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December 8, 2004

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Portals
Washington, DC 20554

Re: ***Unbundled Access to Network Elements*, WC Docket No. 04-313; *Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC Docket No. 01-338**

Dear Ms. Dortch:

This letter responds to recent *ex parte* letters advocating a retreat from the Commission's previous decisions to refrain from extending unbundling obligations to next-generation broadband facilities, such as the fiber-to-the premises ("FTTP") currently being rolled out by Verizon.[1] Their arguments should be rejected.

As explained in more detail below, the Commission has already recognized—both in the *Triennial Review Order* and in subsequent orders—that next-generation, packetized broadband facilities, like Verizon's FTTP network, are not subject to unbundling. Rather than backslide on those prior decisions, as some parties urge, the Commission should move ahead by resolving any remaining ambiguity as to the scope of its present rules so that investment in next-generation networks can proceed without the impediment of uncertainty concerning the scope of the Commission's rules.

1. In the *Triennial Review Order*,[2] the Commission stated that it was adopting a bright line distinction between incumbents' existing legacy networks and their new

[1] In particular, we respond to the ex parte letters, dated November 9, 2004 and November 22, 2004, filed by McLeod USA; an ex parte letter, dated November 19, 2004, filed by several private equity firms (the "equity firms") that invest in CLECs; an ex parte letter, dated November 24, 2004, filed by XO Communications; an ex parte letter, dated November 24, 2004, filed by MCI; an ex parte letter, dated December 1, 2004, filed by Conversent Communications, LLC; and an ex parte letter, dated December 7, 2004, filed by Integra Telecom.
[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*

broadband facilities. The Commission explained that, by providing certainty as to what the rules would be for these new broadband facilities, its rules would "provide the right incentives for all carriers, including incumbent LECs, to invest in broadband facilities." *Triennial Review Order* ¶ 213. As the Commission correctly reasoned, this policy will "stimulate facilities-based deployment" by providing Verizon and others investing in broadband facilities "with the certainty their fiber optic and packet-based networks will remain free of unbundling requirements." *Id.* ¶ 272. Thus, the Commission concluded that "[a]lthough we require unbundling of legacy technology used over hybrid loops, we decline to attach unbundling requirements to the next-generation network capabilities of fiber-based local loops, *i.e.*, those loops that make use of fiber optic cables and electronics or optical cables and electronic or optical equipment capable of supporting truly broadband transmission capabilities." *Id.* ¶ 272. The rules adopted by the Commission attempt to provide this certainty in two respects.

First, the Commission's rules provide that fiber loops to an end user customer's premises (FTTP), regardless of "whether dark or lit," are not subject to an unbundling requirement, 47 C.F.R. § 51.319(a)(3), and that rule has since been extended to fiber to the curb (FTTC) loops as well.[3] The Commission has also clarified that any facilities that qualify as FTTP or FTTC loops under its rules do not become subject to an unbundling requirement just because a signal is handed off to customers in TDM format. *FTTC Order* ¶ 21. In this way, the Commission's rules ensure that loops that qualify as FTTP or FTTC for purposes of the Commission's rules are not subject to unbundling regardless of the services provided over those loops.

Second, the Commission also separately made clear that "[t]he rules we adopt herein do not require incumbent LECs to unbundle *any transmission path* over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is *used to transmit packetized information*." *Triennial Review Order* ¶ 288 (emphasis added). The Commission also has clarified "that incumbent LECs are not obligated to build TDM capability into new packet-based networks that never had TDM capability," and, as noted above, has made clear that converting a packet-based signal into TDM format to be handed off to the customer does not give rise to an unbundling obligation. *FTTC* Order ¶ 20. In this way, the Commission drew a bright line between legacy TDM technology and new packetized fiber loop facilities, regardless of whether they meet the definition of FTTP or FTTC loops that are not subject to unbundling.[4]

Offering Advanced Telecommunications Capabilities, Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order*").

[3] *See 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 Capabilities*, Order on Reconsideration, 19 FCC Rcd 20293 (2004) ("*FTTC Order*").

[4] In addition to concluding that packetized, fiber-loop facilities themselves are not subject to unbundling, the Commission concluded "on a national basis, that competitors are not impaired without access to packet

Some parties, nevertheless, argue that the Commission now should impose an unbundling requirement on new FTTP or other packetized loops in order to provide high capacity services such as DS1 or DS3. Doing so, however, would be a significant step *backwards* from the rules currently in place. Indeed the Commission repeatedly emphasized that it was drawing a "bright line" and that "the line is drawn between legacy technology and the newer technology." *Triennial Review Order* ¶ 293. And the Commission emphasized that it was drawing this distinction based on technology *instead of* distinctions based on the speed of the service, the identity of the customer, or some other factor. *Id.* ¶ 293 ("we conclude that such a line is best based on technological boundaries *rather than* transmission speeds, bandwidth, or some other factor" (emphasis added)); *id.* ¶ 210 ("Thus, while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served.").

Moreover, the Commission expressly addressed the import of this technological distinction on the availability of DS1 and DS3 loops in any instances where those loops are subject to an unbundling obligation, and made clear that any such obligation extended only to existing TDM capabilities of incumbents' networks. For example, the Commission explained that, "as discussed more specifically in the Enterprise Loops section . . . incumbent LECs must provide unbundled access to a complete transmission path *over their TDM networks* to address the impairment we find that requesting carriers currently face," but it repeatedly emphasized that any "packetized fiber capabilities will not be available as UNEs." *Id.* ¶ 289. The Commission also went on to "stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers," yet emphasized again its intent only to require unbundling of legacy facilities:

> These *TDM-based* services – which are generally provided to enterprise customers rather than mass market customers – are *non-packetized*, high-capacity capabilities provided over the circuit-switched networks of incumbent LECs. To provide these services, incumbent LECs typically use the features, functions and capabilities of their networks as deployed to date – *i.e.*, a transmission path provided by means of one TDM form of multiplexing over their digital networks.

Id. ¶ 294 (emphasis added). In short, the Commission made clear that the distinction between legacy TDM technology and newer packetized fiber facilities applies fully to DS1 and DS3 services.

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switching, including routers and DSLAMS," and "decline[d] to unbundle packet switching as a stand-along network element." *Triennial Review Order* ¶ 537. Given that the fiber in next-generation fiber architectures is integrated into optical or other packetized equipment, and that access could not be provided without access to the packet switching equipment, the Commission's decision that unbundling was not warranted for packet-switching equipment would independently preclude the unbundling of packetized, fiber-loop facilities like FTTP.

In light of these unequivocal, pro-broadband, pro-investment rules already adopted by the Commission, neither Verizon's FTTP loops nor any other packetized fiber loops are subject to unbundling. And there is no reason to retreat from that determination now, which would only create a new disincentive to deployment of next-generation networks.

2. Rather than imposing new investment-deterring unbundling obligations on new broadband networks, the Commission should instead eliminate any remaining, potential ambiguities in its existing rules.

As an initial matter, the Commission should clarify the scope of its rules for FTTP loops. A clarification is important because certain parties have attacked the broadband unbundling relief discussed above by arguing that these rules should apply only in the "mass market," and then pushing for an unduly restrictive definition of the "mass market" that cannot be squared with the Commission's previous orders.[5] The Commission should eliminate any uncertainty in this regard by clarifying that fiber loop facilities that are part of a generalized deployment of an FTTP network are not subject to unbundling, regardless of the identity of the customer served, and that any such loop should be considered a "mass market" loop. In contrast, to the extent the Commission retains unbundling requirements for so-called enterprise fiber loops outside the mass market—which it should not—those requirements should be limited to the TDM capabilities of the *customized* network solutions these customers typically require. Accordingly, enterprise loops should be defined as those customized network solutions deployed to serve individual larger business customers using the TDM capabilities of existing networks.

Defining "mass market" loops in this manner makes sense for several reasons:

- First, imposing an unbundling obligation for some customers served by an FTTP network is tantamount to imposing an unbundling obligation for all customers. Requiring unbundling of facilities that are part of a generalized FTTP rollout would require costly re-engineering of the network to provide multiple points of access to individual elements, require all new operations support system capabilities (which make up a substantial part of the overall cost of these new networks), and create added investment risk that will undermine incentives for

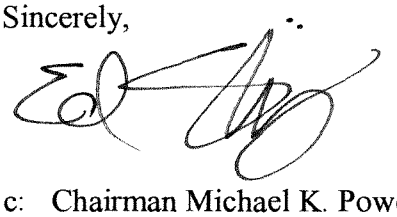
[5] For example, MCI, McLeod, XO and Integra urge the FCC to expressly define the term "mass market" for purposes of access to loops and transport as encompassing exclusively residential customers or possibly home office business customers despite the Commission's orders recognizing that the "mass market" includes business customers. *See infra* n.6. Similarly, the equity firms wrongly suggest that Commission's broadband unbundling relief has so far been limited to "predominately residential premises," and urge the Commission to adopt a definition of "mass market" that would require incumbent LECs to unbundle their next-generation broadband facilities whenever those facilities are providing service to virtually any business end user. As this Commission is well aware, the "predominately residential" limitation arises only with respect to multi-dwelling units and has no bearing on the definition of the "mass market." *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 15856, ¶ 5 (2004) ("*MDU Order*").

widespread deployment. Therefore, keeping these advanced networks free of unbundling obligations regardless of the customers served by these generalized, *i.e.*, mass market, fiber network deployments is critical to widespread deployment.

- Second, this clarification would allow carriers to provide new services to small and medium business customers that are not available today, and provide a significant benefit to this customer segment.
- Third, because they are being deployed where cable operates, the resulting, additional offerings to business customers would provide a competitive option to cable, and would likewise encourage cable companies to develop new services to meet the needs of these customers.
- Finally, from a practical perspective, the standard is easily administered and eliminates the existing uncertainty as to whether particular customers can or cannot be served by FTTP facilities without triggering unbundling obligations.

In addition, the Commission should again confirm the bright line technology-based rule adopted in the *Triennial Review Order* that *no* packetized fiber loop facilities are subject to unbundling, regardless of whether those facilities meet the definition of FTTP loops that are free of unbundling. *See, e.g.*, *id.* ¶ 288. As discussed above, the Commission clearly recognized in the *Triennial Review Order* that the bright line it was drawing was between legacy technology and new packetized fiber loop facilities, and that any continuing unbundling obligations extended only to the TDM capabilities of existing networks. *See id.* ¶¶ 210, 293. The certainty that would come from again confirming this fundamental distinction would go far to encourage additional investment in next-generation broadband facilities. *Id.* ¶ 272.

Sincerely,



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