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Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF RCN TELECOM SERVICES, INC.
ON FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

RCN Telecom Services, Inc. ("RCN"), through its undersigned counsel, hereby submits its reply comments upon the Commission's Fourth Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned case.

SUMMARY AND INTRODUCTION

Responding to the comments of incumbent local exchange carriers ("ILECs"), RCN argues below that neither Section 251(c)(3) nor Section 251(g) of the Act permits the Commission to place usage restrictions upon combinations of unbundled network elements ("UNEs") such as enhanced extended loops ("EELs").

ARGUMENT

I. SECTION 251(c)(3) OF THE ACT DOES NOT ALLOW THE COMMISSION TO PLACE USAGE RESTRICTIONS UPON UNEs

Various ILECs argue that the Commission misinterpreted Section 251(c)(3) when it ruled in the *Local Competition Order* that that provision of the Act does not permit usage restrictions to be placed upon UNEs. *See, e.g.*, SBC Comments, at 19-21; Bell Atlantic Comments, at 18; BellSouth Comments, at 14; U S West Comments, at 14. These ILECs urge the Commission to

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reverse its interpretation of that provision and find instead that usage restrictions are permitted as long as they are just, reasonable and nondiscriminatory.

The Commission's original interpretation of Section 251(c)(3) was correct and should not be revisited here.[1] But even if that were not the case, it is not true that the ILECs' interpretation of Section 251(c)(3) would give them *carte blanche* to restrict the use of UNEs. On the contrary — and as RCN showed in its initial comments — UNE usage restrictions would violate the "just, reasonable and nondiscriminatory" standard of Section 251(c)(3). *See* RCN Comments, at 3-4. The Commission has interpreted that requirement to mean:

> at a minimum, that whatever those terms and conditions are, [UNEs] must be offered equally to all requesting carriers, and where applicable, *they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.*

Local Competition Order,[2] ¶ 315 (emphasis added). This definition, and the highlighted portion in particular, gives proper and due weight to Congress's command that terms and conditions for UNEs be *not only* "just" and "reasonable" *but also* "nondiscriminatory." Applying this definition to the proposed UNE restrictions, it is apparent that the restrictions would be inherently discriminatory. Clearly, ILECs have no intention of subjecting themselves to the restrictions when they provide UNEs to their retail operations. Unquestionably, UNE restrictions that applied to competitive carriers but not to the ILEC itself would fail the "just, reasonable and nondiscriminatory" standard.

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[1] The Commission cannot reconsider its interpretation of Section 251(c)(3) in this case because it has not given interested parties adequate notice of an intention to alter its long-held interpretation of that statutory provision. *See National Family Planning and Reproductive Health Association v. Sullivan*, 979 F.2d 227, 230-31 (D.C. Cir. 1992) (agency must provide notice and opportunity to comment when it seeks to change an interpretation of its governing statute).

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report & Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996), *vacated in part, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("*Local Competition Order*").

It is important to note that although the ILECs argue that UNE restrictions meeting the "just, reasonable and nondiscriminatory" standard are permissible, they do not argue that their proposed restrictions *actually are* nondiscriminatory.[3] They do not do so because, given the Commission's ruling quoted above, they lack a credible argument on that point. Thus, the Commission should reject the ILECs' argument that Section 251(c)(3) permits them to place usage restrictions upon UNEs.

II. THE COMMISSION CANNOT RELY UPON SECTION 251(g) OF THE ACT AS A SOURCE OF AUTHORITY FOR PLACING USAGE RESTRICTIONS UPON UNEs

The ILECs argue that Section 251(g) grants the Commission sufficient authority to restrict the use of UNEs in the name of protecting the current access charge regime. *See, e.g.,* SBC Comments, at 22-25; Bell Atlantic Comments, at 15-16; BellSouth Comments, at 18; U S West Comments, at 15. They make much of the phrase in Section 251(g) "including receipt of compensation," which they claim is evidence of Congress's intent to preserve the access charge regime. They claim that both the legislative history of Section 251 and the Commission's own interpretation of Section 251(g) reinforces their argument. *See* SBC Comments, at 23; They are incorrect.

Section 251(g) does not grant the Commission any authority whatsoever. Rather, the plain text of that provision imposes requirements upon local exchange carriers:

> On and after February 8, 1996, *each local exchange carrier*, to the extent that it provides wireline services, *shall provide* exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commis-

[3] U S West comes the closest when it argues that the Commission should impose UNE restrictions on a nondiscriminatory basis. U S West Comments, at 14. However, U S West does not attempt to explain how UNE restrictions would be nondiscriminatory.

> sion, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.

Section 251(g) requires local exchange carriers to maintain the status quo of the access charge regime. It does not specifically or even implicitly grant the Commission the necessary authority to ignore the provisions of Section 251(c)(3). Congress's reference to the "receipt of compensation" does not grant the Commission any specific authority; that phrase in the provision simply makes clear that, in continuing to provide exchange access, local exchange carriers may do so upon the compensation terms that arose out of the Modified Final Judgment until, of course, the Commission promulgates superseding regulations.

The ILECs claim that the legislative history of Section 251(g) makes up for what the plain text lacks. They cite to the following statement, which appeared in the Senate Report approving passage of the Senate Bill that, along with the House Bill, led to the Act:

> The obligations and procedures prescribed in [section 251] do not apply to the interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the 1934 Act for the purpose of providing interexchange service, and nothing in [Section 251] is intended to affect the FCC's access charge rules.

See SBC Comments, at 23. However, reading the full quote from the Senate Report reveals that the ILECs may be misinterpreting the Senate's intent:

> Section 101 adds a new section 251 entitled "Interconnection" to the 1934 Act. Subsection 251(a) imposes a duty on local exchange carriers possessing market power in the provision of telephone exchange service or exchange access service in a particular local area to negotiate in good faith and to provide interconnection with other telecommunications carriers that have requested interconnection for the purpose of providing telephone exchange service or exchange access service. The obligations and procedures prescribed in this section do not apply to the interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the 1934 Act for the purpose of providing interex-

> change service, and nothing in this section is intended to affect the FCC's access charge rules.[4]

The last sentence of this quotation, upon which the ILECs rely, refers to "this section," which the ILECs change via brackets in their quote to "[section 251]." But Section 251 is not the right reference. The sentence actually discusses Section 251(a), which in the Senate Bill provided terms for the negotiation of interconnection agreements. The last sentence of the quotation thus indicates that the Senate intended to clarify that interconnection agreements between local carriers would not supersede the access charge tariff arrangements between local exchange and interexchange carriers. That legislative intent would not affect how the Commission interprets Section 251(c)(3).[5]

Even more spurious is the ILECs' claim that the Commission's General Counsel has recognized that Section 251(g) preserves the current access charge regime. *See* SBC Comments, at 22-23. The ILECs quote the following passage from a Commission brief: "[Section 251(g)] provides that the existing regulatory regime regarding access provided to interexchange carriers and ISPs shall continue in effect until specifically superseded by subsequent regulations." This quotation stands for nothing more than the Commission's position that the Act contemplates that the existing access charge regime would continue despite the demise of the Modified Final Judgment until the Commission decides otherwise.

In short, the Commission should reject the ILECs' attempt to bootstrap Section 251(g) into either statutory authorization for ignoring Section 251(c)(3) or as statutory protection for the existing access charge regime.

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[4] Report of the Committee on Commerce, Science, and Transportation on S. 652 , at 19 (dated 1995).

[5] Moreover, it is significant that the Conference Report of the committee that drafted Section 251 in final form makes no reference to such legislative intent, other than to summarize generally the Senate Report.

CONCLUSION

For the foregoing reasons, the Commission should not restrict the use of UNEs as proposed by the ILECs in this case.

Respectfully submitted,

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