

**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
)	

OPPOSITION TO AT&T’S PETITION FOR RECONSIDERATION

BellSouth Corporation (“BellSouth”), by its attorneys, hereby submits this Opposition to AT&T’s Petition for Reconsideration of the Commission’s 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*”).¹

I. INTRODUCTION AND SUMMARY

In the *Triennial Review Order*, the Commission eliminated unbundling obligations for fiber-to-the-home (FTTH) loops in greenfield settings and substantially reduced unbundling obligations for such loops in brownfield settings. In doing so, the Commission relied on unrebutted record evidence showing that CLECs are not impaired in deploying such loops – they face the same operational and economic obstacles and enjoy the same revenue opportunities as

¹ *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, Order on Reconsideration*, 19 FCC Rcd 15856 (2004) (“*MDU Reconsideration Order*”).

ILECs – and further noted that the goals of Section 706 support unbundling relief even if some impairment existed.²

In the *MDU Reconsideration Order*, the Commission extended its FTTH rules to include predominantly residential MDUs, explaining that the same impairment analysis and policy considerations supporting FTTH relief for single premises apply in the MDU context. In particular, the Commission properly found that this limited additional unbundling relief would remove regulatory disincentives to broadband deployment to residential and small business customers, many millions of whom are located in multiple-unit buildings.³ The Commission also observed that in both greenfield and brownfield situations, CLECs and ILECs have similar opportunities to deploy broadband to MDUs, facing equivalent barriers to entry and economic incentives.

Despite this compelling logic, AT&T urges the Commission to reconsider its decision to extend unbundling relief to fiber to MDUs, contending (as it did in opposing such unbundling relief in the first place) that CLECs are impaired without access to ILEC fiber loops in providing

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*, Report and Order and Order on Remand and Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17142-17148 (2003) (“*Triennial Review Order*”), *aff’d in part and vacated and remanded in part*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *pets. for cert. pending*.

³ *See MDU Reconsideration Order* at ¶ 7 (finding that the “disincentives faced by carriers seeking to deploy broadband capabilities to single family dwellings also apply in the context of predominantly residential MDUs); *see also Triennial Review Order* at 17141 (eliminating ILECs’ broadband unbundling obligations will lead to a “race to build next generation networks and ... increased competition in the delivery of broadband services”).

AT&T concedes that a “very large” number of customers live in MDUs. It goes on to contend that such customers are “disproportionately low income,” Petition at 3, but neither substantiates this claim nor explains its relevance. Notably, if the low income point is correct, it further confirms the value of unbundling relief in order to bring broadband to a traditionally underserved segment of the population.

service to customers in MDUs.⁴ As an initial and dispositive matter, AT&T's petition is procedurally invalid because it fails to raise any new evidence or arguments that were not already considered and rejected by the Commission in this proceeding. Nor is there substantive merit to AT&T's tired impairment claims, and even if there were, Section 706 provides ample authority to support the Commission's actions in the *MDU Reconsideration Order*. Finally, the "predominantly residential" standard articulated in that *Order*, which AT&T claims will invite gamesmanship, is in reality clear and has proved administratively workable in similar contexts. Accordingly, the Commission should dismiss or deny AT&T's Petition for Reconsideration.

II. AT&T'S PETITION IS PROCEDURALLY INVALID.

The Commission's precedent regarding reconsideration does not allow a petitioner simply to reiterate arguments that the Commission already considered and rejected in a prior order.⁵ Rather, reconsideration of a Commission decision is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.⁶

In its petition, AT&T raises no new evidence or arguments not already considered by the Commission; nor has it shown a material error in the Commission's logic. Instead, it merely disagrees with the Commission's findings and priorities as laid out in its *MDU Reconsideration*

⁴ Indeed, AT&T goes so far as to assert that the relief afforded in the *MDU Reconsideration Order* will "put an end to competition," Petition at 3. Aside from being unsupported hyperbole, this claim ignores the availability of inter-modal alternatives, including cable modem, fixed and mobile wireless, satellite broadband, and in the near future, power line communications.

⁵ See, e.g., *Policies Regarding the Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations*, Memorandum Opinion and Order, 4 FCC Rcd 2276, 2277 (1989); *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 17 FCC Rcd 8520, 8525 ¶ 15 (2002) (citing 47 C.F.R. § 1.429).

⁶ See *LMDS Communications, Inc.*, Order on Reconsideration, 15 FCC Rcd 23747, ¶ 6 (WTB 2000);

Order. Given that the “public interest in expeditious resolution of Commission proceedings is done a disservice if the Commission readdresses arguments and issues it has already considered,”⁷ the Commission should dismiss AT&T’s petition as duplicative. Indeed, dismissal is particularly appropriate here, given that AT&T’s petition is a request for reconsideration of a reconsideration decision.⁸ If second and third petitions for reconsideration were allowed, the Commission “would be involved in a never ending process of review that would frustrate the Commission’s ability to conduct its business in an orderly fashion.”⁹

III. CLECS ARE NOT IMPAIRED BY THE REDUCTION OF UNBUNDLING OBLIGATIONS FOR FTTP LOOPS DEPLOYED TO PRIMARILY RESIDENTIAL MDUS.

Even if AT&T’s Petition were procedurally sound, its substantive arguments are meritless. AT&T asserts that CLECs are impaired in serving customers in MDUs.¹⁰ In making

⁷ *Policies Regarding the Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations*, Memorandum Opinion and Order, 4 FCC Rcd 2276, 2277 (1989) (also noting that “[i]t is well established that reconsideration will not be granted merely for the purpose of again debating matter on which the agency has once deliberated and spoken”).

⁸ *United Broadcasting Co. of Florida, Inc.*, 39 RR 2d 448, 450 (1976).

⁹ *Applications of Warren Price Communications, Inc., Bay Shore, New York, et al., for a Construction Permit for a New FM Station on Channel 276 at Bay Shore, New York*, Memorandum Opinion and Order, 7 FCC Rcd 6850, n. 1 (1992) (quoting *VHF Drop-ins*, 3 RR 2d 1549, 1551 n. 3 (1964)).

¹⁰ See Petition at 4. AT&T also asserts that the Commission’s reliance on Corning’s evidence in the MDU Reconsideration Order violates the requirements of the Data Quality Act. *Id.* at n. 6. The Data Quality Act requires the Commission to ensure that all data it disseminates reflects a level of quality commensurate with the nature of the information. See 44 U.S.C. § 3516 (note); *Implementation of the Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554*, Information Quality Guidelines, 17 FCC Rcd 19890, ¶ 5 (2002) (“*Data Quality Order*”). As indicated in the Commission’s Order implementing the requirements of the Data Quality Act, “public comment plays an important role in ensuring data quality.” *Data Quality Order* at ¶ 5. This information was submitted to the Commission via public comment. Thus, AT&T had every opportunity to review and refute the data and/or the submitting parties’ interpretation of the data. AT&T, however, did not raise an objection as to the validity of this evidence until after the Commission had already reviewed all of the available evidence and made the best possible decision based on that evidence. AT&T has presented no evidence that the Commission did not

this statement, however, AT&T relies heavily on the effect that unbundling will have on “enterprise” customers located in MDUs and the Commission’s prior finding that CLECs are impaired in serving enterprise customers.¹¹ Regardless of the merits of the Commission’s finding with respect to enterprise customers, AT&T ignores the simple fact that businesses located in primarily residential MDUs, such as apartment and condominium buildings, are generally small businesses like dry cleaners and convenience stores, which are hardly “enterprise” customers. The needs of businesses located in MDUs are therefore more similar to the needs of other small businesses located in mass market individual occupancy premises. Thus, as the Commission noted,¹² absent this limited regulatory relief, ILECs would likely shift any investment they do make in fiber networks away from predominantly residential MDUs to markets with fewer investment disincentives, thereby depriving all of these customers of wireline broadband alternatives.

In contrast, the limited regulatory relief provided in the *MDU Reconsideration Order* ensures that both CLECs and ILECs have identical opportunities to deploy broadband facilities to MDUs. Indeed, in both greenfield and brownfield situations, the barriers to entry and economic incentives for deployment of fiber-to-the-premises (“FTTP”) to primarily residential MDUs are equivalent for ILECs and CLECs. To deploy FTTP to greenfield areas, both ILECs and CLECs must negotiate rights of way, respond to bid requests for new housing developments, obtain fiber optic cabling and other materials, develop deployment plans, and implement construction programs just as they must do with respect to mass market customers living in

adhere to the specific requirements of its rules implementing the Data Quality Act when reviewing this evidence. Thus, AT&T’s objection is unsubstantiated and should be dismissed.

¹¹ Petition at 2, 8.

¹² *MDU Reconsideration Order* at ¶ 7.

single-family homes.¹³ Similarly, in brownfield situations, ILECs face many of the same obstacles to deployment as CLECs, including obtaining the necessary materials, hiring the labor force, and constructing the fiber transmission facilities.¹⁴ Although in brownfield areas ILECs have the ability to replace pre-existing copper loops that CLECs are using to provide service to mass-market customers with FTTH, the Commission has established protections to ensure that CLECs will continue to have unbundled access to either the existing copper loop or a 64 kbps transmission path of the FTTH loop in such situations.¹⁵ These protections will be equally effective in ensuring a level playing field with respect to FTTP that is deployed to MDUs. Furthermore, the economic incentives for ILECs to deploy FTTP to MDUs are identical for CLECs, regardless of whether an MDU also contains business customers. CLECs thus are not impaired in offering service to customers located in MDUs, regardless of the customer's classification.¹⁶

Even assuming impairment existed, which it does not, unbundling relief is still warranted in order to achieve the Congressional goals expressed in Section 706.¹⁷ Both the Commission and the D.C. Circuit have found that removing unbundling obligations on FTTH loops generally

¹³ *Triennial Review Order* at 17143.

¹⁴ *See Triennial Review Order* at 17144.

¹⁵ *Id.*

¹⁶ The Commission recently made this same finding with respect to fiber-to-the-curb ("FTTC"). Specifically, the Commission found no impairment with respect to FTTC loops because of the "level playing field for incumbents and competitors seeking to deploy FTTC loops, and increased revenue opportunities associated with those deployments." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, FCC 04-248, ¶ 2 (Oct. 18, 2004).

¹⁷ Section 706 of the Telecommunications Act of 1996 mandates that the Commission "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing, in a manner consistent with the public interest, convenience, and necessity...regulatory forbearance...or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157 nt.

promotes their deployment.¹⁸ This finding holds true with respect to MDUs. As with residential and small business customers located in standalone premises, FTTP deployment to MDUs has been limited to date.¹⁹ Furthermore, the costs and potential benefits of deployment are high and, as indicated above, ILECs and CLECs face similar entry barriers. Thus, an unbundling requirement would delay or foreclose investment in next-generation broadband networks: CLECs will wait for ILECs to deploy FTTP, yet ILECs will be hesitant to deploy FTTP because compulsory sharing of this investment with CLECs would undermine their potential return on this capital-intensive venture.²⁰ Consequently, Section 706 supports unbundling relief even if there were some evidence of impairment.²¹

IV. THE “PREDOMINANTLY RESIDENTIAL” STANDARD IS SUSTAINABLE.

In its *MDU Reconsideration Order*, the Commission defined “predominantly residential” through the use of specific examples, including “apartment buildings, condominium buildings, cooperatives, or planned unit developments.”²² This definition provides sufficient guidance to

¹⁸ *Triennial Review Order* at 17145 (“removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market”); *United States Telecom Association v. FCC*, 359 F.3d 554, 584 (D.C. Cir. 2004) (“*USTA II*”) (“[a]n unbundling obligation under these circumstances seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy FTTH and ILECs fearful that CLEC access would undermine the investments’ potential return. Absence of unbundling, by contrast, will give all parties an incentive to take a shot at this potentially lucrative market.”). Indeed, earlier this month the Commission found that broadband relief will “benefit consumers by making the RBOCs more vigorous competitors to cable modem service, which plays a significant role in the current broadband market.” Press Release, Federal Communications Commission, Federal Communications Commission Further Spurs Advanced Fiber Network Deployment, FCC 04-254 (Oct. 22, 2004).

¹⁹ AT&T asserts, again without support, that fiber already is being deployed to MDUs. Petition at 7. Even if this is so, however, unbundling relief undoubtedly will expand the scope and energize the pace of such deployment for all the reasons explained in the *Triennial Review Order*’s discussion of broadband unbundling relief.

²⁰ See *Triennial Review Order* at 17141.

²¹ See *id.* at ¶¶ 272, 278.

²² *MDU Reconsideration Order* at ¶ 6.

industry and the Commission on a going-forward basis as to which unbundling regime will apply to any given building. Indeed, the “predominantly residential” formulation has proved administratively effective in similar contexts, undermining AT&T’s professed concern that it will permit gamesmanship here. In particular, in the *Competitive Networks Order*, the Commission drew a distinction between the rules governing exclusive contracts between service providers and building owners based on whether property was predominantly used for commercial or residential purposes.²³ In that *Order*, the Commission found that “in most instances the predominantly residential or commercial character of a property will be clear on the facts,” and AT&T has introduced no evidence that this expectation has not been substantiated by marketplace experience.²⁴

²³ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission’s Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983 (2000) (“*Competitive Networks Order*”).

²⁴ *Id.* at ¶ 38.

V. **CONCLUSION**

For these reasons, the Commission should dismiss or deny AT&T's Petition for Reconsideration of the Commission's *MDU Reconsideration Order*.

Respectfully submitted,

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Certificate of Service

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