

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

PETITION FOR RECONSIDERATION

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September 8, 2004

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PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission’s Rules, AT&T Corp. (“AT&T”) respectfully submits this Petition for Reconsideration of the Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-191, CC Docket No. 01-338, et al. (rel. Aug. 9, 2004) (“*MDU Reconsideration Order*”).

INTRODUCTION AND SUMMARY

The Commission should reconsider its decision to expand the application of rules that severely limit access to bottleneck loop facilities to include all “predominantly residential” multiple dwelling units (“MDUs”). The *MDU Reconsideration Order* is unsupported, internally inconsistent, and, for the millions of consumers and small businesses located in “predominantly residential” MDUs, signals the end of competitive choice. Whatever the wisdom of the *Triennial Review Order’s* single family home fiber-to-the-home (“FTTH”) rules, the case for extending them to MDUs simply has not been made.

The single family home FTTH unbundling limits were based on the view that competing carriers were, in true “greenfield” developments, equally as able as incumbents to deploy FTTH

loops, and that application of full unbundling obligations would deter incumbents from making the significant investments necessary to bring FTTH to single family residences. For MDUs, however, the Commission has reaffirmed that competing carriers remain impaired, and are not at all similarly situated to incumbents, in serving MDUs – whether or not the MDUs can be characterized as “predominantly” residential.

Furthermore, this impairment faced by competing carriers is not conceivably outweighed by section 706 interests in broadband investment. For one thing, the Commission’s new rules for “predominantly residential” MDUs are overbroad and sweep in enterprise customers that operate in these buildings even though it is undisputed that incumbents are already deploying fiber to enterprise customers and require no further “incentives” to justify that fiber deployment. Nor is it valid to assume, as the order does, that incumbents will not deploy fiber to serve residential MDU customers unless unbundling relief is provided. Indeed, the order expressly recognizes that “fiber is already being deployed to multiunit premises.”

Although the Commission previously concluded that, for mass market customers in single family homes, unbundling might delay investment, the evidence the Commission cited was limited to that context and did not analyze the economics of deployment of fiber to MDUs. Yet, in its order extending its FTTH rules to “predominantly residential” MDUs, the Commission simply *assumes* that the same economics would apply. Given the facially obvious differences in the potential costs and revenues in deploying FTTH to MDUs versus single family homes, there is no basis for any such assumption, as the Commission’s rejection of the same assumption as to MDUs that are not “predominantly” residential starkly confirms. Indeed, in this regard the order is internally inconsistent. The incumbents and others asserted that the Commission’s *TRO* findings demonstrated that competing carriers could economically serve any customer within an MDU, and that, accordingly, high-capacity fiber loops deployed to “all”

MDUs should be subject to reduced unbundling. *See MDU Reconsideration Order* ¶ 8 & n.26. In rejecting that view and reaffirming that fiber loops deployed to MDUs that contain enterprise customers and that are not “predominantly residential” must be unbundled, the Commission found that there was “no *evidence*” that unbundling relief for “fiber loops deployed to [MDUs] will increase fiber deployment to the enterprise market.” *Id.* (emphasis added). Because there is also “no evidence” – as opposed to assumptions – that unbundling relief would have a different effect on fiber deployment to MDUs, it was inconsistent for the Commission to accept the incumbents’ claims as to “predominantly residential” MDUs.

In the *MDU Reconsideration Order*, the Commission has adopted a regime that threatens to put an end to competition for the vaguely-defined – but very large and disproportionately low-income – group of customers within “predominantly residential” MDUs. The arbitrary regime endorsed by the Commission means that a dry cleaner on the ground floor of an apartment building will have no choice of providers, but a competing dry cleaner operating on the ground floor of an office building will. And the best that people who live in MDUs can hope for is the competitive “choice” provided by a cable/DSL duopoly. Moreover, because the Commission provided no guidance as to the meaning of “predominantly residential,” the incumbents, in anticompetitive fashion, will rely on this newly-broadened exception as a means to stifle competition in virtually all MDUs in which they can find any residences. For these and other reasons detailed below, the Commission should reconsider the *MDU Reconsideration Order* and restore its original FTTH rules.

ARGUMENT

The Commission’s decision to reduce unbundling obligations for FTTH loops deployed to “predominantly residential” MDUs, despite findings of impairment, is unwise, unlawful, and should be reconsidered. The essence of the Commission’s flawed decision in the *MDU*

Reconsideration Order is that, “whatever” the level of impairment that exists for competitive carriers serving “predominantly residential” MDUs with fiber loops, it is in all circumstances “outweigh[ed]” by the Commission’s policy “principles” favoring deployment of advanced services and FTTH. *MDU Reconsideration Order* ¶ 4. This approach produces patently arbitrary results that are unsupported by the record and that are not justified by the Commission’s prior determinations or the Court of Appeals’ decision in *USTA II*.

As an initial matter, the Commission’s decision in the *MDU Reconsideration Order* is based on far different factual findings than it adopted in the *Triennial Review Order*, 18 FCC Red. 16978 (2003) (“*TRO*”). The Commission’s prior determinations to limit unbundling of FTTH loops were based on findings that, in true “greenfield” situations, there was no impairment at all. *TRO* ¶ 275. In the *MDU Reconsideration Order*, by contrast, the Commission reaffirmed its prior findings that competitive carriers were impaired in serving customers in MDUs. Specifically, the Commission determined that “competitive carriers seeking to serve mass market customers residing in MDUs face similar deployment barriers as when serving enterprise customers.” *MDU Reconsideration Order* ¶ 4 & n.11 (citing *TRO* ¶ 197 n.624). The deployment barriers that the Commission found with respect to enterprise loops below the OC-n level included an inability “to recover the significant fixed and sunk construction costs,” tremendous difficulty in “accessing rights of way,” and “obtaining and paying for building access,” and “other service provisioning delays.” *TRO* ¶ 302; *id.* ¶¶ 320-27. The Commission found that CLECs were impaired in providing these enterprise loops because “a single DS3 loop, generally, can not provide a sufficient revenue opportunity to overcome these barriers.” *Id.* ¶ 320; *see id.* ¶ 325 (DS1 loops “provide much lower revenue opportunities”).

The Commission’s *Triennial Review Order* determination to apply the impairment findings for enterprise loops to all customers in MDUs is undoubtedly correct. As AT&T and

other pointed out during the proceedings to review the *Triennial Review Order*, the Commission could not rationally determine that it is uneconomic for competitors to deploy all-fiber high-capacity loops to serve enterprise customers, and yet turn around and conclude that competitors could economically deploy FTTH to mass market customers – including those in MDUs.¹ And the D.C. Circuit in *USTA II* found this position on impairment to be “convincing.” *USTA v. FCC*, 359 F.3d 554, 583 (D.C. Cir. 2004) (“*USTA II*”). Thus, while the Commission’s prior rules regarding FTTH unbundling were based on the view that CLECs were not impaired in true greenfield situations, the Commission’s determination in the *MDU Reconsideration Order* acknowledges, as it must, that competing carriers cannot economically compete for “all classes of customers” “residing in [multiunit] premises.” *See TRO* ¶ 197 n.624; *MDU Reconsideration Order* ¶ 4 & n.11.

Despite the fact that the Commission found that the core statutory criterion for unbundling, *i.e.*, impairment, was present and that, absent unbundling, competing carriers could not economically serve any type of customer in MDUs, it required unbundling of FTTH loops deployed to “predominantly residential” MDUs – even for enterprise customers within the MDUs – only in limited circumstances.² The Commission engaged in “section 706 balancing,” and determined that it must limit unbundling to “ensure that regulatory disincentives for broadband deployment are removed” for those customers that “pose the *greatest* investment risk.” *MDU Reconsideration Order* ¶ 5 (emphasis added). In support of this approach, the Commission cites the court of appeals’ decision in *USTA II*. There, the court upheld the

¹ For example, the revenue potential from FTTH loops deployed to mass market customers is speculative at best and is plainly far outweighed by the revenue from enterprise facilities.

² As with mass market FTTH loops, incumbents have no unbundling obligations for “predominantly residential” MDUs in true greenfield situations. In overbuild or “brownfield” situations for “predominantly residential” MDUs, the incumbents must retain existing copper loops or provide 64 kbps transmission paths. *See TRO* ¶ 277.

Commission's prior FTTH rules by assuming that "even if CLECs are to some extent 'impaired'" in deploying FTTH, "the Commission's decision not require FTTH unbundling" was acceptable based on "§ 706 considerations." *USTA II*, 359 F.3d at 583-84. In fact, the factual context and record relied on by the *USTA II* panel is far different than the record regarding MDUs that the Commission examined here, and the *USTA II* decision does not support the Commission's actions regarding unbundling of fiber facilities deployed to MDUs.

Most fundamentally, there is simply *no* valid evidence in the record that the conditions that led the Commission to limit unbundling for FTTH deployed to individual residences apply to fiber deployed to MDUs, which concentrate numerous households in one area.³ In the *TRO*, the Commission relied on evidence (particularly a CSMG study sponsored by Corning) that purported to show that unbundling would reduce FTTH deployment to residential premises, *i.e.*, homes. *See, e.g.*, *TRO* ¶ 278 & n.818; *id.* ¶¶ 272, 290 & n.837; *see also USTA II*, 359 F.3d at 584 (citing these portions of the *TRO*). Although this evidence was fully rebutted by other submissions,⁴ the *USTA II* panel found it sufficient⁴ to justify the Commission's approach for FTTH that is actually deployed to homes. *Id.* But regardless of the evidence with respect to single family homes, none of the evidence previously relied upon addressed the separate issue of whether unbundling needed to be reduced in order to promote deployment of fiber *to MDUs*. In fact, in the *MDU Reconsideration Order*, the Commission found that SureWest, one of the petitioners in favor of applying the FTTH rules to MDUs, had conceded that "fiber is already

³ *See* Dissenting Statement of Commissioner Michael J. Copps ("where is the evidence that broadband deployment to multi-tenant facilities is dragging comparatively behind, or that apartment dwellers are at higher risk of being left on the wrong side of the digital divide? To the contrary, it strikes me that the economies of scale that come with serving a single building with many – even hundreds – of residential units would put such facilities first on the list of economically viable broadband deployments").

⁴ *See, e.g.*, Clarke-Donovan Reply Decl. ¶¶ 4-42 (CC Docket No. 01-338 (filed July 17, 2002)).

being deployed to multiunit premises.” *MDU Reconsideration Order* ¶ 8 n.26.

Rather than attempt to compile specific evidence analyzing whether unbundling would in fact have any true and dramatic effect on deployment of fiber to MDUs as opposed to homes, the order, in just three sentences, simply assumes the Commission’s prior analysis of “single family dwellings also appl[ies] in the context of predominantly residential MDUs.” *Id.* ¶ 7.⁵ The Commission cited comments submitted by Verizon, HTBC, SureWest, and TRAC, but these comments contain no analysis or substantive evidence whatsoever. *Id.* ¶ 7 nn.23-25.⁶ Because the record with regard to MDUs, unlike the one regarding FTTH deployment to single family homes, shows that fiber is already being deployed to MDUs, there is no basis for the Commission to conclude that “the principles of section 706” outweigh the impairment finding for MDUs that the Commission reaffirmed. Customers in MDUs – even mass market customers – are simply not among “the greatest investment risk” for deployment of all-fiber loops.

A further distinction between the Commission’s rules on FTTH adopted in the *TRO* and those adopted in the *MDU Reconsideration Order* is that, in the latter case, the Commission has

⁵ The prior evidence relied on by the Commission in the *TRO* barely mentions MDUs. The CSMG study, for example, was based on samples drawn from Texas, in which the average household density was “153 Households per square mile,” CSMG study, App. at 32 (attached to Corning Comments, CC Docket No. 01-338 (filed Apr. 5, 2002)), which is substantially less dense than an average MDU. Indeed, the CSMG study made clear that a “key consideration” supporting its conclusions regarding the incremental revenue available was the “larger number of households that are addressable with high speed data services after deploying fiber to the home.” *Id.* at 34.

⁶ The Commission claims, for example, that Verizon’s reply comments “explain[] that Corning’s FTTH deployment evidence . . . focused on deployment to communities, which includes both residential and business customers.” *Id.* ¶ 7 n.23. In fact, the Corning evidence cited by Verizon and the Commission nowhere mentions MDUs in its discussion of “communities.” See *infra*. Nothing cited by these commenters provides evidence supporting the view that reduced unbundling is needed to encourage deployment of FTTH to MDUs, in addition to single family homes. The Commission’s citation to these comments certainly does not comply with the requirements of the Data Quality Act, which requires that data disseminated to the public by an agency be reviewed according to procedures that ensure the “quality, objectivity, utility, and integrity” of the data. See 44 U.S.C. § 3516 (note).

applied its “section 706 principles” not merely to residential, mass market customers, but also has swept in *all* enterprise customers that operate in “predominantly residential” MDUs. As to this category of customers, it is undisputed that the record showed that “enterprise customers already are typically served by high-capacity loops.” *Id.* ¶ 8 n.26. Because this “substantial segment of the population” of enterprise customers operating in predominantly residential MDUs would not be denied “the benefits of broadband” even if unbundling were required, there is accordingly no valid basis to balance the impairment CLECs face in serving these customers with any section 706 considerations. *See id.* (there is “no evidence that unbundling relief for fiber loops deployed to multiunit premises will increase fiber deployment to the enterprise market”).

For enterprise customers operating in predominantly residential MDUs, the Commission has simply chosen to renege on the Act’s promise of introducing competition rapidly to *all* telecommunications markets. Because, as the Commission has found, competing carriers cannot serve these customers without access to unbundled loops, these customers are denied the opportunity to receive competitive local services. *See* Copps Statement (“In most cases, small businesses in multi-tenant units that are ‘predominantly residential’ will be left with one service option – the incumbent carrier.” In large cities, “whole swaths of downtown small businesses will find themselves ineligible for competitive wireline services”). In return, they receive no benefit.⁷ This is arbitrary and unjustified. *Cf.* Statement of Commissioner Adelstein (“The Order declines to adopt a customer-specific approach, despite evidence in the record that such an

⁷ The arbitrary nature of the Commission’s approach is seen in comparing an enterprise customer that operates on the ground floors of a predominantly residential MDU to an enterprise customer operating in an office building next door. For the former, once the incumbent deploys fiber to the MDU, the enterprise customer can only be served by the incumbent (because the impairment faced by CLECs makes it impossible for them to serve the customer). The other enterprise customer located in the office building can be served by competitors using unbundled high-capacity loops.

approach is possible”).

Finally, although some confusion may have existed as to how the Commission’s rules for FTTH adopted in the *TRO* applied, the *MDU Reconsideration Order* adds significantly to the difficulties in applying the Commission’s rules. As commenters showed, given the diverse nature of real estate development across the country, applying a “predominantly residential” test will necessarily cause difficulties and fails to provide the bright-line test that even the incumbents claimed was necessary.⁸ At worst, the vague nature of the standard (which the order does almost nothing to explicate), will provide the incumbents with yet another weapon to use in preventing competitors from providing services. It is not difficult to see that incumbents will raise competitors’ costs by claiming that virtually any building with a residence meets this vague standard and is subject to reduced unbundling obligations.

⁸ See, e.g., Letter from Michael Hunseder, counsel for AT&T, to Marlene H. Dortch, FCC, CC Docket No. 01-338 et al., at 3-4 (May 27, 2004).

CONCLUSION

The Commission should grant AT&T's Petition for Reconsideration.

Respectfully submitted,

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September 8, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2004, I caused true and correct copies of the forgoing Petition for Reconsideration to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: September 8, 2004
Washington, D.C.

/s/ Peter M. Andros

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