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BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation, WC Docket No. 04-313, CC Docket No. 01-338
*Unbundled Access to Network Elements; Review of the Section 251 Unbundling
Obligations of Incumbent Local Exchange Carriers*

Dear Ms. Dortch:

In its most recent reconsideration of the *Triennial Review Order*, the Commission altered its rules in a manner that makes it necessary for the Commission to define clearly “mass market” for the purposes of its unbundling rules.¹ In the *Second Reconsideration Order*, the Commission scaled back the requirement that incumbent local exchange carriers (“LECs”) provide unbundled access to “fiber-to-the-curb” loops serving mass market customers,² and also limited the duty of incumbent LECs to make network modifications in order to provide access to the time-division multiplexing (“TDM”) capabilities of packet-switched fiber and hybrid loops used to provide service to mass market customers.³ In its *Triennial Remand* proceeding, the Bell Operating Companies

¹ This issue was also recently raised in response to AT&T’s petition for reconsideration of the Commission’s *First Reconsideration Order*, which addressed the requirement that incumbent LECs unbundle fiber deployed to multi-dwelling units. See Reply Comments of MCI in Support of AT&T’s Petition for Reconsideration, CC Docket No. 01-338, at 3-6 (Nov. 22, 2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 15856 (2004) (“*First Reconsideration Order*”). Even if the Commission were to grant AT&T’s petition for reconsideration, defining the mass market is necessary to ensure proper application of the Commission’s fiber and hybrid loop unbundling rules and to avoid BOC gaming of any vagueness created by the lack of an unambiguous definition.

² See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, ¶¶ 1, 9 (rel. Oct. 18, 2004) (FCC 04-248) (“*Second Reconsideration Order*”). Unless otherwise noted, all material cited herein is filed in WC Docket No. 04-313.

³ *Second Reconsideration Order* ¶ 20.

("BOCs") now seek to define "mass market" in a wildly overbroad manner, so as to expand the mass market unbundling relief granted in the *Second Reconsideration Order* to as many small and medium-sized businesses as possible.⁴ The Commission has repeatedly defined the mass market to include residential and *very* small business customers.⁵ In this remand proceeding, the Commission should put a finer point on that definition in a manner that stays true to its previous holdings. If the mass market is not defined with precision, the BOCs no doubt will attempt to use that ambiguity to deny access to business customers who are not mass market customers.

To date, the Commission has not drawn a precise distinction between mass market and enterprise customers. In order to ensure that the Commission's unbundling rules are applied properly, the Commission should define the term "mass market," at least as it applies to the Commission's unbundling rules, by establishing a bright line, in order to avoid administrative costs and unnecessary litigation over whether a specific element should be available. The definition also should approximate the class of customers that the Commission has previously identified as belonging to the mass market – residential and very small business customers. MCI has identified two approaches that meet both of these criteria: defining mass market to include only residential customers; and defining mass market to include customers that take three lines or fewer.

Residential Customers. As McLeod and other commenters point out, one reasonable bright-line approach would be to define the mass market to include only residential customers.⁶ Such an approach is eminently reasonable, because the vast majority of mass market customers are residential customers.⁷ Because a carrier would need only to determine the type of service plan to which a customer subscribes in order to apply this rule, this definition would be easily administered.

⁴ See Verizon Reply Comments at 163-65; Verizon Opposition to AT&T's Petition for Reconsideration, CC Docket No. 01-338, at 12-14 (Nov. 12, 2004); see also BellSouth Petition for Clarification and/or Partial Reconsideration, CC Docket No. 01-338, at 19-20 & n.17 (Oct. 2, 2003) ("BellSouth Petition").

⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 127, as modified by Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order*").

⁶ See, e.g., Letter from Chris A. Davis, McLeod USA, to Chairman Powell, FCC (Nov. 9, 2004) (FCC should define mass market as residential customers or residential and home office business customers) ("McLeod Letter"); Letter from Patrick J. Donovan & Philip J. Macres, Swidler Berlin Shereff Friedman, LLP, to Marlene H. Dortch, FCC, attachment at 2 (Nov. 9, 2004) (mass market should be limited to residential and home office customers).

⁷ See MCI Comments at 109 (Nov. 4, 2004).

Three or Fewer Lines Per Location. An alternative bright-line approach would be to declare that the mass market consists of customers that subscribe to three or fewer lines per location. This approach is easy to administer, though perhaps not quite as simple as the residential-only definition. The group of customers that take three lines or fewer is also likely to be a reasonable approximation of the residential and very small business customers previously identified by the Commission as falling into the “mass market.” The three-line limit, however, is admittedly arbitrary, and there is no particular basis for selecting the number three (as opposed to two or four, for example), other than the fact that the Commission has already used this bright line in an earlier decision regarding the availability of unbundled switching.⁸ That said, while any number would be arbitrary (though not capricious), the benefits of a bright-line test that serves as a reasonable proxy for residential and very small business customers far outweigh any concerns about arbitrariness.

BOC 48-Number Proposal. Proposals by the BOCs that the Commission define the mass market to include all customers with 48 or fewer telephone numbers,⁹ however, are unsound, indefensible, and exceedingly overbroad. The group of customers with 48 or fewer telephone numbers – the equivalent or *two or more DSIs* – would include a large number of customers that the Commission has previously identified as enterprise customers. In addition, the use of telephone numbers may not be a good proxy for the size of the customer. A single number, for example, may be associated with a PBX owned by an enterprise customer that in fact employs hundreds of workers. In short, the BOCs’ 48-number proposal should be rejected.

Other Considerations. If the Commission adopts a definition of mass market that applies to its unbundling rules, the Commission should also ensure that its actions do not result in unintended consequences. In particular, if the Commission were to find that competitors are not impaired without unbundled access to mass market switching in certain markets (which it should not do), and thereby eliminate or otherwise limit the availability of UNE-P in those markets, and if the Commission were also to define mass market customers in a way that excluded some existing customers served by UNE-P, the Commission should clarify that any transition mechanism away from UNE-P incorporates continued access to unbundled switching for all customers currently served by UNE-P – including residential and very small business customers – regardless of line count. Absent such a proactive clarification, incumbent LECs undoubtedly would

⁸ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 293 (1999) (adopting a three-line limit on the availability of unbundled switching in density zones 1 of the top 50 MSAs).

⁹ See, e.g., Verizon Comments at 147; Verizon Reply Comments at 166; see also BellSouth Petition at 20 n.17.

attempt unilaterally to raise rates for unbundled mass market switching for business customers in a flash-cut manner, causing significant customer disruption.¹⁰

Pursuant to section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter is being provided to you for inclusion in the public record of the above-referenced proceeding.

Sincerely,



Curtis L. Groves

cc:	Scott Bergmann	Matthew Brill	Michelle Carey
	Jeffrey Carlisle	Gail Cohen	Ian Dillner
	Aaron Goldberger	Daniel Gonzalez	Russ Hanser
	Christopher Libertelli	Marcus Maher	Jeremy Miller
	Thomas Navin	Jessica Rosenworcel	Carol Simpson
	John Stanley	Tim Stelzig	Cathy Zima

¹⁰ *Triennial Review Order* ¶ 266 (finding with respect to line sharing that it was appropriate to “fashion a transition period of sufficient length to enable competitive LECs to move their customers to alternative arrangements and modify their business practices and operations going forward” in order to avoid a “flash cut” to a new regulatory regime).