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July 28, 1999

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EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

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JUL 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Re: CC Docket No. 96-98

Dear Ms. Salas:

On July 27, 1999, Gary Phillips of Ameritech, James Pachulski of BellAtlantic, Ernest Bush and I of BellSouth, Scott Randolph of GTE, Kathy Palter of SBC, Melissa Newman of US West, Steven Bradbury of Kirkland and Ellis, and Michael Kellogg of Kellogg, Huber, Hansen, Todd and Evans made an oral ex parte presentation to Common Carrier Bureau Chief Larry Strickling and members of his staff. Besides Mr. Strickling, Bureau staff attending the presentation included Jordan Goldstein, Carol Matthey, Claudia Fox and Jake Jennings. During the meeting we discussed the views of Ameritech, Bell Atlantic, BellSouth, GTE, SBC and US West on how the Commission should define and apply the "necessary" and "impair" requirements of Section 251(d)(2) of the Communications Act. The attached document, as well as the companies' comments and reply comments in CC Docket 96-98, formed the basis for that presentation.

In accordance with Section 1.1206(b)(2), I am filing two copies of this notice in the docket identified above and ask that you associate this filing with the record in that proceeding.

Sincerely,

Kathleen B. Levitz

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Vice President – Federal Regulatory

- cc: Larry Strickling (w/o attachment)
- Jordan Goldstein (w/o attachment)
- Carol Matthey (w/o attachment)
- Claudia Fox (w/o attachment)
- Jake Jennings (w/o attachment)

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The UNE Remand

**A Joint Ex Parte Presentation of
Ameritech, Bell Atlantic, BellSouth,
GTE, SBC, and U S WEST
in CC Docket No. 96-98**

July 1999

Six Core Principles Must Govern the Commission's UNE Remand

1. The Commission's focus should be on competition and consumer welfare, not individual competitors.
2. Too much unbundling can harm competition and consumers just as too little unbundling can.
3. The best evidence of what an efficient competitor can do is what actual competitors are doing.
4. In order to give meaningful consideration to alternatives to the ILEC network, the Commission must conduct a market-based analysis.
5. The Commission should adopt self-executing national standards to determine when and where network elements must be unbundled.
6. CLECs cannot bootstrap elements onto the UNE list based on the alleged desirability of the UNE-P.

The Commission's Focus Should Be on Competition and Consumer Welfare, Not Individual Competitors

- The Commission must adopt a “limiting standard” that is rationally related to the goals of the Act. 119 S.Ct. at 734.
 - “secure lower prices and higher quality service for American telecommunications consumers” and
 - “encourage the rapid deployment of new telecommunications technology.”

- Section 251(d)(2) must not be read to stifle or inhibit competition or the rapid deployment of new technologies.
 - Resale/use of UNEs may be legitimate, long-term strategies for some competitors, but the key to consumer benefits (lower prices, more innovation, better quality, improved service, and greater product diversity) is facilities-based competition.
 - Facilities-based competitors invest in, and make a commitment to, the community they serve.
 - “[W]e believe that, in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition [O]nly facilities-based competition can fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing.” Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, ¶ 4 (rel. July 7, 1999).

Too Much Unbundling Can Harm Competition and Consumers Just as Too Little Unbundling Can

- Too much unbundling would discourage CLECs from deploying new facilities and dissuade ILECs from upgrading their networks with new technologies.
 - Investment is risk. Risk-free riders discourage investment.
 - M. Armstrong, AT&T: “No company will invest billions of dollars to become a facilities-based . . . services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others.”
 - George Bell, Excite@Home: "What really happens with open access is a serious deflation of the willingness of all parties to invest in infrastructure buildout."
- CLECs who have actually invested, e.g., in their own switches have not sought unbundling of ILEC switches: MGC, Rhythms NetConnections, ALTS, Allegiance, e.spire, Intermedia, Level 3, NextLink, MediaOne, Cox, Covad.

The Best Evidence of What an Efficient Competitor Can Do Is What Actual Competitors Are Doing

- The Commission must look at what CLECs are actually doing in providing service without using the ILEC network. 119 S.Ct. at 735.
 - The Commission must consider all viable, non-ILEC alternatives, which include both wholesale and self-provision.
 - Any increase in cost, decrease in breadth of service, or delay in implementation is not sufficient to satisfy 251(d)(2).
 - All new entrants face build-out costs and delays and expand gradually.
 - The Commission cannot blind itself to actual CLEC entry in favor of a hypothetical “business case.”
 - An efficient competitor can perform at the level of those CLECs actually succeeding in the marketplace (access to capital; technical expertise; basic economies of scale).
- The UNE Fact Report provides the facts necessary for the Commission’s determination.
 - The Report is doubly conservative:
 - Focuses on actual, not potential competition.
 - CLECs have the best information on what they are doing and where, but they aren’t talking.

In Order to Give Meaningful Consideration to Alternatives to the ILEC Network, The Commission Must Conduct a Market-Based Analysis

- The Commission has repeatedly stressed the importance of distinctions between urban and rural markets and residential and business customers:
 - merger orders
 - density pricing zones for special access and switched transport (47 C.F.R. § 69.123)
 - geographic deaveraging decision
 - Local Competition Survey
 - public statements rejecting “one size fits all” regulation

- A “least common denominator” approach -- that looks to whether any CLEC in any market needs a particular element -- unlawfully ignores differences in geographic areas, types of services, and customer groups.
 - It ignores the successful experience of numerous facilities-based CLECs.
 - It ignores the Supreme Court’s mandate to look to alternative sources outside the ILEC.
 - It ignores the Supreme Court’s mandate to supply a genuinely limiting standard.
 - It will prompt significant litigation because ILECs will seek waivers in markets where conditions for unbundling are not satisfied.

The Commission Should Adopt Self-Executing National Standards to Determine When and Where Network Elements Must Be Unbundled

- National standards will ensure an optimal level of unbundling.
 - Some elements should not be unbundled anywhere (e.g., OS/DA); others should be unbundled in some areas, but not others (e.g., switching, transport).
 - A one-size-fits-all list will create too much unbundling in some markets and too little in others.

- National standards will be self-executing.
 - Straightforward factual determination in negotiations, backed by state arbitration if facts are disputed.
 - The same standard will apply throughout the country; only its application to particular markets will vary.

CLECs Cannot Bootstrap Elements Onto The UNE List Based On The Alleged Desirability Of The UNE-P

- Supreme Court said proper application of 251(d)(2) may “moot” UNE-P; thus, UNE-P cannot be presumption of 251(d)(2) inquiry.
 - Section 251(c)(3), which speaks to combinations, applies only after an element has satisfied section 251(d)(2).
- Bootstrapping elements based on the UNE-P would impede the growth of a competitive market for any network element until all network elements are competitively provided everywhere.
 - CLECs’ claims of cost and delay in mixing their own facilities with ILEC elements are greatly exaggerated.
 - CLEC claims of “orderly transition” are bogus.
- UNE-P is itself a bad idea.
 - Undermines statutory distinction between resale and UNEs.
 - Discourages facilities-based investment. Facilities-based competition to date has occurred in absence of the platform.
 - To the extent CLECs have made a case for UNE-P at all, it has been for residential, not business, customers.

Some Network Elements Should Not be Unbundled Anywhere

- **Operator Services and Directory Assistance**
 - Numerous CLECs self-provision OS and DA services (e.g., AT&T, MCI WorldCom, Sprint McCleod, ALLTEL, GST, Cox, Omnipoint and WinStar).
 - There are also numerous wholesale providers: Excell, Teltrust, InfoNXX, MetroOne, and HebCom.
 - “Free” Internet sites are also a major source of competition.
 - White pages listings are available at tariffed rates.
- **Signaling and Databases (except in conjunction with ILEC switch)**
 - Many CLECs have deployed their own signaling networks.
 - There are at least 4 major wholesale providers of signaling services: Illuminet, TNS, GTE, and SNET.
- **Advanced Services (other than conditioned loops)**
 - Cable accounts for 80% of the more than 900,000 high-speed Internet users in the U.S.
 - Fixed wireless companies and satellite provide additional alternatives.
 - CLECs provide DSL service in twice as many cities as ILECs.
 - DSL technology, including packet switching and DSLAMs, is cost efficient and easy to deploy.

**Some Network Elements Should be Unbundled
in Some Circumstances, But Not in Others**

- **Switches**

- Over 160 CLECs have deployed over 700 voice switches in 320 cities.
- Switches have a large geographic reach (125 to 600 miles), which gives each switch a wide potential serving area.
- Wire centers in Zones 1 and 2 (47 C.F.R. § 69.123) are almost always served by one or more CLEC switches.

	<u>Zone 1</u>	<u>Zone 2</u>
Ameritech	100% (17/17)	100% (108/108)
Bell Atlantic	97% (149/153)	91% (178/195)
BellSouth	100% (220/220)	93% (113/122)
GTE	89% (153/172)	54% (102/188)
SBC	96% (51/53)	90% (131/145)
U S WEST	100% (17/17)	85% (91/107)

Aggregate: Zone 1 - 96%; Zone 2 - 84%

- Switches are both modular and scalable, so that CLECs can start small and grow large. CLECs with as little as \$1 million in revenues have deployed switches.
- Traditional switch deployment times can be cut significantly using alternatives such as “prefab” central offices and remote switches.
- Cut-over process is routine and can handle large volumes.

- **Transport**

- CLECs deploy fiber to individual end offices and link these points either by using their switch, by connecting them to a SONET node, or by splicing them together.
- Competitive interoffice transport is available in 56% (1406/2500) of BOC and GTE wire centers with 20,000+ lines, 67% (1136/1696) with 30,000+ lines, and 75% (874/1164) with 40,000+ lines.
- Of the top 50 MSAs (which contain 47% of the U.S. population), 48 contain at least 2 CLECs with fiber, and 46 contain at least three. Nearly three quarters of the top 150 MSAs (which contain 69% of the U.S. population) already have at least 3 providers, and 55% have at least 4.

- **Loops**

- CLEC networks connect to 15% of commercial office buildings.
- CLECs serve between 8 and 18% of all business lines in dense (20K+) wire centers with collocation.
- Fixed wireless, digital mobile wireless, and cable either offer or will soon offer a direct substitute for ILEC loops to most U.S. households.

A Proposal for Where Switching, Transport, and Loops Should Not be Unbundled Today

- **Switching**

Should not be unbundled (1) in Zones 1 and 2 or (2) in rate exchange areas served by one or more CLEC switches.

- **Transport**

Should not be unbundled (1) between ILEC wire centers/switches, each of which has non-ILEC transport facilities or (2) between an ILEC wire center/switch and a CLEC wire center/switch or IXC POP, where the ILEC wire center has non-ILEC transport facilities.

- Because interstate special access is a competitive service, and lack of access to unbundled transport would not “impair” CLECs in their ability to compete for special access customers, unbundled transport may not be used to provide interstate special access.

- **Loops**

Should not be unbundled for large customers (defined as 20+ lines) in Zone 1.

- FCC should commit to re-evaluation of loops within two years.