
**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Petition for Rulemaking and Clarification,)
BridgeCom International, Inc., *et al.*)
) RM-11358
Petition for Rulemaking, XO Communications,)
LLC, *et al.*)
)
)

To: The Commission

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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TABLE OF CONTENTS

SUMMARY ii

I. BACKGROUND 3

 A. *Triennial Review Order* and *USTA II* 4

 B. Post-*TRO* Broadband Orders 7

 C. Results of Commission’s Broadband Policy..... 9

II. DISCUSSION..... 10

 A. The result sought by Petitioners would be directly contrary to conclusions rendered in the “broadband” sections of the *Triennial Review Order*..... 11

 B. The result sought by Petitioners would constitute a reversal of the Commission’s broadband policy more broadly. 13

 C. The *BridgeCom Petition*’s forced-sale proposal would exert the same disincentive effects as the unbundling requirements the Commission has repeatedly rejected. 15

 D. The Petitioners’ public-safety arguments are flatly inconsistent with the Commission’s conclusions regarding deployment incentives. 17

 E. The Petitioners’ request for a more expansive state role in unbundling policy contradicts Commission precedent. 18

III. CONCLUSION..... 20

SUMMARY

In these comments, the United States Telecom Association (“USTelecom”) asks the Commission to deny the relief sought in the petitions giving rise to this proceeding. While the petitions facially address treatment of incumbent local exchange carriers’ (“ILECs”) copper loops, the relief Petitioners seek would amount to a reversal of broadband policies that have served consumers, and the nation, very well. Petitioners have offered no reason to believe that these policies have failed, and no other compelling reason for abandoning the Commission’s current approach.

Beginning with the 2003 *Triennial Review Order* and continuing through a series of subsequent decisions, the Commission has put into place an incentive-based broadband policy. This policy has removed network-sharing obligations in order to promote facilities deployments by incumbents and their competitors alike. At the same time, the Commission has generally maintained competitive LECs’ (“CLECs”) unbundled access to ILECs’ narrowband facilities (or equivalent transmission paths). Thus, in the *Triennial Review Order*, the Commission determined that where an ILEC has constructed a fiber-optic network to replace its legacy copper facilities, it must provide CLECs unbundled access to *either* the preexisting copper loop *or* a 64 kbps channel over the new fiber, at its option. CLECs wishing to provision broadband service, the Commission found, are able to construct or obtain facilities on their own, without unbundled access.

These policies have led to robust broadband deployment. Since the *Triennial Review Order*’s issuance, the number of high-speed lines in service has increased more than 2.5 times, with fiber lines increasing more than sixfold. Moreover, the Commission’s rules have prompted deployment by competitors as well as incumbents. ILECs provide fewer than half of all high-speed lines now in service. Intermodal broadband competitors have seen particularly impressive growth: In mid-2003, there were 309,006 satellite and wireless broadband lines in service; by mid-2006, that figure had increased by over 38 times, to 11,872,309 lines.

Notwithstanding the broadband growth described above, Petitioners here ask the Commission to overturn its incentive-based regime and guarantee their continued access to an ILEC’s copper loops, *for the provision of broadband service*, where the ILEC has overbuilt those loops with fiber. Their arguments, however, fail on all fronts.

The relief Petitioners seek would constitute a reversal of the *Triennial Review Order*’s explicit findings regarding unbundling obligations following a fiber overbuild – findings that were upheld on appeal by the D.C. Circuit. Moreover, the relief sought would also constitute a reversal of the Commission’s investment-based broadband policy more broadly. In making investment decisions regarding the construction of next-generation networks, ILECs would be deterred by rules requiring them to maintain their copper plant, and to provide that plant for use by their competitors at regulated rates for provision of broadband services. Competitors, too, would be deterred from investing, knowing that they could continue to access ILECs’ broadband-capable facilities without expending any capital of their own.

Nor would the forced sale of ILEC plant avoid the problems associated with unbundling requirements. Mandated sales would unavoidably result in below-market prices, or “market” prices that reflect the copper plant’s diminished value following a fiber overbuild and therefore

punish ILECs for the very investment the Commission has sought to encourage. A forced sale requirement would therefore deter investment on a going-forward basis no less than the reinstatement of unbundling requirements for the provision of broadband service.

Further, the “network redundancy” arguments raised by Petitioners stand the Commission’s policy framework on its head, by presuming that a reinstated access obligation would *increase* the stock of critical network facilities when the Commission has repeatedly held just the opposite. Indeed, even the “redundant” copper facilities that might be preserved by the result Petitioners seek would be of limited value in times of emergency, given that they will generally travel over the very same rights-of-way and connect to the very same PSTN as the ILEC’s fiber facilities: In the event the ILEC’s fiber network is disrupted, it appears very likely that the copper network would be disrupted too.

Finally, the Commission should not permit states to adopt rules on this topic that contradict its own; as the Commission has made clear, state rules that require unbundling where the Commission has not done so would frustrate its policy regime and are therefore inconsistent with section 251(d)(3).

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In numerous decisions beginning with 2003’s *Triennial Review Order*,¹ the Commission has established a deregulatory approach to “next-generation” broadband networks designed to foster investment by incumbent providers and competitors alike. This policy regime has recognized that such networks offer providers the opportunity to reap significant revenues from the provision of voice, video, data, and other services. The prospect of earning these revenues drives new entrants to construct new broadband networks, and undercuts any rationale for the network-sharing obligations often applied to narrowband facilities. As the Commission has explained, removal of these access requirements has the effect of promoting network investment and deployment by incumbents *and* competitors: Incumbents will increase deployment with the understanding that the benefit of their investments in competitive markets will not be enjoyed by

¹ *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*, 18 FCC Rcd 16978 (2003) (“TRO”).

their competitors at regulated rates, and those competitors will increase their own deployment knowing that they will only enjoy the benefits of a broadband network if they invest risk capital of their own.

The results of this policy have been impressive. As described below, the number of high-speed lines in service has increased by over two-and-a-half times since the Commission first articulated the broadband framework described above. Growth in the fiber-optic lines most central here has been particularly dramatic, with the number of such lines increasing more than *sixfold* since the Commission clarified that those facilities would be free from unbundling obligations for the provision of broadband service. Moreover, these facilities are being constructed by providers in all market segments: Incumbent LECs (“ILECs”) provided fewer than half of all high-speed lines in service in June 2006, and alternative platforms are poised to play a major role in the broadband marketplace, as the Commission has recognized.

In this proceeding, however, various competitive LECs (“CLECs”) ask the Commission to reverse course.² In place of the policies described above, Petitioners seek a return to the regime of the past, which the Commission has rejected and experience has discredited. Although their requests facially address the treatment of copper loop plant, the petitions address the heart of the Commission’s broadband policy. Notwithstanding existing rules that plainly guarantee a

² Petition for Rulemaking and Clarification, BridgeCom International, Inc., Broadview Networks, Inc., Cavalier Telephone, LLC, Eureka Telecom, Inc. d/b/a InfoHighway Communications, Florida Digital Network, Inc. d/b/a FDN Communications, IDT Corp., Integra Telecom. Inc., DeltaCom. Inc., McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., Norlight Telecommunications, Inc., Pacific Lightnet, Inc., RCN Telecom Services, Inc., RNK, Inc., Talk America Holdings, Inc., TDS Metrocom, LLC, and U.S. Telepacific Corp. d/b/a Telepacific Telecommunications (filed Jan. 18, 2007) (“*BridgeCom Petition*”); Petition for Rulemaking, XO Communications, LLC, Covad Communications Group, (continued on next page)

CLEC's right to an unbundled narrowband transmission path (via either copper or fiber) in the case of a fiber overbuild, Petitioners seek continued access to ILECs' copper loops for the provision of *broadband* service. In short, they ask the Commission to repudiate its findings that CLECs do not require unbundled access to broadband facilities, and that such access would only depress deployment by ILECs and by competitors.

The Commission should recognize these petitions for what they are: unsupported attempts to put the alleged needs of specific providers over those of consumers, and to accord these providers regulated access to facilities that the Commission has long since determined they can feasibly provision themselves. The relief Petitioners seek will undermine broadband deployment, and will disserve the very public interests they cite. The United States Telecom Association ("USTelecom")³ respectfully urges the Commission to act quickly in rejecting the petitions, and eliminating the uncertainty and investment disincentives created by this proceeding.

I. BACKGROUND

In various orders, the Commission has established and refined a broadband regulatory regime recognizing that providers should be pushed to deploy their own high-speed facilities – or secure access to such facilities in the market – wherever feasible. These orders have recognized time and again that rules requiring ILECs to share broadband links at regulated rates give rise to two insidious investment disincentives: They deter ILECs from deploying new broadband

Inc., NuVox Communications and Eschelon Telecom, Inc. (filed Jan. 18, 2007) ("*XO Petition*"). We refer to all above-listed parties collectively as "Petitioners" herein.

³ USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

facilities, because those incumbents know that some fruits of their investment will be reaped by competitors that expend no risk capital of their own, and they deter *CLECs* from deploying their own broadband networks, because it is far safer to use *ILEC* facilities at low rates, again without extensive capital outlays.⁴ Because the instant petitions ask the Commission to revisit its broadband decisions without acknowledging their underlying logic, we briefly review the key points here.

A. *Triennial Review Order and USTA II*

The *TRO*'s broadband-related holdings, like many of its other holdings, were premised on the Commission's recognition of "the difficulties and limitations inherent in competition based on the shared use of infrastructure through network unbundling."⁵ In particular, the Commission expressed its "aware[ness] that excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology."⁶ With these principles in mind, the *TRO* relieved *ILECs* of unbundling obligations with respect to fiber-to-the-home ("FTTH") loops. In the case of deployments in new developments ("greenfield" projects), the Commission determined that the barriers to entry faced by competitive and incumbent carriers were identical.⁷ Indeed, this was *also* true in the "overbuild" scenarios at issue here: *CLECs* and *ILECs*, the Commission determined, faced the same entry burdens and the same (increased) revenue opportunities from the deployment of

⁴ Although this point has not been a focus of the Commission's orders, broadband unbundling will also deter investment by third parties not themselves eligible for *UNEs*, who might well be reluctant to compete against *CLECs* that obtain broadband access with no risk and face minimal entry and exit barriers.

⁵ *TRO*, 18 FCC Rcd at 16984 para. 3.

⁶ *Id.*

⁷ *Id.* at 17143, para. 275.

FTTH facilities.⁸ However, the Commission determined that in the case of fiber overbuilds, CLECs would be impaired if they sought only to provide “narrowband” services. In that case, the revenue opportunities associated with FTTH would be absent, and the same impediments that prevented CLECs from constructing their own copper loops would remain in place.⁹ Therefore, the Commission required that in overbuild situations, the ILEC must either (1) “keep the existing copper loop connected to a particular customer after deploying FTTH,” or (2) “provide unbundled access to a 64 kbps transmission path over its FTTH loop.”¹⁰ The Commission was abundantly clear that this was “a very limited requirement intended only to ensure continued access to a local loop suitable for providing narrowband services to the mass market in situations where an incumbent LEC has deployed overbuild FTTH and elected to retire the pre-existing copper loops.”¹¹ The Commission further recognized that its rules would promote broadband deployment, in fulfillment of its section 706 obligations.¹² The Commission declined to require regulatory approval prior to loop “retirement,” choosing instead to rely on existing requirements that carriers provide public notice of network changes. It *did* modify its rules to permit parties to file objections to copper loop retirements. Such objections, however, would be deemed denied unless acted upon within 90 days.¹³

⁸ *Id.* at 17144-45, paras. 276-77 (noting that CLECs and ILECs “largely face the same obstacles in deploying overbuild FTTH loops” and recognizing that “the revenue opportunities associated with deploying any type of FTTH loop are far greater than for services provided over copper loops”).

⁹ *Id.* at 17144-45, para. 277.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.* at 17145, para. 278.

¹³ *Id.* at 17146-47, paras. 281-82.

The Commission reached a similar result, for similar reasons, for hybrid copper-fiber loops. With respect to those loops, the Commission declined to require ILECs to unbundle any packetized capabilities or any equipment used to transmit packetized information.¹⁴ However, CLECs were permitted to access narrowband transmission paths over ILECs' TDM networks.¹⁵ As with FTTH facilities, the Commission determined that these rules would incent ILECs and CLECs alike to deploy their own next-generation networks for the provision of broadband service.¹⁶

Reviewing the *TRO* in 2004,¹⁷ the U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's decisions with regard to broadband loops. The court noted that even in overbuild situations, the FCC "declined to find impairment as to broadband services."¹⁸ Citing the *TRO*'s findings regarding deployment, the court explicitly endorsed the Commission's reasoning: "An unbundling requirement under these circumstances seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy FTTH and ILECs fearful that CLEC access would undermine the investments' potential return. Absence of unbundling, by contrast, will give all parties an incentive to take a shot at this potentially lucrative market."¹⁹ Indeed, the court recognized that in light of Congressional directives requiring the FCC to promote broadband deployment, restrictions on unbundled access were reasonable, even if they "entail[ed] increasing consumer costs today in order to stimulate

¹⁴ *Id.* at 17149, para. 288.

¹⁵ *Id.* at 17153-54, para. 296.

¹⁶ *Id.* at 17150, para. 290.

¹⁷ *United States Telecom Assoc. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

¹⁸ *Id.* at 583.

¹⁹ *Id.* at 584.

technological innovations” to satisfy demand in the future.²⁰ More generally, the court articulated its view that the Act’s goal was *not* “to provide the widest possible unbundling,” but rather “to stimulate competition – preferably genuine, facilities-based competition.”²¹

B. Post-*TRO* Broadband Orders

In various orders following the *TRO*, the Commission has consistently emphasized the importance of promoting broadband investment, and the ways in which network sharing obligations of various sorts can undermine such investment. In these orders, the Commission has worked assiduously to lift network-access requirements with regard to next-generation networks. In the 2004 *MDU Reconsideration Order*,²² for example, it determined that the *TRO*’s FTTH rules should apply to fiber links serving residential “multiple dwelling units,” noting that the “principles of section 706 of the Act for residential customers living in MDUs outweigh whatever impairment findings may be present for fiber loops serving such customers.”²³ Later that year, in its *FTTC Reconsideration Order*, the Commission determined that the *TRO*’s FTTH rules should apply to links passing within 500 feet of the end-user location.²⁴

²⁰ *Id.* at 581.

²¹ *Id.* at 576. In the subsequent *Triennial Review Remand Order*, the Commission cited its preference for facilities-based competition as one ground on which to deny unbundled access to local circuit switching, even when carriers might be impaired without such access, pursuant to its section 251(d)(2) “at a minimum” authority. See *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2652-53, para. 218 (2005).

²² *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*, 19 FCC Rcd 15856 (2004) (“*MDU Reconsideration Order*”).

²³ *Id.* at 15858, para. 4.

²⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*; (continued on next page)

Nor have the Commission's efforts with regard to broadband deployment been limited to unbundling obligations arising under section 251. In its *Broadband 271 Forbearance Order*,²⁵ the Commission relieved the Bell Operating Companies ("BOCs") of section 271 access obligations with regard to broadband elements they no longer were required to offer as UNEs under section 251. The Commission noted that even section 271's more limited access requirement – which permits BOCs to charge "just and reasonable" rates rather than TELRIC rates²⁶ – exerts "disincentive effects ... on BOC investment," and concluded "that the beneficial effect of [section 271] unbundling is small given the particular characteristics of [the broadband Internet access] retail market."²⁷ Notably, the Commission relied explicitly on "potential" competition in the retail broadband market in reaching its decision.²⁸ In its 2005 *Wireline Broadband Order*, the Commission lifted network-sharing obligations arising from its *Computer Inquiry* decisions from providers of wireline broadband Internet access services.²⁹ These

Deployment of Wireline Services Offering Advanced Telecommunications Capability, 19 FCC Rcd 20293 (2004) ("*FTTC Reconsideration Order*").

²⁵ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496 (2004) ("*Broadband 271 Forbearance Order*").

²⁶ *TRO*, 18 FCC Rcd at 17386, para. 656.

²⁷ *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505, para 21.

²⁸ *Id.*; see also *id.* at 21505-06, para. 22. The D.C. Circuit later upheld this order. *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006). The court expressly affirmed the Commission's conclusions that "the benefits of unbundling were 'modest,'" *id.* at 26, that reliance on potential competition was appropriate, see *id.* at 28, and that even section 271's slightly less burdensome access requirements could still become a significant deterrent to broadband investment, see *id.* at 31-32. The court also recognized that the Commission's predictions regarding future deployment "echo[ed] predictions made in the *Triennial Review Order* and upheld in *USTA II*." *Id.* at 30.

²⁹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*").

obligations, the Commission recognized, “constrain technological advances and deter broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services.”³⁰

C. Results of Commission’s Broadband Policy

There can be little doubt that the incentive-based framework put in place by the orders described above has been a success. According to the Commission’s statistics, there were 23.5 million high-speed lines in service nationwide at the end of June, 2003, just before the *TRO*’s broadband rules took effect.³¹ In mid-2006, there were 64.6 million such lines.³² Thus, the number of high-speed lines in mid-2006 is more than two-and-a-half times the number of lines in service just three years before. The number of cable broadband lines has more than doubled, from 13,684,225 lines in June 2003 to 28,513,500 in June 2006.³³ The number of xDSL lines has almost tripled, from 8,890,827 lines in June 2003 to 23,523,170 million lines in June 2006.³⁴ Growth in fiber-optic lines has been particularly dramatic: In June 2003, there were just 111,386 subscribers using such lines, but in June 2006, there were 700,083 subscribers – 628% as many.³⁵

Moreover, growth has not been limited to ILECs. As the Commission predicted, its broadband rules have also incited competitive deployment; ILECs provide fewer than half of

³⁰ *Id.* at 14865, para. 19.

³¹ Report, High-Speed Services for Internet Access: Status as of June 30, 2003, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 1 (rel. Dec. 2003) (“*June 2003 Report*”).

³² Report, High-Speed Services for Internet Access: Status as of June 30, 2006, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 1 (rel. Jan. 2007) (“*June 2003 Report*”).

³³ See *June 2003 Report* at Table 1; *June 2006 Report* at Table 1.

³⁴ See *June 2003 Report* at Table 1; *June 2006 Report* at Table 1.

all high-speed lines now in service.³⁶ Intermodal broadband competitors have seen particularly impressive growth: In mid-2003, there were 309,006 satellite and wireless broadband lines in service; by mid-2006, that figure had increased by over 38 times, to 11,872,309 lines.³⁷ Moreover, as the Commission has noted, “other forms of broadband Internet access, whether satellite, fixed or mobile wireless, or a yet-to-be-realized alternative, will further stimulate deployment of broadband infrastructure” in the near future.³⁸

II. DISCUSSION

There should be no misunderstanding: The instant petitions seek a reversal of the Commission’s broadband policies that have proven so successful in increasing the deployment of fiber networks. Since 2003, the Commission’s rules have required ILECs subject to section 251(c) to unbundle either (1) a 64 kbps transmission path or (2) home-run copper facilities even where they have overbuilt their copper loops. Thus, while the petitions address copper loop facilities, they do *not* seek access to such facilities for the provision of narrowband service, because they already enjoy such access or its fiber-optic equivalent. Rather, ignoring the wealth of evidence showing skyrocketing broadband deployment resulting from the Commission’s broadband policy choices, the Petitioners seek an entitlement to use unbundled ILEC facilities *for the provision of broadband service* in circumstances where the Commission has found that they are capable of deploying on their own facilities for that purpose.

³⁵ See *June 2003 Report* at Table 1; *June 2006 Report* at Table 1.

³⁶ *June 2006 Report* at Table 5. Most non-ILEC lines are provided via cable modem services, but non-ILEC mobile wireless, xDSL, satellite, and fixed wireless broadband offerings now serve a substantial number of end users. See *id.* at Table 6.

³⁷ See *June 2003 Report* at Table 1; *June 2006 Report* at Table 1. While the 2003 figures did not even account for broadband over powerline (“BPL”) providers, by mid-2006 there were 5,208 BPL lines in service. See *id.*

The approach Petitioners seek will no more promote broadband deployment and competition now than it would have in 2003. Nor is there any merit to the Petitioners' claim that the relief they seek would promote network redundancy: As the Commission has held time and again, increased network sharing obligations will *diminish* deployment, resulting in less – not more – of the network facilities most useful to first responders and the public in times of crisis. Finally, the Commission should not permit the states to undermine broadband deployment by mandating copper loop access for the provision of broadband despite the FCC's *own* choice to promote deployment by prohibiting such access. When all is said and done, Petitioners are seeking reconsideration of the Commission's previous decisions regarding broadband, despite abundant evidence that these policies have worked exactly as intended. The Commission should promptly reject their claims.

A. The result sought by Petitioners would be directly contrary to conclusions rendered in the “broadband” sections of the *Triennial Review Order*.

As described above, the Commission has already faced the primary issue raised in this docket – namely, what should become of ILECs' copper loops following a fiber overbuild. In the TRO, the Commission determined that CLECs remained impaired in the provision of *narrowband* service following fiber overbuilds, but that the revenue opportunities associated with *broadband* offerings would alleviate any barriers to competition in that market. Therefore, the Commission limited unbundling in the “overbuild” context to either (1) a single 64 kbps channel or (2) a copper loop, at the ILEC's option.³⁹ Where the CLEC sought to provide higher-

³⁸ *Wireline Broadband Order*, 20 FCC Rcd at 14884 para. 57; *see also id.* at 14880 para. 50.

³⁹ *TRO*, 18 FCC Rcd at 17144-45, para. 277.

capacity service, the Commission required it to construct or obtain the necessary facilities on its own. As described above, the D.C. Circuit affirmed this decision.

In light of this decision, there is no basis for requiring ILECs to maintain copper facilities in the event of a fiber overbuild. First, to the extent Petitioners here suggest that loops must remain in place to permit provision of competitive *narrowband* service, this is clearly erroneous: The *TRO* expressly preserved CLEC access to unbundled narrowband facilities, and that requirement remains in effect. Second, to the extent Petitioners suggest that loops must remain in place to permit *broadband* competition, they badly misunderstand the *TRO*'s reasoning. The *TRO* found that CLECs *did not require* access to ILEC loops for the provision of broadband, because the revenues associated with such offerings and the relatively equal obstacles faced by ILECs and CLECs in the deployment of broadband networks rendered competitive construction of broadband-capable facilities feasible. Thus, all that was required was "continued access to a local loop suitable for providing narrowband services to the mass market."⁴⁰

In essence, then, Petitioners seek reconsideration of the *TRO*'s conclusions regarding broadband loop unbundling. The Commission's rules provide that a party seeking such reconsideration must demonstrate either changed circumstances or new facts warranting a change in course,⁴¹ but Petitioners here can demonstrate neither.⁴² By any measure, the policies they ask the Commission to reverse have been a success: As described above, the Commission's

⁴⁰ *TRO*, 18 FCC Rcd at 17145, para. 277. *Cf. id.* at 17133-34, para. 258 (declining to require "line sharing" partly on basis of potential revenues available from provision of broadband service using the high-frequency portion of the loop).

⁴¹ *See* 47 C.F.R. § 1.106(b)(2).

⁴² Clearly, the instant Petitions do not formally seek "reconsideration" of the *TRO*, nor could they do so at this point. However, given that the substantive effect of their claims would be
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policies have led to rapid broadband deployment, with ILECs, CLECs and intermodal competitors investing in facilities secure in the knowledge that such investment is the best route to profit. The overall number of broadband lines in service has increased by 174%; the number of cable broadband lines has more than doubled; the number of xDSL lines has almost tripled; and the number of fiber lines has increased by over six times.⁴³ Moreover, the Commission's policies have (as predicted) also promoted competitive deployment, and are expected to facilitate use of new broadband platforms in the coming years. In short, the policies from which Petitioners seek relief are promoting the public interest,⁴⁴ and Petitioners have provided no cause for second-guessing them.

B. The result sought by Petitioners would constitute a reversal of the Commission's broadband policy more broadly.

Grant of the instant petitions would entail not only the explicit reversal of the *TRO's* conclusions, but also the rejection of numerous subsequent orders establishing an incentive-based broadband policy. These orders – including the *MDU Reconsideration Order*, the *FTTC Reconsideration Order*, the *Broadband 271 Forbearance Order*, and the *Wireline Broadband Order* – have repeatedly and consistently enunciated the Commission's view that when ILECs are freed from section 251-, section 271-, and *Computer Inquiry*-derived network sharing obligations, *all* providers enjoy investment incentives that far outweigh the benefits of those

equivalent to a grant of reconsideration, Petitioners' inability to meet the section 1.106(b)(2) standard stands as a strong barrier to any grant of the relief they seek.

⁴³ See generally *June 2003 Report* at Table 1; *June 2006 Report* at Table 1.

⁴⁴ While below-cost access to broadband-capable copper loops would surely benefit the Petitioners themselves, it is axiomatic that the Commission's analysis must look to the interest of consumers and society generally – *i.e.*, to *competition* rather than to individual *competitors*. See, *e.g.*, *Bell Atlantic Mobile Sys., Inc. and NYNEX Mobile Communications Co.*, 12 FCC Rcd (continued on next page)

access obligations. These orders have recognized “the level playing field for incumbents and competitors seeking to deploy [broadband facilities], and increased revenue opportunities associated with those deployments,” as well as “Congress’ clear and express policy goal of ensuring broadband deployment, and its directive that we remove barriers to that deployment, if possible, consistent with our other obligations under the Act.”⁴⁵

Although these orders generally addressed scenarios in which the facility subject to sharing is the *same* facility that the incumbent would itself use to provide service, the analysis remains unchanged here, where the incumbent would otherwise retire the copper facility and provide service exclusively over its fiber plant. In making investment decisions regarding the construction of next-generation networks, ILECs will be deterred by rules requiring them to maintain their copper plant, and to provide that plant for use by their competitors at regulated rates for provision of broadband services, years after the Commission determined that competitors are perfectly able to deploy their *own* facilities for this purpose.⁴⁶ Moreover, as the

22280, 22288, para. 16 (1997) (“[O]ur statutory duty is to protect efficient competition, not competitors.”).

⁴⁵ *Wireline Broadband Order*, 20 FCC Rcd at 14878, para. 44. See also *MDU Reconsideration Order*, 19 FCC Rcd at 15857-58, para. 4; *FTTC Reconsideration Order*, 19 FCC Rcd at 20295, para. 5; *TRO*, 18 FCC Rcd at 17145, para. 278.

⁴⁶ Petitioners are vague about how ILECs would be compensated for future CLEC use of copper facilities left in place by virtue of these petitions. Even assuming *arguendo* that the Commission’s TELRIC framework provides just compensation under ordinary circumstances, we note that current state-approved rates would still *not* properly compensate ILECs in a post-overbuild environment. First, ILECs would be required to expend resources to maintain plant that would otherwise go unused; these expenses are attributable entirely to CLECs that wish to lease those facilities, but current TELRIC rates generally presume that ILECs are using the plant to serve their own customers and will therefore assume many of these costs. That, of course, is not true following an overbuild. Second, the cost models on which current state-determined rates are generally premised presume that the ILEC is serving its own customers over the copper network, and therefore assign a portion of joint and common costs to the ILECs. For example, loop feeder plant that would ordinarily aggregate traffic from numerous end users could be left

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Commission has repeatedly recognized, the resurrection of a network access requirement with respect to broadband-capable copper loops will undermine the CLECs' own incentives to construct more advanced facilities – as well as the incentives of intermodal providers who cannot compete against CLECs enjoying broadband service risk-free.

In sum, the relief sought by Petitioners here would turn back the clock on the Commission's broadband policies, undercutting the deployment incentives faced by ILECs, CLECs, and intermodal competitors. The Commission should reject calls to revisit its current approach absent clear and compelling evidence that revisitation is warranted.

C. The *BridgeCom Petition's* forced-sale proposal would exert the same disincentive effects as the unbundling requirements the Commission has repeatedly rejected.

The *BridgeCom Petition* asks the Commission to “explore ... the feasibility and potential advantages of requiring that ILECs be required [sic] to offer for sale loops that they might otherwise choose to retire.”⁴⁷ Any such requirement, however, would be at least as problematic as a continued unbundling requirement, and must be rejected.

While *BridgeCom et al.* appear to presume that a forced sale of ILEC network assets could result in a price reflecting those assets' market value,⁴⁸ they present no reason to believe that this will be the case. When an entity is required by law to sell its assets, there is simply no room for negotiation, because any buyer will know that the seller must ultimately divest its

mostly fallow following an FTTH deployment, carrying the traffic of only several CLEC customers. In this case, ILEC customers will not defray the cost attributable to the CLEC customer. If such plant must be left in place solely to serve those customers, the entirety of the associated cost must be borne by the CLEC. Current rates, however, do not presume as much.

⁴⁷ *BridgeCom Petition* at 14. This intrusive requirement would apparently implicate all ILECs, including those exempted by section 251(f) from section 251(c)(3)'s unbundling requirements .

⁴⁸ *See BridgeCom Petition* at 14.

property at the best available price.⁴⁹ But even if BridgeCom *et al.* were correct in presuming that the ILEC's copper plant might command something close to market value in a forced sale, it quickly becomes clear that this "market value" will have been substantially diminished by the ILEC's very decision to overbuild: The value the CLEC buyer places on the ILEC's plant will reflect the fact that it can expect to serve only a fraction of the user base previously served by the ILEC over those same facilities. Thus, the copper plant's "market" value will be substantially *below* the value the same plant held immediately prior to the overbuild – and the reduction in value will be due entirely to the ILEC's own decision to invest in new facilities. Thus, the ILEC will face a subsidized competitor using facilities obtained at a bargain price precisely because the ILEC decided to invest.

Thus, if the relief Petitioners seek is granted, ILECs will be forced to divest their assets at fire-sale prices precisely because they took risks and invested in next-generation broadband facilities. This, of course, is exactly the outcome the Commission has repeatedly sought to avoid. A guarantee that new investment will entitle one's competitors to buy one's older (but still broadband-capable) network at rock-bottom rates will have *at least* the same disincentive effect on ILECs as a requirement that one's older facility be made available for lease at TELRIC rates (with likely a *greater* disincentive effect here, because unbundling mandates can be rescinded but CLEC ownership of the facility cannot). Similarly, the ability to *buy* the ILEC's copper plant at such prices will also disincen CLEC investment in next-generation facilities. The Commission should therefore reject the *BridgeCom Petition*'s forced-sale proposal.

⁴⁹ See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537-38 (1994) (observing that "market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is (continued on next page)

D. The Petitioners' public-safety arguments are flatly inconsistent with the Commission's conclusions regarding deployment incentives.

Petitioners argue that their proposals would promote network redundancy and public safety. The Commission should reject this transparent attempt to dress Petitioners' self-serving proposals in the garb of public safety. In fact, the relief Petitioners seek will undermine deployment of the next-generation facilities of greatest use to first responders and the public in times of emergency.

Petitioners' public-safety arguments are premised on a belief that if the Commission mandates indefinite CLEC access to ILEC copper loops, (1) ILECs will maintain their existing copper plant *and* (2) all providers will continue to invest in broadband facilities at the current rate. This presumption, however, ignores the very basis of the Commission's broadband policy – namely, the recognition that network sharing obligations *stymie* investment in next-generation networks. As described in detail above, the rule Petitioners seek here would undermine broadband deployment by ILECs, CLECs *and* intermodal competitors.

Thus, if the Commission granted the petitions, the result would be not *more*, but *less*, network infrastructure: More outdated copper plant might remain in place, but only at the expense of the new, next-generation facilities of greatest use to first responders and others in times of crisis. The result would be a net loss for first responders and the general public. Both groups stand to benefit from packet-switched broadband communications capable of routing around the sort of outages and disruptions that might well attend any natural or man-made emergency. Moreover, to the extent the current rules promote deployment of broadband

the very *antithesis* of forced-sale value.”); *id.* at 538 (“In short, ‘fair market value’ presumes market conditions that, by definition, simply do not obtain in the context of a forced sale.”).

networks entirely distinct from the PSTN – operated, for example, by cable, powerline, satellite, and terrestrial wireless providers – those separate networks will do far more to promote true redundancy than will the “additional” wireline network of a CLEC, which will be linked into the *same* PSTN as the ILEC, via copper facilities often running through the *same* rights-of-way as the ILEC’s fiber. The outcome envisioned by Petitioners will create “redundancy” in only the very thinnest sense, and will do little to promote the robust, distinct networks that this term is meant to evoke.

In short, the Petitions would undermine, not promote, public safety, because they would undercut investment in the next-generation networks – wireline and otherwise – that would most benefit first responders and the public in times of crisis. The Commission should therefore reject Petitioners’ public-safety arguments.

E. The Petitioners’ request for a more expansive state role in unbundling policy contradicts Commission precedent.

The *BridgeCom Petition* asks the Commission to “stat[e] expressly that it would not conflict with federal policy for states to prohibit or restrict copper loop retirements.”⁵⁰ As the two petitions make clear, Petitioners only seek to restrict such retirement in order to *permit* continued unbundling under section 251(c)(3). The Commission has made clear, however, that states may not impose unbundling requirements any more expansive than those reflected in federal law. It should not change course here.

Section 251(d)(3) permits the Commission to preclude enforcement of state requirements that are inconsistent with its own unbundling policies or substantially prevent implementation of

⁵⁰ *BridgeCom Petition* at 14.

its regime.⁵¹ In the 2005 *BellSouth DSL Order*, the Commission considered whether this provision permitted states to mandate unbundling in cases where the Commission did not itself require such unbundling.⁵² It determined there that such requirements were *not* permitted, because state unbundling requirements more stringent than the FCC’s own requirements “do exactly what the Commission expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B).”⁵³ Such requirements “undermine the effectiveness of the [existing framework’s] incentives for deployment, including the advancement of section 706 goals.”⁵⁴ The jurisdictional ruling sought by the *BridgeCom Petition* is subject to the very same flaws, and should be rejected.

⁵¹ 47 U.S.C. § 251(d)(3).

⁵² *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, 20 FCC Rcd 6830 (2005) (“*BellSouth DSL Order*”).

⁵³ *Id.* at 6844, para. 27.

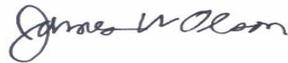
⁵⁴ *Id.* at 6846, para. 30.

III. CONCLUSION

The Commission's broadband policy has been a success, with facilities proliferating at an impressive and increasing rate. For the reasons stated above, the Commission should decline the Petitioners' invitation to repudiate that policy, and should reject the instant petitions.

Respectfully submitted,

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