

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
CC Docket No. 96-98

In the Matter of )  
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Implementation of the )  
Local Competition Provisions of the )  
Telecommunications Act of 1996 )  
 )

REPLY COMMENTS OF  
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these brief reply comments on the *Fourth Further Notice of Proposed Rulemaking* ("FNPRM") in the above-captioned proceeding.<sup>1</sup>

In its comments, CompTel demonstrated that based on the statute, the Commission's rules, and sound public policy, all requesting carriers are entitled to obtain unrestricted access to unbundled network elements ("UNEs"), either alone or in combinations such as the enhanced extended loop ("EEL"), to provide any telecommunications service. As expected, the incumbent local exchange carriers ("ILECs") have opposed unrestricted access to EELs in order to protect their inflated special access revenue stream. Recognizing the absence of legal or equitable basis for protecting their monopoly revenue stream, the ILECs have raised a series of specious legal justifications for restricting access to EELs. As many of their arguments already have been refuted in the comments filed by CompTel and other parties, these comments shall focus on a few points that require further clarification on the record.

<sup>1</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999)("FNPRM").

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First, several ILECs argued that the use of EELs by requesting carriers for the routing of interexchange traffic does not satisfy the impairment standard in Section 251(d)(2)(B). *E.g.*, GTE Comments at 4; SBC Comments at 7. That argument is not properly before the Commission in this further rulemaking. The Commission has already applied the impairment standard to EELs in the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* released in this proceeding on November 5, 1999 (“*UNE Remand Order*”). The Commission applied the impairment standard not just to competitive local carriers, but to all “requesting carriers.” *See, e.g., UNE Remand Order* at ¶¶ 15, 51, 53, 62, 80, 89. In determining that local loops and transport (the two UNEs comprising the EEL) satisfy the impairment standard, the Commission expressly found that all “requesting carriers” are impaired by the denial of access to those UNEs. *Id.* at ¶¶ 165, 321. The Commission emphasized that its application of the impairment standard did not reflect any specific competitive or business strategy by the requesting carrier. *Id.* at ¶ 65. In applying the impairment standard, the Commission confirmed that “the Act is designed to create a regulatory framework that requires incumbent LECs to make network elements subject to the unbundling obligations of section 251 available to *all* requesting carriers.” *Id.* at ¶ 53 (emphasis in original). Therefore, the Commission already has determined that requesting carriers will be impaired without access to EELs, and the ILECs must raise any disagreement with that holding in petitions for reconsideration.

Further, the ILECs have not identified grounds (nor are there any) upon which the Commission could conclude that EELs used to carry one type of traffic satisfy the impairment standard while EELs used to carry another type do not. To the contrary, the extent to which requesting carriers can obtain and use special access-type facilities in the marketplace does not

vary based on the mix of traffic that carriers route over the EELs. Moreover, it would contravene the statute for the Commission to vary its impairment analysis based upon the proposed use of the facilities. *See* CompTel Comments at 8-16.

*Second*, in a last-ditch attempt to concoct a public policy basis for restricting UNEs to protect their special access revenues, a few ILECs sought to identify a link between special access revenues and universal service. In particular, some ILECs argued that replacing special access circuits with EELs will affect the cross-over point at which some customers migrate from switched access to dedicated circuits. This migration, the argument goes, would harm universal service because a small portion of switched access revenues implicitly supports universal service. *E.g.*, GTE Comments at 12-13; USTA Comments at 13. This argument is wholly unsupported. The ILECs have not quantified the alleged change in cross-over points caused by converting special access circuits to EELs, nor have they calculated the impact, if any, that such a change would have on putative universal service contributions implicit in switched access rates.<sup>2</sup> In short, the ILECs have provided no empirical basis for concluding that converting special access circuits to cost-based rates will have a material impact on universal service.

Further, the ILECs' argument obviously proves far too much. In effect, the ILECs are arguing that their special access revenues must be protected against any diminution to preserve universal service. If that contention were accurate, the reductions in special access rates over the past decade should have been devastating to universal service. Indeed, if the ILECs really believed their own words, presumably they would oppose the Commission's recent pricing

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<sup>2</sup> For the record, CompTel reiterates its long-held position that switched access rates, while far above total service long run incremental costs, do not provide any significant implicit support for universal service.

flexibility decision, which establishes a framework pursuant to which ILECs can obtain additional discretion to reduce their special access rates. *See Fifth Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-262, et al., FCC 99-206, rel. Aug. 27, 1999. In fact, special access rate reductions have never harmed universal service, and the ILECs have actively sought the freedom to lower their special access rates as they see fit. Those undisputed facts repudiate the ILECs' argument that cost-based special access rates are incompatible with universal service.<sup>3</sup>

The ILECs' argument that any reduction in special access revenues would harm consumers by reducing overhead contribution (*e.g.*, SBC Comments at 15) may be rebutted briefly. In effect, the ILECs are saying that consumer welfare depends upon a guaranteed rate of return for the ILECs in markets which (they claim) are competitive. That position falls of its own weight, and cannot support regulatory intervention by the Commission to prop up above-cost special access rates contrary to the entitlement of all requesting carriers to obtain and use UNEs, alone or in combinations, to provide any telecommunications service.

*Third*, the ILECs argue that use-based UNE restrictions qualify as "just, reasonable and nondiscriminatory" conditions under Section 251(c)(3). *E.g.*, SBC Comments at 19; GTE Comments at 5. That argument fails because such conditions must be "in accordance with . . . the requirements of this section," which expressly authorizes any requesting carrier to use any UNE to provide any telecommunications service. 47 U.S.C. § 251(c)(3). Further, once a

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<sup>3</sup> In an effort to provide a policy basis for restricting EELs, USTA sponsored a study to estimate the alleged revenue impact on the ILECs from converting special access circuits to EELs. However, USTA did not show any nexus between that amount (which it refused to disclose on the record) and universal service, nor did it disclose the assumptions and methodology used to calculate that amount. As a result, even were that figure relevant, the Commission could not lawfully adopt any policies based on it. *E.g.*, *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023-24 (2d Cir. 1986); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392, 393 & n.67 (D.C. Cir. 1973).

UNE is placed on the mandatory list, the Commission cannot strip it away by adopting rules precluding some or all requesting carriers from using the UNE to provide any telecommunications service. Such a rule would be the functional equivalent of the exercise of the Commission's forbearance authority, and Section 10(d) precludes the Commission from applying forbearance to Section 251(c) until it has been "fully implemented." 47 U.S.C. §160(d). It is undisputed that Section 251(c) has yet to be fully implemented, and therefore the removal of UNEs for specific uses or carriers is not permitted.

*Fourth*, and lastly, CompTel would like to correct the ILECs' mischaracterization of the Commission's recent line-sharing decision. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 & 96-98, FCC 99-355, rel. Dec. 9, 1999. The ILECs argue that this decision represents a use restriction because CLECs may use the high frequency portion of the loop only for advanced services such as xDSL. *E.g.*, USTA Comments at 22. In fact, CLECs may use the high-frequency loop UNE to provide any telecommunications service. 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.309(a). While it is true that the Commission limited the ability of CLECs to use xDSL technologies that are not compatible with the provision of voice services over the lower loop frequencies, the Commission nowhere limited the upper frequency loop UNE to advanced services. As a result, the Commission's line-sharing decision does not embody a use restriction.

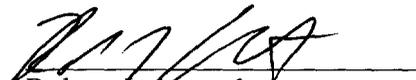
In conclusion, CompTel submits that the Commission should confirm that requesting carriers are entitled to use UNEs, alone or in combinations, to provide any telecommunications service.

Respectfully submitted,

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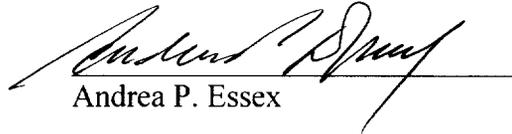
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February 18, 2000

## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **“Reply Comments of the Competitive Telecommunications Association”** were served via courier this 18<sup>th</sup> day of February, 2000 to each individual on the attached service list.



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