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September 30, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Ex Parte
CC Docket Nos. 01-338
WC Docket No. 04-313

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this will provide notice that on September 29, 2004, Mark Jenn, Manager, Federal Regulatory Affairs, TDS Metrocom, LLC, and the undersigned met with Commissioner Kathleen Q. Abernathy and Matt Brill; and with Commissioner Kevin J. Martin and Daniel Gonzalez. We reiterated the views presented in the attached letter filed September 23, 2004.

Sincerely,

Patrick J. Donovan
Counsel for
TDS Metrocom, LLC

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September 23, 2004

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

Re: BellSouth Petition for Reconsideration of the Triennial Review Order Seeking Additional Unbundling Relief for Fiber to the Curb Architecture (Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; 96-98; 98-147)

Dear Chairman Powell:

Recent reports have suggested that the Commission is seriously considering providing additional unbundling relief to incumbent carriers who provide service via fiber to the curb (FTTC) network architecture. TDS Metrocom believes such an extension of the fiber to the home (FTTH) rules to FTTC is unnecessary and unwarranted and will continue the disturbing trend of Commission orders further undermining the ability of carriers to provide a facilities-based competitive alternative for mass market consumers over the long-term.

TDS Metrocom offers competitive local, long distance and high speed Internet service to customers in parts of Illinois, Michigan and Wisconsin. The facilities-based model used by TDS Metrocom is one that has been held up by this Commission time and again as one that was clearly envisioned by the 1996 Act. TDS Metrocom has deployed its own switching facilities in each of its seven markets and has built numerous fiber optic transport rings connecting to collocations in RBOC central offices. All of these facilities have been deployed to serve the entire addressable market in each geographic area - both business and residential customers.

TDS Metrocom currently serves over 300,000 customers and nearly half of those, 130,000 are residential customers. Each and every one of those residential customers is served using unbundled loops in connection with self-provisioned switching, commonly referred to as a UNE-L strategy. TDS Metrocom has used this provisioning method from day one of operation and as such has been a market leader in providing significant benefits to consumers through innovative service offerings.

TDS Metrocom was the first carrier in its Wisconsin markets to provide a residential DSL product well before such a product was rolled out by SBC and continues to provide differentiated DSL products. TDS Metrocom was serving residential customers in Wisconsin long before any

of the national CLECs arrived and even before UNE-P was sanctioned by the courts. TDS Metrocom was one of the leaders in developing unlimited local calling packages in its markets where the incumbent only offered measured service. And TDS Metrocom was nearly alone in providing an option to residential consumers during years of quality of service nightmares that plagued consumers in SBC's Midwest region, the former Ameritech states.

However, with each and every order released by the Commission, the long-term viability of a facilities-based model to serve mass market consumers becomes more tenuous because the addressable market of customers over the long term shrinks. Curiously, at the same time the Commission continues to publicly profess its support for this model, it is also likely to compel carriers to move towards more use of UNE-L by enacting extensive limitations on the availability of UNE-P in its Triennial Review remand proceeding. For a number of reasons expanded on below, providing relief for FTTC in the same manner as FTTH is not good policy, will not spur additional broadband deployment and will discourage CLECs from serving the mass market through a facilities-based strategy.

The Impairment Analysis in the TRO for FTTH is Not Applicable to FTTC

While TDS Metrocom and other CLECs continue to dispute the wisdom and legality of the FCC decision in the TRO to limit unbundling requirements on FTTH loops, the Commission's initial decision at least appeared to establish a bright line standard. While that bright line has now been blurred by moving from relief for purely residential FTTH to mass market FTTH that includes small businesses and MDUs, the greater leap to include FTTC is not justifiable even under the Commission's reasoning as elaborated in the TRO.

The FCC pointed to a record indicating that CLECs were "leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation."[1] In order for the FCC to justify extending the unbundling exemption to FTTC, it needs to do the same analysis with data on FTTC. BellSouth states that it has passed nearly 1 million homes with FTTC[2] while Marconi presents evidence that Sprint's ILEC has also deployed FTTC.[3] Marconi also states that two CLECs and one cable operator have passed a combined 99,000 homes with FTTC.[4] Thus, the data show that while FTTH deployment was supposedly led by CLECs, it appears that at least 90% of FTTC deployment has been undertaken by ILECs.[5] This complete reversal of the results of the data undermines the first cornerstone of the Commission's analysis.

A second justification for unbundling relief for FTTH is just as suspect for FTTC. The Commission found that "entry barriers appear largely the same"[6] for ILECs and CLECs with respect to FTTH loops, including, among other things, responding to bid requests for deployment. With BellSouth stating that it has been deploying FTTC since 1995, it is hard to argue that

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[1] *Triennial Review Order at* ¶ 275. CLECs have disputed this analysis by pointing out that 92% of the non-ILEC total was deployed by two entities, one with a failed and repudiated business model and the other a municipal utility with built in monopoly-like advantages of its own. (Opening Brief of CLEC Petitioners and Intervenors in Support, *USTA v. FCC*, D.C. Cir. No. 00-1012, December 1, 2003, page 29.)

[2] BellSouth *Notice of Ex Parte*, December 16, 2003, page 5.

[3] Marconi *Reply Comments*, November 17, 2003, page 10.

[4] *Id*, page 10.

[5] These data do not take into account the vast number of ILEC lines behind fiber-fed DLCs that include less than 500 feet of copper. The FTTH rules proposed by BellSouth and others could easily be interpreted to include such lines.

[6] *Triennial Review Order at* ¶ 275.

CLECs have had equal opportunities to bid on FTTC developments when deployment had taken place years before any CLEC could possibly have entered the bidding process.

Other arguments for extending FTTH relief to FTTC are just as unconvincing. BellSouth in its Petition for Reconsideration argues for the expansion of limits on unbundling because FTTC provides "service equivalence" to FTTH through its ability to "deliver broadcast or better quality, multi-channel video along with high-speed data and voice services." And, because it allegedly furthers the Commission's goal of not unbundling networks that support "truly broadband transmission capabilities".[7]

However, as a Covad White Paper recently pointed out, within the next 6-12 months ADSL2+ and VDSL technologies coupled with compression advancements will allow for download speeds of 25-52 Mpbs on copper loops of 5000 feet or greater.[8] SBC's fiber to the node Project Lightspeed envisions 15-25 Mbps service with loops lengths presumably well in excess of the 500 foot FTTC limit.[9] These speeds will easily be capable of providing video, data and voice services on a single platform. In the face of advancing technology, a service equivalency test will not provide a bright line standard and neither will a definition of "truly broadband" regardless of whether a line is drawn at 10, 25, 52, 100 or 1000 Mbps. Accordingly, there is no need to expand limits on unbundling to promote broadband under any reasonable interpretation of that term.

FTTC is simply one of many variations of deep fiber deployment that should not be singled out for preferential treatment. ALTS in its Notice of Ex Parte Presentation dated January 23, 2004 provides comprehensive evidence of the limits of FTTC technology in comparison to FTTH.[10] Outside analysts agree. One of the preeminent market analysts of FTTH recently stated that "despite the similar sounding names" FTTC and FTTH are quite different because FTTC "is basically a DSL technology" whereas when a carrier takes fiber all the way to the home "your bandwidth is much, much higher."[11] Further evidence comes from a representative of BellSouth who explains that "the (FTTC) product currently being deployed utilizes ADSL data delivery," and that "as bandwidth requirements increase, BellSouth will migrate to utilize other DSL delivery strategies from the ONU to the house".[12] Another telecom consultant argues that "(b)ecause of their non-optimum economics, both FTTC and deep-fiber DSL...are likely to be overtaken by the clean passive-all-the-way FTTH, and thus never really make a strong appearance outside the history books".[13] Any unbundling relief for fiber deployment if granted at all should be reserved for a future-proof network such as true FTTH.

Current Commission FTTH Rules and Proposed FTTC Rules are Vague and Leave Too Much Room for Interpretation and Dispute

Extending the FTTH unbundling exemption to FTTC will highlight significant gaps in commission rules. Most glaringly, the Commission has yet to provide guidance on its definition of "greenfield" which is key to the triggering of the full unbundling exemption. In order to

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[7] BellSouth *Petition for Reconsideration*, pages ii and 2-3.
[8] The Future of the Copper Loop, *Covad White Paper*, page 2.
[9] SBC, *Notice of Ex Parte*, September 17, 2004, CC 01-338, page 2.
[10] ALTS *Notice of Ex Parte Presentation*, January 17, 2004, CC 01-338
[11] Focus on Fiber to the Home, Interview with Mike Render, *Telecommunications Reports*, August 15, 2004, Vol. 70, No. 16, pages 34-35.
[12] Real Speed, Not Angels on Pinheads by Dave Burstein, *DSL Prime*, July 19, 2004, http://isp-planet.com/cplanet/tech/2004/prime_letter_040719_angel.html
[13] *Fiber to the Home White Paper*, Paul E. Green Jr., February 21, 2003, http://www.ftthcouncil.org/dbfiles/techexchange/FTTH%20White%20Paper%20PaulGreen%200203.pdf

eliminate sources of potential dispute, the FCC should clarify its "greenfield" definition as follows:

- The ILEC must not be able to rely on any existing rights-of-way, infrastructure, loop plant or other equipment between the network interface device at the customer premise and the serving wire center. The ILEC must not be allowed relief for mere incremental deployment at the remote terminal or elsewhere along existing conduits or loop plant. Such deployment cannot be construed as greenfield deployment and will not promote the policy or investment objectives the FCC seeks. In no event should the ILEC be entitled to construe any loop as part of a greenfield if that loop (or any of the loop components) were deployed prior to the effective date of any order clarifying the definition of a greenfield.
- CLECs must have a genuine legal and economic opportunity to bid and have, in fact, bid via an RFP process on greenfield proposals. Only through a thorough RFP process will developers be informed of all of the choices available to them and be able to secure the most attractive pricing or package of services for the benefit of end users. Accordingly, in order to qualify for an unbundling exemption, a greenfield proposal should be required to utilize the RFP process. In order to demonstrate that the ILEC won the bid after a fair, competitive bidding process, the ILEC bears the burden of demonstrating that the bid was fair and the result of a competitive bidding process which included a public posting of bid opportunities and sufficient time for CLECs to respond.
- ILEC greenfield unbundling protection must be limited to the mass market and must be limited to brand new developments, not extensions of existing developments. Only "new housing developments"[14] consisting entirely of mass market end users should qualify for greenfield consideration -- extensions of the existing ILEC network to new groupings of houses in established developments should not qualify. Any other construction of the term greenfield would allow the ILEC to leverage its existing network in such a way as to preclude CLECs from generating competitive bids in an RFP process. Additionally, a definition not tied to the mass market could negatively impact competition in the market for small and medium-sized businesses.

Beyond concerns about the current FTTH rules, the rule changes proposed by BellSouth and Marconi to extend unbundling exemptions to FTTC are far too broad and vague. Marconi proposes that a loop should be classified as a fiber loop when it is "serving a terminal, at or within 500 feet of an end user's customer premise."[15] BellSouth's definition would require the loop to have the "capacity to deliver voice, multi-channel video, and data services to mass market customers," and that the loop have "a service drop of not more than 500 feet."[16] Under both of the proposals, the rules could easily be interpreted to include a massive amount of loops that have already been deployed that are served through fiber-fed DLCs that have short copper tails of less than 500 feet. Millions of such lines are likely in operation today and would be encompassed by either proposed rule. The current bright line FTTH rule avoids these definitional problems.

Furthermore, CLECs would be significantly impacted operationally by such a change. BellSouth has attempted to dismiss CLEC concerns that identifying FTTC loops will be problematic

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[14] *Triennial Review Order at* ¶ 275. The FCC reiterated its conception of "greenfield" as encompassing only "new residential developments." Brief for Respondents, *USTA v. FCC*, D.C. Cir. No. 00-1012, at 57 (Dec. 31, 2003) ("In the case of 'greenfield' FTTH deployment in new residential developments, ILECs are new entrants in those markets and have no natural monopoly.")

[15] Marconi *Ex Parte Presentation*, February 18, 2004, page 1.

[16] BellSouth *Notice of Ex Parte Presentation*, December 16, 2003, page 14.

because FTTC loops bear an information code designating an all-fiber loop.[17] This is less than reassuring. First, the data for the information code will be self-provided by the ILEC. This will clearly allow ILECs to broadly interpret the rules to maximize the number of lines covered by the unbundling exemption. Because CLECs have no visibility into ILEC network facility records or the network itself, it will be difficult if not impossible for CLECs to verify ILEC entered data. Second, while CLECs may in fact be able to identify whether or not a loop is subject to unbundling based on the information code, the operational reality is that in order to do this, all loop orders would need to be pre-qualified whereas generally only DSL-capable loop orders must be pre-qualified today. Such a requirement would add significant processing time and cost to each and every mass market loop order, further hampering mass market competition via UNE-L.

As one of the few CLECs who have attempted to serve mass market consumers via a UNE-L strategy, expansion of unbundling exemptions, in this case to FTTC architecture, is extremely worrisome to TDS Metrocom. The broad and vague rules related to FTTH and FTTC will further shrink CLEC addressable market and potentially curtail deployment of new competing broadband services by CLECs. The proposed FTTC unbundling exemption walls off potential voice revenue sources that are critical in providing funds for deployment of alternative broadband facilities and eliminates the ability of CLEC's to collocate at FTTC remote terminals and access the remaining copper plant to provide competitive broadband service. The Commission's mixed signals of claiming support for UNE-L and pushing UNE-P providers to that model while at the same time chipping away at revenue sources and network access rights is troubling. TDS Metrocom urges to Commission to stake a clear path in support of facilities-based competition by taking this first small step of rejecting BellSouth's request for FTTC unbundling relief.

If you have any additional questions please feel free to contact me at any time.

Sincerely,

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[17] BellSouth *Reply Comments*, page 6.