FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

ORDER ON RECONSIDERATION

Adopted: August 4, 2004 **Released: August 9, 2004**

By the Commission: Chairman Powell, and Commissioner Abernathy issuing separate statements; Commissioner Adelstein concurring in part, dissenting in part, and issuing a statement; Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. In this Reconsideration Order (Order), we address, in part, the BellSouth and SureWest petitions for clarification and/or partial reconsideration of our Triennial Review Order.[1] Specifically, we reconsider certain of the Commission's determinations with regard to multiple dwelling units (MDUs) and conclude that the fiber-to-the-home (FTTH) rules will apply to MDUs that are predominantly residential. We further clarify that the definition of FTTH loops includes fiber loops deployed to the minimum point of entry (MPOE) of MDUs, regardless of the ownership of the inside wiring.[2]

[1]We do not address issues relating to the regulatory treatment of treatment of fiber-to-the-curb loops, dark fiber, network modification to provide access to time division multiplexing (TDM) capabilities, or the access obligations of section 271. *See* BellSouth Petition at 1-9, 10-16, 16-17, 18-19; SureWest Petition at 8-9. We also do not address issues relating to clarifying the definitions of "mass market" or "enterprise market." SureWest Petition at 6-8.

[2]In using the phrase "inside wire" or "inside wire subloop," we continue to apply the definitions the Commission utilized in the *Triennial Review Order*. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd (continued....)

II. BACKGROUND

2. In the *Triennial Review Order*, the Commission imposed only limited unbundling obligations on incumbent LECs' broadband loops. In *USTA II*, the D.C. Circuit recently upheld these rules.[3] For loops serving mass market customers, the Commission ruled that incumbent LECs need not unbundle either dark or lit fiber loops that extend to the customer's premises (known as fiber-to-the-home or FTTH loops) deployed in new build, or "greenfield," situations.[4] Where a FTTH loop is deployed in overbuild, or "brownfield," situations, incumbent LECs must either provide unbundled access to a 64 kbps transmission path over the fiber loop or unbundled access to a spare copper loop.[5] For hybrid copper/fiber loops, the Commission specified that incumbent LECs need not unbundle the packet-switched capabilities of those loops, but must provide unbundled access to any TDM features, functions, and capabilities for requesting carriers seeking to provide broadband services.[6] When a requesting carrier seeks access to a hybrid loop to provide narrowband service, the incumbent LEC may provide either unbundled access to an entire hybrid loop capable of voice grade service using TDM technology or provide unbundled access to a spare copper loop.[7]

3. BellSouth and SureWest seek clarification and reconsideration of several aspects of the Commission's rules regarding fiber loops that we address in this Order. The petitioners request reconsideration of the extent to which fiber loops serving MDUs are regulated pursuant to the FTTH rules. Specifically, BellSouth and SureWest request that the Commission apply the FTTH rules to MDUs.[8] In addition, they assert that the definition of FTTH should apply to MDUs regardless of how far into the building the fiber extends, and regardless of the ownership of the inside wiring.[9]

III. DISCUSSION

4. *Predominantly Residential MDUs*. For the reasons discussed below, we grant in part the BellSouth and SureWest requests and conclude that, to the extent fiber loops serve MDUs that are

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16978, 17186, para. 343 n.1021 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

[3] *USTA II*, 359 F.3d at 578-85.

[4] *Triennial Review Order*, 18 FCC Rcd at 17143, para. 275; 47 C.F.R. § 51.319(a)(3)(i).

[5] *Triennial Review Order*, 18 FCC Rcd at 17144-45, paras. 276-77; 47 C.F.R. § 51.319(a)(3)(ii).

[6] *Triennial Review Order*, 18 FCC Rcd at 17149-90, paras. 288-89; 47 C.F.R. §§ 51.319(a)(2)(i), (ii).

[7] *Triennial Review Order*, 18 FCC Rcd at 17153-54, para. 296; 47 C.F.R. § 51.319(a)(2)(iii).

[8] BellSouth Petition at 9-10; SureWest Petition at 5-7.

[9] The rules we adopt today with respect to the inside wire subloop are not intended to impact or otherwise modify any aspect of our existing rules regarding the inside wire on the non-network side of the demarcation point, either inside the subscriber's suite or under the control of the premises owner as set forth in sections 68.100 *et. seq.* 47 C.F.R. § 68.100 *et. seq.*

predominantly residential in nature, those loops should be governed by the FTTH rules.[10] In the *Triennial Review Order*, the Commission concluded that competitive carriers seeking to serve mass market customers residing in MDUs face similar deployment barriers as when serving enterprise customers.[11] We find in this Order, however, that 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.[12] Thus, we find that the Commission was overly broad in its classifications of MDUs by failing to make distinctions among different types of multiunit environments.

5. Ultimately, the question presented in these petitions is whether we could have – and should have – more precisely calibrated our broadband analysis for fiber loops for particular customers that reside in MDUs, rather than treat all customers in multiunit premises the same. After performing the section 706 balancing for customers located in predominantly residential MDUs, we conclude that the record here demonstrates that the same unbundling relief as provided for FTTH loops is warranted for such MDUs. In arriving at this conclusion, we are persuaded that making such a change in our rules is necessary to ensure that regulatory disincentives for broadband deployment are removed for carriers seeking to serve those customers – residential customers – that pose the greatest investment risk.[13]

6. We find that it is possible to draw an administrable line between predominantly residential MDUs and other types of multiunit premises. General examples of MDUs include apartment buildings, condominium buildings, cooperatives, or planned unit developments.[14] In making a distinction based upon the "predominantly residential" nature of the dwelling or development, we note that in other contexts the Commission likewise has drawn distinctions based on the predominantly residential nature of premises.[15] Specifically, in the *Competitive Networks Order*, the Commission drew a distinction

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[10]According to AT&T, BellSouth's petition on these issues may not be granted because the evidence relied upon could have been filed during the *Triennial Review* proceeding, but was not. AT&T Comments at 12 (citing 47 C.F.R. § 1.429(b)). Even if we were to determine that BellSouth's petition is procedurally flawed under section 1.429(b)(1) and (2) of our rules, the importance to broadband deployment of the reconsideration and clarification we grant would warrant our discretionary review of the substance of the petition. *See* 47 C.F.R. § 1.429(b)(3)(a petition that relies on facts not previously presented to the Commission will be granted where "[t]he Commission determines that consideration of the facts relied on is required in the public interest."). Therefore, we need not address the procedural issue raised by AT&T.

[11]*Triennial Review Order*, 18 FCC Rcd at 17102-03, para. 197 n.624. Accordingly, the Commission determined that its impairment findings with respect to enterprise loops also apply to loops serving mass market customers in MDUs. *Id.*

[12]47 U.S.C. § 157 nt.

[13]*See, e.g.*, High Tech Broadband Coalition Comments, CC Docket Nos. 01-338, 96-98, 98-147 at 28-29, Attach. at 12 (filed Apr. 5, 2002); *Triennial Review Order*, 18 FCC Rcd at 17122-23, 17169-70, paras. 237, 316-17.

[14]*See, e.g.*, 47 C.F.R. § 76.800(a) (defining "MDU" in the context of cable television regulations); *OPTEL, INC. Petition For Waiver of Section 101.603 of the Commission's Rules*, Order, DA 99-406 at para. 2 n.4 (WTB Mar. 10, 1999) (discussing the definition of MDU for purposes of an analysis of SMATV service); *World Satellite Network, Inc. v. Tele-Communications, Inc., et al.*, Memorandum Opinion and Order, DA 99-1572 at para. 8 (CSB Aug. 11, 1999) (discussing locations to which video programming is sold).

[15]*See, e.g.*, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the* (continued....)

between the rules governing exclusive contracts based on whether a property being served was commercial or residential, with such determination being made on the basis of its "predominant use."[16] The Commission stated that, "for example, an apartment building that includes retail or professional establishments on the ground floor would be considered residential, whereas an office building that includes one or a few residential users would be considered commercial. We believe that in most instances the predominantly residential or commercial character of a property will be clear on the facts."[17] For example, a multi-level apartment building that houses retail stores such as a drycleaner and/or a mini-mart on the ground floor is predominantly residential, while an office building that contains a floor of residential suites is not.

7. We decide to include predominantly residential MDUs in our FTTH rules for the following reasons. First, as we did in the *Triennial Review Order*, we retain the flexibility under our section 251(d)(2) "at a minimum" authority to consider the statutory goals of section 706 which requires us to encourage the deployment of advanced telecommunications capability to all Americans.[18] We conclude that not requiring unbundling for fiber loops serving predominantly residential MDUs furthers the goals of section 706. The record reveals that millions of Americans today live in MDUs, constituting perhaps as much as one-third of the population.[19] Many of these individuals live in predominantly residential MDUs.[20] Currently, such residential customers typically obtain service over copper loops at the DS0 capacity level.[21] For these customers, next-generation networks provide significantly greater potential for the delivery of advanced telecommunications capability.[22] It would be inconsistent with the Commission's goal of promoting broadband deployment to the mass market to deny this substantial

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Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 23001, para. 38 (2000) (*Competitive Networks Order*).

[16] *Id.*

[17] *Id.*

[18] *See Triennial Review Order*, 18 FCC Rcd at 17121, para. 234; 47 U.S.C. § 251(d)(2). The D.C. Circuit affirmed the Commission's use of the "at a minimum" clause in this manner to consider investment disincentives pursuant to section 706. *USTA II*, 359 F.3d at 572, 580.

[19] *See* BellSouth Reply at 7 (stating that one-third of the population resides in multiunit premises); Verizon Comments at 22 (stating that 30-35% of the population currently lives in multiunit premises); Telecommunications Research and Action Center *et al.* Reply at 6 (citing 2001 U.S. Census data demonstrating that 25 million households, representing 100 million people, live in multiunit premises).

[20] *See* Verizon Comments at 20 (noting that small and medium-size business customers "typically are at the same locations and mixed in with residential and other business customers").

[21] As we state in the *Triennial Review Order*, residential customers and small business customers typically purchase analog loops, DS0 loops, or loops using xDSL-based technologies. *See Triennial Review Order*, 18 FCC Rcd at 17109, para. 209. We have no evidence to suggest that the loops purchased by consumers living in predominantly residential MDUs would differ from other residential customers.

[22] *Triennial Review Order*, 18 FCC Rcd at 17145, para. 278.

segment of the population the benefits of broadband by retaining the regulatory disincentives associated with unbundling.[23] Indeed, disincentives faced by carriers seeking to deploy broadband capabilities to single family dwellings also apply in the context of predominantly residential MDUs.[24] A regulatory distinction between mass market individual occupancy premises and predominantly residential MDUs could cause incumbent LECs to shift any investment in fiber networks that they do make away from predominantly residential MDUs to markets with fewer investment disincentives.[25] Accordingly, providing unbundling relief for predominantly residential MDUs helps reduce disincentives for incumbent LECs to deploy next-generation facilities and further ensures that all Americans, not just those residing in single family homes, will be able to reap the benefits of broadband technology.

8. Second, we conclude that tailoring FTTH relief to predominantly residential MDUs is more appropriate than a single, categorical rule covering all types of multiunit premises. A categorical rule either would retain disincentives to deploying broadband to millions of consumers contrary to the goals of section 706 or would eliminate unbundling for enterprise customers where the record shows additional investment incentives are not needed.[26] As discussed above, we find that extending relief to predominantly residential MDUs best tailors the unbundling relief to those situations where the analysis of impairment and investment incentives indicates that such relief is appropriate. We thus reject commenters' categorical assertions that the FTTH rules should never apply in the case of any multiunit premises, or that the unbundling relief should extend to all multiunit premises.[27] Because we can draw an administratively workable distinction between predominantly residential MDUs and other multiunit premises, we find that we can more carefully target the unbundling relief warranted by the consideration of section 706's goals.

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[23]Verizon Comments at 20; Verizon Reply at 13 (explaining that the Corning's FTTH deployment evidence, relied on by the Commission in the *Triennial Review Order*, focused on deployment to communities, which includes both residential and business customers); *see also* Telecommunications Research and Action Center *et al.* Reply at 6-7 (noting presence of numerous residential customers in multiunit premises).

[24]*See* Verizon Comments at 22; SureWest Reply at 5; High Tech Broadband Coalition Comments at 12.

[25]Telecommunications Research and Action Center *et al.* Reply at 6-7; Verizon Comments at 25.

[26]Incumbent LEC commenters assert that eliminating the unbundling requirements of fiber loops serving enterprise customers in multiunit premises will promote deployment of next-generation networks by both incumbent LECs and competitive LECs. Verizon Comments at 30; SBC Comments at 7-8. However, they fail to rebut the evidence that, under the current rules, enterprise customers already typically are served by high-capacity loops. ALTS Comments at 19; MCI Comments at 9-10; Sprint Comments at 19; AT&T Reply at 8; *see also Triennial Review Order*, 18 FCC Rcd at 17109, para. 209 (Enterprise customers "typically purchase high-capacity loops, such as DS1, DS3, and OCn capacity loops). SureWest asserts that although fiber already is being deployed to multiunit premises, eliminating unbundling obligations for fiber deployed to multiunit premises would "*speed up*" the deployment of fiber. SureWest Reply at 5 (emphasis in original). However, SureWest provides no evidence that unbundling relief for fiber loops deployed to multiunit premises will increase fiber deployment to the enterprise market. *See* SureWest Reply at 6 (relying on the *Triennial Review Order*'s findings regarding investment incentives to deploy FTTH).

[27]*See* Allegiance *et al.* Comments at 18-20; Allegiance *et al.* Reply at 6-7; ALTS Comments at 18-22; AT&T Comments at 17-21; AT&T Reply at 7-8; Covad Comments at 11-12; MCI Comments at 8-10; Sprint Comments at 9-11 (no unbundling relief for multiunit premises) *and* Verizon Comments at 30; SBC Comments at 7-8; SureWest Reply at 5-6 (unbundling relief for all multiunit premises).

9. We also reject commenters' assertions that the analysis the Commission relied upon in its inside wiring discussion in the *Triennial Review Order* precludes granting any further unbundling relief for fiber loops serving MDUs.[28] In its consideration of access to inside wiring, the Commission found that competitive LECs face the same economic and operational barriers regardless of whether the tenant being served is a mass market or enterprise market customer.[29] However, this analysis was limited to the impairment associated with inside wiring.[30] We retain competitive LECs' rights under the *Triennial Review Order* to unbundled access to inside wiring, NIDs, and other subloops for multiunit premises, which fully addresses that impairment.[31]

10. *MDU Demarcation Point.* We hold that the scope of FTTH loops should include any fiber loops deployed to the minimum point of entry (MPOE) of predominantly residential MDUs, regardless of the ownership of the inside wiring. BellSouth and several commenters sought clarification that "the fiber portion of a loop that extends to a multi-unit building and that connects to in-building copper cable owned or controlled by the LEC, is considered a [FTTH] loop."[32]

11. Although our general loop definition identifies the loop network element as the "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises," we find that this definition could have undesired policy consequences in our FTTH rules. As BellSouth and SureWest point out, it would be anomalous for "two identical buildings – one next to the other – to be subject to disparate regulatory treatment based solely on the entity owning or controlling the inside wire."[33] We agree with these petitions and find no legal or policy reason to deny unbundling relief to otherwise identical buildings simply because the

[28] *See, e.g.*, Allegiance *et al.* Comments at 19; ALTS Comments at 21; AT&T Comments at 19; MCI Comments at 7; Sprint Comments at 9-10.

[29] *Triennial Review Order*, 18 FCC Rcd at 17189, para. 347 n.1040.

[30] *Triennial Review Order*, 18 FCC Rcd at 17189-90, para. 347 & n. 1041.

[31] *Triennial Review Order*, 18 FCC Rcd at 17184-99, paras. 343-58, *corrected by Triennial Review Order Errata* 18 FCC Rcd at 19021, para. 14; 47 C.F.R. §§ 51.319(b), (c). *USTA II* did not address these rules.

[32] BellSouth Petition at 10. *See also* SureWest Petition at 4 ("The Commission could retain [unbundling of inside wiring], but recognize that fiber leading to the building is exempt from unbundling under a new fiber-to-the-premises definition."); Verizon Comments at 22, 24-25 (The Commission "should clarify that its definition of fiber to the premises applies to any situation where fiber is deployed to a multi-unit premises building, regardless of whether the fiber continues to the individual units within that building."); High Tech Broadband Coalition Comments at 1[illegible] ("[T]he Commission should clarify that the fiber portion of a loop that extends to an MDU and connects to in[illegible]ld copper cable owned or controlled by the LEC is considered a fiber-to-the-premises loop."); Catena Comment[illegible] ("For subscribers living in MDUs, apparently even in situations where the ILEC deploys fiber all the way to the building, the loop would be considered a hybrid loop (rather than FTTP), because in most deployments the carrier will utilize copper risers within the building to reach each of the apartments/condominiums or offices. Such treatment makes no sense, however."); Marconi Reply at 6 n.11 ("As the reconsideration petitions and comments thereon demonstrate, there is ambiguity as to the application of the FTTH definition in the case of FTTH deployments to multi-dwelling units ('MDUs')").

[33] BellSouth Petition at 10; SureWest Petition at 4. Such a result would occur to the extent that a building with incumbent LEC-owned copper inside wire would be regulated as a hybrid loop, rather than a FTTH loop.

incumbent LEC owns the copper inside wire. Regardless of the medium used for inside wiring, deployment of fiber from a central office all the way to an MPOE of an MDU can bring a number of new broadband-based capabilities and services to customers located in those buildings.[34] A rule that only grants unbundling relief to fiber loops serving those predominantly residential MDUs where the incumbent LEC does not own the inside wiring, or where the inside wiring is also fiber, narrows the scope of the unbundling relief in a manner inconsistent with the policy purposes behind the rule. As we have noted in other proceedings, the issues surrounding modifying inside wiring exist regardless of who owns the wiring.[35] Given the cost and technical issues associated with such modifications, deployment of fiber inside wiring cannot necessarily be expected to occur at the same time as the deployment of fiber in the outside plant. Thus, limiting unbundling relief to those instances in which the fiber deployment has occurred simultaneously would likely dampen incentives to deploy more fiber in the loop plant – in order to realize the incentive, a LEC would need to overcome the economic and logistical barriers that would attend simultaneous replacement of both the loop plant and inside wiring. Such a result would run counter to our obligations under section 706 to encourage broadband deployment.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

12. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[36] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM*.[37] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. In the *Triennial Review Order*, the Commission issued a Final Regulatory Flexibility Analysis (FRFA) addressing comments

[34]SureWest Petition at 3; Catena Comments at 11-12; Verizon Reply at 23; BellSouth Dec. 15, 2003 *Ex Parte* Letter at 12; High Tech Broadband Coalition Comments at 12-13 (citing ITU-T G.983 standard). As some commenters note, the long-term future capabilities of entirely fiber architectures exceed that of fiber architectures that include a small amount of copper, as is the case for many multiunit premises where the in-building wiring is copper. *See, e.g.*, Letter from Walter Steimel, Jr., to Marlene H. Dortch, Secretary, FCC, Attach. at 9-13 (Dec. 16, 2003) (FTTH Council Dec. 16, 2003 *Ex Parte* Letter); FTTH Council Feb. 12, 2004 *Ex Parte* Letter at 7; ALTS Jan. 22, 2004 *Ex Parte* Letter at 6. However, this does not change the fact that such facilities today provide the capability of offering broadband capability that is enhanced compared to copper networks. We thus reject commenters' assertions that the existence of copper inside wiring in MDUs should preclude unbundling relief. Allegiance *et al.* Reply at 6; ALTS Comments at 19; AT&T Comments at 18; AT&T Reply at 8.

[35]*Competitive Networks Order*, 15 FCC Rcd at 23008, para. 55 (age and complexity of the inside wiring can affect the ability to make modifications); *cf. Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition For Modification of Section 68.213 of the Commission's Rules Filed By the Electronic Industries Association*, Third Report and Order, CC Docket No. 88-57 and RM-5643, 15 FCC Rcd 927, 934, para. 13 n. 33 (2000) (discussing cost to replace inside wiring in individual occupancy residence).

[36]*See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[37]*See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) (*NPRM*).

submitted with regard to the IRFA.[38] This present Order addresses an issue raised by two petitions for reconsideration of the *Triennial Review Order*. This present Supplemental FRFA (Supplemental FRFA) conforms to the RFA.[39]

1. Need for, and Objectives Of, the Rule

13. This Order concludes that the FTTH rules, which relieve the incumbent LECs from certain unbundling obligations, will apply to MDUs that are predominantly residential. In the *Triennial Review Order* released last year, the Commission concluded that the broadband capabilities of FTTH loops would be relieved from unbundling under section 251 of the Act. Today's action builds on the broadband principles of the *Triennial Review Order* by further extending the unbundling relief to fiber loops deployed to predominantly residential MDUs. In this Order, the Commission performs the section 706 balancing for customers located in predominantly residential MDUs, and concludes that fiber loops provided to such dwellings should have the same unbundling relief as FTTH loops. The Order concludes that determining what constitutes a predominantly residential MDU will be based on the dwelling's predominant use. For example, a multi-level apartment building that houses retail stores such as a drycleaner or a mini-mart would be predominantly residential, while an office building that contains a floor of residential suites would not. The Order further clarifies that a loop will be considered a FTTH loop if it is deployed to the minimum point of entry of a predominantly residential MDU, regardless of the ownership of the inside wiring.

2. Summary of Significant Issues Raised by the Public

14. The subject petitions for reconsideration were not submitted in response to the previous FRFA, and did not address the FRFA.

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Would Apply

15. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[40] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[41] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[42] A "small business concern" is one

[38] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17416-442, paras. 730-86 (2003) (*Triennial Review Order*) (subsequent history omitted).

[39] *See* 5 U.S.C. § 604.

[40] 5 U.S.C. § 604(a)(3).

[41] 5 U.S.C. § 601(6).

[42] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an (continued....)

which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[43]

16. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the revised rule adopted in this Order. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.[44] The SBA has developed small business size standards for wireline small businesses within the commercial census category of Wired Telecommunications Carriers.[45] Under this category, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

17. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[46] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[47] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

18. *Wired Telecommunications Carriers*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[48] According to Census Bureau data for 1997, there were 2,225 firms in this category, total,

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agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[43] 15 U.S.C. § 632.

[44] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003) (*Trends in Telephone Service August 2003 Report*). This source uses data that are current as of December 31, 2001.

[45] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

[46] 15 U.S.C. § 632.

[47] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

[48] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

that operated for the entire year.[49] Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.[50] Thus, under this size standard, the majority of firms can be considered small.

19. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[51] According to Commission data,[52] 1,337 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

20. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[53] which includes all such companies generating $12.5 million or less in annual receipts.[54] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[55] Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[56] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

21. In this Order, we conclude that fiber networks serving predominantly residential MDUs will be subject to the same unbundling obligations as FTTH loops serving individual occupancy premises. This rule modification will relieve the providers of such broadband fiber loops from unbundling obligations

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[49] 1997 Economic Census, Establishment and Firm Size, Table 5, NAICS code 513310 (issued Oct. 2000).

[50] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[51] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110 (changed from 513310 in October 2002).

[52] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003) (*Trends in Telephone Service August 2003 Report*). This source uses data that are current as of December 31, 2001.

[53] 13 C.F.R. § 121.201, NAICS code 517510.

[54] *Id.*

[55] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

[56] *Id.*

under section 251 of the Act. This relieved a compliance requirement currently placed on such providers.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

22. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[57]

23. In this Order, we conclude that fiber loops serving predominantly residential MDUs should be governed by the FTTH rules. The Order applies principles established in the *Triennial Review Order* to more precisely calibrate the Commission's broadband policy for fiber loops for customers that reside in MDUs. In response to petitions for reconsideration requesting that the Commission look more closely at the unbundling requirements for MDUs, the Order considers section 706 in its unbundling analysis for customers located in predominantly residential MDUs, and concludes that the record demonstrates that fiber loops provided to such dwellings should have the same unbundling relief as FTTH loops. Although this rule will deny unbundling to competitive carriers seeking to serve customers in predominantly residential MDUs, the Commission concluded that such unbundling relief was necessary to remove disincentives for incumbent LECs to deploy fiber to these buildings.[58] We believe that this approach is the least burdensome way to ensure that all Americans, not just those residing in single family homes, will be able to obtain the benefits of broadband services. Alternatives considered, including the use of a single, categorical rule, were not adopted because they do not accomplish the Commission's objectives in this proceeding.[59]

24. **Report to Congress:** The Commission will send a copy of the Order, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[60] In addition, the Commission will send a copy of the Order, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.

B. Final Paperwork Reduction Act Analysis

25. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than

[57] 5 U.S.C. § 603(c)(1) – (c)(4).

[58] *See* paras. 7-8, *supra*.

[59] *See* paras. 7-9, *supra*.

[60] *See* 5 U.S.C. § 801(a)(1)(A).

25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

IV. ORDERING CLAUSES

26. IT IS ORDERED that, pursuant to the authority contained in sections 2, 4(i)-4(j), 10(d), 201, 251, 303(r), and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i)-4(j), 160(d), 201, 251, 303(r), 706 this Order on Reconsideration IS ADOPTED.

27. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 2, 4(i)-4(j), 10(d), 201, 251, 303(r), and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i)-4(j), 160(d), 201, 251, 303(r), and 706, the petitions for reconsideration filed by BellSouth and SureWest ARE GRANTED IN PART.

28. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A
LIST OF COMMENTERS

Comments	Abbreviation
Association for Local Telecommunications Services	ALTS
Allegiance Telecom *et. al*	
AT&T Corporation	AT&T
BellSouth Corporation	BellSouth
Catena Networks , Inc.	Catena
Cellular Mobile Systems of St Cloud	
Covad Communications	Covad
El Paso Networks/Fibernet/ McLeodUSA	
High Tech Broadband Coalition	
MCI	MCI
New South Communication, Inc./ Comptel, Inc./ Ascent Alliance	
PACE Coalition	PACE
Qwest Communications	Qwest
Rural Independent Competitive Alliance	RICA
SBC Communications, Inc.	SBC
Sprint Communications, Inc.	Sprint
Talk America Inc./ Nu Vox Inc./ XO Communications Inc.	
Verizon Communications, Inc.	Verizon
Z-Tel Communications, Inc.	

Reply Comments	
Allegiance Telecom *et.al.*	
AT&T Corporation	AT&T
AT&T Wireless	
BellSouth Corporation	
Coalition for High-Speed Online Internet Competition and Enterprise	CHOICE
Earthlink, Inc.	
El Paso Networks/Fibernet/McLeodUSA	
Marconi Corporation	Marconi
National Association of State Utility Consumer Advocates	NASUCA
Nextel Communications	
Qwest Communications	Qwest
SBC Communications, Inc.	SBC
SureWest Communications	SureWest
Telecommunications Research and Action Center *et.al.*	
T-Mobile USA, Inc.	
Verizon Communications, Inc.	

APPENDIX B
FINAL RULES

PART 51 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 51 – SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

29. Section 51.319 is amended by revising paragraphs (a)(3) as follows:

§ 51.319 Specific unbundling requirements.

(a) ***

(3) Fiber-to-the-home loops. A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of entry (MPOE).

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STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket Nos. 01-338, 96-98); Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147), Order on Reconsideration

Eight years ago, Congress charged the Commission with deregulating local telephone monopolies in favor of competitive markets. In *USTA II*, the D.C. Circuit endorsed the Commission's approach to the broadband marketplace and for the first time since the Act was passed validated a Commission unbundling decision. Today we take another step toward ensuring that all Americans, not just those residing in single family homes, will reap the benefits of the information age. As many as one in three Americans live in high-rise structures, known in Commission parlance as "multiple dwelling units." Today's decision clarifies unbundling rules as they apply to broadband services provided to these structures. It draws an administratively workable distinction between primarily residential multi-unit dwellings, and other, more commercial locations. By clarifying our unbundling rules as they apply to these situations, we restore the incentives of incumbent LECs to deploy broadband technology, particularly in our nation's cities. After the D.C. Circuit's most recent vacatur in *USTA II*, we hear the message loud and clear: only sustainable, genuine competition fulfills our Congressional mandate. Today's decision goes lengths to support meaningful, facilities-based competition.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98 & 98-147, Order on Reconsideration

When the Commission adopted the Triennial Review Order last year, we provided significant relief from unbundling obligations for next-generation fiber networks. In particular, the Order provided complete relief for the broadband capabilities of fiber-to-the-home (FTTH) deployments. This deregulatory action is already achieving its desired impact as carriers are accelerating plans to deploy fiber deeper in the network — in many cases all the way to the customer. The Triennial Review Order inadvertently created a barrier to investment in some areas, however, by stating that multiple dwelling units (MDUs) were flatly ineligible for this unbundling relief. This Reconsideration Order corrects that anomaly and assures that mass market consumers will benefit from increased broadband deployment irrespective of whether they live in single family homes or in apartment buildings. While the lines we have drawn may not be perfect, they represent a reasonable effort to put residents of MDUs on equal footing with other mass market customers while also preserving competitors' opportunities to serve business customers over legacy network architectures.

I am also pleased that the Order clarifies that the FTTH rules apply wherever the LEC extends fiber to the minimum point of entry in the MDU. The inside wiring is often owned by the building owner, and the carrier thus cannot control whether that wiring consists of fiber or copper. The important fact is that, in either case, deploying fiber to the minimum point of entry will enable consumers to receive both high-speed data services and multichannel video programming services.

I recognize that according FTTH treatment even where a short length of inside copper wiring exists is no different in principle from extending such treatment to fiber-to-the-curb deployments that serve premises other than MDUs. Indeed, I believe that broadband providers, equipment manufacturers, and consumers all would benefit if we left the choice among the various deep-fiber architectures to the marketplace. I see no reason for the Commission to prefer one form of deployment over another so long as all of them enable very high-speed Internet access and video services (and thus are affected comparably by the investment disincentives associated with unbundling) and all are subject to the same degree of intermodal competition (as they undoubtedly are). I therefore hope that the Commission builds on this Reconsideration Order by revisiting the treatment of fiber-to-the-curb deployments in an upcoming item in the near future.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket Nos. 01-338, 96-98, 98-147)*

I believe this decision puts competitive telecommunications services out of reach for many small business and residential consumers. No matter how this decision is dressed up in the sheep's clothing of broadband relief, the wolf beneath means less choice and less price competition for anyone who lives and works in a multi-tenant building. This outcome is inconsistent with the pro-competitive, market-opening legislation that Congress put in place in the 1996 Telecommunications Act. It is an overbroad and ill-conceived expansion of the Commission's exemption for fiber facility unbundling in the *Triennial Review*. I do not support it.

Small business is the engine that drives America's economy. We know that small businesses generate between two-thirds and three-quarters of all new jobs in this country. They represent way over 90 percent of all employers, and they produce over half of the nation's private sector output. Yet today's decision is fundamentally at odds with the telecommunications needs of so many small business consumers, not to mention tens of thousands of Americans who live in the apartment buildings that are being reclassified. I found the Commission's anti-competitive broadband policies bad enough when they were rolled out in the *Triennial Review* decision. Today stretches them way beyond that, and it does so in spite of the fact that the court found no need for us to do this.

The Small Business Administration tells us that in metropolitan areas where most multi-tenant buildings are located, competitive carriers serve 29 percent of small businesses. Small business likes competition. It has voted with its pocketbook for competition. That is because small business has been a chief beneficiary of the enhanced services and lower prices that competition brings to market.

But today's decision means that small businesses located in buildings that also have residential apartments will henceforth be unable to enjoy the full panoply of competitive voice and data services. In most cases, small businesses in multi-tenant units that are "primarily residential" will be left with one service option—the incumbent carrier. By sweeping into today's decision law offices, doctor's offices, copy shops, stock brokers, real estate offices, dry cleaners, coffee shops, dentists' offices, grocery stores and other small retail and service businesses located on the ground floor of so many apartment buildings, the majority denies them the opportunities for cost savings and innovative services that come with having a competitive array of carriers to choose from. In cities like New York and Chicago and Washington, where residential buildings routinely include ground floor commercial tenants, whole swaths of downtown small businesses will find themselves ineligible for competitive wireline services.

This decision also reduces choice for people who make their homes in apartment buildings. As long as the incumbent carrier brings fiber facilities to the basement, competitive carriers will be restricted from offering services to residents on the floors above. When it comes to broadband, the best scenario these residents can hope for is a choice between the cable and DSL duopoly. Otherwise, they'll have no choice at all.

Why are we restricting broadband competition for these businesses and apartment dwellers? Where is the evidence that broadband deployment to multi-tenant facilities is dragging comparatively behind, or that apartment dwellers are at higher risk of being left on the wrong side of the digital divide? To the contrary, it strikes me that the economies of scale that come with serving a single building with many—even hundreds—of residential units would put such facilities first on the list of economically viable broadband deployments.

Finally, I believe this decision is a prescription for administrative headache. It saddles every state commission in this country with the task of determining just what buildings in their state fit the blurry parameters of "primarily residential." Some people were worried before about the ability of fifty jurisdictions to characterize the state of switching competition within their borders. What we have here is exponentially more complex. Every building, in every city and every town, in every state, from brownfield to greenfield, will need to be tagged as eligible or not eligible for the full scope of competitive carrier services. This fails to provide small business consumers, residential consumers, carriers, investors or our hard-working state counterparts with the regulatory clarity they need. For these reasons, I respectfully dissent.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING IN PART, DISSENTING IN PART

Re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147

In this Order, we reconsider portions of our *Triennial Review Order*, which set out a regulatory framework for local telephone competition. Throughout this proceeding, I have sought to take a careful and balanced view of the benefits and burdens of our unbundling rules. That approach led me to support measured unbundling relief for broadband investment in our prior order. I concur in much of this Order in that I support granting targeted additional unbundling relief to address issues that were not squarely before us when we adopted the *Triennial Review Order*. I cannot, however, join in the full decision because it is unnecessarily vague and overbroad. While this Commission speaks often about the importance of regulatory certainty, I am concerned that this Order unfortunately will raise as many questions as it answers.

The focus of this Order is the deployment of broadband services, a goal that I strongly support. Ensuring that all Americans have reasonable and timely access to broadband services is our charge under the Act and is an issue of critical importance to the health of our economy and the vibrancy of our nation. In the *Triennial Review Order*, this Commission took dramatic steps with the goal of encouraging incumbent providers to build fiber facilities to their mass market customers. I supported that decision to refrain from unbundling fiber-to-the-home developments know as "greenfield areas" because the record supported a finding that incumbents and competitors stand on roughly equal footing in competing for these construction projects. By eliminating unbundling for greenfield fiber-to-the-home projects, we hoped to speed the deployment of these large information pipes, which have the greatest potential to deliver innovative and beneficial services to consumers.

I concur in today's decision to the extent that it injects more symmetry to our treatment of residential consumers, whether they reside in single family homes or multi-tenant buildings (referred to as MDUs). Much as I supported unbundling relief for the deployment of fiber loops to single family homes in greenfield developments, I support similar relief for residential consumers in multi-tenant buildings. This relief should encourage investment in broadband facilities to serve these customers. The record shows that a sizeable portion of the American population lives in multi-tenant buildings. The record also contains evidence suggesting that a disproportionate number of these Americans are persons with disabilities, seniors, minorities and low income citizens, and that these citizens stand to benefit dramatically from the expanded educational, career, and health opportunities that are available through broadband.

The decision to impose or lift unbundling requirements under section 251 is not a trivial matter. Our local competition rules are of enormous importance to providers, both competitors and incumbents, alike, and, ultimately, to American consumers. As contemplated by Congress,

the development of competition has brought enormous benefits to residential and business consumers. Consistent with Congress' vision, where barriers to deployment are equivalent, we should give providers every incentive to invest in and roll-out next generation facilities that will bring the benefit of advanced services to American consumers. I can only concur in my support because I believe that this Order could have provided much more analytical depth to address the specific requirements of the Act. The Order is virtually silent in its factual consideration of impairment, failing to address in any comprehensive way the level of competition between incumbents and new entrants to serve residential apartment buildings. These concerns are amplified by a lack of precision in this Order. For example, by failing to adopt a specific definition of what buildings are "predominantly-residential," we invite a host of disputes.

Beyond this, I am forced to dissent in part because the Order fails to consider potential distinctions in the analysis of greenfield developments as compared with so-called brownfield developments, where providers are overbuilding their existing networks. In my view, this Order should have delved far more deeply to address these very different factual scenarios. Similarly, the Order declines to adopt a customer-specific approach, despite evidence in the record that such an approach is possible. Nor does the Order fully address the relationship of these rules with our existing high capacity loop rules, which the Commission, last year, endorsed as necessary for competition. Cumulatively, I am concerned that this Order will not only leave many small business customers without the full benefit of competitive options, but that it will leave both incumbents and competitors yet again unclear about the scope of our rules.

For these reasons, I concur in part and dissent in part.