

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Biennial Regulatory Review of Regulations
Administered by the Wireline Competition
Bureau

WC Docket No. 02-313

REPLY COMMENTS OF VERIZON

Summary

As Verizon explained in its opening comments, the Commission should use this biennial review proceeding to eliminate a number of significant regulatory burdens, currently imposed on ILECs, that are unnecessary in light of significant intermodal competition. *See* Verizon Comments, at 6-34 (filed April 19, 2004).¹ It should reject certain commenters' attempts to use the biennial review proceeding to establish *new* regulatory requirements regarding notification for retirement of copper loops.

A few CLEC commenters have suggested that the Commission use this proceeding to significantly add to existing rules governing when ILECs must notify CLECs of copper retirement. Indeed, these commenters appear to want to take a system developed for a limited, specific purpose – namely, to notify CLECs of planned retirement of copper loops and subloops that would affect CLEC services – and subvert it into a tool to delay ILECs' competitive deployment of fiber to the premises ("FTTP"). As a procedural matter, however, it would be entirely inappropriate for the Commission to entertain suggestions in this proceeding – which is

¹ In particular, the Commission should eliminate the regulatory burdens on wireline broadband Internet access services, reform its TELRIC pricing regime to restore correct investment incentives, and eliminate its detailed continuing property records rules. *See* Verizon Comments, at 6-34.

designed to *eliminate* unnecessary regulations – to dramatically *expand* carriers’ obligations regarding the retirement of copper loops. Moreover, these suggestions are utterly wrong as a matter of policy, and inconsistent with the Commission’s own recent decisions. Relying on a broad record, in the Triennial Review Order the Commission specifically rejected proposals to impose “extensive rules that would require affirmative regulatory approval prior to the retirement of any copper loop facilities.” *Review of Section 251 Unbundling Obligations of Incumbent*

Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 281 (2003) (“TRO”). Rather, it determined that making minor modifications to the existing rules regarding notices of network change would “serve as adequate safeguards” against the concerns raised by CLECs. *Id.* In so doing, this portion of the TRO comported with the Commission’s decision to remove regulatory burdens that would only inhibit incentives by ILECs and CLECs alike to invest in new fiber to the premises deployment. *See* TRO, ¶¶ 273-284, 288-290. Nothing has changed that would warrant revisiting that aspect of the Triennial Review Order, and the Commission should reject attempts to rewrite those rules in this docket.

Argument

The argument that the Commission should use the biennial review proceeding to dramatically *increase* the regulatory requirements for retiring copper loops is flatly inconsistent with the Act, and must be rejected on that threshold ground alone. Section 11 requires the Commission to review all regulations and “repeal or modify” any regulation that is “is no longer necessary in the public interest as a result of meaningful economic competition.” 47 U.S.C. § 161. The Commission cannot use the biennial review proceeding to add to existing regulations, as that would be contrary to the purposes of Section 11, which directs the

Commission to “repeal or modify” regulations that are no longer necessary. *Id.*; *see also* 2002 *Biennial Regulatory Review*, 18 FCC Rcd 4726, ¶ 11 (2003) (“add[ing] or expand[ing]” regulations, “as opposed to modifying or eliminating existing rules,” is “beyond the scope” of the biennial review.); 2000 *Biennial Regulatory Review*, 16 FCC Rcd 1207, ¶ 19 (2001) (“[A]s a part of the biennial review process, we do not intend to impose new obligations on parties in lieu of current ones, unless we are persuaded that the former are *less burdensome* than the latter and are necessary to protect the public interest”) (emphasis added). It is not a vehicle to promulgate new rules and regulatory requirements.

Moreover, if commenters disagreed with the policy decisions set forth in the Triennial Review Order, they should have raised their objections in a petition for reconsideration of *that* order. Of course, many of these commenters could not have filed petitions for reconsideration, as they chose to instead appeal the Triennial Review Order. *See Wade v. F.C.C.*, 986 F.2d 1433, 1433 (D.C.Cir. 1993) (“It is well established that a party may not simultaneously seek both agency reconsideration and judicial review of an agency's order . . .”) (dismissing appeal where petition for reconsideration was filed after appeal). However, they cannot circumvent that limitation on petitions for reconsideration, or escape the time period for filing such petitions (which has long passed), by attempting to revive their arguments in this docket. *See* 47 C.F.R. § 1.429 (petitions for reconsideration must be filed within 30 days).² Indeed, it would be arbitrary and capricious for the Commission to revisit and reverse its position on the proper scope of these requirements in this Biennial Review proceeding, because the Commission gave

² *See also Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 601-602 (D.C.Cir. 1981) (“The issue we face, therefore, is whether NRDC may now do indirectly what it is forbidden by statute from doing directly—that is, whether NRDC may now seek review of the procedure by which the amendments were promulgated, even though it could have but did not seek direct review thereof, by simply raising its objections in a petition for rulemaking and seeking direct review of the order denying the petition. We answer that question in the negative.”)

no prior indication of any intent to do so. Rather, the Commission made clear its intent to resolve UNE issues in the context of the Triennial Review proceeding.³ In light of the FCC's expressed aim of bringing "certainty" to unbundling questions in its TRO, changing course on these issues in this proceeding would be fundamentally unfair to parties who participated in the Triennial Review proceeding in reliance on the Commission's statements of purpose. *See generally Natural Resources Defense Council, Inc. v. EPA*, 790 F.2d 289, 302 (3d Cir. 1986) (finding agency decision was arbitrary and capricious where it was "blatantly contradicted by ... repeated statements by [the agency] itself").

In addition to the numerous procedural problems, the arguments should be – and already have been – rejected by the Commission on policy grounds as well, and correctly so. Relying on an extensive record in the TRO proceeding, the Commission found that CLECs' concerns about retirement of copper loops would be adequately addressed by amending the network disclosure rules to ensure that carriers are provided notice of any network change that would affect CLECs' ability to provide service. *See* TRO, ¶¶ 281-284. As the Commission recognized elsewhere in the TRO, FTTP deployment "is still in its infancy" and faces "several economic and operational entry barriers." *Id.*, ¶ 274. In accordance with Section 706(a)'s directive to "remove barriers to infrastructure investment," the Commission eliminated requirements (such as unbundling) that would stifle FTTP or other advanced infrastructure investment by both ILECs and CLECs. *Id.*, ¶¶ 286, 288, 290; *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004) ("USTA II"). In reliance on the TRO's deregulatory approach to FTTP, Verizon plans to spend

³ *See* TRO, ¶ 6 ("The path to the rules and policies we set forth in this Order has been neither straight nor easy." However, "[w]e believe that the certainty that we bring today will help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of American consumers.")

\$1 billion to pass more than one million homes in 2004, and billions more in future years to further expand its fiber deployment. *See* Declaration of Jerry Holland, ¶ 6 (attached to Letter from Ann Berkowitz, Verizon, to Marlene Dortch, CC Docket Nos. 01-337, 01-338, 02-33, and 02-52 (filed Mar. 29, 2004)).

Yet the rule changes proposed by the CLEC commenters would *add* to the burdens and costs of replacing copper with fiber, thus creating disincentives to both CLECs and ILECs to spend the billions of dollars in necessary broadband infrastructure investment and ultimately hampering FTTP deployment. For example, MCI actually goes so far as to suggest that ILECs should *pay* CLECs for the privilege of replacing copper loops with fiber. *See* MCI Comments, at 10-11 (arguing that ILECs should be required to “compensate CLECs for lost investment” in retired copper). It also argues that CLECs should be able to oppose retirement of copper loops, *id.* at 8, which would require an ILEC to indefinitely maintain (and pay for) two networks to the same home. These are precisely the types of regulatory disincentives to investment that the Triennial Review Order wisely decided to eliminate.

The Commission also should reject proposals that would create unnecessary hurdles to the replacement of copper with fiber, such as burdensome notification processes or longer periods for CLEC notification/opposition.⁴ In the Triennial Review Order, the Commission ordered ILECs to notify parties of copper loop retirement that could affect their services, and gave CLECs a reasonable period of time in which to object to the network changes. *See Biennial Regulatory Review of Regulations Administered by the Wireline Competition Bureau*, Notice of

⁴ The Commission should not accept some commenters’ suggestions to lengthen the time period required for notice. *See, e.g.,* ALTS Comments at 7; MCI Comments at 13. The Commission’s current rules give CLECs nine business days after the public notice of planned retirement to file oppositions, and it can take up to 90 days after the public notice before such objections are deemed denied. TRO, ¶¶ 282-83. Some have argued that the delays resulting the public notice requirement already are too long. *See* BellSouth Reply Comments, WC Docket No. 02-313, at 2-6 (filed Nov. 4, 2002).

Proposed Rulemaking, 19 FCC Rcd 764, ¶ 19 n.47 (2004); TRO, ¶¶ 282-83. However, it also held that for all copper loop retirement due to replacement with a FTTP loop, any such objections would be deemed denied “unless the Commission rules otherwise upon the specific facts and circumstances of the case at issue within 90 days of the Commission’s public notice of the intended retirement.” TRO, ¶¶ 282-83. This policy decision reflects the reality that, unless ILECs have some reasonable assurance that they will be able to successfully complete the transition away from copper loops, they will not have the necessary incentives to invest in FTTP deployment.

Similarly, the Commission should decline to accept any arguments that rely on the already-rejected theory that CLECs will somehow be impaired without access to FTTP broadband capabilities. For instance, ALTS argues that its customers should be “grandfathered” into receiving the same services they had on copper loops, even if such action requires more than a 64 kbps channel, or alternatively that the Commission establish a three year “glide path” before a CLEC’s services to its customers can be transitioned off the ILEC’s copper network or equivalent DSL services. ALTS Comments, at 5-6. However, as both the Commission and the D.C. Circuit recognized, because there exist many competitive alternatives to ILEC-provided DSL, carriers cannot claim they are impaired in their ability to compete without access to such services. *See* TRO, ¶¶ 273-284, 288-290; *USTA II*, 359 F.3d 554. In addition, the longer a CLEC can continue its reliance on ILEC networks, the less incentives it has to build its own. *See* TRO, ¶ 290. ALTS’ arguments are nothing more than one more attempt to reverse the sound broadband policies set forth in the Triennial Review Order, and affirmed by the D.C. Circuit.

MCI argues that the Commission should require ILECs to provide notification not just of fiber deployment that results in retirement of the copper loop or otherwise affects CLEC

services, but rather should notify CLECs of any location where new fiber is deployed, even if it does not involve copper retirements. *See* MCI Comments, at 15 (arguing that to “fully comport with the network change notification rules” “ILECs should provide public notice of *all* FTTP and hybrid loop fiber deployment”) (emphasis added). While MCI argues that access to this information could theoretically affect CLECs’ own “investment decisions,” *id.*, this argument in reality is little more than a thinly veiled ploy to gain access to ILECs’ highly competitive and intensely proprietary plans regarding FTTP deployment. Contrary to MCI’s arguments, the language of Section 251(c)(5) – which only requires reasonable notice of “changes in the information necessary for the transmission and routing of services” using ILEC networks, or “other changes that would affect the interoperability of those facilities and networks” – cannot be stretched to require such an absurd or anti-competitive result. 47 U.S.C. § 251(c)(5).

In addition, there are logistical reasons why the rules regarding network notification only apply to replacement of the copper loop, and should not (as some commenters propose) be extended to all situations where fiber is placed in the loop, including hybrid fiber/copper loops. Verizon and other ILECs are continually modernizing their networks to gain efficiencies, reduce costs, and provide abilities to offer new services and applications. Requiring notification to thousands of carriers of each new fiber replacement would be unwieldy and in most cases would not provide any additional benefit to CLECs. Where copper may be replaced by a hybrid copper/fiber loop, ILECs are obligated to continue to provide access to the TDM-based features and functions of the hybrid loop. In addition, the existing rules already require notice where CLECs’ services will be “affected.” *See* 47 C.F.R. §§ 51.325-51.335, and in particular Section 51.333 (addressing notice procedures for replacement of copper loops with fiber to the premises

loops); TRO, ¶¶ 281, 283 n. 829, and 294. But there is absolutely no justification to require notification where the construction of a hybrid loop does not affect CLEC services.

CONCLUSION

The Commission should not expand the requirements for network notification of retirement of copper loops. Rather, it should use the opportunity presented by the biennial review to eliminate or forbear from applying requirements that are no longer necessary, as mandated by Congress.

Respectfully submitted,



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