

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Competitive Telecommunications Association,)
Florida Competitive Carriers Association, and)
Southeastern Competitive Carriers Association)
Petition On Defining Certain Incumbent LEC Affiliates)
As Successors, Assigns, or Comparable Carriers)
Under Section 251(h) of the Communications Act)

CC Docket No. 98-39

REPLY COMMENTS OF EXCEL TELECOMMUNICATIONS, INC.

Excel Telecommunications, Inc. ("Excel"), by its attorneys, hereby replies to the comments filed in the above-captioned proceeding in response to the petition of the Competitive Telecommunications Association ("CompTel"), the Florida Competitive Carriers Association ("FCCA"), and the Southeastern Competitive Carriers Association ("SECCA") ("*CompTel Petition*").¹ Excel strongly supports the *CompTel Petition*. The Commission must not allow incumbent local exchange carriers ("ILECs") to circumvent their Section 251 and 252 obligations by establishing affiliates in their own territory that are ostensibly competitive local exchange carriers ("CLECs"). Any such CLEC is a wolf in sheep's clothing. As many of the commenters recognize, these "CLEC" affiliates are nothing but alter egos of the ILECs. It is important that the Commission act expeditiously to clarify the regulatory status of "CLEC" affiliates before local competition is irreversibly thwarted.

¹ *Petition on Defining Certain Incumbent LEC Affiliates as Successors, Assigns or Comparable Carriers under Section 251(h) of the Communications Act*, CC Docket No. 98-39, Petition for Declaratory Ruling or, in the Alternative, for Rulemaking (March 23, 1998) ("*CompTel Petition*"). Comments were filed pursuant to Public Notice, *Commission Seeks Comments on Petition Regarding Regulatory Treatment of Affiliates of ILECs*, DA 98-627 (April 1, 1998).

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Introduction

Excel is the fifth largest interexchange carrier in the United States, in terms of presubscribed lines, as well as one of the fastest growing providers of telecommunications service in the nation. Through resale and increasingly through the use of its own facilities, Excel offers a full range of residential and business telephony. It is now pursuing the provision of competitive local exchange services. In fact, through its wholly-owned subsidiaries, Excel currently is authorized to provide competitive local exchange service in more than thirty states. Excel intends to offer a wide range of advanced telecommunications services to its customers, including packet-switched data services and Internet connectivity.

Like other existing and potential CLECs, however, Excel faces the ILECs' monopoly control over essential local services and facilities. One of the primary goals of the Telecommunications Act of 1996 ("1996 Act") is to eliminate this monopoly and open the local market to competition. Section 251(c) gives carriers like Excel the opportunity to compete with the ILECs by imposing interconnection obligations on the ILECs. In an attempt to retain their control, however, ILECs currently are attempting to use their affiliates to avoid complying with important aspects of Section 251(c). In particular, ILECs such as BellSouth are transferring resources to their affiliates to provide service within their own territory in order to evade their interconnection, unbundling, resale and dominant carrier obligations. As a result, potential CLECs are discouraged from entering the local market to compete with the ILECs. Excel is poised to expand into the local marketplace. Yet, the actions of the ILECs with respect to their in-region affiliates threaten to bring local competition to a grinding halt.

I. THE ILECS ARE USING THEIR AFFILIATES TO AVOID CRITICAL STATUTORY OBLIGATIONS UNDER THE 1996 ACT.

The *CompTel Petition* demonstrates that ILECs such as BellSouth are establishing wholly-owned affiliates for the sole purpose of subverting their statutory obligations through CLEC certification. These ILECs are transferring valuable resources, including financial support, management personnel, and corporate goodwill, to affiliates created for the purpose of becoming CLECs *within their own regions*. Through this sham corporate maneuvering, the same company would operate both as an ILEC and a CLEC simultaneously. By transferring customers to their largely deregulated CLEC affiliates (which may or may not be operated as independent profit centers), the ILECs could remove entire classes of service offerings from the local exchange resale obligation under Section 251(c)(4).

The only plausible explanation for the ILECs to create wholly-owned affiliates to compete with themselves is their attempt to escape Commission regulation. As WorldCom wrote, the “Commission must ask itself why an ILEC would voluntarily choose to assume CLEC status within its region. . . . The only compelling reason an ILEC would seek to be classified legally (but not viewed in the market) as a CLEC is for the ILEC, by extension, to be able to avoid legal mandates that the ILEC itself is required to perform pursuant to the 1996 Act.”² Numerous commenters agree that the ILECs are being driven by an intent to impede competition.³ The Commission should not allow the ILECs to thwart the development of local competition. Rather, it should expose these “CLECs” for what they really are: extensions of the

² *WorldCom, Inc. Comments* at 3.

³ *Id.* at 3-4 (using CLEC status, the ILEC can maintain its advantage as an incumbent while also using the unregulated CLEC to its advantage); *NEXTLINK Communications, Inc. Comments* at 2 (the ILEC’s only legitimate purpose is to avoid its obligations under (continued...))

ILECs themselves that should likewise be subject to all statutory requirements imposed on ILECs.

II. A “CLEC” AFFILIATE OPERATING IN THE ILEC’S TERRITORY USING RESOURCES TRANSFERRED FROM THE ILEC IS A “SUCCESSOR” OR “ASSIGN” UNDER SECTION 251(H), AS WELL AS A DOMINANT CARRIER.

The *CompTel Petition* requests that the Commission issue a declaratory ruling that a “CLEC” affiliate that uses valuable resources transferred from the ILEC and that provides local service within the ILEC’s service area is a “successor” or “assign” of the ILEC pursuant to Section 251(h)(1) of the Communications Act, as well as a “dominant carrier” in the provision of interstate service. Excel strongly supports this request because CLECs created by and operated for the benefit of ILECs within their own region are not separate competitive entities in the local market.

As detailed in the *CompTel Petition*, the ILECs are establishing “CLEC” affiliates that are under common ownership, using the same resources and personnel, and providing the same services in the same geographic area as the ILECs. It is ludicrous to claim that these “CLECs” are true competitors or in any way independent from their ILEC parents. There is a consensus that, in every important respect, these “CLEC” affiliates have all the advantages of the ILECs with none of the corresponding responsibilities.⁴ Accordingly, the “CLEC” affiliates, as

(...continued)

the 1996 Act); *MCI Telecommunications Corporation Comments* at 3-11 (the ostensible CLECs facilitate many anticompetitive strategies).

⁴ See, e.g., *KMC Telecom Inc.’s Comments* at 3-4; *LCI International Telecom Corp. Comments* at 5 (the CLEC affiliates “are nothing more than the ILEC in sheep’s clothing.”); *Telecommunications Resellers Association Comments* at 4 (the CLEC affiliate is simply an extension of the ILEC itself that benefits from the ILEC’s competitive advantages.)

“successors” or “assigns,” should be subject to the same statutory and regulatory obligations as the ILECs.

Some commenters contend that, under Commission precedent, “CLEC” affiliates can not be “successors” or “assigns” absent a transfer of ownership of network elements.⁵ This assertion is incorrect. In fact, the Commission has not fully addressed the situations when affiliates are “successors” or “assigns” of the ILECs under Section 251(h). The Commission should take this opportunity to declare that a “CLEC” affiliate that receives valuable resources from the ILEC, such as brand name, capital or personnel, and provides local service in the ILEC’s service territory, should be considered a “successor” or “assign” of the ILEC under Section 251(h). Further, given that “CLEC” affiliates are essentially indistinguishable from the ILECs, they should also be treated as dominant carriers. As such, they would also be subject to the same access charge, price cap and other rules and regulations that apply to the ILECs.

III. A “CLEC” AFFILIATE OPERATING IN THE ILEC’S TERRITORY USING RESOURCES TRANSFERRED FROM THE ILEC IS A “COMPARABLE CARRIER” UNDER SECTION 251(H).

The *CompTel Petition* requests that, in the alternative, the Commission initiate a rulemaking to clarify the criteria under which a “CLEC” affiliate will be considered a “comparable” carrier under Section 251(h). Excel concurs with CompTel and several of the commenters that “CLEC” affiliates that receive resources as described above should be considered “comparable” carriers.⁶

⁵ See, e.g., *Ameritech Corporation Comments* at 7; *Bell Atlantic Comments* at 4; *BellSouth Corporation Comments* at 4; *SBC Communications Inc. Comments* at 4.

⁶ See, e.g., *e.spire Communications, Inc. Comments* at 8; *Telecommunications Resellers Association Comments* at 7.

Section 251(h)(2) authorizes the Commission to treat a carrier as an ILEC if three criteria are satisfied: (1) it occupies a position comparable to the ILEC in the same market and area; (2) it has substantially replaced the ILEC; and (3) such treatment is in the public interest. As alter egos of the ILECs, the “CLEC” affiliates are undeniably “comparable” to the ILECs. As explained in the *CompTel Petition*, not only do the “CLEC” affiliates occupy a comparable position in the market, but essentially an identical position as the ILECs. In addition, by transferring customers, assets, employees and other resources to the affiliates, the ILECs have essentially cloned themselves. Specifically, “for purposes of serving selected market segments, such as businesses which are candidates for contract service arrangements, the ILEC-branded ILEC local affiliate has replaced the ILEC in the market.”⁷ Finally, it is beyond question that treating “CLEC” affiliates as “comparable carriers” would promote the public interest, convenience and necessity. To do otherwise would perpetuate the circumvention of the statutes and rules by the ILECs.

As some commenters note, the Commission has concluded that a BOC affiliate is not a “successor,” “assign” or “comparable carrier” merely because it conducts local exchange activities.⁸ Excel does not dispute this point. What is significant here is that these “CLEC” affiliates do not have distinct competitive activities when compared to the ILECs. Indeed, they are joined at the hip. The “CLEC” affiliates are created for the purpose of enabling the ILECs to circumvent their regulatory obligations. As one commenter stated, if the ILECs are “allowed to continue with this sham, the congressional goal underlying Section 251 – the opening of local

⁷ *Telecommunications Resellers Association Comments* at 7.

⁸ *See, e.g., Bell Atlantic Comments* at 4.

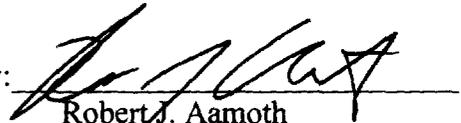
markets to competition – will be compromised severely.”⁹ To prevent the ILECs from maintaining their monopoly control over the local markets, the Commission should regulate these “CLEC” affiliates as ILECs.

Conclusion

For the foregoing reasons, Excel respectfully requests that the Commission grant the *CompTel Petition*. Otherwise, the ILECs will continue to use their “CLEC” affiliates to exploit the ILEC’s monopoly power in a way that will stifle local competition.

Respectfully submitted,

EXCEL TELECOMMUNICATIONS, INC.

By: 

Robert J. Aamo

Melissa M. Smith

KELLEY DRYE & WARREN LLP

1200 19th Street, N.W., Suite 500

Washington, D.C. 20036

(202) 955-9600

Its Attorneys

James M. Smith
Vice President, Law & Public Policy
EXCEL TELECOMMUNICATIONS, INC.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7538

Dated: June 1, 1998

⁹ *E.spire Communications, Inc. Comments* at 9.

CERTIFICATE OF SERVICE

I, Melissa M. Smith, hereby certify that on this 1st day of June, 1998, I caused true and correct copies of the foregoing REPLY COMMENTS of Excel Telecommunications, Inc. to be served via U.S. mail, first class postage, upon those persons listed below.

David L. Sieradzki
Jennifer A. Purvis
Hogan & Hartson L.L.P.
555 13th Street, NW
Washington, DC 20004

Genevieve Morelli
Executive Vice-President
And General Counsel
Competitive Telecommunications
Association
1900 M Street, NW, Suite 800
Washington, DC 20036

Janice M. Myles*
Common Carrier Bureau
Federal Communications Commission
Room 554
1919 M Street, NW
Washington, DC 20554

International Transcription Services, Inc.*
1231 20th Street, N.W.
Washington, DC 20036

Gary L. Phillips
Counsel for Ameritech
1401 H Street, N.W.
Suite 1020
Washington, DC 20005

James W. Grudus
Mark C. Rosenblum
Leonard J. Cali
295 North Maple Avenue
Room 3250G3
Basking Ridge, NJ 07920

James G. Pachulski
1320 North Court House Road
8th Floor
Arlington, VA 22201

Richard J. Metzger
Emily M. Williams
Association for Local Telecommunications
Services
888 17th Street, N.W., Suite 900
Washington, DC 20006

William B. Barfield
M. Robert Sutherland
David G. Richards
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309-3610

Michael J. Shortley, III
Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Cherie R. Kiser
A. Sheba Chacko
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004

Andrew D. Lipman
Mary C. Albert
Swidler & Berlin, Chtd.
3000 K Street, N.W., Suite 300
Washington, DC 20007

Albert H. Kramer
Michael Carowitz
Dickstein Shapiro Morin & Oshinsky
2101 L Street, N.W.
Washington, DC 20037

Peter A. Rohrbach
Linda L. Oliver
Hogan & Hartson, L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004

Frank W. Krogh
Mary L. Brown
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

Patricia L.C. Mahoney
140 New Montgomery Street
Room 1523
San Francisco, CA 94105

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
1850 M Street, N.W.
11th Floor
Washington, DC 20036

Teresa Marrero
Senior Regulatory Counsel – Federal
Two Teleport Drive
Staten Island, NY 10311

Catherine R. Sloan
Richard L. Fruchterman, III
Richard S. Whitt
David N. Porter
1120 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036

David W. Zesiger
Donn T. Wonnell
Independent Telephone &
Telecommunications Alliance
1300 Connecticut Avenue, N.W.
Suite 600
Washington, DC 20036

L. Marie Guillory
2626 Pennsylvania Avenue, N.W.
Washington, DC 20037

Mark L. Evans
Geoffrey M. Klineberg
Rebecca A. Beynon
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, DC 20005

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W., Suite 701
Washington, DC 20006

Mary McDermott
Linda Kent
Keith Townsend
Lawrence E. Sarjeant
U.S. Telephone Association
1401 H Street, N.W., Suite 600
Washington, DC 20005

R. Michael Senkowski
Jeffrey S. Linder
Timothy J. Simeone
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006

Cathleen A. Massey
Public Policy Counsel
& Assistant General Counsel
NEXTLINK Communications, Inc.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036

Larry Strickling*
Deputy Chief – Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Richard Metzger*
Chief – Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

*Via Hand Delivery

A handwritten signature in black ink, appearing to read "Melissa M. Smith". The signature is fluid and cursive, with a large, stylized "M" at the beginning and a long, sweeping underline that extends across the width of the signature.

Melissa M. Smith