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

In the Matter of)
)
Biennial Regulatory Review of Regulations)
Administered by the Wireline Competition) WC Docket No. 02-313
Bureau)

REPLY COMMENTS OF BELLSOUTH

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively “BellSouth”), submits the following reply comments in response to comments filed in the above referenced proceeding.¹

I. Introduction and Summary

Comments filed by several parties advocate the promulgation of numerous new rules relating to incumbent local exchange carriers’ (“ILECs”) ability to manage their networks. These rules are substantive in nature and in many instances would undermine the Commission’s stated policy on broadband deployment. Accordingly, the Commission must summarily dismiss the requests in these comments because granting them would (1) violate the Commission’s biennial review obligations established in Section 11 of the Telecommunications Act of 1996 (“1996 Act”); (2) violate the Administrative Procedures Act (“APA”); and (3) have a negative impact on broadband deployment.

¹ *Biennial Regulatory Review of Regulations Administered by the Wireline Competition Bureau*, WC Docket No. 02-313, *Notice of Proposed Rulemaking*, FCC 03-337 (rel. Jan. 12, 2004) (“*Notice*”).

The comments of MCI, Covad, and ALTS all request changes to the Commission's rules that are flawed both procedurally and substantively. These flaws are not correctable in this proceeding and must therefore be rejected. Moreover, even if these commenters had followed proper administrative procedure in proposing the new rules, the Commission would have to reject them as being counter to the Commission's policy on broadband deployment that the Commission set forth in the *Triennial Review Order*.²

II. A Biennial Review Proceeding Cannot Be Used to Implement New Substantive Rules

This proceeding was initiated to comply with the requirement in Section 11 of the 1996 Act:

Section 11. Regulatory Reform.

(a) BIENNIAL REVIEW OF REGULATIONS.

In every even-numbered year (beginning with 1998), the Commission –

(1) shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and

(2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.

(b) EFFECT OF DETERMINATION.

The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.³

Congress enacted this statute to serve as one of the lynchpins behind the de-regulatory intent of the entire 1996 Act. Its very purpose is to ensure that the Commission review and eliminate

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 & 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*” or “*TRO*”).

³ 47 U.S.C. § 161.

needless regulation. Indeed, the statute specifically states that the Commission's only authority within a biennial review is to "repeal or modify any regulation it determines to be no longer necessary in the public interest." While the Commission has differed with BellSouth and other carriers on what regulation remains "necessary" and what should be repealed or modified, one thing has always remained crystal clear and that is that this statute cannot be a basis for establishing new substantive rules.⁴ The Commission expressly acknowledged that its authority in this proceeding is limited and recognized that this scope of Section 11 biennial review proceedings does not allow the creation of new substantive rules.⁵ Clearly, the proposals made by MCI, Covad, and ALTS are all substantive rules that would govern how incumbent local exchange carriers ("ILECs") deploy their networks and would even require ILECs to compensate competitive local exchange carriers ("CLECs") for their investment. None of the proposed new rules made by these commenters could be considered non-substantive in nature and must all be denied.⁶

III. The Rules Proposed by the Commenters, if Adopted, Would Violate the APA

Even if this proceeding was not a biennial review, which, as discussed above, has a very limited scope and cannot be used for the adoption of new substantive rules, the proposed new rules made in the comments could not be adopted because they fall outside the APA. The APA requires that the adoption of any proposed new substantive rules must be done through a

⁴ See *Notice*, ¶ 3.

⁵ *Id.*

⁶ The *Notice* sought comments on whether the Commission should modify its existing rule regarding network change public notices filed with the Commission by "adding specific titles to identify notices of replacement of copper loops or copper subloops with [fiber to the home] loops." *Notice*, ¶ 20. The Commission deemed this proposal a non-substantive change to its rules and therefore allowable under the scope of the biennial review. The commenters supported this change. BellSouth opposes this change as unnecessary. A simple reading of the notice will determine the characteristics of the network change. There is no need for ILECs to be required to spoon-feed carriers on these matters.

rulemaking proceeding and that the Commission must provide adequate public notice of such a proceeding.⁷ Clearly, this requirement has not been met. The *Notice* for the biennial review does not meet this requirement because (1) as discussed above, the changes proposed in the comments are beyond the scope of that proceeding,⁸ and (2) the *Notice* does not meet the statutory obligations required for a public notice, namely that it state “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁹ Accordingly, the Commission cannot adopt any of the proposed new rules set forth in the comments.

IV. The Proposed New Rules Contradict Important Federal and State Policy

Even if the proposed new rules made by the commenters were procedurally valid – which they are not – the Commission would still have to reject them because they are inconsistent with the broadband policies established by the Commission. Moreover, many of the new proposed network disclosure rules would frustrate economic development at the state and local level because, if such rules were adopted, any change to the ILEC’s network that is the result of road moves or capacity concerns would be held up indefinitely while CLECs oppose the changes.

The new rules proposed by MCI are summarized as follows: (1) CLECs should be able to file oppositions to any ILEC copper retirement; (2) ILECs should compensate CLECs for any stranded investment as a result of a copper retirement; (3) ILECs should have to send tailored notifications directly to all CLECs, for short-term as well as long-term notifications; (4) CLECs should have 90 days instead of 30 days to file objections to the retirement of copper loops; and

⁷ 5 U.S.C. § 553(b).

⁸ Because the Commission has no authority to implement new substantive rules in a Section 11 biennial review proceeding, the commenters cannot argue that the proposed new rules in their comments are a logical outgrowth of the *Notice*.

⁹ 5 U.S.C. § 553(b)(3).

(5) ILECs should have to report all fiber deployment, regardless of whether it has any impact on a CLEC's network. As discussed below, these drastic limitations placed on an ILEC's ability to manage and deploy its network are contrary to federal and state policy and will limit broadband deployment.

A. MCI's Proposed New Rules Would Not Only Hinder Broadband Deployment but Are Also Unfair

In the *Triennial Review Order*, the Commission stated, "broadband deployment is a critical policy objective that is necessary to ensure that consumers are able to fully reap the benefits of the information age."¹⁰ As part of this critical policy objective the Commission found that "[u]pgrading telecommunications loop plant is a central and critical component of ensuring that deployment of advanced telecommunications capacity to all Americans is done on a reasonable and timely basis and, therefore, where directly implicated, our policies must encourage such modifications."¹¹ MCI's chief motivation behind these requests is to attack the ILECs' deployment of fiber into the loop. ILECs may deploy fiber directly to the home or may integrate fiber into the loop for efficiency purposes.¹² The purpose for these fiber deployments are typically (1) to replace outside plant because it is either worn and in need of replacement or growth has exceeded capacity limits; (2) because of economic development in an area, e.g., a road move or construction of a new building(s), or (3) to provide greater capacity to offer a greater array of services, including broadband services. Clearly, rules that prohibit ILECs from

¹⁰ *Triennial Review Order*, 18 FCC Rcd at 17125, ¶ 241.

¹¹ *Id.* at 17126, ¶ 243.

¹² ILECs routinely deploy digital loop carrier ("DLC") systems by placing fiber in the feeder portion of the loop to a remote terminal ("RT"), with copper remaining in the distribution portion of the loop from the RT to the customer premises. ILECs have been engineering their networks with DLC for years – long before the passage of the 1996 Act. It is a more efficient manner of deployment as compared to copper all the way from the central office to the customer premises.

deploying fiber until after a CLEC has had an opportunity to file an opposition to that deployment would violate the Commission's stated policy of ensuring upgrades to the network for broadband capacity to consumers.

Indeed, MCI's proposals, if adopted, could essentially shut down fiber deployment. There is little doubt that if a CLEC had the ability to file an opposition to an ILEC's fiber deployment, it would do so any time such deployment affected service to just one of its customers. Such an opposition would then be before a Bureau within the Commission to hold a mini-trial to determine if the deployment should go forward or be denied. No matter what the Bureau decided, the losing party would have an opportunity to have the decision reviewed by the entire Commission, as the Bureau would be acting under delegated authority.¹³ Applications for Review ("AFR") must be filed within 30 days from the release of the Bureau's decision.¹⁴ The Commission is then under no time obligation to act on an AFR. Moreover, once the Commission does release its order on the AFR, that order would be appealable to a federal circuit court of competent jurisdiction. Even assuming that the court rendered a decision and did not remand the matter back to the Commission for further action, the entire process would take well over a year.¹⁵ Thus, fiber deployment would come to a grinding halt. Furthermore, the Commission would incur a significant burden in having to rule on all the oppositions that would be filed. Such a rule is squarely at odds with the Commission's policies and the public interest.

¹³ 47 C.F.R. § 1.115.

¹⁴ 47 C.F.R. § 1.115(d).

¹⁵ Assuming that neither party filed an AFR with the Commission but instead was willing to accept the Bureau's decision, the deployment is still at the mercy of an already understaffed Bureau. Considering the number of fiber deployments that occur nationally within a month's timeframe, the Bureau in charge of ruling on the opposition would be severely backlogged in a short period. (Filing an AFR is a right that the aggrieved party would have and it is highly unlikely that either party would not pursue its rights on such a matter. BellSouth makes this assumption merely to demonstrate that even under the best possible time frame, fiber deployments would be severely and unreasonably delayed.)

As part of the opposition process, MCI next requests that the Commission force ILECs to compensate CLECs for their investment any time an ILEC s has a fiber deployment that displaces the CLEC's investment. This request is troubling on so many fronts that BellSouth hardly knows where to begin. First, many fiber deployments are the result of civil construction, i.e., road moves or expansions, or business construction, i.e., the development of a new building or subdivision. Under either of these construction situations, if copper must be displaced then it is usually more efficient to deploy fiber. Although this construction causes expensive network reconfigurations for BellSouth, as well as, in some cases, CLECs, it is inconceivable that BellSouth should have to compensate the CLECs for the displacement of their investment. Moreover, even if the fiber deployment were strictly a business decision that BellSouth makes, such as fiber to the home, in order to offer more robust broadband services to customers, it would be completely unreasonable for BellSouth to have to compensate CLECs. Substantial evidence is on record supporting the Commission's broadband policy position.¹⁶ This evidence demonstrates that broadband deployment is one of the most important factors for future economic growth.¹⁷ The chilling effect on deployment that would occur if ILECs were required to compensate CLECs for the CLECs' business decisions regarding network investment cannot be over estimated. The Commission cannot do an about-face on its broadband policy by allowing such a moronic rule.

Second, companies make business decisions everyday about how to allocate their resources. CLECs have the luxury of having very little outside influence in making these

¹⁶ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, and the Commission's *Triennial Review* proceeding, CC Docket No. 01-338.

¹⁷ See, e.g., Patrick Ross, *Bush Touts Efforts to Promote Broadband*, *Communications Daily*, April 27, 2004.

decisions. ILECs, on the other hand, must constantly expend resources for CLECs at the CLECs' whim. For example, ILECs are constantly upgrading networks and expanding central offices for collocation based, in many cases, on CLEC projections. If the CLECs, however, decide to change business strategies and therefore, will no longer utilize the expanded capacity, ILECs have unused facilities. ILECs do not, in those instances, seek compensation from CLECs for these unused facilities. Clearly, it is not in the Commission's or the public's interest for the Commission to try to monitor and assign blame for investment losses incurred by a carrier based on the losing carrier's allegations that the losses were caused by legitimate business decisions of other carriers.

B. ILECs Should Not Be Required to Perform Work That the CLECs Are Perfectly Capable of Performing Themselves

ILECs already are inundated with regulations that make little sense – or even if they make sense in theory they do not in practice. The public notice for network changes may have made sense when it was implemented in 1996 but certainly is an anachronistic rule today. The fact is that in the Internet age, where information is easily disseminated to the public over the World Wide Web, the regulation requiring ILECs to file network changes with the Commission so the Commission can put them out for public notice has simply outlived its usefulness. Accordingly, BellSouth continues to urge the Commission to accept its recommendation that changes be provided through the ILECs' public web sites.

MCI not only opposes BellSouth's proposal but also wants to drag the entire industry back into the Stone Age with "snail-mail." It proposes as a new rule that ILECs must send "tailored notifications" directly to CLECs for network changes for copper replacements. Under

the current rules, such notification is required if the ILEC is operating under a time constraint¹⁸ and makes a “short-term” notice, i.e., the change will occur in six months or less. Under these circumstances the ILEC must send notice directly to CLECs that interconnect with the ILEC. This alerts the CLEC directly of the upcoming change. The Commission considered six months or longer to be adequate notice for the CLECs and therefore regular notices (notices of changes occurring more than six months later) are simply made through public notification. MCI, however, wants direct notification for all changes if they involve copper retirements.

This is an unnecessary burden on ILECs. CLECs are perfectly capable of monitoring network changes that will not occur for more than six months; they do not need ILECs to act in such a maternal role. Moreover, it is expensive to send direct mail notifications. A short-term mail notification costs BellSouth approximately \$2,000. While BellSouth does not attempt to contend that \$2,000 is an excessive expense for a company its size, it is an expense that can add up over time depending on the number of changes that occur. Additionally, it is an added regulatory burden that is completely unnecessary. Unnecessary regulatory burdens make no sense – in theory or practice.

MCI also requests that ILECs not be able to retire any copper without at least a 90-day notice period and that the time period for filing objections to a copper retirement be extended 30 days. These proposed new rules, like the others, contradict the Commission’s policy on broadband deployment. Additionally, as explained above, many fiber deployments are the result of needed changes because of construction projects or capacity limitations that must be

¹⁸ Time constraints are common in construction projects. Many times the construction plans will change, meaning that network changes that were not initially thought necessary are now required. Or, the contractor will fail to notify BellSouth with the proper amount of lead time of a necessary network change.

addressed immediately. The current Commission rules adequately address any concerns that CLECs may have over fiber deployments.

Finally, MCI also proposes that ILECs must disclose all fiber deployment regardless of whether it impacts the services provided by a CLEC or the CLEC's ability to interconnect. This rule clearly violates the scope of the statute regarding network disclosures and the Commission's interpretation of that scope.¹⁹

Conclusion

For the reasons set forth above, the Commission must dismiss proposed new rules to the network disclosure requirements. First, the new rules are substantive in nature and beyond the scope of a biennial review proceeding. Therefore, the Commission has no legal authority to adopt them in this proceeding. Second, even if the Commission had legal authority to adopt them in this proceeding – which it does not – adopting them would violate the APA because they were not properly noticed and are not a logical extension of the biennial review notice. Finally, assuming arguendo that the proposals were before the Commission in a legally allowable proceeding and had been properly noticed, they must be denied because they are completely contrary to the Commission's policy goals of broadband expansion. Indeed, these rules are nothing more than a backdoor attempt to change many of the Commission's policy decisions from the *Triennial Review Order*.

¹⁹ See 47 U.S.C. § 251(c)(5); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas; Administration of the North American Numbering Plan; Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, CC Docket Nos. 96-98, 95-185 & 92-237, NSD File No. 96-8; IAD File No. 94-102, *Second Report and Order and Memorandum Opinion and Order*, 11 FCC Rcd 19392, 19476, ¶ 182 (1996) (public notice is required when the ILEC “implement[s] a change that either (1) affects competing service providers’ performance or ability to provide service; or (2) otherwise affects the ability of the [ILEC’s] and a competing service provider’s facilities or network to connect, to exchange information, or to use the information exchanged.”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 3rd day of May 2004 served the following parties to this action with a copy of the foregoing **REPLY COMMENTS OF BELLSOUTH** 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.

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