

**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 OF BELLSOUTH TO PETITIONS FOR RECONSIDERATION OF
COVAD, ET AL. AND MCLEODUSA**

BellSouth Corporation (“BellSouth”), by its attorneys, hereby submits this Opposition to the Petitions for Reconsideration filed by Covad, et al.¹ and McLeodUSA² of the Commission’s Order on Reconsideration regarding the unbundling obligations that apply to Fiber to the Curb (“FTTC”) networks. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293 (2004) (“*FTTC Order*”).

Neither Petition raises new arguments or presents any new evidence that would warrant revisiting the FCC’s decision on these issues a second time. As a result, both Petitions should be rejected.

¹ Petition for Reconsideration and/or Clarification of Order on Reconsideration of Covad Communications Group, Inc., NuVox Communications, Inc. and XO Communications, Inc., CC Docket No. 01-338 (filed January 28, 2005) (“Petition of Covad”).

² Petition for Reconsideration of McLeodUSA Telecommunications Services, Inc., CC Docket No. 01-338 (filed January 28, 2005) (“Petition of McLeodUSA”).

I. MCLEODUSA IMPROPERLY SEEKS RECONSIDERATION OF THE COMMISSION'S DECISION WITHOUT OFFERING ANY NEW FACTS OR ARGUMENT

McLeodUSA's petition mounts a general attack on the *FTTC Order*, asking that the Commission "rescind its treatment of FTTC as FTTH." Petition of McLeodUSA at 2.

McLeodUSA, however, offers no new evidence or arguments to support its broad request for reconsideration. It merely rehashes two claims that the Commission has already considered and rejected. Petition of McLeodUSA at 2-3. Because the "public interest in expeditious resolution of Commission proceedings is done a disservice if the Commission readdresses arguments and issues it has already considered," and "[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," McLeodUSA's petition should be denied. *Policies Regarding the Detrimental Effects of Proposed New Broadcasting Stations*, 4 FCC Rcd 2276, 2277 (1989).

McLeodUSA first argues that the FCC failed adequately to consider difficulties CLECs allegedly face in deploying FTTC networks in both greenfield and brownfield settings. As McLeodUSA acknowledges, however, the Commission already took these arguments into account in the *FTTC Order*. Petition of McLeodUSA at 2 (citing *FTTC Order* at n.46.) The agency could not have been clearer in "reject[ing] the claims of commenters that the ability to re-use existing copper facilities gives incumbent LECs an additional advantage in brownfield deployments." *FTTC Order* at n.46 (citing comments by Allegiance, ALTS, and AT&T).

Similarly, in the greenfield context, the Commission explicitly found that CLECs and incumbents face the same barriers to deployment, including access to rights of way, responding to bid requests for housing developments, obtaining fiber optic cabling and other materials, developing deployment plans, and implementing construction programs. *Id.* at ¶ 12.

McLeodUSA presents no evidence that the Commission's conclusions were mistaken. Indeed,

the only new fact contained in its petition is that McLeodUSA installed certain copper facilities when it constructed an FTTH trial network in Cedar Rapids. Petition of McLeodUSA at 3. This says nothing about whether McLeodUSA faced a disadvantage relative to an ILEC attempting to deploy a similar network, but even if it did, McLeodUSA does not explain why this single anecdote should be powerful enough to force the Commission to reconsider its decision.

McLeodUSA next argues that the *FTTC Order* erroneously found that unbundling relief would reduce disincentives to invest in FTTC, because BellSouth already had deployed FTTC networks to a small subset of its customers prior to the grant of regulatory relief in the *FTTC Order*. *Id.* As with alleged CLEC disadvantages in deployment, the FCC squarely dismissed this argument. *See FTTC Order*, ¶ 15 (“reject[ing] competitive LEC commenters’ claims that because incumbent LECs have already deployed *some* FTTC facilities, unbundling creates no disincentive to invest in such next-generation facilities”) (citing comments from Allegiance, ALTS, AT&T, MCI, NuVox, *et al.*, PACE, and Sprint) (emphasis added). As the Commission recognized, disincentives to investment may exist without being complete barriers to deployment: “while FTTC networks have been deployed to some extent, the deployment has been far from ubiquitous.” *Id.* (quotation omitted). Further, in its sound discretion, the Commission determined that lifting unbundling obligations would encourage CLECs to invest in their own facilities. *Id.*, ¶ 16.

McLeodUSA offers no reason to believe that the Commission’s decision was mistaken, beyond the conclusory and unsupported allegation that it was “arbitrary.” Petition of McLeodUSA at 3. Indeed, experience so far has borne out the wisdom of the Commission’s decision, as BellSouth revised its loop deployment guidelines in early 2005 so that FTTC is now the preferred technology in almost all new-build deployments. Moreover, BellSouth deployed

FTTC to 30 percent more new locations in 2004 than in 2003, and plans to deploy FTTC to almost 60 percent more new locations in 2005 than in 2004.

Because McLeodUSA has neither shown a material error in the Commission's decision nor introduced additional facts different from those already considered by the agency, reconsideration is not appropriate. *LMDS Communications, Inc.*, 15 FCC Rcd. 23747, ¶ 6 (2000).

II. THERE IS NO PROCEDURAL OR SUBSTANTIVE BASIS FOR THE RELIEF COVAD ET AL. SEEK WITH RESPECT TO ENTERPRISE DS1 AND DS3 LOOPS.

Covad, Nuvox, and XO ask the Commission to “confirm” that CLECs can access unbundled DS1 and DS3 loops for enterprise customers regardless of the underlying transmission technology, and to “clarify” that the mass market category includes only residential and single line business customers. Petition of Covad *et al.* at 2-6. Their request is both procedurally improper and inconsistent with the *Triennial Review Order*.³

The *FTTC Order* merely endorsed unbundling relief adopted in the *Triennial Review Order* and extended to FTTC loops the same regulatory treatment that applies to FTTP loops. *FTTC Order*, ¶ 1. Thus, Covad *et al.* really are seeking reconsideration or clarification of the *Triennial Review Order* itself, and their petition must be dismissed as both untimely⁴ and duplicative.⁵

³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”).

⁴ See 47 C.F.R. § 1.429(d) (requiring petitions for reconsideration to be filed within 30 days of public notice of an action, which in the case of the *Triennial Review Order* required that petitions be filed no later than October 2, 2003).

⁵ See 47 C.F.R. § 1.429(i) (emphasis added) (“Any order disposing of a petition for reconsideration which *modifies rules* adopted by the original order is, *to the extent of such modification*, subject to reconsideration in the same manner as the original order. *Except in such*

Nor is there any substantive basis for Covad *et al.*'s request. Indeed, the best reading of the *Triennial Review Order* and the Commission's goals of increasing broadband deployment is that FTTP (and now FTTC) relief extends to all FTTP deployments, not just those serving mass market customers. The Commission previously 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. Indeed, the Commission emphasized that it was drawing this distinction based on technology instead of on the speed of the service, the identity of the customer, or some other factor. See *Triennial Review Order* ¶ 293 ("we conclude that such a line is best based on technological boundaries *rather than* transmission speeds, bandwidth, or some other factor" (emphasis added)). Preserving next generation architectures free from forced unbundling is the best way to ensure that the Commission's goals for increased deployment of next generation broadband are met.

BellSouth recognizes that some of the Commission's orders contain language which can be read to suggest that FTTP relief extends only to loops serving mass market customers.⁶ Nonetheless, although the FTTP discussion was contained within the portion of the *Triennial Review Order* dealing with mass market customers, the Commission was careful to explain that,

circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious.").

⁶ See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 15856, 15857 ¶ 2 ("For loops serving mass market customers, the Commission ruled that incumbent LECs need not unbundle either dark or lit fiber loops that extend to the customer's premises") ("*MDU Order*").

“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.”⁷

To the extent that FTTP relief could be read as being limited to the mass market, Covad *et al.* are wrong in claiming that the mass market category includes only residential and single-line business customers. Nothing in the *Triennial Review Order*, the *MDU Order*, or the *FTTC Order* supports this claim.

In fact, Covad *et al.*'s Petition is internally inconsistent on this point. On the one hand, they assert that “the Commission already has found that the mass market ““consists *primarily* of residential and similar, very small, business users of analog POTS.””⁸ At the same time, they insist that “DS1 level and above loops clearly are associated with the enterprise market.”⁹ Thus, by Covad, *et al.*'s own admission, a residence or business customer purchasing multiple POTS lines would be considered a “mass market customer,” notwithstanding their request for clarification otherwise. Even if the Commission were to adopt Covad's interpretation and find it necessary to clarify the “delineation between the ‘mass market’ and ‘enterprise market,’” as requested by Covad *et al.*,¹⁰ the absolute minimum for the dividing line would be a DS1 loop. In other words, in the above circumstances, the mass market would be comprised of customers served by a loop at less than a DS1 level, while the enterprise market would be comprised of

⁷ *Triennial Review Order*, 18 FCC Rcd at 17110 ¶ 210. The Commission further explained that “we recognize that although each loop type and capacity level may be used predominantly to provide service to a particular customer group, that same loop also may be used to provide service across a range of customer categories. For that reason, though our loop unbundling analysis focuses upon the customer classes most likely to be served by a specific type of loop, *the unbundling rules we adopt apply with equal force to every customer served by that loop type.*” *Id.* at 17102 n.623 (emphasis added).

⁸ Covad, *et al.* Petition at 3 (*quoting Triennial Review Order* at 17102 n.624) (emphasis added).

⁹ *Id.* at 3.

¹⁰ *Id.* at 1.

customers served by a loop at the DS1 or higher level.¹¹ However, consistent with the Commission's *MDU Order*, there is no unbundling obligation to provide DS1s over FTTP or FTTC serving buildings that are "predominantly residential."¹² In addition, a DS1 loop provided over FTTC or FTTP to a residential customer would receive the same treatment as any other FTTC or FTTP loop for unbundling purposes.¹³

For these reasons, the Commission should reject Covad *et al.*'s request.

III. THE PETITIONERS' CONCERNS ABOUT TDM CAPABILITIES ARE SPECULATIVE, DO NOT WARRANT COMMISSION ACTION, AND RISK FREEZING THE INCUMBENTS' NETWORKS.

Both petitions request that the Commission revisit certain aspects of the *FTTC Order* as it pertains to TDM capabilities. McLeodUSA's request is based on speculative, hypothetical concerns and fails to demonstrate any need for the FCC to take action at this time. The radical rewriting of the *FTTC Order* proposed by Covad runs the risk of paralyzing the ability of incumbents to evolve their networks and implement new, advanced technologies.

In the *FTTC Order*, the Commission clarified that incumbent LECs are not obligated to build legacy TDM capability into new, packet-based networks or existing packet-based networks that never had TDM capability. *FTTC Order*, ¶ 20. The FCC also noted, in response to evidence submitted by Verizon, that there may be certain circumstances where an incumbent LEC deploys a packet-based network, but where customers are unable or unwilling to upgrade

¹¹ Admittedly, this dividing line is not clear-cut because, as the Commission has noted, "[w]hile DS1 loops are typically used to serve small to medium-sized business customers associated with the enterprise market, they are also used to serve customers associated with the mass market." *Triennial Review Order* at 17174 ¶ 326. Nevertheless, using the DS1 loop to distinguish mass market from enterprise market customers is administratively workable.

¹² *MDU Order* at 15857-58 ¶ 4 ("to the extent fiber loops serve MDUs that are predominantly residential in nature, those loops should be governed by the FTTH rules").

¹³ See *Triennial Review Order* at 17173 n.956.

their entire legacy communications infrastructure. In such cases, the FCC recognized that the modest format translation necessary for the incumbent LEC to provide service to the customer did not alter the scope of the unbundling relief. *Id.*, ¶ 21. In other words, the Commission understood that if a LEC deploys a piece of equipment to translate between the customer's equipment and the network, that deployment should not lead to unbundling obligations.

McLeodUSA speculates that “ILECs will seek to exploit this hand-off exception by performing the TDM conversion deep within the packet network.” Petition of McLeodUSA at 5. The *FTTC Order* already addresses this concern by limiting the TDM clarification to the specific circumstances “described above and in Verizon’s ex parte” – that is, where the translation is performed at the customer’s premise. *FTTC Order*, ¶ 21. To the extent that McLeodUSA is concerned that an incumbent LEC might alter its hybrid loops to disrupt or degrade access to TDM capabilities, such a scheme already is prohibited by the terms of the *Triennial Review Order*. See Petition of McLeodUSA at 4 (citing *Triennial Review Order*, ¶ 294).¹⁴

Covad asserts that it is merely seeking clarification and confirmation from the Commission that the *FTTC Order* prohibits “any network modifications that would restrict CLEC access to DS1 and DS3 capacity loops through TDM based facilities.” Covad Petition at 8. This request is far more than a simple clarification; Covad seeks a fundamental change to the rules announced in the *FTTC Order* and *Triennial Review Order*. In the *FTTC Order*, the FCC was careful to state that its rules prohibiting changes that would degrade access to TDM-based features, functions and capabilities extend only to “hybrid loops.” *FTTC Order*, ¶ 20. The Commission, however, categorically *excluded* from this prohibition “new packet-based networks or...existing packet-based networks that never had TDM capability.” *Id.*

¹⁴ McLeodUSA’s request that the Commission “reiterate” the findings of the *Triennial Review Order* with respect to this point is thus superfluous. *Id.*

As the Commission correctly perceived, forcing incumbent LECs to engraft TDM capability on packet-based networks solely for the convenience of CLECs would stifle technological growth and unduly limit the right of incumbent LECs to upgrade and update their networks. Alternatively, maintaining legacy TDM/hybrid loops in place indefinitely after deploying a packetized network would be prohibitively expensive and unwieldy. If incumbent LECs could not replace their TDM legacy networks with packetized networks, but instead had to *supplement* their existing, obsolete facilities with new packetized networks, development of packetized networks would be constrained. No rational company would choose to build and maintain two separate and independent networks. If forced to retain hybrid loops, therefore, incumbent LECs would be less likely to invest in new technologies.

Covad's reinterpretation of the rules is contrary to the "bright line" that the Commission sought to draw between old, TDM-based facilities and newer, packet-based technologies. *Triennial Review Order*, ¶ 293. The former are currently subject to unbundling, but the latter are not. *Id.*, ¶ 294. While the Commission noted that the majority of enterprise customers *currently* are served by TDM-based facilities, the *Triennial Review Order* does not extend legacy unbundling requirements to packetized networks simply because those networks are used to serve enterprise customers. *Id.* Moreover, such a requirement would contradict the Commission's goal of promoting *CLEC* investment in new facilities and technologies, where CLECs face no disadvantage from being new market entrants. *FTTC Order*, ¶ 16.

The Commission should reject Covad's proposed reinterpretation of the rules and confirm that the prohibition on degrading access to TDM features and facilities applies only insofar as the incumbent retains hybrid loops for service to its own customers. If an incumbent LEC replaces its hybrid loops with a new, packetized network that does not contain TDM

capability, and does not need to retain its hybrid loops for its own customers, it should not be forced to maintain legacy plant simply to allow CLECs to avoid the expense of deploying their own facilities.

IV. CONCLUSION

For the foregoing reasons, the Commission should dismiss or deny the McLeodUSA and Covad *et al.* Petitions.

Respectfully Submitted,

Bennett L. Ross
Stephen L. Earnest
BELLSOUTH CORPORATION
1133 21ST St., N.W.
Suite 900
Washington, D.C. 20036
(202) 463-4113

/s/ Jeffrey S. Linder
Jeffrey S. Linder
Joshua S. Turner
WILEY REIN & FIELDING, LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000

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CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 30th day of June, 2005, I caused copies of the foregoing Opposition Of Bellsouth To Petitions For Reconsideration Of Covad, et al. and McLeodUSA to be served upon the following parties by first-class mail, postage prepaid:

Brett Heather Freedson
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

Andrew D. Lipman
Patrick J. Donovan
Danielle C. Burt
Swidler Berlin LLP
3000 K Street, N.W.
Washington, DC 20007

/s/ Robin Walker
Robin Walker