BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
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 COMMENTS OF CBEYOND COMMUNICATIONS, LLC, CONVERSENT COMMUNICATIONS, LLC AND CTC COMMUNICATIONS CORP.

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July 11, 2005

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Cbeyond Communications, LLC, Conversent Communications, LLC and CTC Communications Corp. hereby file these reply comments in support of the petition for reconsideration and/or clarification of Covad, et al. and the petition for reconsideration of McLeodUSA of the Order in the above-captioned proceedings in which the Commission extended the unbundling exemption for broadband loops to so-called fiber-to-the-curb ("FTTC") network architectures. The Commission should grant at least three of the changes requested by the petitioners.

First, and most fundamentally, McLeodUSA is correct that the FCC should rescind its decision to extend the unbundling exemption applicable to fiber-to-the-premises ("FTTP") loops

to FTTC loops. Neither of the two justifications relied upon by the Commission in reaching this decision in fact supports the ruling, and the FCC failed to conduct the cost-benefit analysis that is required for determining whether to unbundle FTTC loops.

To begin with, the FCC incorrectly concluded that CLECs and ILECs generally face similar entry barriers in deploying FTTC architectures in both greenfield and overbuild situations.[1] As the FCC recognized, the record in the *FTTC Order* proceeding showed that CLECs had not deployed FTTC networks on anything close to the scale that BellSouth and other incumbents had. *FTTC Order* n.35. The FCC concluded that this asymmetry in deployment levels did not, by itself, prove impairment. *See id.* But there can be no denying that such asymmetry is *relevant* to the impairment question.[2] In fact, throughout its unbundling orders, the Commission has relied on the extent of competitive deployment of a particular type of facility to determine whether competitors are impaired in the absence of unbundled access to such facility.[3] Where the FCC has found impairment in a geographic area in which CLECs have *not* deployed a particular type of facility to any significant degree, it has done so based on a detailed explanation as to why the entry barriers in such an area are similar to those in which competitive deployment

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[1] *In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, Order on Reconsideration, 19 FCC Rcd 20293 ¶¶ 11-12 (2004) (*"FTTC Order"*).

[2] Indeed, in the TRO, the FCC relied on evidence of symmetrical levels of deployment between incumbents and competitors as a central basis for adopting the unbundling exemption for FTTP loops. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, Report & Order & Order on Remand, 18 FCC Rcd 16978 ¶ 275 (2003) (*"Triennial Review Order"*).

[3] *See, e.g., In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 ¶¶ 41-43 (2005) (*"Triennial Review Remand Order")*; *Triennial Review Order* ¶ 308; *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report & Order & Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 ¶¶ 53-54 (1999).

is high. *See, e.g., Triennial Review Remand Order* ¶¶ 87-104 (describing the methodology for determining impairment for unbundled transport). Yet the FCC undertook no such analysis here with regard to FTTC loops; it simply stated (without any factual support) that CLECs and ILECs face similar entry barriers when deploying FTTC loops. As the D.C. Circuit has explained, the Commission may not establish unbundling rules without an examination as to which markets are "similarly situated with regard to the 'barriers to entry.'"[4] For this reason alone, therefore, the impairment analysis relied upon by the FCC in the *FTTC Order* is fatally flawed.

But the impairment analysis in the order is incoherent for the additional reason that the FCC did not adequately assess the magnitude or significance of BellSouth's use of legacy copper loops as part of its FTTC overbuilds.[5] As the FCC has held, the portion of loop facilities that is closest to the end user demarcation point is the most intractable bottleneck facility in the telecommunications network. *Triennial Review Order* ¶ 348. This is the facility for which impairment is most pronounced. Not surprisingly, in opposing BellSouth's request to expand the broadband unbundling exemption to cover FTTC networks, CLECs argued that such networks are fundamentally different than FTTP networks because incumbents can re-use legacy copper loops. *See FTTC Order* n.46 (citing CLEC comments). BellSouth responded by stating that "[i]n most cases" it must use "a new copper drop" to serve customers via overbuilt FTTC.

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[4] *United States Telecom. Assoc. v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) ("*USTA II*").

[5] It is also important to emphasize that the FCC failed to account for the extent to which BellSouth can leverage legacy fiber feeder facilities by (1) adding remote terminals in areas where the existing fiber is within 500 feet of customer locations; and (2) extending the existing fiber incrementally to come within 500 feet of customer locations. Competitors have no ability to leverage existing fiber feeder facilities serving the mass market in this manner. Moreover, the deployment of additional remote terminals and the incremental fiber required to meet the FTTC criteria would be far less costly to the incumbent than would be the case for FTTP. Thus, the existence of legacy fiber feeder facilities offers a further illustration of why incumbents have a much more substantial advantage over competitors in the deployment of FTTC loops than is the case with FTTP loops.

BellSouth Reply, CC Dkt. No. 01-338 (Nov. 17, 2003) at 4. BellSouth made no attempt to quantify what it meant by "most." Amazingly, the FCC relied on BellSouth's statement as adequate to refute CLEC concerns that incumbents could re-use copper loops in FTTC deployments. *See FTTC Order* n.46.

Given the FCC's repeated recognition that CLECs have essentially no hope of ever duplicating such loop facilities, it was patently unreasonable for the Commission to wave off impairment concerns based on the vague statement from BellSouth that "most" customers are served by newly deployed drops to the customer premises. In this context "most" might mean merely more often than not, say 51 percent. In that case, nearly half of the customers in question would be served by legacy bottleneck facilities that were likely deployed and paid for during a period when Bellsouth operated as a legally sanctioned monopolist. Moreover, BellSouth offered no further clarity on this subject in its Opposition, in which it merely cited to the FCC's own refusal to scrutinize this issue with the care that it warrants. *See* BellSouth Opposition, CC Dkt. 01-338, Jun. 30, 2005 at 2-3. The Commission cannot make anything like the "nuanced" assessment of impairment required by the Act[6] in the absence of more detailed information regarding the extent of ILEC re-use of copper loops or the characteristics of markets in which such re-use is most likely. This aspect of the impairment analysis would not therefore survive judicial scrutiny.

Nor was the other basis upon which the Commission relied in adopting the *FTTC Order*, namely the advancement of the goals of Section 706, a justifiable predicate for eliminating unbundling for FTTC loops. All unbundling determinations require that the Commission balance the relevant costs and benefits. *See USTA I* at 427. Especially in light of the high level

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[6] *United States Telecom. Assoc. v. FCC*, 290 F.3d 415, 426 (D.C. Cir. 2002) ("*USTA I*").

of competitor impairment in the absence of FTTC loops and the incumbents' undeniable advantages in deploying these facilities, the Commission could only reasonably eliminate unbundling for FTTC if such a change would yield substantial improvements in the quality and extent of broadband deployment. It does not. While the FCC concluded that adoption of the unbundling exemption for FTTC loops would increase the extent to which FTTC loops are deployed (*FTTC Order* ¶ 15), this has not been the case. BellSouth has made much of its plan to extend its FTTC network this year to pass 180,000 new customers.[7] But as the attached charts tracking BellSouth's announced deployment of fiber over the last several years demonstrates, this most recent announcement does not result in a material increase in the pace of BellSouth's fiber deployment. *See* Appendix.[8] Based on BellSouth's public announcements, therefore, it appears that the *FTTC Order* has not had any significant effect on the speed of fiber loop deployment in the BellSouth region. Moreover, there does not appear to be any other incumbent LEC that has increased the pace of FTTC deployment after the release of the *FTTC Order*.

As McLeodUSA points out, the FCC was equally misguided in concluding that the elimination of unbundling for FTTC loops would spur CLEC deployment of these facilities. Knology and Grande Communications, apparently the only CLECs that had deployed FTTC at

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[7] *See* Press Release, BellSouth Corp., BellSouth Initiates Technical Trial Of Microsoft TV IPTV Edition (Jan. 6, 2005) *at* http://bellsouthcorp.com/proactive/documents.com; BellSouth Opposition at 3-4.

[8] It is also telling to compare BellSouth's claims of growth in the deployment of FTTC loops with Verizon's planned deployment of FTTP loops. While BellSouth has claimed that its fiber network passes "over one million" homes (BellSouth SEC 8-K Filing, Apr. 22, 2004), it has announced plans to add only 180,000 homes in 2005. BellSouth therefore plans to increase the number of homes passed by its FTTC network by less than 20 percent this year. In stark contrast, Verizon states that its FTTP network passed one million homes in 2004 and will have passed three million homes by year-end 2005, an increase of fully 200 percent. Dr. Paul Polishuk, Dr. Hui Pan, IGI Consulting, *Overview of the FTTx Market in the U.S.*, presented at Fiberfest New England, May 2, 2005, at http://www.nefc.com/pp_fiberfest2005/HPan_FiberFest05.pdf.

the time the *FTTC Order* was adopted, have not announced any plans to deploy new FTTC loops since the release of the order. Nor is there evidence that any other CLEC has deployed these facilities in the relevant time period.

The Commission also failed to give adequate weight to the fact that FTTC loops cannot possibly deliver the capacity to end users that FTTP loops can deliver. This problem is most pronounced for MDUs. The FCC determined that FTTC loops should be exempt from unbundling when they serve MDUs. *FTTC Order* ¶ 14. The FCC has determined that fiber loops serving predominantly residential MDUs should be subject to the broadband exemption regardless of whether the distribution wires within the MDU are fiber or copper.[9] *See MDU Order* ¶ 10. While the use of long copper in-building distribution wires degrades the broadband service delivered by FTTP loops, the issue is more serious for FTTC loops for which the copper wire from the network node to the building is already as long as 500 feet. Indeed, the record in the *FTTC Order* demonstrated that there is a "steep" decline in the broadband capacity of copper loops that are longer than 500 feet. *See* Marconi Reply Comments, CC Dkt. 01-338, Nov. 17, 2003 at 5. Applying the FTTC relief to MDUs would almost certainly grant unbundling relief in many cases where the copper loop combined with copper in-building wires far exceeds 500 feet. Deployment of such facilities does little to advance the policy goals of Section 706, and yet the Commission failed to account for this fact. Thus, there should be no dispute that the Commission must rescind the *FTTC Order* as it applies to MDUs.

But even FTTC loops to single dwelling units offer far less capacity than FTTP loops. As Verizon CEO, Ivan Seidenberg has stated, only fiber provides sufficient, upgradeable

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[9] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.,* Order on Reconsideration, 19 FCC Rcd 15856 ¶ 10 (2004) (*"MDU Order"*).

bandwidth in the long term while hybrid architectures (such as FTTC) require continuous upgrades to the DSL network that are only viable for two to three years.[10] Moreover, current FTTP service offerings deliver much greater bandwidth than current FTTC service offerings. For example, Verizon's so-called "Fios" service provided *via* its FTTP network currently offers speeds of up to 30 megabits per second.[11] In contrast, BellSouth's DSL service provided via its FTTC networks delivers only 12 megabits per second. Nor is FTTC likely ever to close this gap since the maximum potential capacity of FTTP loops is much greater than the potential capacity of FTTC loops. FTTP can ultimately deliver dozens of Gigabits per second, whereas FTTC can only promise a maximum of 2.5 gigabits per second.[12]

All of this shows that the Commission should grant McLeodUSA's request that it rescind the decision to treat FTTC loops like FTTP loops. The Commission offered no basis for concluding that competitors and incumbents face similar entry barriers in all markets when deploying FTTC loops, experience since the adoption of the *FTTC Order* confirms that exempting FTTC loops from unbundling will not materially increase deployment of those facilities by either incumbents or competitors, and, even if it did, those facilities would not deliver anywhere near the broadband throughput that FTTP loops deliver. The Commission should therefore require that BellSouth deploy fiber all the way to customer premises, as Verizon and SBC plan to do, in order to obtain the extraordinary (and anticompetitive) benefit of the unbundling exemption.

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[10] *Verizon Bets on FTTP*, CONVERGE NETWORK DIGEST (Oct. 6, 2004) at http://www.convergedigest.com/DSL/lastmilearticle.asp?ID=12550.

[11] Verizon Fios Product Information, at http://www22.verizon.com/fiosforhome/channels/fios/root/about_fios.asp.

[12] Paul Budde, *Last Mile Telecommunications Infrastructure -- Fibre, Microwave, and Stratospheric,* Verizon Learning Center, at http://www.verizon.com/learningcenter/.

Second, as Covad, et al. correctly observe in their petition, the unbundling exemption for FTTP loops and FTTC loops (should it remain in place) applies only to the mass market[13] and that it would be appropriate to clarify that "mass market" includes only residential and single line business customers. *See* Covad, et al. Petition at 2-3. As Cbeyond and others have explained at length in response to Qwest's petition for forbearance from regulation of its xDSL service, this definition of mass market is reasonable because it is (1) consistent with the fact that, as the FCC recognized in the *Triennial Review Remand Order*,[14] intermodal competition from cable operators is limited to residential customers; (2) easily administrable; and (3) consistent with the Commission's treatment of residential customers in its unbundling orders as the prototypical mass market customers (by, for example, limiting mass market relief to predominantly residential MDUs).[15] The Commission should therefore grant this aspect of Covad, et al.'s petition.

Finally, the Commission should grant Covad, et al.'s petition at least to the extent that it seeks Commission clarification that incumbent LECs must unbundle DS1 and DS3 loops that traverse packetized hybrid loops over which the incumbents themselves provide DS1 and DS3 services to their customers. *See* Covad, et al. Petition at 4-6. In adopting the unbundling rules

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[13] The Commission should obviously ignore BellSouth's absurd suggestion that "the best reading" of the *Triennial Review Order* is that FTTP (and now FTTC) relief applies to mass market *as well as all other customers*. BellSouth Opposition at 5. In the *Triennial Review Order* as well as in subsequent orders, the Commission has repeatedly clarified that the FTTP/FTTC unbundling exemption applies only to the mass market. *See, e.g., Triennial Review Order* ¶¶ 277, 278; *MDU Order* ¶ 8; *FTTC Order* ¶¶ 2, 5, 6, 9, 14, 17. Moreover, limiting the unbundling exemption to the mass market makes sense for the reasons discussed herein in support of defining the mass market to include only residential and single line business customers.

[14] *See Triennial Review Remand Order* ¶¶ 193-94.

[15] See Comments of Time Warner Telecom, Cbeyond Communications and XO Communications, WC Docket No. 04-416 (Jan. 6, 2005) at 15-17.

governing hybrid loops, the Commission ruled that incumbent LECs should not be required to unbundle a hybrid facility "that is used to transmit packetized information" (*Triennial Review Order* ¶ 288) but that incumbent LECs remain obligated to provide unbundled access to "hybrid loops *capable* of providing DS1 and DS3 service to customers" (*Id*. ¶ 294 (emphasis added)). The Commission clearly indicated that the hybrid facilities "capable" of providing DS1 and DS3 loops include loops utilizing multi-use integrated line cards deployed in DLC systems as well as other technologies that allow the service provider to deliver *either* a TDM or a packet-switched service over a particular loop facility. *See id.* Moreover, the Commission stressed that the incumbents remain obligated to comply with the nondiscrimination requirements of Section 251(c)(3) when offering DS1 and DS3 loops to competitors. *See id*. ¶ 294. Those requirements mandate that the incumbent permit competitors nondiscriminatory access to the various systems, databases, and personnel that the incumbent uses in providing service to its customers.[16]

All of this supports the conclusion that, where an incumbent LEC uses a hybrid facility to deliver both TDM and packetized services to its own customers, it must make the TDM services available on an unbundled basis to competitors. Moreover, if for some reason the incumbent utilizes packetized transmission but delivers a TDM "hand off" of DS1 or DS3 connectivity to an end user, that same capability must be made available to competitors as a UNE. The determination of whether a hybrid facility is used to deliver TDM service must be viewed from the perspective of the end user. If the end user receives a packetized transmission service, then

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[16] *See, e.g., Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia,* Memorandum Opinion & Order, 18 FCC Rcd 5212 ¶¶ 16-17 (2003).

the existing rules preclude unbundled access. But if the end user receives a TDM service, then the existing rules should allow unbundled access, regardless of whether the signals in question are transmitted in packetized format before they reach the end user.

This approach would ensure that incumbents comply with their duty to provide access to unbundled TDM services on a nondiscriminatory basis. At the same time, this approach is consistent with the goals of Section 706. Incumbents would only benefit from the unbundling exemption where they actually deliver packetized services to end users, and they would have an incentive to do so in order to avoid their TDM unbundling obligations. The Commission should therefore adopt the Covad, et al. petition to the extent that it seeks this clarification.

Respectfully submitted,

/s/

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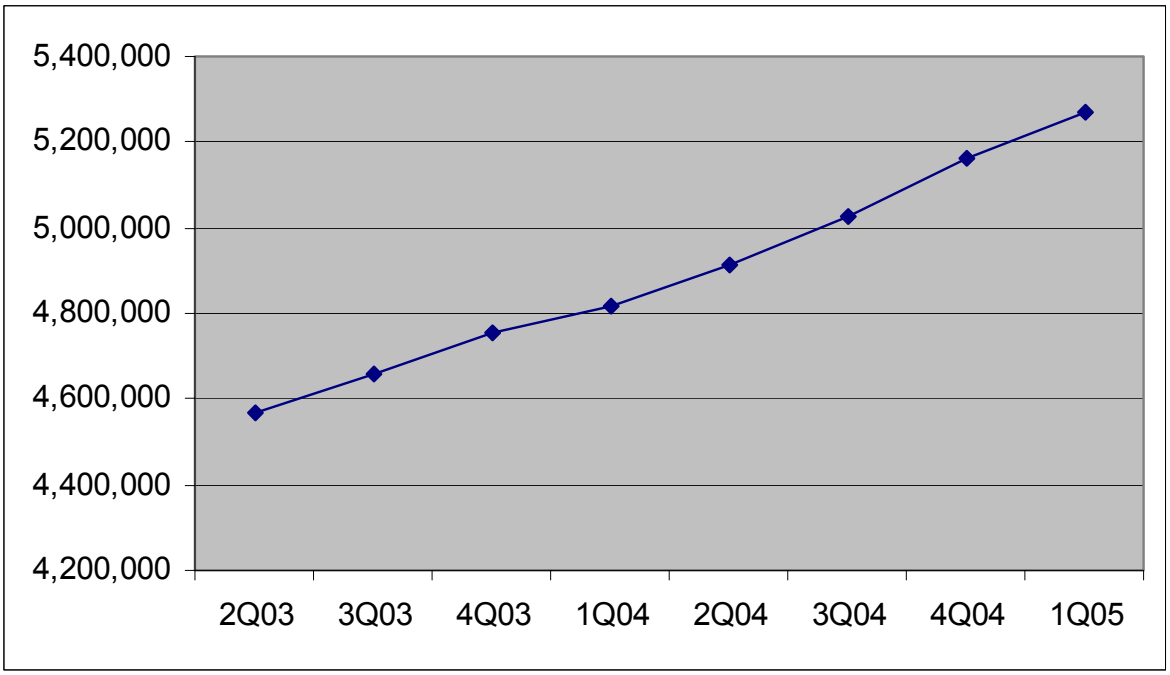
APPENDIX

Growth in BellSouth Network Fiber Miles
2nd Quarter 2003 - 1st Quarter 2005



MILES OF FIBER			
	Total Network Mi.	**Net Growth**	**% Delta**
2Q03	4,567,000	-	
3Q03	4,656,000	89,000	2%
4Q03	4,753,000	97,000	2%
1Q04	4,819,000	66,000	1%
2Q04	4,911,000	92,000	2%
3Q04	5,025,000	114,000	2%
4Q04	5,163,000	138,000	3%
1Q05	5,269,000	106,000	2%

Sources: BellSouth Corp., SEC 8-K Filing, Apr. 21, 2005; BellSouth Corp., SEC 8-K Filing, Jan. 25, 2005; BellSouth Corp., SEC 8-K Filing, Oct. 25, 2004; BellSouth Corp., SEC 8-K Filing, Jul. 26, 2004; BellSouth Corp., SEC 8-K Filing, Apr. 22, 2004.

CERTIFICATE OF SERVICE

I, Thomas Jones, certify that on this 11th day of July, 2005, I have caused to be served by first class mail, postage prepaid, a copy of the foregoing Reply to Oppositions to Petitions for Reconsideration of Cbeyond Communications, LLC, Conversent Communications, LLC, and CTC Communications Corp. on counsel for all parties of record, as follows:

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