier, a non-participant in the proceedings, simply repeats the petitioners' arguments.³ One carrier with significant, nationwide CMRS operations does the same, and in so doing reverses the positions and arguments it made in the record.⁴ Two wireline CLEC pleadings reiterate positions taken in *ex parte* letters filed by two CLECs affiliated with major power companies more than seven months after BellSouth anticipated and refuted the same positions in its initial comments.⁵ Because these issues were fully presented and briefed by BellSouth in the pleading cycle and by both BellSouth and CLECs in the post-pleading cycle period, because the CMRS carriers refused to advocate this position below, and because the Commission expressly declined to adopt alternative loop proposals in the *Triennial Review Order*, these comments provide no support for the already inadequate petitions for reconsideration.

³ Comments of Cellular Mobile Systems of St. Cloud, L.L.C. (filed Nov. 6, 2003).

⁴ *Cf.* Sprint Corporation's Comments on Petitions for Reconsideration and Clarification at 3 (filed Nov. 6, 2003) ("Sprint PFR Comments") (arguing that the ILEC to CMRS base station links should be available as "loops") with Comments of Sprint Corporation at 48 (filed April 5, 2002) ("The base station is the wireless equivalent of a wireline carrier's wire center, and the connections between the MSC and the base station fall within the concept of dedicated transport.") and Letter from John E. Benedict, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-338 (Jan. 10, 2003) at 2-7, esp. 4 (cell sites are points of traffic aggregation in the same manner as landline wire centers, and connections between them and MSCs are properly dedicated transport UNEs).

⁵ Comments of El Paso Networks, LLC, FPL FiberNet, LLC, and McLeodUSA Telecommunications Services, Inc. (filed Nov. 6, 2003) ("El Paso Comments"); CompTel/Ascent Alliance Comments in Support of Wireless Carrier Petitions for Clarification or Reconsideration (filed Nov. 6, 2003) ("CompTel Comments").

1. The Issues Were Fully Presented in the Pleading Cycle and in Post-Pleading *ex parte* Contacts.

BellSouth addressed, in its initial comments, the claims that certain CLECs have made, and continue to make, that they should be able to convert special access or other private line tariffed services to UNEs because the cell site is simply a customer:

This is wrong. The cell site is merely a component facility of the wireless carriers' network. While wireless carrier [sic] may be considered the CLEC's customer, a "carrier" cannot be considered an end user. A facility between a cell site and an ILEC end office or switch cannot be considered the functional equivalent of a loop because the cell site is merely one hardware component in the overall wireless network. Thus, this facility is, in reality, a point-to-point private line.⁶

No CMRS provider and no CLEC, and in particular, neither El Paso nor CompTel, chose to address this argument in reply comments.⁷ Instead, two CLEC affiliates of major power

⁶ Comments of BellSouth Corporation at 54 (filed April 8, 2002) ("BellSouth Comments"). *Accord*, Response of Verizon to Petitions for Reconsideration at 32-35 (filed Nov. 6, 2003) ("Verizon Response") (facility is neither dedicated transport nor a loop). As BellSouth explained in its initial comments specifically opposing carriers that "attempted to argue that the facility between a cell site and an ILEC end office is the functional equivalent of a loop," this Commission long ago established the definition of "end-user" in the access arena: "*End User* means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller." 47 C.F.R. § 69.2(m); BellSouth Comments at 53, 54 n.187.

⁷ Thus, T-Mobile is wrong (and somewhat patronizing) when it states that the Commission's "decision not to address this question is understandable in view of the fact that although the issue was raised in the *UNE Triennial Review Proceeding*, see El Paso Nov. 26 Letter at 2, it was not the focus of the debate regarding CMRS carriers' access to UNEs." T-Mobile at 9, n.27. As shown above, BellSouth made this issue a focus of debate over the appropriate classification of loops in its initial comments. Neither T-Mobile nor any other carrier chose to address this classification in their reply comments. No CLEC or CMRS carrier took a contrary position in initial comments, so there was nothing for BellSouth or any other carrier to reply to. BellSouth again addressed the issue in its own Nov. 27, 2003 *ex parte*, responding to the DukeNet *ex parte*, *infra* note 10. Letter from W.W. Jordan, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 27, 2003). T-Mobile itself filed five *ex parte* letters after the pleading cycle

companies that own and control extensive rights-of-way and transmission networks waited seven months to file the first *ex parte* letter on the issue first raised by BellSouth in the initial comment round. But even in the weeks and months after DukeNet (a subsidiary of Duke Energy, a diversified multinational Fortune 100 energy company that controls a 1,600 mile fiber optic network in the southeastern United States installed within the overhead ground wire of its electric transmission lines),⁸ and El Paso Networks (a subsidiary of El Paso Corporation, “rich in assets” as the “leading provider of natural gas services and the largest pipeline company in North America”)⁹ filed post-pleading cycle *ex partes* which are now urged as petitions for reconsideration, no CMRS carrier adopted their arguments.¹⁰

closed, four of those after the DukeNet/El Paso *ex partes* (see *infra*. note 10). T-Mobile never opposed the loop arguments raised by BellSouth in its comments, or supported or embraced the arguments raised by DukeNet and El Paso in their *ex partes*. If this ILEC-to-CMRS base station link as loop “view” was “not the focus” of the proceedings below, it is no fault of BellSouth, DukeNet or El Paso, but the result of T-Mobile and other CMRS carriers’ deliberate and strategic determination not to make it a focus of their own comments and filings.

⁸ <http://www.dc.duke-energy.com/content/InformationUpdates/2002/01-Jan/2002010101.html>; http://www.dc.duke-energy.com/content/aboutus/dn08_sub.asp.

⁹ <http://www.elpaso.com/business/default.shtm>. FPL FiberNet, LLC, a party to the El Paso Comments, is the self-described “leading carrier in the state of Florida,” a subsidiary of FPL Group, along with Florida Power & Light Company, the largest investor-owned electric utility in the state of Florida, and FPL Energy LLC. <http://www.fplfibernet.com> (with link to FPL Group).

¹⁰ Letter from Henry C. Campen, Parker Poe Adams & Bernstein L.L.P., counsel for DukeNet, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 18, 2002); Letter from Patrick J. Donovan and Joshua M. Bobeck, Swidler Berlin Shereff Friedman, LLP, counsel for El Paso, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 20, 2002); Letter from Russell M. Blau, Patrick J. Donovan and Joshua M. Bobeck, Swidler Berlin Shereff Friedman, LLP, counsel for El Paso, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 4, 2003). BellSouth addressed issues arising out the of the DukeNet letter, at the request of Commission staff, in its November 27, 2002 *ex parte* at 6-8 (“CMRS Cell Sites Are Distinguishable from a Wireline Customer Premises”). Following El Paso’s December 20, *ex parte*, T-Mobile, AT&T Wireless filed multiple *ex parte* letters in January and February, and Sprint and CTIA filed *ex parte* letters in January and February, all arguing that this point-to-point transmission link was properly classified as unbundled transport, and all ignoring or failing to raise the “loop” argument. See Letter from Douglas G. Bonner, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 6, 2003, redacted public version); Letter from Douglas G. Bonner, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications

2. The Commission Rejected the Arguments Urged in the Wireless Petitions and Supporting Comments in its *Triennial Review Order*.

Thus, the record was fully briefed and the Commission properly rejected both wireline arguments that CLECs should obtain ILEC to CMRS base station inter-network links as either UNE loops or UNE transport, and wireless arguments that CMRS providers should obtain these same links as UNE transport. As the Commission noted with respect to its UNE loop analysis:

Commenters have proposed various alternatives to the method we have adopted herein for conducting our loop impairment analysis and reaching our resulting conclusions. To the extent the methods we use and the conclusions we reach differ from those proposed, we expressly decline to incorporate them herein.¹¹

The wireline CLECs concede as much in their comments when they state that by “limiting the definition of local loop element to the transmission facility between the distribution frame in an ILEC central office and the demarcation point at the end-user customer premise, the Commission is limiting CLECs’ ability to provide services to some of their customers, such as, CMRS providers.”¹² Indeed, the Commission’s final loop element rule defining the local loop element retained the earlier rule’s definition of a local loop element as “a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop

Commission (Jan. 8, 2003); Letter from Douglas G. Bonner, counsel for T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 10, 2003); Letter from John E. Benedict, Sprint Corporation (January 10, 2003); Letter from Michael H. Pryor, counsel for AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 16, 2003); Letter from Douglas I. Brandon, VP-External Affairs & Law, AT&T Wireless, to Marlene H. Dortch (Feb. 3, 2003); Letter from Laura H. Phillips, counsel for Nextel Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 5, 2003); Letter from Douglas I. Brandon, VP-External Affairs & Law, AT&T Wireless, to Marlene H. Dortch (Feb. 5, 2003); Letter from Diane J. Cornell, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 6, 2003).

¹¹ *Triennial Review Order*, ¶ 341.

¹² El Paso Comments at 14-15.

demarcation point at an end-user customer premises.”¹³ Moreover, the relief requested by El Paso in its comments is exactly the same definitional clarification that El Paso requested with respect to both UNE loops and UNE transport in its *ex partes*, and which the Commission dealt with conclusively in the *Triennial Review Order*.¹⁴

The Commission dealt with this link, as well, in the context of its discussion of special construction of transmission facilities:

Although we recognize that our conclusion in this Order not to unbundle inter-network transport facilities, including circuits from the incumbent LEC networks to CMRS to base stations and mobile switching centers, will diminish the significance of this issue for many commenters, the issues surrounding special construction play an important role in infrastructure growth for new channel termination and transport facilities.¹⁵

This demonstrates that the Commission considered this link to be an entrance facility not subject to access as any sort of UNE.¹⁶

Although Sprint claims that AT&T Wireless states that the Commission’s revised transport definition discriminates against wireless carriers if they cannot secure ILEC to CMRS base station links on an unbundled basis, when their wireline CLEC competitors are

¹³ *Triennial Review Order*, App. B, p. 7, section 51.319(a). See also Errata, FCC 03-227, ¶ 38 (rel. Sept. 17, 2003) (replacing “residential unit” with “end user’s customer premises” in section 51.319(a)(3)(i)). See, generally, Verizon Response at 34-35; Opposition of Qwest Communications International Inc. at 4-5 (filed Nov. 6, 2003) (“Qwest Opposition”); Comments of SBC on Petitions for Reconsideration at 16-21 (filed Nov. 6, 2003) (“SBC Comments”).

¹⁴ Indeed the relief requested by El Paso is precisely the relief requested by DukeNet in its October 18, 2002 *ex parte*.

¹⁵ *Triennial Review Order*, ¶ 645; see also Qwest Opposition at 6.

¹⁶ See also SBC Comments at 16-21 for a full discussion of the Commission’s treatment of entrance facilities in the *Triennial Review Order*.

“unquestionably” entitled to unbundled access to the very same facilities as unbundled loops,¹⁷ AT&T Wireless never said that CLEC competitors are “unquestionably” entitled to unbundled access to these facilities as unbundled loops. AT&T Wireless simply noted the unsuccessful El Paso and DukeNet *ex parte* arguments to this effect and disingenuously stated that “if CLECs can obtain the link as a loop in order to provide service to CMRS *carriers*, surely CMRS carriers should have the right to obtain the link as loop directly from the ILEC.”¹⁸ This is a rhetorical stratagem by wireless carriers to persuade regulators of the fallacious claim that somehow the Commission did not consider, but rather left open, the notion that ILEC-to-CMRS base station inter-network links should be available to any requesting carrier as a UNE loop. But CLECs may not obtain the ILEC wire center to CMRS base station link as a UNE loop in order to serve CMRS carriers, as the wireline CLECs themselves concede when they argue again, vociferously, the need for reconsideration and clarification of the Commission’s UNE loop definition.¹⁹ The Commission essentially excluded all entrance facilities from the definition of unbundled

¹⁷ Sprint PFR Comments at 3, referring to AT&T Wireless Services, Inc. Petition for Clarification or Reconsideration (filed Oct. 2, 2003) (“ATW”) at 9.

¹⁸ ATW at 9 (emphasis added). A CMRS “provider” is a carrier, as AT&T here concedes. A “carrier-customer” is simply not an “end user” who uses a telephone to receive and make calls over a wireline loop.

¹⁹ El Paso Comments at 14 (Commission has limited the definition of local loop element to the transmission facility between the distribution frame in an ILEC central office and the demarcation point at the end-user’s premises). BellSouth also dealt with the arguments that regardless of CMRS impairment, CLECs are entitled to ILEC provisioned point-to-point transmission links outside of the ILEC network as UNE loops. BellSouth demonstrated that Commission must determine if the wireless carrier served by the CLEC would be impaired in its ability to provide a particular service. BellSouth Comments at 52. In the case of wireline CLECs like DukeNet, El Paso, and FPL FiberNet, claims of impairment ring hollow; not only are their wireless carrier-customers not the “end users” contemplated by the Commission’s UNE loop definition, and not only are they categorically and demonstrably not impaired in the provision of qualifying services, but the CLECs themselves are subsidiaries of electric and gas utility behemoths that control access to far more rights-of-way and transmission or distribution facilities than do the local exchange carriers in the areas they serve, and who are not entitled to these links as dedicated transport.

transport,²⁰ and did not revise its loop definitions to include entrance facilities that are the “functional” equivalents of loops. No party has carried its burden of showing that these decisions should be reconsidered.

II. CONCLUSION

The Commission should deny the wireless petitions.

Respectfully submitted,

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²⁰ *Triennial Review Order*, ¶¶ 365-66; see SBC Comments at 17-20.

CERTIFICATE OF SERVICE

I do hereby certify that I have this 17th day of November 2003 served the following parties to this action with a copy of the foregoing **RESPONSE TO COMMENTS SUPPORTING WIRELESS PETITIONS FOR RECONSIDERATION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

/s/ Juanita H. Lee
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