

**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

**REPLY TO OPPOSITIONS
TO PETITION FOR RECONSIDERATION AND/OR CLARIFICATION**

Covad Communications Group, Inc., NuVox Communications, Inc. and XO Communications, Inc. (together, the “Petitioners”), by their attorneys, pursuant to 47 C.F.R. §1.429(g), respectfully reply to the Oppositions filed by BellSouth Corporation (“BellSouth”), SBC Communications, Inc. (“SBC”), and the Verizon telephone companies (“Verizon”) (collectively, “RBOCs”) filed on June 30, 2005 in the above-captioned proceedings. In support of the instant Reply, Petitioners show as follows:

I. THE COMMISSION’S ORDERS REQUIRE ILECS TO UNBUNDLE ENTERPRISE LOOPS WHERE IMPAIRMENT EXISTS REGARDLESS OF THE UNDERLYING TRANSMISSION TECHNOLOGY

As Petitioners demonstrated in their Petition for Reconsideration,¹ in the *TRO* the Commission held that enterprise loops must remain available to requesting carriers on an unbundled basis regardless of the technology that such carriers deploy. The Commission stated:

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the*

DS1 loops will be available to requesting carriers, *without limitation, regardless of technology used to provide such loops*, e.g., two-wire and four-wire HDSL or SHDSL, fiber optics or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve...*The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to service mass market customers.*²

The Commission's decision to permit CLECs continued access to enterprise loops and subloops, regardless of the technology used, was a primary justification of the Commission's decision to eliminate unbundling relief for the mass market. Indeed, the Commission's Opposition to Allegiance Telecom's Motion to stay the *Triennial Review Order* was based, in substantial part, on the Commission's finding that Allegiance would not suffer competitive harm in the enterprise market under the Commission's FTTH-related rules because CLECs would receive continued access to ILEC fiber as necessary to serve their enterprise customers with DS1 and DS3 loops.³

In their respective Oppositions, however, the RBOCs argue that the Commission's *Triennial Review Order* ("TRO")⁴ and the *Order on Reconsideration* ("FTTC

Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98 and 98-147, Petition for Reconsideration and/or Clarification of Order on Reconsideration of Covad Communications Group, Inc. *et al.*, filed Jan. 28, 2005 ("*Petition for Reconsideration*").

² TRO at ¶325 and n. 956 (emphasis added).

³ *Allegiance Telecom, Inc. et al. v. FCC*, D.C. Cir. No. 03-1316, Opposition of the Federal Communications Commission to Allegiance Telecom's Motion for Stay Pending Review (filed Oct. 31, 2003) at 2 ("it is not likely that the FTTH rule will have any significant impact on Allegiance's ability to serve its existing residential and small business customers . . . [w]ith respect to Allegiance's larger business customers, the Commission *preserved* access to incumbents' fiber loops and there can be no harm at all") (emphasis in original); *see also id.*, at 12 ("The text, as well as the rules themselves, make it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices") (citing 51.319(c)(4), (a)(5)).

⁴ *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("Triennial Review Order") ("TRO").

Order)⁵ exempt ILECs from unbundling for all packetized fiber loop facilities -- both “mass market” and “enterprise loops.”⁶ Verizon, for example, points to paragraph 210 of the *TRO* as support for the proposition that the Commission’s unbundling relief applies equally to DS1 and DS3 loops.⁷ Contrary to Verizon’s assertion, the Commission’s statement supports Petitioners’ contention that the Commission limited FTTH and FTTC unbundling relief to DS0 mass market loops. In paragraph 210 of the *TRO* the Commission discusses loop impairment by customer market, stating:

[o]ur market classifications are not intended to prohibit the use of UNE loops by customers not typically associated with the respective customer market class... A competitive LEC faces the same economic considerations in provisioning a DS1 loop to a large business customer typically associated with the enterprise market that it faces in provisioning that same loop type to a very small business or residential customer typically associated with the mass market.⁸

The Commission continued, “[t]hus, 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.”⁹ In other words, simply because a CLEC chooses to serve a small business or residential *aka* “mass market” customer via a DS1 loop, it does not mean that ILECs are relieved from their unbundling obligations for DS1 loops. Moreover, the Commission’s reference to “unbundling rules specific to each loop type” clearly indicates that it promulgated different rules for mass market DS0 loops and enterprise DS1 and DS3 loops.

⁵ *In the Matter of 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 Capability*, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 04-248, Order On Reconsideration, 19 FCC Rcd 20293 (rel. Oct. 18, 2004) (“*FTTC Order*”).

⁶ See Verizon Opposition at 2; BellSouth Opposition at 5; SBC Opposition at 6.

⁷ Verizon Opposition at n. 9.

⁸ *TRO* at ¶210.

⁹ *Id.* (emphasis added).

SBC maintains in its Opposition that “[t]he Commission *never* has required ILECs to unbundled packetized loops to serve any customers.”¹⁰ SBC points to its November 9, 2004 *ex parte* in which it asserts, *inter alia*, that the Commission in the *TRO* “exempted ILECs from any obligation to unbundle ***any packet switched technology or functionality in the loop.***”¹¹ SBC’s assertions are erroneous. In fact, the Commission in the *TRO* exempted ILECs only from unbundling packet switching. Specifically, the Commission found that

[m]ost parties that favor unbundling of packet switching focus their arguments on unbundling the packet switching functionality as it exists in DLC systems that are deployed in the loop plant to provide multiplexing, switching, and routing functionalities between the customer premises and the central office. Our rules covering these situations are discussed in part IV.A.4.a.(v), which addresses unbundled loops. In view of our analysis in that section, we decline to permit any limited exceptions to ***our decision not to unbundle packet switching.***¹²

In a footnote to the above-referenced passage, the Commission explained that its loop unbundling rules also exempt ILECs from unbundling packet switching functionality, *i.e.*, routers, DSLAMs and “any electronics or other equipment used to transmit packetized information, such as xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking capabilities ***to the mass market.***”¹³ Thus, contrary to SBC’s sweeping statement that that Commission exempted from unbundling ***any*** packet switching functionality, the truth is that the Commission only exempted ILECs from unbundling packet switches and associated electronics, and did so only to the extent that such equipment is used to serve the mass market.

¹⁰ SBC Opposition at 6 (emphasis in original).

¹¹ Ex Parte letter of Christopher M. Heimann, SBC Telecommunications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-313 and CC Docket No. 01-338, dated Nov.9, 2004 at 3-4 (emphasis added).

¹² *TRO* at ¶539 (emphasis added).

¹³ *Id.* at n. 1661 (emphasis added).

In its Opposition, BellSouth concedes that “some of the Commission’s orders contain language which can be read to suggest that FTTH relief extends only to loops serving mass market customers.”¹⁴ Indeed, in the *FTTC Order* the Commission qualifies its relief by referring to the term “mass market” a total of 16 times in the 12 pages that make up the *FTTC Order*. By contrast, there is not a single express, unambiguous reference to the supposed “fact” that ILECs are exempted from unbundling FTTC enterprise loops.

Accordingly, the Commission must reject the RBOCs’ arguments and confirm that ILECs are required to unbundle enterprise loops, irrespective of the underlying loop technology used by the ILECs to provide service.

II. THE COMMISSION MUST ENSURE THAT CLECS HAVE ACCESS TO THE DS1 AND DS3 CAPABILITIES OF THE ILECS’ NETWORKS, REGARDLESS OF THE PACKETIZED TECHNOLOGY THEY CHOOSE TO DEPLOY

As noted in their Petition for Reconsideration, Petitioners are concerned that the *FTTC Order* will be misconstrued by ILECs to limit unbundled access to TDM-based services and capabilities, such as DS1- and DS3-capable loops, which would be directly contrary to the Commission’s impairment findings for enterprise market loops.¹⁵ Indeed, as ALTS noted earlier in these proceedings, “removing ILEC obligations to make the network modifications to provide TDM capability would allow the ILEC to reconfigure its network to eliminate competition.”¹⁶

In the *FTTC Order*, the Commission found that ILECs are “not obligated to build TDM capability into new packet-based networks or into existing packet-based networks that

¹⁴ BellSouth Opposition at 5.

¹⁵ Petition for Reconsideration at 7.

¹⁶ Opposition to Petitions for Reconsideration of the Association for Local Telecommunications Services, CC Docket Nos. 01-338, 96-98 and 98-147 (filed Nov. 6, 2003).

never had TDM capability.”¹⁷ In its Opposition, BellSouth argues that, based on the *FTTC Order*, “[i]f an incumbent LEC replaces its hybrid loops with a new, packetized network that does not contain TDM capability...it should not be forced to maintain legacy plant simply to allow CLECs to avoid the expense of deploying their own facilities.”¹⁸

Despite BellSouth’s assertions, nothing in the *FTTC Order* should be construed to relieve the ILECs of their existing obligations to unbundle DS1 and DS3 enterprise UNE loops. BellSouth’s argument must be rejected as it is contrary to the *TRO* and would allow BellSouth and other ILECs to reconfigure their network to eliminate competition for services in the enterprise market. In the *TRO*, the Commission expressly found that requesting carriers are impaired with respect to DS1 and DS3 enterprise loops.¹⁹ Indeed, the Commission specifically found that the ILECs are required to unbundle obligation DS1, regardless of the platform used to deliver service:

DS1 loops will be available to requesting carriers, ***without limitation, regardless of the technology used to provide such loops, e.g., two-wire and four-wire HDSL and SHDSL, fiber optics, or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve...The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers.***²⁰

¹⁷ *FTTC Order* at ¶20.

¹⁸ BellSouth Opposition at 9-10.

¹⁹ See *TRO* at ¶¶320, 325. See also, *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005)(“*Triennial Review Remand Order*”) (“*TRRO*”) at ¶146 (requesting carriers are impaired without access to DS1 and DS3 loops, subject to the Commission’s wire center-based business line and fiber-based collocator thresholds.)

²⁰ *Id.* at n. 956 (emphasis added).

Thus, while it should be clear to BellSouth and other ILECs that DS1 and DS3 enterprise loops are available to CLECs under the Commission's rules, BellSouth's Opposition indicates otherwise. Accordingly, Petitioners request that the Commission confirm that ILECs are required to unbundled DS1 and DS3 enterprise loops even where they have reconfigured their networks by deploying new, non-TDM-based plant.

III. RBOC CLAIMS THAT UNBUNDLING WILL STIFLE TECHNOLOGICAL GROWTH ARE DELUSORY OR FICTITIOUS

In their Oppositions, the RBOCs claim that unbundling packetized loops or maintaining legacy TDM capability in their networks to allow CLECs to serve enterprise customers would, among other things, "stifle technological growth,"²¹ "create added investment risk,"²² and "undermine []incentives to invest in next generation facilities."²³ These claims are clearly overblown. Proper consideration of the effect on innovation of the regulations at issue requires that the Commission also consider innovation and investment by CLECs, and carefully scrutinize ILEC claims that investment will, in fact, be held back by pro-competitive network access requirements. In the context of business services, the record is clear that CLECs, not ILECs, have been a critical force in driving innovation and new services.

For example, the RBOCs possessed xDSL technology for years but refused to roll out service for fear that it would cannibalize its business by obviating customers' need for additional lines. Moreover, a recent study by the Small Business Administration ("SBA") found that the primary beneficiaries of facilities-based CLEC services are small and medium-sized

²¹ BellSouth Opposition at 9.

²² Verizon Opposition at 7.

²³ SBC Opposition at 8.

businesses.²⁴ That small and medium-sized businesses favor doing business with CLECs is due primarily to the beneficial effects of integrated T1 products, which were pioneered by CLECs. CLECs have been successful in luring customers to these integrated T1 service offerings by bundling advanced services, voice services, long distance calling plans, data and various calling features. Indeed, it was CLEC integrated T1 offerings that awoke the slumbering Bell companies and prompted them to deploy advanced services technology. Confirming that the ILECs must unbundle packetized loops and maintain legacy TDM capability in their networks will allow CLECs to better serve enterprise customers and will serve as a catalyst for growth and innovation, which historically has been the domain of CLECs -- not ILECs. Conversely, the costs of denying CLECs the ability to access the DS1 and DS3 capabilities of the ILECs' networks, and thereby effectively eliminating competition, is estimated at nearly \$5 billion annually.²⁵ As Commissioner Copps aptly noted in his dissenting statement in the *TRRO*, “[s]mall businesses generate between two-thirds and three-quarters of all new jobs... and they produce over half the nation’s private sector output. The savings they enjoy from competitive telecommunications services go straight to the bottom line.”²⁶ Thus, in addition to technological considerations, economic considerations require the Commission to confirm that ILECs must unbundle the DS1 and DS3 capabilities of their networks.

²⁴ Stephen B. Pociask, TeleNomic Research LLC (for SBA Office of Advocacy), *A Survey of Small Businesses' Telecommunications Use and Spending* at pp. li, 67, 71. (Mar. 2004) (“*SBA Study*”).

²⁵ Mark T. Bryant, Ph.D. and Michael D. Pelcovits, Ph.D., Microeconomic Consulting & Research Associates, Inc., *The Economic Impact of the Elimination of DS1 Loops and Transport as Unbundled Network Elements* at 10.

²⁶ Dissenting Statement of Commissioner Michael J. Copps, *TRRO* at p.182.

IV. CONCLUSION

For the reasons set forth herein, the Commission should reject the RBOCs' arguments and reconsider and/or clarify portions of its *FTTC Order* to ensure that unbundling relief is limited to mass market consumers and that requesting carriers continue to have access to enterprise loops.

Respectfully submitted,

COVAD COMMUNICATIONS GROUP, INC.
NUVOX COMMUNICATIONS, INC.
XO COMMUNICATIONS, INC.

By:  _____

Brad E. Mutschelknaus
Scott A. Kassman*
Kelley Drye & Warren LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)

Date: July 11, 2005

* Not admitted in D.C. Practice limited to matters and proceedings before federal courts and agencies.