

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
)  
Policies and Rules Governing Retirement )  
Of Copper Loops by Incumbent Local )  
Exchange Carriers )  
) RM-11358  
Petition of XO Communications, LLC, *et al.* )  
For a Rulemaking to Amend Certain Part 51 )  
Rules Applicable to Incumbent LEC )  
Retirement of Copper Loops and Copper )  
Subloops )  
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**OPPOSITION OF AT&T**

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March 1, 2007

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**OPPOSITION OF AT&T**

**I. INTRODUCTION AND SUMMARY.**

Pursuant to Section 1.405 of the Commission’s rules,<sup>1</sup> AT&T opposes the CLECs’ request that the Commission initiate a proceeding to impose new and onerous requirements governing ILEC retirement of copper loop facilities.<sup>2</sup> In their petitions, the CLECs ask the Commission to adopt a formal process for Commission review and approval of any proposed retirement of copper loops or subloops by an ILEC. Under the CLECs’ proposals, an ILEC seeking to retire copper facilities would first be required to file a formal application with the Commission showing that its proposed retirement of copper is necessary for the ILEC to overbuild with fiber and will serve the public

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<sup>1</sup> 47 C.F.R. § 1.405.

<sup>2</sup> Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers, BridgeCom International, *et al.*, Petition for Rulemaking and Clarification (filed Jan. 18, 2007) (“BridgeCom Petition”); Petition of XO Communications, LLC, *et al.*, For a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops (filed Jan. 18, 2007) (“XO Petition”) (collectively “CLEC Petitions”).

interest.<sup>3</sup> The proposed retirement would be presumed *not* to serve the public interest, and the ILEC would bear the burden of justifying the retirement of its copper facilities.<sup>4</sup> And, the ILEC's application to retire copper would be deemed denied unless the Commission finds that it would serve the public interest and is necessary to overbuild fiber facilities.<sup>5</sup> BridgeCom further proposes that the Commission clarify that states may adopt even more stringent restrictions on copper retirement, and consider mandating the forced sale or auction of spare copper loops.<sup>6</sup>

The CLECs contend that these proposed changes are necessary because the existing copper retirement rules do not adequately safeguard against purportedly discriminatory and anticompetitive conduct by ILECs that, they claim, has effectively denied CLECs access to UNEs used to provide broadband services to retail and business customers.<sup>7</sup> In particular, they claim that the existing rules do not provide CLECs a

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<sup>3</sup> XO Petition at 6. BridgeCom, *et al.* propose that an ILEC be permitted to retire copper only if it can show that the ILEC will suffer undue hardship if it is not allowed to retire copper, or if retirement is caused by factors outside the control of the ILEC. BridgeCom Petition at 11-12.

<sup>4</sup> XO Petition at 6; BridgeCom Petition at 12.

<sup>5</sup> XO Petition at 6; BridgeCom Petition at 13 (proposing that objections to ILEC copper retirement would be denied only on a written order of the Commission). XO asserts that, under its proposal, the ILEC would incur no ongoing maintenance obligation for copper facilities that it seeks to retire absent a request to unbundle them, at which point the ILEC would be required to undertake any necessary upgrades or other maintenance necessary to restore the copper to operational status with no opportunity to recover the costs of such restoration work. Obviously, an ILEC would, as a practical matter, be required to maintain any copper remaining in inventory to ensure that it could meet UNE performance requirements, as well as to ensure that those facilities did not pose a hazard. XO's proposal not to "require" ILEC's to incur ongoing maintenance obligations for copper they seek to retire thus is no more than a hollow gesture.

<sup>6</sup> BridgeCom Petition at 13-14.

<sup>7</sup> XO Petition at 1; BridgeCom Petition at 4-7. BridgeCom alleges that BellSouth's purported "rush to unnecessarily retire" the feeder portion of copper loops "verifies that ILECs will act on anticompetitive incentives to retire copper loops." *Id.* at 6-7, citing "BellSouth's numerous copper loop retirements" in 2006 on BellSouth's website. As discussed below, the cite to which

meaningful opportunity to object to copper retirement or for the FCC and state commissions to assess the purported public interest harms resulting from such retirement.<sup>8</sup> The CLECs argue that these purported harms include: the elimination of network redundancy in the event of a terrorist attack or natural disaster, and a concomitant increase in the recovery period following such events;<sup>9</sup> the inhibition of competition by denying CLECs’ the “ability to serve and grow as network competitors” because the narrowband channel on replacement fiber does not allow CLECs to provide the “full array” of “broadband” services that “they could feasibly offer over such copper facilities, now or in the future;”<sup>10</sup> and the purported inhibition of broadband deployment by denying CLECs access to copper facilities, which, they claim, now can deliver substantially more bandwidth than it did when the *Triennial Review Order* was adopted.<sup>11</sup>

The CLECs’ petitions do not even come close to supporting these arguments or the rules they propose. While the CLEC petitions are long on rhetoric and rife with speculation and innuendo, they are utterly devoid of any evidence that ILECs have retired

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BridgeCom refers, which is the only “evidence” either petition cites to support their claims that ILECs have anticompetitively retired numerous copper loops, lists 189 network notices for the entire BellSouth region in 2006, 43 of which involved changes or cancellations of prior notices, and only 12 of which impacted circuits sold to CLECs (and those 12 notices affected a grand total of 38 CLEC circuits). Given the literally millions of copper circuits in BellSouth’s territory and the infinitesimal number of copper retirement notices, and the even smaller number of notices that affected CLEC services, the CLECs have presented no case that ILEC retirement of copper loop facilities is a problem deserving of any Commission attention, but have amply demonstrated that their proposal is a solution in search of a problem. Indeed, as with so many of these CLECs’ filings over the past decade, the CLECs’ petitions are “full of sound and fury, signifying nothing.” Shakespeare, *Macbeth*, Act 5, Scene 5.

<sup>8</sup> XO Petition at 7-8; BridgeCom Petition at 8.

<sup>9</sup> XO Petition at 1-2, 15-17; BridgeCom Petition at 9-10.

<sup>10</sup> XO Petition at 10; BridgeCom Petition at 8-9.

<sup>11</sup> XO Petition at 13; BridgeCom Petition at 9.

copper “to thwart competition,” as they claim.<sup>12</sup> Nor do they present any new or credible arguments to support their proposals that were not considered and rejected by the Commission in the *Triennial Review Order* when it adopted the existing regime. For these reasons alone, their petitions should be summarily denied.

Equally important, the CLECs’ proposals would up-end key components of the Commission’s broadband regulatory regime, which were designed to stimulate and promote deployment of next-generation infrastructure by ILECs and CLECs alike. In particular, their proposals would force ILECs to maintain redundant copper loop facilities, and deny them the ability to efficiently manage and upgrade their networks, on the off chance that a CLEC might someday seek to use those copper facilities to provide broadband services. The CLECs’ proposed rules thus not only would discourage ILEC investment in fiber and other facilities to upgrade their networks to provide broadband services, but also eliminate any incentive for CLECs to deploy their own broadband facilities, contrary to Commission policy and the objectives of the 1996 Act.

The CLECs’ proposals also are flatly inconsistent with the unbundling requirements of the Act and the Commission’s rules and orders. Specifically, as their petitions make clear, petitioners seek to impose onerous copper loop retirement procedures to maintain CLEC access to copper loops not to provide those narrowband services for which the Commission has found impairment, but rather to provide broadband services for which the Commission explicitly found no impairment. But, as

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<sup>12</sup> BridgeCom Petition at 4; XO Petition at 3 (baldly asserting, without citing any evidence or other support, that “incumbent LECs regularly have exploited the Commission’s permissive rules for retirement of copper loops and copper subloops to render unavailable bottleneck copper loop facilities used by competitive LECs to serve the retail consumer and business customer markets, under the guise of ‘upgrading’ legacy networks to advance [sic] deployment of broadband services”).

the Supreme Court and DC Circuit have repeatedly made clear, the Commission cannot require unbundling in the absence of impairment. As such, the CLECs' petitions are contrary to the unbundling provisions of the 1996 Act and should be rejected out of hand.

## **II. BACKGROUND.**

If there is one aspect of the Commission's network unbundling regime that has been a success to date, it has been the Commission's long-standing hands-off policy with respect to the facilities and investment used to provide broadband services. Over the past decade, the Commission has repeatedly rejected CLEC claims that they are impaired in their ability to provide broadband services without unbundled access to ILEC facilities, both because it found new entrants stand largely on the same footing as ILECs when it comes to deployment of broadband facilities<sup>13</sup> and because it determined that the potential rewards and revenue opportunities from providing broadband services offsets the cost of deploying such facilities, rendering facilities-based entry economic.<sup>14</sup> The Commission further has recognized that forced sharing of the facilities used to provide those services impedes, rather than promotes, this critical congressional objective by undermining the incentives of both incumbents and new entrants to invest in new

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<sup>13</sup> See *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*) (rejecting proposals to require ILECs to provide unbundled access to packet switching). See also *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696, para. 306 (1999) (*UNE Remand Order*) (rejecting CLEC claims of impairment with respect to packet-switched facilities).

<sup>14</sup> *Triennial Review Order* at para. 240 (noting that carriers can earn significant returns on their broadband investment by providing a suite of services ranging from traditional voice to full-motion video).

facilities and new technologies.<sup>15</sup> The Commission accordingly has declined to require ILECs to provide CLECs unbundled access to network elements for the provision of broadband services.<sup>16</sup>

Of particular relevance here, in the *Triennial Review Order*, the Commission ruled that 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 that, in brownfield (or overbuild) situations, ILECs need only provide *either* a spare copper loop or a 64 kbps voice grade transmission path.<sup>17</sup> The Commission found that, in greenfield situations, CLECs are not impaired without access to ILEC fiber because the barriers to entry for both incumbent and competitive carriers are the same, and the potential rewards and revenue opportunities available to carriers from the deployment of broadband (including revenues from the provision of voice, data, video and other services) ameliorate whatever barriers exist.<sup>18</sup> The Commission therefore determined that ILECs need not unbundle greenfield fiber for *either* narrowband *or* broadband services.<sup>19</sup>

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<sup>15</sup> *Triennial Review Order* at para. 3 (“[W]e are very aware 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. The effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment.”)

<sup>16</sup> The only exception was the obligation to provide unbundled access to the TDM-based features, functions and capabilities, including DS1 and DS3 transmission, of hybrid fiber-copper loops, where those capabilities are already deployed. *Triennial Review Order* at paras. 291, 294.

<sup>17</sup> *Id.* at paras. 275-77.

<sup>18</sup> *Id.* at paras. 274-75.

<sup>19</sup> *Id.* at para. 275.

The Commission likewise concluded that CLECs are not impaired in their ability to provide *broadband* services without access to ILEC facilities in brownfield – or overbuild – situations. In particular, the Commission found that, as in greenfield situations, CLECs and ILECs face the same obstacles to deployment of FTTH loops in overbuild scenarios.<sup>20</sup> And, while the Commission acknowledged that ILECs enjoyed an established customer base in overbuild situations, it concluded that whatever advantage this might convey was outweighed by the significantly greater revenue opportunities available to CLECs that deploy their own broadband facilities.<sup>21</sup> The Commission therefore ruled that ILECs need not unbundle fiber loop facilities for the provision of broadband services, even in brownfield environments.

The one exception to the Commission’s hands-off policy for ILEC broadband loop facilities was in fiber loop overbuild situations where the ILEC elects to retire existing copper loops, in which case the ILEC was required to offer unbundled access to a 64 kbps voice grade transmission path on those fiber loops, but – the Commission emphasized – such access need be offered for the provision of “*narrowband services only*.”<sup>22</sup> The Commission found, in that situation, an ILEC might be able to deny CLECs the ability to provide *narrowband* services to the mass market by replacing *pre-existing*

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<sup>20</sup> *Id.* at para. 276.

<sup>21</sup> *Id.* (“[B]esides providing narrowband services like voice, fax, and dial-up Internet access, competitive LECs could also provide a wide-array of video and other broadband applications over such FTTH loops. . . . Thus, the potential rewards for deploying overbuild FTTH loops are distinctly greater than those associated with deploying copper loops and thus present a different balance when weighed against the barriers to entry.”)

<sup>22</sup> *Id.* at para. 273 (emphasis added).

copper loops with fiber.<sup>23</sup> Thus, “[i]n order to ensure *narrowband access* in this situation,” the Commission gave incumbent LECs “the option to either (1) keep the existing copper loop connected to a particular customer after deploying FTTH; or (2) in situations where the incumbent LEC elects to retire the copper loop, it must provide unbundled access to a 64 kbps transmission path over its FTTH loop,”<sup>24</sup> which, the Commission concluded, “would counteract any obstacles competitive LECs face in overbuild FTTH situations.”<sup>25</sup> Again, the Commission emphasized that this “very limited requirement [was] intended only to ensure continued access to a local loop suitable for providing narrowband services” where the ILEC elects to retire copper.<sup>26</sup>

The Commission specifically rejected proposals – virtually identical to those pushed by the CLECs here – that the Commission prohibit ILECs from retiring any copper loops or subloops that they replace with fiber, or impose extensive rules that would require ILECs to obtain affirmative regulatory approval before retiring any copper loop facilities.<sup>27</sup> The Commission acknowledged that requiring ILECs to maintain two networks would impose additional costs on ILECs,<sup>28</sup> and concluded that the Commission’s existing network modification rules, with minor modifications, would

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<sup>23</sup> *Id.* at para. 277.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at para. 281.

<sup>28</sup> *Id.* fn. 823.

adequately safeguard CLEC interests, rejecting CLEC arguments, like those offered here, that additional rules were necessary.<sup>29</sup>

The Commission similarly ruled that ILECs need not unbundle hybrid fiber-copper loops for the provision of broadband services. Specifically, it declined to require ILECs to unbundle the packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services, allowing CLECs to access such facilities only for the provision of narrowband services and TDM-based DS1 and DS3 services, where such TDM functionality exists.

The Commission observed that its decision to deny CLECs access to ILEC loop facilities for the provision of broadband services would promote investment in, and deployment of, next generation networks, consistent with the requirements of section 706. In particular, it found that relieving ILECs of unbundling obligations for broadband facilities would encourage ILECs to expand their deployment of those facilities, secure in the knowledge that they would reap the rewards of their investment.<sup>30</sup> Likewise, it found that, with the knowledge that they could not obtain unbundled access to ILEC facilities for the provision of broadband services, CLECs would be forced to invest in, and deploy, the infrastructure necessary to provide competitive broadband services.<sup>31</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at para. 272.

<sup>31</sup> *Id.* at paras. 272, 278.

**III. THE COMMISSION'S BROADBAND UNBUNDLING POLICIES HAVE BEEN ENORMOUSLY SUCCESSFUL, AND PETITIONERS HAVE FAILED TO SHOW THAT ANY CHANGE IS NECESSARY OR APPROPRIATE.**

The Commission's broadband unbundling policies, which have been upheld by the courts, have succeeded in stimulating broadband investment as the Commission anticipated and intended. A wide spectrum of competitors has deployed broadband over multifarious platforms, including satellite, cable infrastructure, broadband over power lines, fixed wireless and wireline technologies without any reliance on ILEC facilities. And, in reliance on the Commission's broadband unbundling policies, ILECs have expended billions of dollars to extend fiber deeper into their networks to bring broadband choice to millions of customers. According to the Commission's own statistics, the number of high-speed lines has almost tripled since the Commission adopted its existing broadband unbundling regime in the *Triennial Review Order*.<sup>32</sup> While ILEC investment and deployment of broadband facilities has been impressive, the growth in facilities-based broadband competition has been equally spectacular. For example, the number of satellite and wireless broadband lines has grown by a factor of 38 to almost 12 million lines.<sup>33</sup> Over the same period, cable modem lines more than doubled, while DSL lines almost tripled and the number of fiber loops increased six-fold.<sup>34</sup> As a consequence, ILECs account for less than half of the broadband lines currently in service.<sup>35</sup>

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<sup>32</sup> *Compare* 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) (*2003 Report*) with 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. Dec. 2006) (*2006 Report*).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

In light of the spectacular growth in broadband investment and competition that has resulted from the Commission’s broadband policies and rules – including, in particular, its decision to deny CLECs unbundled access to ILEC facilities for the provision of broadband services – the burden clearly is on the proponents of any changes to those policies and rules to show that a change is necessary, and that any such change would be equally successful in promoting broadband deployment by all market participants. The CLECs have not even come close to meeting that challenge.

As an initial matter, the CLECs have failed to show that ILEC copper retirement has posed any problem in need of a solution. They have not offered a single shred of evidence to support their claim that ILECs have, or even can, thwart competition for broadband and other services by retiring copper loop facilities, or that the Commission’s existing rules are inadequate. XO, for example, cited nothing to support its claims that “[t]hree years experience” shows that the existing rules “clearly have failed to protect the public interest, and need reexamination,” and that ILECs “regularly have exploited the Commission’s permissive rules for retirement of copper loops and copper subloops to render unavailable bottleneck copper loop facilities . . . under the guise of ‘upgrading’ legacy networks to advance deployment of broadband services.”<sup>36</sup> And, while BridgeCom claims that BellSouth’s alleged “rush to unnecessarily retire the feeder portion of copper loops . . . verifies that ILECs will act on anticompetitive incentives to retire copper loops,” the only so-called evidence it cites is the purportedly “numerous

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<sup>35</sup> *2006 Report* at Table 1.

<sup>36</sup> XO Petition at 3.

copper loop retirements” in 2006 listed on BellSouth’s website.<sup>37</sup> But, as noted above, the website to which BridgeCom refers lists only 189 network notices for BellSouth’s entire region in 2006, 43 of which involved changes or cancellations of prior notices, and only 12 of which impacted circuits sold to CLECs. Even those 12 notices affected only 38 CLEC circuits – out of the millions of copper circuits in BellSouth’s territory. Additionally, 10 of those notices did not involve copper retirements, and at least 51 of them involved copper retirements necessitated by circumstances beyond BellSouth’s control, such as damage due to Hurricane Katrina and other natural causes and road moves, and virtually none of the notices were subject to any opposition.

Neither BridgeCom nor XO cited any evidence regarding ILEC retirement of copper loop facilities in other regions – and for good reason. In AT&T’s premerger, thirteen-state territory, AT&T retired copper loop facilities in only four instances between 2002 and 2006. Three of these retirements were caused by road moves and one by force majeure, and none were opposed.

AT&T and other ILECs currently maintain literally tens of millions of copper loop facilities, yet the CLECs have cited only a handful of instances in which an ILEC has retired copper loop facilities over the past year, and even those retirements affected only 38 circuits leased to CLECs. Presumably, if the CLECs had any additional or stronger data to support their claims, they would have submitted that evidence with their petitions; their failure to do so is telling indeed.

Nor do the CLECs present any new or credible arguments to support their proposals that were not considered and rejected by the Commission in the *Triennial*

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<sup>37</sup> BridgeCom Petition at 6-7, n.16.

*Review Order.* When it adopted its existing loop unbundling policies and rules (including the copper retirement rules), the Commission was well aware that, as they deployed fiber deeper into their networks, ILECs might find it uneconomic to continue to maintain existing copper loop facilities and thus might retire them, depriving CLECs of unbundled access to those facilities. For that reason, the Commission specifically gave ILECs (not CLECs) the option either to continue to maintain and unbundle that copper *or* to provide unbundled access to a 64 kbps channel on their fiber facilities (and refused to prohibit ILECs from retiring copper) so as to ensure that ILECs could efficiently control and manage their networks without interference. And, as discussed above, the whole point of those rules was to encourage ILECs to upgrade their networks to promote broader deployment of broadband facilities and services, as well as to encourage CLECs to make the investment and deploy the facilities necessary to provide broadband services without any reliance on ILEC facilities. Moreover, having determined that CLECs were impaired only in their ability to provide *narrowband* services without access to ILEC facilities, and having directly addressed that issue by requiring an ILEC to provide a voice grade channel on its fiber loops if it elected to retire existing copper, the Commission reasonably concluded that its existing network notification requirements (with minor modifications) would adequately safeguard any legitimate CLEC interest.<sup>38</sup> The Commission therefore rejected CLEC arguments (echoed here) that ILECs should be categorically prohibited from retiring copper loop facilities, or subject to extensive rules

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<sup>38</sup> AT&T notes, in this regard, that at the time the Commission adopted its copper loop retirement rules, the Commission was well aware that CLECs might use copper loops to provide xDSL services, but nevertheless allowed ILECs, at their option, either to provide CLECs access to spare copper or to offer a 64 kbps voice channel on brownfield fiber in the event the ILEC decided to retire such copper. The CLECs thus have failed to show any changed circumstances here that would merit Commission reexamination of its copper retirement policies.

requiring affirmative regulatory approval before retiring such facilities, and should do so again here.

The CLECs' other arguments fare no better. In particular, their attempt to exploit public anxiety over the twin threats of terrorism and natural disaster by arguing that their proposals would promote network redundancy and public safety is not only inappropriate, but also wholly untrue. In the first place, ILECs already follow prudent engineering principles and maintain reasonable and appropriate network redundancies to address the risk of damage to their networks from such threats. The CLECs' proposals thus are superfluous. But, in any event, when ILECs deploy fiber in overbuild situations they typically utilize the same rights of way, conduits and support structures through or on which existing copper facilities are deployed. As a consequence, if an ILEC's fiber loop facilities were damaged or destroyed through terrorist attack or natural disaster, its copper facilities likely also would be damaged or destroyed, and thus unavailable to restore service quickly. Moreover, requiring an ILEC to retain copper where the ILEC has determined it would be uneconomic or otherwise too burdensome to maintain would simply divert resources that could be used to restore service in the event of a disaster and require the ILEC to divide its attention and personnel to restore two networks, lengthening (rather than reducing) any resulting network outage. The CLECs' public safety claims thus are vacuous and should be rejected out of hand.

Likewise, their claims that allowing ILECs to retire copper loop facilities inhibits competition and broadband deployment fail to hold any water. They claim, for example, that ILEC copper retirement inhibits competition because the narrowband channel on replacement fiber does not allow them to provide the "full array" of "broadband" services

that “they could feasibly offer over such copper facilities, now or in the future.”<sup>39</sup> But that argument flies in the face of the Commission’s determination in the *Triennial Review Order* (affirmed by the D.C. Circuit) that CLECs are impaired only in their ability to provide *narrowband* (not broadband) services without access to ILEC loop facilities in fiber overbuild scenarios.<sup>40</sup> And, the Commission directly addressed that impairment by ensuring that, in cases in which an ILEC replaces copper with fiber loop facilities, the CLECs would continue to have access to ILEC facilities to provide narrowband services.<sup>41</sup>

Their claim that denying CLECs access to copper in brownfield environments inhibits broadband deployment because copper facilities purportedly now can deliver substantially more bandwidth than when the *Triennial Review Order* was adopted<sup>42</sup> fails for the same reason. Specifically, the Commission concluded in the *Triennial Review Order* that CLECs were not impaired in their ability to provide broadband services without access to ILEC loops because the potential rewards and revenue opportunities associated with such services ameliorated whatever barriers to entry might exist.<sup>43</sup> CLECs thus have no need to access ILEC facilities to provision their own broadband services. The Commission further determined that denying CLECs access to ILEC loop facilities for the provision of broadband services would promote investment in, and

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<sup>39</sup> XO Petition at 10; BridgeCom Petition at 8-9.

<sup>40</sup> *Triennial Review Order* at para. 276.

<sup>41</sup> *Id.* at para. 277.

<sup>42</sup> XO Petition at 13; BridgeCom Petition at 9.

<sup>43</sup> *Id.* at paras. 274-75.

deployment of, next generation networks by ILECs and CLECs alike, and that forced sharing of such facilities would discourage such investment – and rightly so.<sup>44</sup> Plainly, CLECs will not invest in their own broadband transmission facilities if they can obtain access to ILEC facilities at below-cost UNE rates. Likewise, ILECs may scale back their investment in broadband if they are forced to divert capital and other resources to maintain copper where it is uneconomic or burdensome to do so. Insofar as the CLECs have failed to offer any new evidence or other basis for second-guessing these conclusions (and it is hard to see how the CLECs could make such a showing given the success of the Commission’s unbundling rules in spurring facilities-based competition and encouraging broadband deployment), their petitions should be summarily denied.

**IV. The CLECs’ Proposals are Inconsistent with the Requirements of Section 251(c)(3).**

As noted above, the CLECs’ proposals are flatly inconsistent with the unbundling requirements of the Act and the Commission’s rules and orders. As their petitions make clear, petitioners ask the Commission to impose onerous copper loop retirement procedures to maintain CLEC access to copper loop facilities not to provide those narrowband services for which the Commission has found impairment, but rather to provide broadband services for which the Commission explicitly found no impairment. But, as the Supreme Court and DC Circuit have repeatedly made clear, the Commission cannot require unbundling in the absence of impairment.

Their proposals also are inconsistent with the Eighth Circuit’s decision in *Iowa Utilities Board*, and the Commission’s decision in the *Triennial Review Order*, that

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<sup>44</sup> *Id.* at paras. 272, 278.

section 251(c)(3) requires unbundled access only to an ILEC's existing network, and that an ILEC cannot be required to perform network modifications that it would not undertake for its own customers.<sup>45</sup> While those decisions specifically addressed whether an ILEC could be required to build new facilities or modify existing facilities in response to CLEC demand, rather than the retirement of an ILECs' existing facilities, the basic principle enunciated by the court and Commission applies equally here: that is, a CLEC takes an ILEC's network as the CLEC finds it and cannot require an ILEC to build, modify or maintain network facilities that it otherwise would not build or maintain solely for the CLEC's benefit. Consequently, any requirement that an ILEC must maintain network facilities that it otherwise would not maintain would be inconsistent with the unbundling requirements of 251(c)(3). As such, the CLECs' petitions should be rejected out of hand.

**V. BRIDGECOM'S REQUESTS THAT THE COMMISSION CLARIFY THAT STATES MAY ADOPT MORE STRINGENT COPPER RETIREMENT RULES AND CONSIDER MANDATING THE FORCED SALE OF SPARE COPPER LOOPS ARE PREMATURE.**

Finally, the Commission should reject BridgeCom's proposals that the Commission clarify that states may adopt even more stringent restrictions on copper retirement, and consider mandating the forced sale or auction of spare copper loops.<sup>46</sup> Plainly, until or unless the Commission concludes that ILEC retirement of copper loops poses a problem (and, for the reasons articulated above, it should not), any consideration of these proposals would be premature. Consequently, AT&T will not address these suggestions here.

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<sup>45</sup> *Iowa Utils. Bd. V. FCC*, 120 F.3d at 813; *Triennial Review Order* at paras. 630-32.

<sup>46</sup> BridgeCom Petition at 13-14.

## VI. CONCLUSION

The Commission's hands-off policy for broadband, and, in particular, its broadband unbundling policies and rules, has proven to be a success. As the Commission anticipated, ILECs, secure in the knowledge that they would reap the rewards of their investment in broadband, have invested billions of dollars to expand their deployment of fiber and next-generation networks. Likewise, inter- and intra-modal competitors have vastly increased their investment in the infrastructure necessary to provide competitive broadband services, resulting in the type of facilities-based competition intended by the Commission and Congress in the 1996 Act. Subjecting ILECs to onerous copper loop retirement requirements in order to ensure that CLECs can have access to ILEC copper to provide broadband services, as the CLEC petitioners propose, would dramatically alter the investment calculus for all concerned. For ILECs, it would significantly increase the cost of deploying next generation networks by forcing the ILEC to maintain redundant facilities on the off-chance that some CLEC some day might want to purchase unbundled copper loops, and thus reduce both the capital available and ILEC incentives to deploy those facilities. It also would reduce CLEC incentives to deploy their own broadband transmission facilities because the cost of deploying those facilities would inevitably be higher than purchasing below-cost UNEs. Moreover, the CLECs have failed to provide any evidence or new arguments that would warrant any change in Commission's existing loop unbundling policies and rules – including its existing copper retirement rules. Accordingly, and for the reasons articulated above, the Commission should reject the CLECs' petitions.

Respectfully submitted,

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March 1, 2007

**CERTIFICATE OF SERVICE**

I, Shandee R. Parran, hereby certify that on this 1<sup>st</sup> day of March 2007, a copy of AT&T's Opposition to the Petitions for Rulemaking filed by BridgeCom, *et al.* and XO, *et al.* in File No. RM-11358, was served by First Class U.S. Mail postage prepaid to the following:

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