

Appendix S4 and Resolution No. 642 of the Radio Regulations.

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 51

[CC Docket Nos. 01-338; CC Docket No. 96-98; CC Docket No. 98-147; FCC 04-191]

#### 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

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission) modifies certain of the unbundling obligations associated with fiber networks serving multiple dwelling units (MDUs) pursuant to section 251 of the Telecommunications Act of 1996 (1996 Act). Specifically, the Commission concludes that fiber networks serving predominantly residential MDUs will be subject to the same, limited unbundling obligations governing fiber-to-the-home (FTTH) loops serving individual occupancy premises. The Commission further clarifies 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 MDU's inside wiring.

**DATES:** Effective October 12, 2004.

**FOR FURTHER INFORMATION CONTACT:** Pamela Arluk, Attorney-Advisor, Wireline Competition Bureau, at (202) 418-1580, or via the Internet at [pamela.arluk@fcc.gov](mailto:pamela.arluk@fcc.gov). The complete text of this Order on Reconsideration is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. Further information may also be obtained by calling the Wireline Competition Bureau's TTY number: (202) 418-0484.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Order on Reconsideration in CC Docket No. 01-338, CC Docket No. 96-98, and CC Docket No. 98-147; FCC 04-191,

adopted August 4, 2004, and released August 9, 2004. The full text of this document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or at [www.bcpiweb.com](http://www.bcpiweb.com). It is also available on the Commission's Web site at <http://www.fcc.gov>.

#### Synopsis of the Order on Reconsideration

1. In the *Triennial Review Order* (68 FR 52276, Sept. 2, 2003), the Commission adopted rules implementing section 251 of the 1996 Act, requiring incumbent local exchange carriers (LECs) to make elements of their local network available to competitors on a unbundled basis. The *Triennial Review Order* imposed only limited unbundling obligations with respect to incumbent LECs' broadband loops. In *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), the D.C. Circuit recently upheld these rules. In particular, 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. 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. The FTTH rules expressly applied only to fiber loops serving individual occupancy premises, and not multiunit premises.

2. In this Order, the Commission determines that it is possible to make an administrable distinction between predominantly residential MDUs and other multiunit premises for purposes of its unbundling rules. For example, a multi-level apartment building that houses retail stores such as a drycleaner and/or a mini-mart on the ground floor would be considered predominantly residential, while an office building that contains a floor of residential suites would not.

3. The Commission concludes that it is appropriate to apply the FTTH rules to fiber deployed to predominantly residential MDUs. The Commission has the flexibility under section 251(d)(2) of the 1996 Act to consider the statutory goals of section 706, which require the Commission to encourage the deployment of advanced telecommunications capability to all Americans. In the Order, the Commission finds that the broadband

deployment goals of section 706 justify reducing the unbundling obligations on fiber to predominantly residential MDUs, providing greater incentives for the deployment of such facilities. By tailoring the Order's unbundling relief to predominantly residential MDUs, the Commission draws an administrable line between those MDUs for which unbundling relief would significantly increase broadband investment incentives and those for which it would not.

4. The Commission further concluded that a new definition of FTTH loops was necessary for purposes of the rules governing predominantly residential MDUs. The prior definition of FTTH loops required the deployment of fiber from the incumbent LEC central office all the way to the end-user customer's premises. However, many MDUs have copper wiring inside the building which is used to connect to each individual tenant. To ensure that the incentives to deploy broadband facilities extend to these buildings as well, the Commission determined that a FTTH loop in the context of predominantly residential MDUs only requires the deployment of fiber from the incumbent LEC's central office to the MPOE of the MDU, which is usually located in the basement of the building. With such a rule, the fact that the incumbent LEC may have copper inside wiring in the MDU will not result in different regulatory treatment.

#### Final Regulatory Flexibility Analysis

5. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM. 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 submitted with regard to the IRFA. 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.

6. *Need for, and Objectives of, the Rules.* 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.

7. *Summary of Significant Issues Raised by the Public.* The subject petitions for reconsideration were not submitted in response to the previous FRFA, and did not address the FRFA.

8. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Would Apply.* 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. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one 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).

9. 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. The SBA has developed small business size standards for wireline small businesses within the commercial census category of Wired Telecommunications Carriers. 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.

10. 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." 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. 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.

11. *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. According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year. 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. Thus, under this size standard, the majority of firms can be considered small.

12. *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. According to Commission data, 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.

13. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in annual receipts. 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. 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. 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.

14. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities:* 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 under section 251 of the Act. This relieved a compliance requirement currently placed on such providers.

15. *Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:* 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."

16. 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. 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.

17. *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. 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**.

**Final Paperwork Reduction Act Analysis**

18. 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 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

**Ordering Clauses**

19. *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*.

20. *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*.

21. *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.

**List of Subjects in 47 CFR part 51**

Interconnection, Unbundling requirements.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

**Rule Changes**

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

**PART 51—SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES**

■ 1. The authority citation for Part 51 continues to read:

**Authority:** Sections 1-5, 7, 201-05, 207-09, 218, 225-27, 251-54, 256, 271, 303(r), 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 207-09, 218, 225-27, 251-54, 256, 271, 303(r), 332, 47 U.S.C. 157 *note*, unless otherwise noted.

■ 2. Section 51.319 is amended by revising paragraph (a)(3) introductory text to read 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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[FR Doc. 04-20356 Filed 9-8-04; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Research and Special Programs Administration**

**49 CFR Parts 192 and 195**

**[Docket No. RSPA-99-6106; Amdt. Nos. 192-94, 195-81]**

**RIN 2137-AD35**

**Pipeline Safety: Periodic Updates to Pipeline Safety Regulations (2001); Corrections**

**AGENCY:** Research and Special Programs Administration, DOT.

**ACTION:** Correcting amendments.

**SUMMARY:** The Research and Special Programs Administration (RSPA) is correcting a final rule published in the **Federal Register** on June 14, 2004 (69

FR 32886). That final rule amended and updated various sections of the pipeline safety regulations and incorporated the most recent editions of the voluntary consensus standards publications referenced in 49 CFR parts 192 and 195. That document made an inadvertent error in the definition of "Transmission line" in § 192.3, failed to properly amend Appendix B to part 192, inadvertently reversed a recent amendment to a welder qualification requirement in § 195.222, and contained several typographical errors. This document corrects the final rule by revising the relevant sections.

**DATES:** Effective July 14, 2004.

**FOR FURTHER INFORMATION CONTACT:**

Gopala K. Vinjamuri by telephone at (202) 366-4503, by fax at (202) 366-4566, by e-mail at [gopala.vinjamuri@rspa.dot.gov](mailto:gopala.vinjamuri@rspa.dot.gov), or by mail at U.S. Department of Transportation, RSPA/Office of Pipeline Safety, Room 2103, 400 Seventh Street, SW., Washington, DC 20590-0001.

**SUPPLEMENTARY INFORMATION:** On June 14, 2004, RSPA published a final rule in the **Federal Register** entitled, "Pipeline Safety: Periodic Updates to Pipeline Safety Regulations" (69 FR 32886). That final rule amended and updated various sections of the pipeline safety regulations and incorporated the most recent editions of the voluntary consensus standards publications referenced in 49 CFR parts 192 and 195. After the final rule was published, RSPA received ten written comments from interested parties identifying an apparent inconsistency in the definition of "Transmission line" in the final rule. Upon further review, we have determined that the June 14, 2002, final rule made an inadvertent error in the definition of "Transmission line" in § 192.3, failed to properly amend Appendix B to part 192 due to an improper amendatory instruction, and inadvertently reversed a recent amendment to § 195.222. It also contained several typographical and punctuation errors.

This document corrects the final regulations by revising the relevant sections.

**List of Subjects**

*49 CFR Part 192*

Pipeline safety, Reporting and recordkeeping requirements.

*49 CFR Part 195*

Carbon dioxide, Petroleum, Pipeline safety, Reporting and recordkeeping requirements.