

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

In the Matter of:)
)
Implementation of the Local Competition) CC Docket No. 96-98
Provisions of the Telecommunications Act)
of 1996)

REPLY COMMENTS OF GTE

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GTE Service Corporation and its affiliated domestic telecommunications companies¹ ("GTE") respectfully submit their reply comments in response to the Fourth Further Notice of Proposed Rulemaking in the above-captioned proceeding. As explained herein, the record confirms that special and switched access services should be convertible into UNEs only when the requesting telecommunications carrier provides local exchange service to the end user.

I. INTRODUCTION AND SUMMARY

The opening comments reflect a consensus among ILECs and leading facilities-based CLECs that limiting the availability of UNEs and UNE combinations to provide access services will advance important statutory objectives and is well within the Commission's authority. In particular, the comments of CLECs such as Time Warner

¹ GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, and Contel of the South, Inc.

Telecommunications and Intermedia, like those of GTE and other ILECs, make a compelling case for prohibiting the conversion of access arrangements into UNEs when the requesting carrier does not also provide local service to the end user. This limitation on access arbitrage is needed to prevent a dramatic, flash-cut loss of special access revenues (which are used to support investment in and maintenance of exchange facilities) and to permit a predictable transition to cost-based switched access charges (thereby safeguarding universal service pending the replacement of implicit support with explicit subsidies). The limitation also guarantees that existing investment in competitive facilities is not undercut and thereby validates a commitment to additional facilities deployment going forward. Most importantly, the limitation assures that local rates will remain affordable, that investment by ILECs and CLECs alike will continue undiminished, and that facilities-based competition, with all its attendant benefits, will carry the day.

In contrast, the parties advocating an unlimited right to convert access services into UNEs offer no persuasive legal or policy support for their position. As summarized below and detailed in section II, the various arguments raised by these parties are legally erroneous and factually inaccurate. In reality:

- Given the multitude of competitive alternatives and lack of appreciable barriers to entry in the special access market, unconstrained access to unbundled entrance facilities and loop/transport combinations is foreclosed by section 251(d)(2) (section II.A).
- Section 251(c)(3) offers an independent basis for assuring that loop/transport UNE combinations are available only where the requesting carrier also provides telephone exchange service (or xDSL-based advanced services) to the end user (section II.B).

- Re-pricing special access services at TELRIC-based rates would cause significant revenue shortfalls (as shown in the USTA Fact Report) and would injure consumers of local telephone services (section II.C).
- Converting special access services to UNEs would impair universal service both directly and by diverting demand from switched access due to a lower cross-over point (section II.D).
- Unlimited access arbitrage would undermine continued facilities-based investment (section II.E).
- Unlimited access arbitrage would preclude rational and rapid access charge reform through implementation of the CALLS proposal (section II.F).

The Commission should resist the request to compel re-pricing of access services at TELRIC-based rates. Permitting such arbitrage would not promote competition or benefit consumers; it would merely precipitate an massive, arbitrary transfer of wealth from ILECs (and facilities-based CLECs) to IXCs. Instead, the Commission should confirm that access arrangements are convertible into UNEs only when the requesting carrier provides local service to the end user and should promptly adopt the CALLS proposal.

II. THE PROPONENTS OF UNLIMITED ACCESS ARBITRAGE OFFER NO PERSUASIVE LEGAL OR POLICY ARGUMENTS FOR GRANTING AN UNECONOMIC WINDFALL TO IXCS.

GTE and other ILECs and CLECs persuasively demonstrated in their comments that the Commission has ample statutory authority and policy justification for requiring that UNEs and loop/transport combinations be made available only where the requesting carrier provides local service to a customer. GTE explained, for example, that re-pricing access services at TELRIC would be arbitrary, would impair universal service, would deter facilities-based competition, would cede authority over interstate

access charges to the states, and would violate section 251(g) of the Act.² These showings were supported by numerous commenters, including facilities-based CLECs such as Time Warner and Intermedia.³

In contrast, AT&T, MCI WorldCom, and other commenters seeking a windfall from access arbitrage propose a number of legal and policy claims in support of their position. None of these arguments withstands scrutiny.

A. Unlimited Access to Unbundled Entrance Facilities and Loop/Transport Combinations Is Foreclosed by Section 251(d)(2).

MCI WorldCom and GSA contend that the lack of access to unbundled entrance facilities and loop/transport combinations would impair competition, and that mandatory access to these facilities for the provision of access services is consistent with section 251(d)(2).⁴ This is plainly incorrect.

First, as the USTA Fact Report demonstrates, competitors face no appreciable barriers to competition in the special access market. CLECs and CAPs already have captured roughly one-third of that market, and ILECs such as GTE have been forced to price their special access offerings below the applicable price caps in response to that competition. Indeed, GTE demonstrated at length in its opening comments that (1) neither IXCs nor CAPs are impeded in providing special access services, and (2)

² GTE at 6-21.

³ Time Warner, Intermedia, Bell Atlantic, BellSouth, SBC, USTA, NECA *et al.*, and U S West all opposed unlimited access arbitrage.

⁴ GSA at 4, 12; MCI WorldCom at 16-17.

simply re-setting special access rates (which are subject to competitive discipline) at TELRIC would be arbitrary and serve no pro-competitive purpose.⁵ As Time Warner explained in discussing section 251(d)(2), “while the Commission has stated that the availability of UNEs in many cases will assist carriers until they can build their own facilities, pure arbitrage does nothing of the sort.”⁶

Second, the examples of impairment cited by MCI WorldCom and GSA are entirely unpersuasive. GSA argues, first, that entrance facilities are competitively vital because CLECs may need these links to offer interexchange services. This claim cannot be credited in light of the widespread competitive availability of these facilities for interexchange access purposes.⁷ For its part, MCI WorldCom contends that CLECs with switches depend on loop/transport combinations to carry all CLEC traffic to their switches and that ILECs freely mix access and local traffic.⁸ There is no basis for finding a competitive disadvantage based on this claim. CLECs are free to combine access and local traffic on a loop/transport combination when they provide local service to the customer generating the access traffic. This places CLECs and ILECs in exactly the same competitive posture.

⁵ GTE at 8-11; *see also* BellSouth at 20-30; SBC at 6-12; U S West at 2-12.

⁶ Time Warner Telecom at 23-24.

⁷ *See* USTA Fact Report and footnote 5, *supra*.

⁸ MCI at 16-17.

B. Section 251(c)(3) Offers an Independent Basis for Making Loop/Transport UNE Combinations Available Only Where the Requesting Carrier Also Provides Telephone Exchange Service or xDSL-Based Advanced Services to the End User.

The proponents of access arbitrage argue broadly that “use restrictions” are contrary to section 251(c)(3) and the Commission’s Rules,⁹ and claim more specifically that the “just and reasonable” qualification in section 251(c)(3) cannot be used to limit the availability of UNEs to provide any telecommunications service.¹⁰ Once again, these arguments are legally flawed.

As an initial matter, section 251(c)(3) plainly contemplates limitations on the availability of UNEs in certain cases. Contrary to CompTel’s reading of the statute, the “just and reasonable” terms and conditions required by that section must encompass constraints designed to assure that the Act’s fundamental goals of universal service and economically rational competition are not undermined.¹¹ Similarly, Sprint is mistaken in claiming that the “requirements of this section” language in 251(c)(3) imposes a duty to provide UNEs to any carrier for *any* telecommunications service.¹² The Act states that UNEs must be made available “for the provision of a [not any] telecommunications service.” Sprint cannot, by adding words to the statute, broaden

⁹ See, e.g., Sprint at 3; TRA at 5; MCI WorldCom at 3-4; AT&T at 3-5.

¹⁰ See, e.g., Sprint at 7; CompTel at 9-11.

¹¹ GTE at 11-20; see *also* Time Warner Telecom at 22-23 (explaining that the Commission has authority under section 251(d)(2) to limit availability of UNEs where necessary to further the objectives of the Act).

¹² Sprint at 7.

the scope of its requirements.¹³ As SBC explained, the language in section 251(c)(3) “addresses the outer boundaries of what a requesting carrier may seek, not the terms and conditions under which the incumbent must provide facilities and services.”

Nor can sections 51.307 and 51.309 of the Commission’s rules preclude limitations on the use of UNEs where necessary to preserve universal service and promote facilities-based competition.¹⁴ Those rule sections were adopted at a time when the Commission erroneously believed that any element that could, as a technical matter, be unbundled had to be made available. The Supreme Court has made it clear that technical feasibility is a necessary but not sufficient predicate to mandatory unbundling. To assure that its rules are consistent with the statute, therefore, the Commission must interpret them in a manner that does not frustrate the Court’s opinion and the Act’s guiding objectives.¹⁵

C. Re-Pricing Special Access Services at TELRIC-Based Rates Would Cause Significant Revenue Shortfalls and Would Injure Consumers of Local Telephone Services.

A few commenters gratuitously assert that the loss of revenues from re-pricing special access services at TELRIC-based rates would be “minimal.” For example, GSA claims that special access is a relatively small portion of ILEC revenues and that losses

¹³ See SBC at 20-21 (noting that Congress used essentially the same formulation in sections 251(c)(2) and 251(b)(5) and that “[t]he Commission has consistently read these provisions as ‘impos[ing] limits’ on the purposes for which a carrier may invoke the statutory arrangements.”).

¹⁴ Obviously, the rules cannot require that UNEs be made available where they do not meet the section 251(d)(2) standard.

¹⁵ See SBC at 27-29.

in special access can be offset by gains from other services.¹⁶ Relatedly, several IXCs contend that losses will be small because most special access arrangements are purchased under long-term agreements with termination penalties.¹⁷ These claims are inaccurate.

Regardless of the percentage of ILEC revenues derived from special access, the absolute amount of money involved runs close to six billion dollars – a very substantial sum by any rational measure. Deep reductions in special access revenues cannot simply be made up with gains from other services. The new markets being entered by ILECs, such as long distance and Internet access, are competitive and therefore not capable of generating excess profits. Moreover, even if such internal cross-subsidization were possible as a competitive manner or as a matter of law,¹⁸ which it is not, the government should not be in the business of mandating new pricing distortions.

In addition, as the USTA Fact Report makes clear, the impact of the industry-wide loss of special access revenues would be substantial, even accounting for offsetting termination liability. This loss, furthermore, is conservative, since it does not account for additional losses in switched access revenues resulting from the lower

¹⁶ GSA at 8-9.

¹⁷ TRA at 7, MCI WorldCom at 15. Cable & Wireless argues that any financial impact is consistent with the Act because ILECs now have the opportunity to enter new markets. Cable & Wireless at 6-8. Whatever the merits of this argument for the RBOCs (and GTE believes the argument has no merit), it certainly does not apply to GTE, which has been free to provide long distance services since prior to the 1996 Act. In any event, the Act intended to put revenue streams at risk through the emergence of economically rational competition, not by encouraging arbitrage that is unrelated to actual competition.

¹⁸ See *Brooks-Scanlon v. Railroad Comm'n*, 251 U.S. 396 (1920).

cross-over point between special and switched access. The Commission must therefore reject claims that any financial losses would be nominal.

D. Converting Special Access Services to UNEs Would Impair Universal Service Both Directly and by Diverting Demand from Switched Access.

Several IXC's argue that no limitation on the availability of UNEs is needed because special access revenues do not support universal service.¹⁹ This contention is wrong on two levels. Looking only at special access, it is incontrovertible that ILECs use revenues from these services to offset expenses, contribute to investment in new facilities, and cover overhead costs. Dramatically reducing these revenues on a flash-cut basis therefore would markedly impair the ILECs' ability to continue providing affordable, high quality basic local service.

More importantly, the IXC's ignore the impact on switched access of re-pricing special access services at TELRIC-based rates. No party disagrees that switched access rates continue to provide implicit support toward universal service. As special access rates come down, however, the economic cross-over point between special and switched access will correspondingly decline. As a result, IXC's will increasingly substitute special access arrangements (or, more precisely, UNEs and UNE combinations) for switched access services. Such substitution would cause a considerable loss of support from switched access, undermining the goals of section 254 of the Act.

¹⁹ See, e.g., AT&T at 12-13; TRA at 7; MCI WorldCom at 9; CompTel at 3-8.

E. Unlimited Access Arbitrage Would Deter Facilities-Based Competition.

AT&T and MCI WorldCom argue that limiting the availability of UNEs for access to entities providing local service to a customer would not deter facilities-based investment by CLECs.²⁰ As Time Warner Telecommunications and Intermedia confirm, however, unlimited access arbitrage would undermine existing investment in competitive access facilities and deter future investment.

Specifically, MCI WorldCom claims that allowing IXCs to convert access services into UNEs will not affect facilities investment by CLECs because CLECs deploy T3 circuits, but access arbitrage will only drive down the ILECs' retail rates for T1 services. This is preposterous. First, MCI WorldCom declines to offer any supporting rationale or evidence for the untenable assumptions underlying its argument – i.e., that CLECs do not invest in T1 facilities (they do) and that access arbitrage will not affect the ILECs' T3 pricing (it would). Even accepting MCI WorldCom's assumptions for the sake of argument, competitive access providers still would suffer. As rates for T1 services dropped, demand would be shifted away from T3 facilities (that is, the cross-over point between T1 and T3 circuits would increase), depressing the market for the CAPs' higher capacity circuits.

Second, MCI WorldCom's argument is inconsistent with its statement (made only two pages earlier in its filing) that ILECs could engage in a price squeeze by lowering

²⁰ MCI WorldCom at 18; AT&T at 10 n.10.

access rates to a level to which CAPs and CLECs could not respond.²¹ If CLECs do not compete in the providing T1 services, as MCI WorldCom asserts on page 18, then they should not be susceptible to a price squeeze, as MCI WorldCom asserts on page 16. In addition, if access arbitrage would not affect the ILECs' T3 rates, then there should likewise be no price squeeze.²²

Third, Time Warner's comments make it abundantly clear that facilities-based CLECs and CAPs perceive unrestricted access arbitrage as a potent disincentive to investment. As Time Warner points out, investment in competitive access facilities has been stimulated by the Commission's "reliance on facilities-based competitive entry, rather than prescriptive rate reductions, to drive ILEC access charges down." The Commission's "policy has been very successful. Competitive carriers have built a tremendous amount of fiber, over 30,000 miles nationwide covering most of the commercial districts in the country."²³ Permitting unrestricted access arbitrage, however, would reverse these gains:

From TWTC's perspective, the most important reason [to prohibit the use of UNEs for the provision of dedicated and special access services] is that a flash-cut to TELRIC-based prices for these services would substantially reduce TWTC's incentive to expand its entry in the 21 markets it has already entered or to invest in network facilities in new geographic areas. In addition, regulatory prescription is inherently flawed and will likely create market distortions. For example, if TELRIC rates are set too low, even efficient entrants like TWTC

²¹ MCI WorldCom at 16.

²² In any event, there is no merit to MCI WorldCom's price squeeze claim. In yet another inconsistency, MCI WorldCom seeks to re-price special access at TELRIC in order to obtain an economic windfall, but then expresses concern that access rates might become too low.

²³ Time Warner Telecom at 1-2.

would not be able to compete. The risks inherent in prescriptive rate reduction would thus increase the level of uncertainty in the market, and would likely increase the cost of capital for TWTC and other entrants.²⁴

Intermedia expresses the same concern, cautioning that converting special access service into UNEs “would undermine the investment that facilities-based carriers have made in competing facilities.”²⁵

For its part, AT&T argues that the “lack of alternative local facilities in most locations today” belies concerns that limiting access arbitrage would promote investment. AT&T’s view of the access market has no basis in reality. As the USTA Fact Report amply demonstrates (and Time Warner confirms, as noted immediately above), CAPs and CLECs have deployed competitive facilities throughout the nation and have succeeded in capturing large portions of the market. Indeed, AT&T itself informed the FCC that, as of June 1998, between five and twelve CLECs operated in each of Teleport’s ten top markets²⁶; there must be even more competitors today. AT&T cannot legitimately change its view of the market just to suit its financial interests.

Simple economics dictate that if a good is priced artificially low, competitors will be dissuaded from entering the market. No rational CAP would invest millions of dollars in new facilities if it knew that it could not hope to match an ILEC’s prices for access services. AT&T and MCI WorldCom, in their quest for windfall profits, would have the Commission suspend the laws of the marketplace. In reality, limiting access

²⁴ *Id.* at 19.

²⁵ Intermedia at 3.

²⁶ AT&T Ex Parte, CC Docket No. 98-24, filed June 10, 1998.

arbitrage as proposed by GTE would promote, not prevent, the facilities-based competition that Congress sought to bring about through the 1996 Act.

F. Just and Reasonable Limits on the Conversion of Access Services into UNEs Will Permit Rational Reform of Access Charges.

In its opening comments, GTE explained that re-pricing access services at TELRIC-based rates would preclude the ability to reform access charges in a rational manner.²⁷ The IXCs nonetheless argue that limiting the availability of UNEs for access arbitrage would keep access rates artificially high and frustrate the Commission's desire to rely on market forces (including UNEs) to put pressure on access rates.²⁸ This claim, once again, is baseless.

Looking first at special access rates, there is no record evidence and no grounds for concluding that rates are unreasonable. To the contrary, as GTE and other ILECs demonstrated, the ILECs' pricing of these services confirms that they face competitive pressure. Moreover, that pressure is increasing constantly, as shown by the CAPs' success in capturing an increasingly large share of the special access market.

Turning to switched access, the process of bringing these rates closer to cost is well on the way, thanks both to competition and to the CALLS proposal. While switched access competition has been slower to emerge than special access competition, substantial inroads are being made as CLECs capture more of the local market. Notably, UNEs remain available to provide switched access services (and

²⁷ GTE at 20-22.

²⁸ See AT&T at 8-9; MCI at 9, 14; TRA at 8.

therefore place market pressure on switched access pricing) when a CLEC also provides local service to the customer. In addition, adoption of the CALLS proposal would rapidly drive down usage-sensitive switched access rates, as even AT&T recognizes.²⁹

III. CONCLUSION

The Commission has ample authority under the statute to permit conversion of access arrangements into UNEs only when the requesting carrier provides local service to the end user. Doing so will directly and substantially promote the Act's fundamental goals of promoting affordable local telephone service and facilities-based local competition. In contrast, the IXCs arguing for unlimited access arbitrage are seeking a windfall that would benefit no one but their shareholders. The Commission accordingly should reject arguments that access services should be convertible into UNEs even

²⁹ See AT&T at 17 ("The CALLS proposal ... offers the Commission means to complete the work mandated by the Act nearly four years ago. ... [The Commission] can and should resolve the longstanding debate over a means to implement access and universal service reform by adopting the complete CALLS proposal as soon as possible.").

where the requesting carrier does not provide local service or xDSL-based advanced services to the end user.

Respectfully submitted,

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