

**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 SBC¹ TO PETITIONS FOR RECONSIDERATION
AND/OR CLARIFICATION OF ORDER ON RECONSIDERATION**

If there is one aspect of the Commission's network unbundling policies and rules that has been a success, both from a policy and a litigation perspective, and for which the Commission rightly deserves credit, it has been the Commission's long-standing hands-off policy with respect to the facilities and investment used to provide next-generation broadband services. For over nine years now, the Commission consistently has rejected CLEC claims that they are impaired without unbundled access to those facilities, recognizing that new entrants stand largely on the same footing as incumbents when it comes to deployment of broadband and that forced sharing of those facilities would undermine incentives to invest for incumbents and new entrants alike.

Even in the *Local Competition* and *UNE Remand* orders, when the Commission ordered blanket unbundling of all other elements of ILEC networks, the Commission categorically exempted packet switching functionality from unbundling, regardless of the market served.² In

¹ SBC Communications Inc. files this opposition on behalf of itself and its operating company affiliates, including: Southwestern Bell Telephone, L.P., Nevada Bell Telephone Company; Pacific Bell Telephone Company; Illinois Bell Telephone Company; Indiana Bell Telephone Company, Inc.; Michigan Bell Telephone Company; The Ohio Bell Telephone Company; Wisconsin Bell, Inc.; and the Southern New England Telephone Company.

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 1, para. 427 (1996) (*Local Competition Order*); *Implementation of the Local Competition*

the *UNE Remand Order*, for example, the Commission rejected CLEC claims of impairment with respect to packet switched facilities, concluding that “competitors [were] actively deploying facilities used to provide advanced services to certain segments of the market – namely medium and large businesses – and hence cannot be said to be impaired in their ability to offer service, at least as to these segments without access to the incumbent’s facilities.”³

The Commission maintained its hands-off approach in the *Triennial Review Order*, ruling that: (1) ILECs need not unbundle any packetized transmission facilities, (2) ILECs cannot be required to unbundle fiber loops that extend to the customer’s premises (*i.e.*, fiber-to-the-home or FTTH loops) in greenfield environments, and (3) in brownfield (or overbuild) situations, ILECs need only provide *either* a spare copper loop *or* a 64kbps voice grade transmission path.⁴ In subsequent orders, the Commission sought to build on these policies, and further spur deployment of fiber optic networks capable of providing next generation voice, data and video services to consumers, by extending the unbundling framework for FTTH loops first to fiber loops deployed to multiple dwelling units and then to fiber-to-the-curb arrangements.⁵ The Commission further clarified that ILECs are not required to add TDM-based transmission capabilities (which are the only type of high capacity transmission facilities that must be unbundled) into new packetized transmission facilities, and that a mere transformation of a packetized signal to TDM to be compatible with a customer’s legacy customer premises equipment (CPE) did not change the scope of the Commission’s relief from unbundling.⁶

Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, 15 FCC Rcd 3696, para. 306 (1999) (*UNE Remand Order*).

³ *UNE Remand Order*, 15 FCC Rcd 3696 at para. 306.

⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*).

⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Reconsideration, 19 FCC Rcd 15856 (2004) (*MDU Reconsideration Order*); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Reconsideration, FCC 04-248 (rel. Oct. 18, 2004) (*FTTC Order*).

⁶ *FTTC Order*, FCC 04-248 at paras. 20-21.

The Commission's hands-off policies for broadband, which have been upheld by the courts, have been a clear success. A broad range of competitors have deployed broadband over a variety of platforms, including cable modem, satellite, fixed wireless, and wireline technologies. These providers, which have no need to rely on ILEC facilities, reach upwards of 90 percent of consumers in the United States,⁷ more than can be served over traditional wireline networks today.⁸ In reliance on the Commission's hands-off policies, ILECs too have expended billions of dollars to deploy new fiber and packetized transmission capabilities to bring broadband to millions of customers, and have committed to expend billions more. SBC, for example, has announced plans to spend approximately \$4 billion over five years to extend fiber far deeper into its network to provide a host of voice, video, and data services to its customers. Critically, these plans depend on the continuation of a rational, market-oriented regulatory environment that allows broadband providers to enjoy the fruits (and not just bear the risks) of their investments.

Despite these successes, a handful of CLECs (including McLeod, Covad, NuVox and XO Communications)⁹ have continued their assault on the Commission's hands-off broadband unbundling policies. These CLECs now have set their sights on the Commission's *FTTC Order*, asking the Commission to reconsider its decision to extend its FTTH unbundling framework to FTTC loops;¹⁰ rescind its decision that incumbents are not required to add TDM capabilities into new packetized transmission facilities or existing ones that never had such capabilities;¹¹ and "confirm" that the Commission's network modification rules require ILECs to provision DS1

⁷ By mid-2004, 87 percent of homes had access to cable modem services, over 90 percent had access to satellite broadband, and over 70 MSAs had access to fixed wireless broadband, none of which rely on ILEC facilities. UNE Fact Report 2004 at I-2.

⁸ *High-Speed Services for Internet Access: Status as of December 31, 2003*, Report, Charts 6 and 8 (FCC, Wireline Competition Bureau June 2004) (reporting that a significant majority of customers receive broadband from sources other than ILECs and CLECs).

⁹ McLeod Petition for Reconsideration (filed Jun. 28, 2005); Joint Petition of Covad, NuVox, and XO Communications (filed Jan. 28, 2005) (Joint Petitioners).

¹⁰ McLeod Petition at 1-4.

¹¹ McLeod Petition at 4-5; Joint Petitioners at 4-6.

and DS3 loops to “enterprise customers” regardless of the underlying transmission technologies deployed in the ILECs’ networks.¹² In support, these CLECs offer no new facts or analyses to support their petitions. Instead, they simply rehash arguments they and others have made repeatedly that ILECs have an insuperable advantage in deploying such facilities,¹³ and that ILECs need no additional incentives to build out broadband facilities to business customers.¹⁴ The Commission already has rejected these arguments, and should do so again here.

I. MCLEOD OFFERS NO JUSTIFICATION FOR RECONSIDERING THE FTTC RULES.

In its petition, McLeod urges the Commission to rescind its FTTC rules on the grounds that CLECs face greater barriers to deployment than incumbents in deploying FTTC loops, and that requiring ILECs to unbundle FTTC loops would create no disincentive to invest in broadband because ILECs already have deployed some FTTC networks.¹⁵ The Commission, however, already has specifically considered and rejected these claims. In particular, the Commission concluded that, as with FTTH loops, CLECs are not impaired without access to FTTC loops in greenfield areas and face only limited impairment in overbuild environments because the entry barriers for FTTC deployments are largely the same for both ILECs and CLECs,¹⁶ and that the revenue opportunities associated with such deployments largely ameliorate whatever entry barriers exist.¹⁷ The Commission further rejected CLEC claims that the ability to reuse legacy copper facilities provided ILECs an additional advantage in brownfield deployments.¹⁸ Specifically, it found that ILECs deploying in overbuild situations

¹² Joint Petitioners at 7-10.

¹³ See, e.g., McLeod Petition at 2, arguing that, unlike ILECs, CLECs cannot utilize existing copper in deploying FTTC loops. The Commission’s subloop unbundling rules, however, already address this concern, and ensure that CLECs have access to existing copper loop plant, a fact that McLeod utterly ignores.

¹⁴ See McLeod Petition at 3; Joint Petitioners at 8-9.

¹⁵ McLeod Petition at 2-3.

¹⁶ *FTTC Order* at para. 11-12 (noting that both must negotiate for rights of way, obtain fiber optic cabling and other materials, develop deployment plans and construct new facilities).

¹⁷ *Id.*

¹⁸ *Id.* at 14.

are not necessarily able to reuse existing copper due to the different network designs associated with FTTC loops.¹⁹ In any event, as noted above, the Commission's subloop unbundling rules, which enable CLECs to access copper subloops at any accessible terminal, ensure that CLECs have access to the same copper loop plant that ILECs might use in FTTC deployments, a fact that McLeod utterly ignores.

The Commission also has rejected CLEC claims that, because some ILECs have deployed some FTTC networks, unbundling creates no disincentive to invest in next generation facilities.²⁰ In particular, the Commission found that, while FTTC facilities have been deployed to some extent, deployment has been "far from ubiquitous," and has not been used to its full potential.²¹ And the Commission concluded that the costs of unbundling would hinder deployment of FTTC loops that otherwise would occur.²² McLeod has offered no basis for revisiting those conclusions here. The Commission therefore should reject McLeod's petition to reconsider the FTTC rules.

II. THE COMMISSION SHOULD REJECT CLEC REQUESTS THAT IT RESCIND ITS CLARIFICATION OF THE NETWORK MODIFICATION RULES.

In their petition, the Joint Petitioners ask the Commission to "confirm that the ILECs' continuing obligation to unbundle enterprise loops applies regardless of the underlying transmission technology."²³ In particular, the Joint Petitioners contend that the Commission has determined that CLECs are impaired without unbundled access to DS1 and DS3 loops regardless of technology, and that its decision not to require unbundling of packetized loops was predicated on the ability of CLECs to obtain access to TDM-based loops.²⁴ The Joint Petitioners claim that

¹⁹ *Id.*

²⁰ *Id.* at para. 15.

²¹ *Id.*

²² *Id.*

²³ Joint Petitioners at 4.

²⁴ *Id.* at 8-9.

the Commission therefore should require ILECs to “take the steps necessary to provision industry standard DS1 and DS3 interfaces and transmission capabilities, including enterprise loops (e.g., DS1 and DS3 loops), regardless of the underlying transmission technologies the ILECs choose to deploy in their local exchange network.”²⁵

For its part, McLeod argues that the Commission should rescind its clarification of the network modification rules, and reiterate that ILECs must continue to provide unbundled access to network elements to serve enterprise customers regardless of technologies.²⁶ McLeod also asks the Commission to reconsider its decision that ILECs are not required to provide access to packet networks when they perform a format translation to assure proper functioning of CPE because, it contends, ILECs will seek to exploit this exception by performing the TDM conversion deep in the packet network.²⁷ McLeod thus argues that ILECs should be required to provide unbundled access to loops whenever there is a TDM hand-off to customers.²⁸

The Commission should reject both of these petitions. As SBC previously has pointed out, CLEC claims that the Commission required ILECs to unbundle next generation, packetized loops to serve business customers are wrong.²⁹ The Commission *never* has required ILECs to unbundle packetized loops to serve any customers. As noted above, and explained in greater detail in SBC’s November 9 Ex Parte, the Commission concluded in the *Triennial Review Order* that ILECs need not unbundle any packetized transmission capability, and made clear that its decision applied to business, as well as mass market, customers.³⁰ The Commission did not break new ground in this regard. Even in the *UNE Remand Order*, the Commission expressly

²⁵ *Id.* at 9.

²⁶ McLeod at 4.

²⁷ *Id.* at 5.

²⁸ *Id.*

²⁹ See Letter of Christopher M. Heimann, General Attorney, SBC Telecommunications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Nov. 9, 2004) (SBC November 9 Ex Parte), attached hereto.

³⁰ *Id.* at 2-6.

held that CLECs are not impaired in their ability to serve business customers without access to any packet switching capability:

We decline at this time to unbundle the packet switching functionality, except in limited circumstances. . . . The record demonstrates that competitors are actively deploying facilities used to provide advanced services to serve certain segments of the market – namely, medium and large business – and hence cannot be said to be impaired in their ability to offer service, at least as to these segments without access to the incumbent’s facilities.³¹

In the *UNE Remand Order*, the Commission further found that, to the extent CLECs might be impaired in their ability to serve residential and small business customers without access to ILEC facilities, which it did not decide, the benefits of unbundling were outweighed by section 706 concerns.³² The Commission therefore held that ILECs need not unbundle any packet switching technology or capability (except in very limited circumstances not relevant here). And, to prevent any ambiguity regarding the breadth of this holding, it specifically excluded the “electronics used for the provision of advanced services” from the definition of the loop – and therefore unbundling.³³ Thus, if the Joint Petitioners and McLeod were correct in their reading of the *Triennial Review Order* and its progeny, the Commission significantly expanded ILECs’ obligation to unbundle broadband facilities by requiring ILECs, for the first time, to unbundle packetized transmission facilities. In light of the Commission’s statements to the contrary, and its commitment to progressive, deregulatory broadband policies, it is clear that the Joint Petitioners’s and McLeod’s reading of that order is wrong.

The Joint Petitioners likewise are incorrect when they claim that mandatory unbundling of packetized loops to serve enterprise customers will not affect ILEC incentives to invest in

³¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696, para. 306 (1999).

³² *Id.* at paras. 306-07, 317.

³³ *Id.* at Appendix C, page 3, 47 C.F.R. § 51.319(a)(1).

broadband.³⁴ As SBC has explained, requiring ILECs to unbundle packetized loops to serve enterprise customers would directly implicate their investment in broadband for *all customers*.³⁵ First, SBC has not yet deployed broadband facilities to serve all enterprise customers, let alone all customers, and therefore still must invest in new fiber and hybrid loops to meet expanding demand. Requiring SBC to unbundle those facilities would require SBC to bear all the potential risks and socialize all the potential rewards of that investment, undermining its incentive to invest in next generation facilities. Second, mandatory unbundling would increase the cost of that investment by forcing SBC to design the network to accommodate potential CLEC demand that may never materialize. And, third, when SBC deploys broadband facilities, it does so to reach all customers (not just enterprise or mass market customers) in order to achieve economies of scale and scope. Forced unbundling, even if only to serve enterprise customers, therefore would drive up the cost of deploying those facilities, and thus the cost of providing broadband services to enterprise and mass market customers alike.

Finally, the Commission should reject McLeod's request that ILECs be required to provide unbundled access to loops whenever there is a TDM hand-off to customers. McLeod attempts to justify this request on the ground that ILECs might "seek to exploit this exception" by performing the TDM conversion deep in the packet network.³⁶ Apart from being pure speculation, McLeod's claim does not support reversal of the Commission's conclusion that a mere transformation of a packetized signal to TDM to accommodate a customer's legacy CPE should not change the scope of the Commission's relief from unbundling for packetized transmission facilities. The same factors that led the Commission to exempt packetized transmission facilities from unbundling (including the lack of CLEC impairment with respect to such facilities, and the impact of unbundling on ILEC and CLEC investment incentives) apply

³⁴ Joint Petitioners at 8-9.

³⁵ SBC November 9 Ex Parte at 9.

³⁶ *Id.* at 5.

irrespective of whether an ILEC performs a modest format translation to make packet-based signals compatible with legacy CPE.

III. CONCLUSION

The Commission should reject McLeod's and the Joint Petitioners' latest assault on the Commission's hands-off policy for ILECs' investment in next-generation, broadband facilities. Failure to do so not only would reverse longstanding Commission policy, it also would threaten future deployment of broadband. As noted above, SBC's decision to invest billions of dollars to extend IP-enabled fiber and hybrid loops deeper into its network was predicated on SBC's understanding that its investment would be exempt from unbundling, and would not be diverted to meet CLEC demands for unbundled access to high capacity loops to serve large business customers. If the Commission were to limit its exemption from unbundling for broadband as McLeod and the Joint Petitioners suggest, the Commission will put that investment at risk by undermining the business case for that investment. The petitions therefore should be denied.

Respectfully submitted,

SBC COMMUNICATIONS INC.

By /s/ Christopher M. Heimann

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini

1401 I Street, N.W.
Washington, D.C. 20005
202-326-8909, *phone*
202-408-8745, *facsimile*

June 30, 2005

CERTIFICATE OF SERVICE

I, Loretia Hill, state that copies of the attached were delivered via First Class Mail, postage paid, on this day, Thursday, June 30, 2005, to the following:

Brad E. Mustschelknaus
Paul G. Madison
Brett Heather Freedson
Kelley Drye & Warren LLP
Counsel for Covad Communications
Group, NuVox and XO
Communications Inc.
1200 Nineteenth Street, N.W. Suite 500
Washington, D.C. 20036

Andrew D. Lipman
Patrick J. Donovan
Danielle C. Burt
Swidler Berlin Shereff Friedman, LLP
Counsel for McLeod USA
Telecommunications Services, Inc.
3000 K Street, N.W. Suite 300
Washington, D.C. 20007

/s/ Loretia Hill
Loretia Hill