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

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

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

CompTel praises the Commission for its hard work on the *Third Report and Order*, most aspects of which will lower barriers to local entry and promote the rapid development of competition by a multitude of providers as envisioned by the 1996 Act. In this Petition, CompTel respectfully requests that the Commission reconsider those limited aspects of the *Third Report and Order* and *Supplemental Order* that are inconsistent with the 1996 Act because they allow ILECs to impair the ability of CLECs to provide service in both business and residential markets.

First, the Commission should reconsider the four line cutoff for the exemption from the unbundling requirement for local switching, which is not based on the impair standard or supported by the facts. Moreover, four lines ignores the reality of serving today's *small* business market. CompTel has submitted evidence on the record that the incumbent LECs' failure to provide access to local switching for customers with less than a DS-1 interface impairs a requesting carrier by materially diminishing that carrier's ability to provide the services it seeks to offer. This evidence demonstrates that the manual provisioning systems of the incumbent LECs impose excessive costs and delays on requesting carriers that order termination of individual circuits. Therefore, the DS-1 interface, which is the point at which many requesting carriers use self-supplied switches to provide service, and which would ensure that *small* businesses have a choice of providers, is the most rational cutoff for the Commission's exception for unbundled local switching.

Second, the Commission should require the ILECs to unbundle interoffice packet transport and interoffice packet switching functionalities. When the Commission applied the impair standard to packet switched functionalities, it inexplicably applied the standard in a different matter, considering only unbundling of digital subscriber line access multiplexers

("DSLAMs"). However, packet switched services consist not only of packet switching network elements, which include both DSLAMs and interoffice packet switching, but also combinations of packet transport and switching elements that have unique characteristics which justify definition as unbundled network elements. CompTel and its members have submitted evidence on the record that, even if requesting carriers install their own DSLAMs, the incumbent LECs' failure to provide access to interoffice packet transport and interoffice packet switching impairs a requesting carrier by materially diminishing that carrier's ability to provide the packet switched services it seeks to offer.

Third, the Commission should clarify that Rule 315(b) broadly entitles requesting carriers to provide any service to any customer through an unbundled network element ("UNE") combination if the ILEC provides or uses that combination anywhere in its local network. The Commission need not wait for any further rulings by the Eighth Circuit to clarify Rule 315(b), because the Supreme Court has reinstated Rule 315(b) and the Commission has the authority to interpret its own rules. Moreover, the Commission should define the Enhanced Extended Link ("EEL") and the UNE Platform ("UNE-P") as an individual UNE in addition to a UNE combination.

Finally, the Commission should reconsider its decision to impose use restrictions on UNEs because all use restrictions – even if only temporary in nature – are unlawful under the Act. The Commission should also reconsider its decision that the routing tables of the local circuit switching element may be proprietary. For a UNE to be proprietary "in nature," the proprietary aspect of the UNE must be its "essential character" or its "innate disposition," and the allegedly proprietary aspect of a routing table is not its "essential character."

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PETITION FOR RECONSIDERATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully petitions the Commission for reconsideration of certain aspects of its *Third Report and Order*, as amended by its *Supplemental Order*, in the above-captioned docket.[1] With over 350 members, CompTel is the leading trade association representing competitive communications firms and their suppliers. CompTel's member companies include the nation's leading providers of competitive local exchange services and span the full range of entry strategies and options. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future.

As a general matter, CompTel praises the Commission for its hard work on the *Third Report and Order*, most aspects of which will lower barriers to local entry and promote the rapid development of competition by a multitude of providers as envisioned by the Telecommunications Act of 1996 ("1996 Act" or "Act").[2] In this Petition, CompTel respectfully

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1 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (1999) ("*Third Report and Order*").

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

requests that the Commission reconsider those limited aspects of the *Third Report and Order* and *Supplemental Order* that are inconsistent with the 1996 Act because they allow ILECs to impair the ability of CLECs to provide service in both business and residential markets.

As explained more fully below, CompTel urges the Commission to correct these errors by (1) reconsidering the four line cutoff for exemption from the unbundling requirement for local switching, (2) ordering ILECs to unbundle interoffice packet transport and interoffice packet switching functionalities, (3) clarifying that Rule 315(b) broadly entitles requesting carriers to provide any service to any customer through a UNE combination if the ILEC provides or uses that combination anywhere in its local network, (4) reconsidering its decision to impose use restrictions on UNEs, and (5) reconsidering its decision that the routing tables of the local circuit switching element may be proprietary.

I. THE COMMISSION SHOULD RECONSIDER ITS FOUR LINE CUTOFF FOR EXEMPTION FROM UNBUNDLING OF LOCAL SWITCHING

In the *Third Report and Order*, the Commission adopted a rule requiring incumbent LECs to provide local switching as an unbundled network element.[3] The Commission, however, adopted an exception to this rule: incumbent LECs are not required to provide local switching as an unbundled network element for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas ("MSAs") where they are providing nondiscriminatory, cost-based access to EELs for end users. In adopting this exception, the Commission rejected the proposal that CompTel had submitted in its comments and ex parte presentations.[4] Nevertheless, CompTel only requests the Commission to reconsider

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[3] *Third Report and Order* at ¶ 253.

[4] In an *ex parte* presentation, CompTel proposed that the Commission order unbundled switching for customer interfaces at the DS-1 level and above in all Zone 2 and 3 central (continued...)

one aspect of the exception: The Commission's decision to base the exception in part on whether the end user has four or more lines. This Petition requests that the Commission instead base the exception in part on whether the end user has a DS-1 interface or higher.

In adopting the exception, the Commission chose to distinguish between mass market customers and larger business customers solely because it considered separate markets in its merger review analysis and reform of the interstate access regime.[5] Without explanation or record support, the Commission concluded that it was appropriate here to distinguish between the "mass market" and medium and large business customers,[6] and that customers with three lines or less captures a significant portion of the mass market.[7] The Commission then found, again without explanation or record support, that requesting carriers are not impaired in their ability to serve medium and large business customers, defined as all customers with four or more lines.[8]

The main problems with the Commission's analysis are that it bears no rational connection to the impairment analysis that Section 251(d)(2) mandates and it is not supported by the record. Rather than applying the impair standard, the Commission relied on findings made in two unrelated proceedings, neither of which applied the impair standard or contained record evidence upon which the Commission could rely in applying the impair standard. Because none of the findings in either the Commission's merger review analysis or its reform of the interstate

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(...continued)

offices within the top 20 MSAs and in all MSAs outside the top 20, and unbundled switching for all customer interfaces below the DS-1 level nationwide. *See* CompTel August 19, 1999 *Ex Parte* Presentation at 5.

5 *Third Report and Order* at ¶ 295.

6 *Id.*

7 *Id.* at ¶¶ 291, 293.

8 *Id.* at ¶¶ 293, 295.

access regime are relevant to the impair standard, these proceedings have no bearing upon the exemption from unbundling of local switching. Moreover, if the Commission wants to distinguish between mass market and medium and large business customers, four lines is not the right demarcation point, principally because it ignores the realities of serving today's *small* business market. Rather, a DS-1 interface makes more sense if the Commission wants to ensure that *small* businesses, people who work at home, residential users with multiple lines, etc., have a choice of providers. This is the real mass market, and an increasingly small percentage of that market is served by three or fewer lines. It is becoming increasingly common for residential and small business customers to have more than four lines. The Commission's exception also could place many end users into a very awkward situation. If an end user has three lines prefers a carrier providing service using UNE-P, the end user might have to change its local carrier in order to expand to four lines. This type of disruption would be minimized if the line of demarcation is a DS-1 interface rather than four lines.

The Commission also failed to consider any of the record evidence in this proceeding about the costs and delays associated with serving customers with less than a DS-1 through external switches. As CompTel explained in *ex parte* presentations, the manual provisioning systems of the incumbent LECs impose excessive costs and delays on competitive carriers that order termination of individual circuits.[9] Where carriers seek higher capacity end-user interfaces, the non-recurring costs to establish a serving arrangement become a smaller percentage of the overall cost of service. CompTel submitted affidavits and record evidence that requesting carriers use self-supplied switches to provide service to customers at a DS-1 interface

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[9] *See, e.g.,* CompTel Comments at 47-53 & *Appendix B* (containing a Profitability Analysis that compares the average profitability of serving typical multi-line business customers in New York).

or higher.[10] Therefore, the DS-1 interface is the most rational cutoff for the Commission's exception for unbundled local switching.[11] This is the only evidence on the record upon which the Commission could rely to establish a limit for the unbundling switching exception. For these reasons, CompTel urges the Commission to reconsider its use of the four or more lines limit for the unbundled switching exception.

II. THE COMMISSION SHOULD REQUIRE ILECS TO UNBUNDLE INTEROFFICE PACKET TRANSPORT AND INTEROFFICE PACKET SWITCHING FUNCTIONALITIES

As an initial matter, CompTel commends the Commission for the unbundling standards it adopted in the *Third Report and Order*. Under those standards, the incumbent LECs' failure to provide access to a non-proprietary network element "impairs" a requesting carrier within the meaning of Section 251(d)(2)(B) if that element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer, taking into consideration the availability of alternative elements outside the incumbent's networks.[12] In evaluating whether there are alternatives that are actually available to the requesting carrier as a practical, economic and operational matter, the Commission looks at the totality of the circumstances, including

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10 *See, e.g.*, Letter dated August 11, 1999 from Steven A. Augustino, Counsel to CompTel, to Magalie R. Salas, Secretary of the FCC, submitting the following documents for inclusion in the record in this proceeding: Affidavit of Andrew M. Walker, Vice Chairman and Chief Executive Officer, ITC DeltaCom, Inc.; Declaration of Jerry James, Executive Vice President, Governmental Affairs and Business Development, Golden Harbor of Texas, Inc.; and Affidavit of Richard L. Tidwell, Vice President, Industry and Regulatory Relations, Birch Telecom, Inc. (discussing the experiences of each respective company in installing a local exchange switch and demonstrating how CLECs are impaired without access to unbundled switching as a network element).

11 This limit is feasible only where EELs are available ubiquitously and without restrictions, the ILECs have fully implemented the Commission's collocation requirements, and ILECs provide "hot-cuts" of DS-1 interface arrangements on a non-discriminatory basis.

12 *Third Report and Order* at ¶ 15.

particularly the cost, timeliness, quality, ubiquity, and operational issues associated with use of the alternative.

When the Commission applied the impair standard to circuit switched functionalities, it found that several individual network elements must be unbundled, including loops, subloops, network interface devices ("NIDs"), circuit switching, interoffice transmission facilities, signaling and call-related databases, and operations support systems ("OSS").[13] When the Commission considered packet switched functionalities, however, it inexplicably applied the impair standard in a different manner and failed to require unbundling for certain individual network elements, including interoffice packet transport and interoffice packet switching, the unavailability of which *materially diminishes* a requesting carrier's ability to provide the packet switched services it seeks to offer.[14]

In comments and *ex parte* presentations, CompTel and its members had urged the Commission to unbundle generally the network elements necessary to provide packet switched data services, including specifically frame relay, voice over data, Internet protocol ("IP") and asynchronous transfer mode ("ATM") services. The Commission rejected these proposals, addressing only the packet switching functionality. Specifically, the Commission declined to order unbundling of the packet switching functionality as a general matter, except that incumbent LECs must provide requesting carriers with access to unbundled packet switching where the incumbent has placed its digital subscriber line access multiplexer ("DSLAM") in a remote

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13 *Id.* at ¶¶ 11-13.

14 *Id.* at ¶¶ 300-317.

terminal.[15] The Commission will relieve the incumbent of this unbundling obligation if it permits a requesting carrier to collocate a DSLAM in the incumbent's remote terminal, on the same terms and conditions that apply to its own DSLAM.[16] This Petition requests that the Commission order unbundling of interoffice packet transport and interoffice packet switching.

The Commission erred by failing to apply its impair standard to network elements other than DSLAMs in order to determine whether the ability of requesting carriers to provide packet switched services would be *materially diminished* if the incumbent LEC withheld access to any or all of these elements. Packet switched services consist not only of packet switching network elements, which include both DSLAMs and interoffice packet switching, but also combinations of packet transport and switching elements that have unique characteristics which justify definition and unbundled network elements.[17] As CompTel and its members explained in comments and *ex parte* presentations, requesting carriers need access not only to subscriber side switching elements like DSLAMs, but also interoffice packet switching and interoffice packet transport elements. The Commission must analyze all of the functionalities necessary to provide packet switched services, just as it did with circuit switched circuits.

For the same reasons that the Commission ordered unbundling of interoffice transmission facilities for circuit switched services, the Commission should order unbundling of interoffice packet transport and interoffice packet switching. The Commission has already ordered ILECs to unbundle interoffice switching and transport functionalities. Interoffice packet

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15 *Id.* at ¶¶ 306, 313.

16 *Third Report and Order* at ¶ 306.

17 For example, the combination of transport and switching that is necessary to provide Frame Relay corresponds to the following ILEC tariffed elements: 1) User-to-Network Interface Ports ("UNI Ports"); Network-to-Network Interface Ports ("NNI Ports"); and Data Link Connection Identifiers at Committed Information Rates ("DLCIs at CIRs").

transport and interoffice packet switching are merely variations of these same functionalities, much like shared transport, high capacity transport and tandem switching. These variations are extremely important, however, and were not considered by the Commission in the *Third Report and Order*. Even if requesting carriers install their own DSLAMs, they are materially impaired if they cannot get this traffic into the network because the ILEC has not unbundled interoffice packet transport and interoffice packet switching.

The Commission rejected the proposals of CompTel and its members because "[d]efining an unbundled element according to a particular packet switching technology, such as frame relay, violates this principle of technological neutrality," and because there allegedly was no specific information on the record "to support a finding that requesting carriers are impaired without access to unbundled frame relay."[18] Neither of these justifications is based on the Commission's application of the impair standard. Rather, both are based on a mischaracterization of the proposals as a request for unbundling of a specific packet switching technology (*i.e.*, frame relay).[19] Moreover, the *Third Report and Order* in effect treats all of the network elements necessary to provide packet switched services as if they were identical to DSLAMs. Therefore, not only is the *Third Report and Order* incorrect as a factual matter, it is also inconsistent with the evidence on the record in this proceeding.

CompTel and its members made clear to the Commission that they were not requesting a technology-specific frame relay UNE. For example, e.spire and Intermedia explicitly stated in an *ex parte* position paper dated August 9, 1999 that they

> "seek access to advanced services UNEs that go beyond frame relay. The frame relay UNEs described herein closely track frame

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18 *Third Report and Order* at ¶ 312.

19 *Third Report and Order* at ¶ 311.

> relay elements currently available in ILEC access tariffs, and are offered *in response to requests for specificity [from FCC staff] and indications [from FCC staff] that it may be difficult for the Commission to apply the unbundling standards of Section 251(d)(2) to broad functionality defined UNEs.* Thus, e.spire and Intermedia offer frame relay UNEs *as an example* of the types of UNEs that will be necessary to move implementation of the competitive provisions of the 1996 Act beyond the circuit-switched world and into the packet-switched world."[20]

In sum, CompTel and its members had not requested that the Commission define technology-specific UNEs. Therefore, it was erroneous not to apply the impair standard to all of the network elements that are necessary to provide packet switched services.

The Commission similarly erred in failing to apply the impair standard to network elements other than DSLAMs merely because the record in the proceeding allegedly did not contain "any specific information to support a finding that requesting carriers are impaired without access to unbundled frame relay."[21] CompTel, e.spire and Intermedia submitted evidence on the record to support a finding that competitors are impaired in their ability to offer packet switched services. This evidence outlined the costs and delays of providing packet switched services, which satisfy the impair standard.[22] Specifically, the evidence demonstrated the efficiencies that only LECs can achieve given the proximity of their network to most customers' geographically dispersed LAN locations, which usually translates into a decisive cost-advantage for the ILECs, and their ability to "oversubscribe" their ubiquitous facilities,

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20 e.spire Communications, Inc. and Intermedia Communications Inc., *Frame Relay and Data UNEs; Ex Parte Position Paper*, CC Docket No. 96-98 (filed August 9, 1999) (emphasis added and footnotes omitted).

21 *Third Report and Order* at ¶ 312.

22 *See, e.g.,* e.spire Communications, Inc. and Intermedia Communications Inc., *Frame Relay and Data UNEs; Ex Parte Position Paper*, CC Docket No. 96-98 (filed August 9, 1999).

which results in significant cost efficiencies.[23] Further evidence of these efficiencies can be seen in the rates that ILECs charge end users for packet switched services like Frame Relay, which are less than the cost that requesting carriers would incur by using the existing distance sensitive transport UNEs to provide the same services. This independently verifiable fact alone demonstrates that the ILECs are not providing to competitors access to otherwise unavailable elements of their Frame Relay networks at UNE rates, as required by the 1996 Act and the Commission's rules.

The *Third Report and Order* did not address any of this evidence and did not indicate whether any parties had submitted evidence to the contrary. Therefore, CompTel urges the Commission to reconsider its treatment of packet switching functionalities in the *Third Report and Order* and order ILECs to unbundle interoffice packet transport and interoffice packet switching. If the Commission still believes that the record on this issue is not fully developed, despite the evidence that CompTel and its members have already submitted, it should request additional comment so that it can issue a supplemental order based on a fully informed decision about packet switched functionalities.

III. THE COMMISSION SHOULD CLARIFY THAT RULE 315(b) BROADLY APPLIES TO UNES THAT ARE ORDINARILY COMBINED WITHIN THE ILEC'S NETWORK

In the *Third Report and Order*, the Commission declined to address whether Rule 315(b) applies to UNEs that are "ordinarily combined within their network, in the manner which they are typically combined", or only to UNEs that are currently combined.[24] The Commission also declined to define the EEL as a separate network element. In its comments, CompTel

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23 *Id. See also* e.spire and Intermedia White Paper on Frame Relay and DATA Unes.

24 *Third Report and Order* at ¶¶ 478-79.

argued both that the language and intent of Rule 315(b) are sufficiently broad to permit requesting carriers to order EELs without first purchasing them as special access circuits and that UNE combinations, such as the EEL and the UNE-P, should be defined as a UNE.[25] The Commission rejected CompTel's argument, stating that the issue is currently pending before the Eighth Circuit. This petition respectfully requests the Commission to reconsider its decision and to clarify that requesting carriers need not purchase special access circuits in order to qualify for EELs.

As an initial matter, CompTel notes that the Commission need not wait for any further rulings by the Eighth Circuit to take up this issue, because both the Supreme Court and the Eighth Circuit have already reinstated Rule 315(b). Thus, none of CompTel's arguments, which are based solely upon Rule 315(b), are affected by the Eighth Circuit proceedings, which pertain solely to the status of Rules 315(c)-(f). The Commission has broad discretion in interpreting its own rules,[26] and a change or clarification of Rule 315(c) is not necessary to interpret that requesting carriers need not purchase special access circuits in order to qualify for EELs. Accordingly, CompTel urges the Commission to interpret Rule 315(b) as applying to UNEs that are ordinarily combined within the ILECs' networks in the manner which they are typically combined.

As CompTel explained in its comments, Section 251(c)(3) states that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such

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25 *See, e.g.,* CompTel Comments at 47-53.

26 *See, e.g., Omnipoint Corp. v. FCC,* 78 F.3d 620, 631 (D.C. Cir. 1996).

telecommunications service."[27] The Supreme Court agreed with the Commission's interpretation of Section 251(c)(3), finding that requesting carriers need not supply any of their own network functionalities to preserve the statutory distinction between UNEs and total service resale. The Court explained that "the 1996 Act imposes no such limitation; if anything, it suggests the opposite, by requiring in Section 251(c)(3) that incumbents provide access to 'any' requesting carrier."[28] The Supreme Court affirmed the "all elements" rule whereby entrants may provide service exclusively through UNEs, and it reinstated the Commission's requirement in Rule 315(b) that ILECs must make the "entire preassembled network" available to entrants through UNE combinations at cost-based rates.[29] Therefore, CompTel and its members are legally entitled to non-discriminatory access to all technically-feasible UNE combinations at cost-based rates.

The Commission should clarify that Rule 315 broadly entitles an entrant to provide any service to any customer through a UNE combination if the ILEC provides or uses that combination anywhere in its local network. This immediate clarification is necessary to prevent the ILECs from interfering with the legal rights of new entrants to pre-existing UNE combinations under Rule 315(b). The ILECs should not be able to evade their statutory and regulatory obligations through hyper-technical rule interpretations, including arguments that there are no pre-existing UNE combinations for customers who are new to the area, or that the obligation does not apply to subscribers moving from one CLEC to another CLEC. As CompTel

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27 47 U.S.C. § 251(c)(3).

28 *AT&T Corp. v. Iowa Utilities Board,* 119 S. Ct. 721, 736 (1999).

29 *Id.* at 736-37; 47 C.F.R. § 51.315(b).

explained in its comments and *ex parte* presentations, if the ILEC has previously supplied or used a UNE combination anywhere in its network for any service or customer, then the ILEC should be required to provide that same combination upon request to new entrants for any service they wish to provide to any customer they wish to serve. Requiring CLECs to buy special access services and then immediately convert them into UNE combinations or UNEs imposes needless costs and burdens on both CLECs and ILECs.

When a new entrant provides local services through a combination of loop, switching and transport UNEs, it is dependent upon the ILEC for the *combination,* not merely for each UNE *individually*. If even one UNE in a combination satisfies the "impair" standard, the entire UNE combination must be offered by ILECs on a mandatory basis under Section 251(c)(3). Hence, even if the entrant can obtain one functionality from an alternative supplier, the entrant's dependence upon the ILEC for the entire UNE combination is not reduced in the slightest, unless the entrant can efficiently use the non-ILEC functionality seamlessly, interchangeably and without penalties in combination with the remaining two ILEC-supplied UNEs for the provision of services to subscribers. Without that, the entrant is still fully dependent on the ILEC for the entire UNE combination, and none of the combined UNEs can be removed from the mandatory list. The Supreme Court has removed any possible doubt that Section 251(c)(3) entitles all requesting carriers to obtain and use UNEs in any technically-feasible combinations to provide services to subscribers.[30]

Finally, CompTel urges the Commission to define the EEL as an individual UNE in addition to being a UNE combination. This approach is consistent with Section 251(c), and it is easier and cleaner to implement than relying on the Commission's combination authority to

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[30] 119 S. Ct. at 736-37.

require access to EELs. In fact, it has been the Commission's intent since 1996 to identify UNE combinations as individual UNEs. For example, the Commission has explained that

> "[o]ur conclusion that incumbent LECs must combine unbundled elements when so requested is consistent with the method that we have adopted to identify unbundled network elements. Under our method, incumbents must provide, as a single, combined element, facilities that could comprise more than one element. This means, for example, that, if the states require incumbent LECs to provision subloop elements, incumbent LECs must still provision a local loop as a single, combined element when so requested, because we identify local loops as a single element in this proceeding."[31]

The Supreme Court has also upheld the Commission's finding that individual UNEs can be defined as combinations of sub-UNEs and other functionalities, so long as the UNE meets the impair standard.[32] The record in this proceeding supports defining the EEL and the UNE-P as a UNE, and thus the Commission can and should find on reconsideration that the EEL is an individual UNE.

IV. THE COMMISSION SHOULD NOT IMPOSE ANY USE RESTRICTIONS ON UNES

In the *Third Report and Order*, the Commission reaffirmed that, in certain circumstances, a requesting carrier is entitled to obtain existing combinations of loop and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at UNE prices.[33] In its *Supplemental Order*, however, the Commission modified this decision to allow ILECs to constrain the use of combinations of unbundled loops and transport

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31 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 295 (1996).

32 *See* 119 S. Ct. at 736-37.

33 *Third Report and Order* at ¶¶ 486-89.

network elements.[34] Accordingly, a carrier may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the carrier self-provides entrance facilities, unless the carrier uses the combinations to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.[35]

CompTel urges the Commission to reconsider its decision to allow use restrictions because all use restrictions – even if only temporary in nature – are unlawful under the 1996 Act. As CompTel explained in its comments, Section 251(c)(3) of the 1996 Act imposes upon ILECs:

> The duty to provide, *to any requesting telecommunications carrier for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point* on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier *shall provide* such unbundled network elements *in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.*[36]

The Commission has repeatedly found that Section 251(c)(3) "unambiguously" permits carriers to use UNEs to provide any telecommunications service. In the *Local Competition Order*, the Commission found that "Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements,"[37] and,

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34 *Supplemental Order* at ¶¶ 4-5.

35 *Id.*

36 47 U.S.C. § 251(c)(3) (emphasis added).

37 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 264 ("*Local Competition Order*"), *aff'd in part, vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

therefore, that ILECs "*may not impose restrictions upon the uses* to which requesting carriers put such network elements."[38] Moreover, it found that "the plain language of Section 251(c)(3) does not obligate carriers to provide all services that an unbundled element is capable of providing or that typically are provided over that element."[39] The Commission emphasized its finding by observing that "there is no statutory basis by which we could reach a different conclusion," because the statutory language is "not ambiguous."[40]

Based on its interpretation of this statutory language, the Commission adopted regulations, including Rules 307(c),[41] 309(a)[42] and 309(b),[43] that prohibit ILECs from restricting in any manner the types of telecommunications services that requesting carriers can provide using UNEs. The Commission correctly recognized that these rules are compelled by the unambiguous language of Section 251(c), which grants the competitor, not the incumbent, the right to decide whether and in what manner it will use UNEs.

The Commission's decision to allow the ILECs to impose a use restriction – even temporarily – flies in the face of Section 251(c) and the Commission's own rules. The Commission based the temporary use restriction on its need for sufficient time to issue an order

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38 *Id.* at ¶ 27 (emphasis added).

39 *Id.* at ¶ 264.

40 *See id.* at ¶ 359.

41 Rule 51.307(c) requires ILECs to provide UNEs "in a manner that allows the requesting carrier to provide any telecommunications carrier to provide any telecommunications service that can be offered by means of that network element." 47 C.F.R. § 51.307(c).

42 Rule 51.309(a) prohibits ILECs from imposing any "limitations, restrictions, or requirements on . . . the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in a manner the requesting carrier intends." 47 C.F.R. § 51.309(a).

43 Rule 51.309(b) provides that a "telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers." 47 C.F.R. § 51.309(b).

addressing the *Fourth FNPRM*, which it expanded to seek comment on the argument that the "just and reasonable" terms of section 251(c) or (g) permit the Commission to establish a use restriction on combinations of unbundled loops and transport elements. Nothing in Section 251 or the Commission's own rules, however, contemplates or allows even temporary use restrictions, as explained in more detail in CompTel's comments, which are attached and incorporated herein by reference. Therefore, CompTel requests that the Commission reconsider its decision to adopt a temporary use restriction.

V. THE COMMISSION SHOULD RECONSIDER ITS DECISION THAT ROUTING TABLES MAY BE PROPRIETARY

On the basis of Ameritech's assertion that its routing tables qualify for trade secret protection, the Commission concluded in the *Third Report and Order* that the routing aspect of the local circuit switching element "may" be proprietary.[44] Nonetheless, the Commission ordered the ILECs to provide access to unbundled local circuit switching.[45] CompTel applauds the Commission's decision to require the ILECs to provide access to unbundled local circuit switching despite certain ILECs' arguments that routing tables are proprietary. Nonetheless, CompTel urges the Commission to reconsider its decision that the routing aspect of the local circuit switching element may be proprietary.

For a UNE to be proprietary "in nature," the proprietary aspects of the UNE must be its "essential character" or its "innate disposition."[46] It is not enough that an ILEC can provision a certain functionality in a proprietary manner; the functionality itself must be

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44 *See Third Report and Order* at ¶ 247.

45 *See id.* at ¶ 252.

46 *See* Webster's New World Dictionary, Second College Edition (Simon & Schuster) at 948 (definition of "nature").

inherently proprietary. A UNE is not proprietary "in nature" if an ILEC can choose to furnish it as a non-proprietary network functionality (even if it also can choose to provide the UNE through proprietary technology).[47] This interpretation is mandated by the statutory language and it is necessary to effectuate Congress' objective of opening the ILECs' bottleneck local exchange networks to competitive entry. If the ILECs could prevent unbundling of network functionalities simply by developing or using a proprietary technology, then they would have compelling incentives to abandon industry standardization in favor of unnecessary proprietary technologies simply to thwart new entrants and preserve their local monopolies. When it adopted Section 251(d)(2)(A), Congress did not intend to provide the ILECs with an easy tool to defeat competitive entry or to create incentives for the ILECs to balkanize the telecommunications infrastructure through unnecessary proprietary technologies.

Although Ameritech claims that its routing tables have proprietary aspects, it failed to present any evidence that its routing tables are "proprietary in nature." Because competing carriers and even large end users can design their own routing tables, as Ameritech itself acknowledged,[48] the routing table *functionality* is not "proprietary in nature." Therefore, CompTel urges the Commission to reconsider its decision that Ameritech's routing tables may be proprietary in nature.

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47 *See* Excel Comments at 4-5.

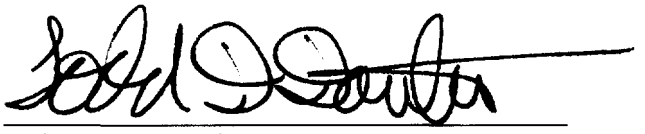
48 *See* Ameritech Comments at 44-45 & 84-85.

VI. CONCLUSION

For the foregoing reasons, the Commission should act promptly to reconsider the aspects of its *Third Report and Order* and *Supplemental Order* discussed above that do not further the 1996 Act's goal of robust local competition.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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February 17, 2000

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I , Tracey Sorenson, do hereby certify that on this 17th day of February, 2000, a copy of the foregoing was served, by Courier, to the parties listed below:

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