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 PETITION FOR RECONSIDERATION

Advanced Fibre Communications, Inc. ("AFC®"), pursuant to Section 1.429(f) of the Commission's Rules, opposes the petition of AT&T Corp. ("AT&T") seeking reconsideration of the Commission's decision to reduce the unbundling obligation for fiber-to-Multiple Dwelling Units ("fiber-to-MDUs") deployed by an incumbent local exchange carrier ("ILEC").[1] The Commission should reject AT&T's shrill and unsubstantiated claims that the Commission's decision "signals the end of competitive choice" for the millions of customers in predominantly residential buildings.[2] As AFC demonstrates herein, the Commission's decision merely extends the fiber-to-the-home ("FTTH") relief adopted in the *Triennial Review Order*[3] to a particular FTTH

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[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, FCC 04-191, released August 9, 2004. Notice of AT&T's petition appeared in the *Federal Register*, October 27, 2004 at p. 62693.

[2] AT&T Petition at p. 1.

[3] *Review Of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003).

architecture, and was fully justified by the record in this proceeding. Indeed, the affirmative reaction to that lifting of investment disincentives in the form of increased fiber investment reinforces the wisdom of the Commission's predictive judgment. The treatment of fiber-to-MDUs as FTTH will accelerate advanced services to the millions of end users in predominantly residential buildings.

I. The Commission Correctly Determined that Fiber-to-MDUs Should be Subject to Minimal Unbundling

In assessing the proper degree of unbundling that should apply to the fiber-based facilities of the ILECs, the Commission in the *Triennial Review Order* initially classified the various fiber architectures as either FTTH or "hybrid" loops (and additionally applied different unbundling obligations depending on whether a loop was a "greenfield" or a "brownfield" deployment). The *Triennial Review Order* defined a FTTH loop as "a local loop consisting entirely of fiber-optic cable, whether dark or lit, and serving a residential end user's customer premises."[4] Any other fiber-based loop was considered a hybrid loop, and subject to additional unbundling obligations.[5]

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[4] *Triennial Review Order* at n. 802 (codified at 47 C.F.R. § 51.319 (a)(3)). The *Errata* subsequently issued by the Commission eliminated the reference to "residential."

[5] The comments in response to original *Triennial Review Notice of Proposed Rulemaking* did not address which architectures should fall into these two categories, however, because the Notice of Proposed Rulemaking talked in terms of distinguishing between fiber-to-remote terminals and other deep fiber architecture, not FTTH and hybrid loops:

> For example, should we distinguish between the deployment of fiber optic facilities directly to the home (*i.e.*, "fiber to the curb") and fiber optic facilities only to remote terminals?

In response to petitions for reconsideration, the Commission refined its fiber-loop categorizations, initially expanding "FTTH" to include fiber-to-MDUs,[6] and subsequently adding fiber-to-the-curb ("FTTC") to the deep fiber architectures that required the least unbundling.[7] These reconsideration decisions were based on supplementary showings that these various deep fiber architectures shared common economics with FTTH, and importantly, an ability to provide the "triple play" of bundled services that carriers are offering to customers: voice, multi-channel video and high-speed data. As AFC had demonstrated, the relatively short copper and/or coaxial cable present in fiber-to-MDUs (for in-building distribution) or FTTC (up to 500 feet connecting the customer premises to the node) do not significantly reduce the capacity of those deep fiber architectures.[8]

As a result, the impairment analyses and revenue opportunities are the same whether the ILEC deploys FTTH, fiber-to-MDUs or FTTC. Competing carriers, in greenfield situations, face the same deployment costs as the ILECs, whether the fiber is deployed to a new apartment building or a new subdivision. Indeed, competing carriers are likely to even have some advantages, such as lower labor costs. The in-building metallic wiring does not alter the analysis. Likewise, a competing carrier will have the

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Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC 01-361, Released December 20, 2001 at ¶ 50.

[6] *See* n. 1, *supra*.

[7] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Reconsideration, FCC 04-248, released October 18, 2004.

[8] *See, e.g.*, Comments of AFC in WC Docket No. 04-313, filed October 4, 2004, at pp. 12-13 and Appendix B; Marconi Reply Comments in CC Docket No. 01-338, filed November 17, 2003, at pp. 4-5 and Attachment.

same opportunity to go after the "triple play" revenues if it chooses to compete for those new customers using similar deep fiber architectures.

In other areas as well, whether the deep fiber architecture is fiber-to-MDUs or FTTH does not affect the Commission's unbundling analyses. With respect to intermodal competition, the cable companies – the dominant broadband providers today -- are just as likely to offer voice, multi-channel video and high-speed data services to customers in apartment buildings as single-family homes. Moreover, to the extent AT&T expressed concern about the degree of competition for broadband service to any "incidental" business customers in predominantly residential buildings,[9] the record reflects that cable companies are now offering broadband services to business customers.[10] In addition, other competitive broadband services that have been proven to be viable, including broadband over power line and wireless, will likewise be able to serve residential or business customers located in predominantly residential buildings.

Equally as important, the Commission has determined that under the "at a minimum" standard of Section 251(d)(2), the Commission is obligated to examine additional factors and policies besides "impairment." One such factor the Commission considered in its fiber-to-MDUs decision was the important policy, reflected in Section 706, of facilitating the availability of advanced services to all Americans. Fiber-to-

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[9] *Cf.*, AT&T Petition at p. 3. Although AT&T refers to these businesses as "enterprise customers" (*e.g.*, AT&T Petition at p. 8), AFC presumes that most business customers located in predominantly residential buildings will be small businesses (such as dry cleaners and convenience stores).

[10] *See, e.g.,* UNE Fact Report 2004, submitted by BellSouth, SBC, Qwest and Verizon, October, 2004 at pp. I-10, III-25 and III-36 – III-38.

MDUs clearly has the capability for providing advanced services. Thus, even assuming *arguendo* competitive carriers face some impairment without unbundled access to broadband fiber-to-MDU loops, the Commission properly considered the impact unbundling would have on slowing the deployment of advanced services to customers in predominantly residential buildings – and distinguished between those buildings and others.[11] Moreover, the Court of Appeals has upheld the Commission's authority to refrain from requiring unbundling, even in the face of impairment, in order to accommodate the policies enshrined in Section 706.[12] Thus, the Commission's decision to extend unbundling relief to fiber-to-MDUs for predominantly residential buildings was

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[11] As the Commission observed in its Reconsideration decision being challenged here at ¶ 4:

> In the *Triennial Review Order*, the Commission concluded that competitive carriers seeking to serve mass market customers residing in MDUs face similar deployment barriers as when serving enterprise customers. We find in this Order, however, that principles of section 706 of the Act for residential customers living in MDUs outweigh whatever impairment findings may be present for fiber loops serving such customers. Thus, we find that the Commission was overly broad in its classifications of MDUs by failing to make distinctions among different types of multiunit environments. (footnotes omitted)

[12] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 583 (D.C. Cir. 2004). Indeed, AT&T quotes the Court of Appeals out of context when it asserts "the D.C. Circuit in *USTA II* found this position on impairment to be 'convincing.'" AT&T Petition at p. 5. What the Court actually stated was:

> While the CLECs' objections are convincing in many respects, they are ultimately unavailing. Even if the CLECs are impaired with respect to FTTH deployment (***a point we do not decide***), the § 706 considerations that we upheld as legitimate in the hybrid loop case are enough to justify the Commission's decision not to unbundled FTTH.

USTA II, 359 F.3d at p. 583 (emphasis added).

fully justified.

II. The Commission Properly Assessed the Investment Disincentives that Continued Unbundling of Fiber-to-MDUs Would Engender

The record clearly supports the Commission's decision on reconsideration to further reduce the unbundling obligations applicable to fiber loops deployed to predominantly residential buildings. Corning had submitted a detailed analysis of the dampening effects on investment in fiber deployment resulting from unbundling obligations.[13] That study examined the likely impact of unbundling based on the costs of deployment and likely revenues under a "no unbundling" and an "unbundling" scenario, using representative central offices in Texas to model the effects. That study looked at actual "households" in Texas, which presumably includes apartments and condominiums as well as single-family homes – there certainly was no mention in the study that any such residences were excluded. Thus, AT&T's claim that there was no evidence concerning fiber-to-MDUs before the Commission is not correct.[14] In addition,

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[13] Cambridge Strategic Management Group, "Assessing the Impact of Regulation on Deployment of Fiber to the Home; A Comparative Business Case Analysis" (April 5, 2002), filed by Corning in CC Docket No. 01-338 on April 5, 2002.

[14] *Cf.*, AT&T Petition at pp. 3 and 6. Moreover, as mentioned previously, the initial record did not specifically address fiber-to-MDUs because the Notice of Proposed Rulemaking did not appear to distinguish among deep-fiber architectures. The Commission, however, has the discretion to rely on its expertise in developing forward looking rules designed to anticipate future development of the marketplace – such as elimination of investment disincentives – even in the absence of complete factual support. *E.g., FCC v. Nat'l Citizens Comm. for Broad*, 436 U.S. 775, 814 (1978) (quoting *FPC v. Transcontinental Gas Pipe Line Corp*., 365 U.S. 1, 29 (1961):

> In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; "a forecast of the direction in which future public interest lies necessarily involves deductions

numerous manufacturers submitted evidence with regard to the investment disincentives of unbundling, which was applicable to fiber-to-MDUs and other deep-fiber architectures.[15]

The Commission is entitled to significant deference when called upon to make predictive judgments, as it did in this case with regard to the likely effect of eliminating unbundling on the deployment of advanced services.[16] In this case, moreover, there has been immediate feedback to the Commission's decision, thus validating the Commission's forecasts regarding the impact on ILECs' investment decision. In response to the Commission's decision to eliminate unbundling for fiber-to-MDU loops in predominantly residential buildings (as well as other related unbundling relief), several

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based on the expert knowledge of the agency."

[15] *E.g.*, High Tech Broadband Coalition Comments in CC Docket No. 01-338, filed November 6, 2003 at pp. 4, 11 and 13; Corning Comments in CC Docket No. 01-338, filed April 4, 2002 at pp. 9 and 11; Corning Reply Comments in CC Docket No. 01-338, filed July 17, 2002 at pp. 4, 9. 12-3; Marconi Reply Comments in CC Docket No. 01-338, filed November 17, 2003 at pp. 2, 13-15; Catena Reply Comments in CC Docket No. 01-336, filed July 17, 2002 at pp. 2, 11-14; Catena Comments in CC Docket No. 01-338, filed November 6, 2003 at pp. 3, 6-8 and 12.

[16] See e.g., *Sioux Valley Rural Television, Inc. v. FCC*, 30 CR 1320 (D.C. Cir. 2003):

> We can find no fault with the Commission's decision; the Commission considered the relevant evidence and made a policy judgment concerning the development of a nascent technology. Such decisions are well within the purview of the responsible agency. *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 813 (1978) ("a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency" (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961))); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (Commission is entitled to "appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency").

incumbent carriers have initiated plans to accelerate their deployment of deep-fiber advanced services.[17] The marketplace reacted as the Commission and the commenters expected, and as a result more Americans will more rapidly gain access to advanced services. AT&T has presented no valid basis for retreating from such a successful policy. WHEREFORE, AFC requests that the Commission expeditiously deny AT&T's Petition for Reconsideration.

Respectfully submitted,

/s/

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[17] *E.g., Multichannel News*, November 1, 2004 ("After winning broadband relief from federal regulators last month, both Verizon and SBC said they would accelerate fiber deployments to offer a suite of world-class digital products, including cable television."); Primedia Insight. *Telephony*, October 14, 2004 (SBC and BellSouth announced they will accelerate their fiber buildout in the wake of FCC rulings); PBI Media, *Fiber Optics Forecast*, October 27, 2004 (SBC announced plans to accelerate its Project Lightspeed; Verizon announced an immediate acceleration of its Fios FTTx).