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April 13, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 - 12th Street, SW - Room TWB-204
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Notice of Ex Parte Presentation
In the Matter of Access Charge Reform, CC Docket No. 96-262; Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1; Low-Volume Long Distance Users, CC Docket No. 99-249; Federal-State Joint Board on Universal Service, CC Docket No. 96-45

In the Matter of Implementation of the Local Competition Provisions in the Local Telecommunications Act of 1996, Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Ms. Roman Salas:

On Wednesday April 12, 2000, I had a telephone conversation with Rebecca Beynon, Legal Advisor to Commissioner Furchgott-Roth. The purpose of the meeting was to discuss AT&T's views in the Fourth Notice of Proposed Rulemaking proceeding docket. In particular, we discussed that use restrictions are impermissible under the Telecommunications Act and that the Commission should reject any attempt at limiting UNE availability based on the services the CLEC sought to offer with those elements. Finally, I advised that the issues in the Fourth Notice proceeding should not be linked to the above captioned access proceeding and that the Commission should decide both of these proceedings on their respective merits. In addition to the conversation, I provided Ms. Beynon a copy of the *ex parte* AT&T filed in this proceeding August 20, 2000 on the use restriction issue, a copy of which is attached hereto. The positions expressed by AT&T were consistent with those contained in the Comments and *ex parte* filings previously made in this docket.

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Two copies of this Notice are being submitted to the secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

CW f/Robert Quinn

Attachment

cc: Rebecca Beynon

Use Restrictions On Extended Loops

This memorandum responds to the *ex parte* submissions filed by SBC Telecommunications Inc. and BellSouth Corporation (collectively "the BOCs") concerning whether competitive local exchange carriers ("CLECs") may purchase "extended loops" solely to provide exchange access.¹ The BOCs concede that the Telecommunications Act of 1996 ("the Act") allows CLECs to purchase network elements at cost-based rates to "provide any telecommunications service," which includes access service.² The BOCs nonetheless maintain that the Commission has the authority to permit incumbent LECs to deny a CLEC access to extended loops when the CLEC would use those loops to provide access to customers for whom it is not the local service provider, and that it would be in the public interest for the Commission to do so. Further, while characterizing their requested restriction as an "interim" rule, the BOCs propose no fixed termination date for the rule and suggest that it would "last for a number of years" (SBC *ex parte* at 9) -- at least until the Commission completes access charge reform and universal service reform. As set forth below, the restriction advocated by the BOCs would be contrary to the Act, prior Commission precedent interpreting the Act, and sound public policy.

1. Section 251(c)(3) imposes upon incumbent LECs:

the duty to provide, *to any requesting carrier for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled bases at any technically feasible point on rates, 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.

¹ See August 9, 1999 letter from William Barfield to Lawrence Strickling ("BellSouth *ex parte*"); August 11, 1999 letter from Martin Grambow to Lawrence Strickling ("SBC *ex parte*").

² See SBC *ex parte* at 2; Bell South *ex parte* at 2 n.1.

47 U.S.C. § 251(c)(3) (emphasis added). As the Commission recognized in its *Local Competition Order*,³ the "plain meaning" of Section 251(c)(3) "compel[s]" the conclusion that carriers may use network elements "for the purpose of providing exchange access to themselves in order to provide interexchange services to customers."⁴ Moreover, that right may not be conditioned on the CLEC becoming a customer's local service provider because, as the Commission likewise held, "the plain language of Section 251(c)(3) does not obligate carriers purchasing access to network elements to provide all services that an unbundled element is capable of providing or that are typically provided over that element," and, indeed, "Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements."⁵ Incumbent LECs therefore "*may not impose restrictions* upon the uses to which requesting carriers put such network elements."⁶ The Commission underscored its holding by observing that "there is no statutory basis by which we could reach a different conclusion,"⁷ because the statutory language is "not ambiguous."⁸

Furthermore, based upon this plain language reading of Section 251(c)(3), the Commission also promulgated a number of regulations that prohibit incumbent LECs from restricting in any manner the types of telecommunications services that competitive LECs can provide using network

³ First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996).

⁴ *See id.* ¶ 356.

⁵ *See id.* ¶ 264.

⁶ *See id.* ¶ 27 (emphasis added).

⁷ *See id.* ¶ 356.

⁸ *See id.* ¶ 359.

elements. Thus, for example, Rule 51.307(c) requires incumbent LECs to provide network elements “in a manner that allows the requesting carrier to provide any telecommunications service that can be offered by means of that network element”;⁹ Rule 51.309(a) forbids the incumbent LEC 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 the manner the requesting carrier intends”;¹⁰ and 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.”¹¹

These interpretations and prohibitions follow naturally from the nature of network elements and foreclose the rule that the BOCs now seek. “[W]hen interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access ‘service’ or any other particular ‘service.’”¹² Rather, they are purchasing access to a functionality that, when combined with other elements and/or functionalities, can be used to provide a service. Once access to an element is purchased, that element can be used by the CLEC at its and its customer’s discretion to provide any service the element is capable of supporting. The Commission has recognized precisely this point.

⁹ See 47 C.F.R. § 51.307(c).

¹⁰ See 47 C.F.R. § 51.309(a).

¹¹ See 47 C.F.R. § 51.309(b).

¹² See *Local Competition Order* ¶ 358.

"[N]etwork elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services."¹³

Because Section 251(c)(3) unambiguously grants any "telecommunications carrier" the right to use network elements to provide any "telecommunications service," the Commission could not reverse its prior determinations and authorize the use restriction the BOCs seek to impose.

2. The BOCs rely on a variety of other provisions and statements for their claim that the Commission has the authority to adopt their proposed rule, but none of these arguments withstand scrutiny. For example, the BOCs rely upon the Commission's prior statements that unbundled local loops and switching cannot feasibly be used to provide access services by any carrier other than the end user's local carrier.¹⁴ But those statements provide no support for their position -- and, indeed, they refute it. In these orders, the Commission did not authorize incumbent LECs to impose a restriction (or impose one itself), but instead merely noted a practical reality: that a carrier which obtains the right to use the local loop or switching element cannot use those facilities to provide only exchange access, because if it did so, the end user would not be able to obtain local exchange services.¹⁵ As the Commission thus explained in its *Shared Transport Order*,¹⁶ "we did not

¹³ See *Local Competition Order* ¶ 264.

¹⁴ See *BellSouth ex parte* at 4-5 (citing *Local Competition Order* ¶¶ 356-67; *Order on Reconsideration, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 13042, ¶¶ 10-13 (1996) ("*Order on Reconsideration*").

¹⁵ See *Local Competition Order* ¶ 357 ("[C]arriers purchase rights to exclusive use of unbundled loop elements, and thus, . . . such carriers, as a practical matter, will have to provide whatever services are requested by the customers to whom those loops are dedicated. . . . That is, interexchange carriers purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops."); *Order on Reconsideration* ¶ 13 (because the unbundled switch includes a dedicated line card, "as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service (continued...)");

condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer" but instead "recognized . . . that, as a practical matter, a requesting carrier using certain network elements would be unlikely to obtain customer unless it offered local exchange services as well as exchange access service over those network elements."¹⁷

The BOCs' reliance on Section 251(g) of the Act, 47 U.S.C. § 251(g) is likewise inapposite. According to the BOCs (SBC *ex parte* at 6), use of network elements solely to provide access would be a "violation" of Section 251(g), which requires incumbent LECs to "provide exchange access, information access, and exchange services for such access to interexchange carriers . . . in accordance with the same equal access and nondiscrimination interconnection restrictions and obligations (including receipt of compensation) that [applied prior to the Act]." But, as the Commission explained, "the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent."¹⁸ The Commission further found that Section 251(g) "does not apply to the exchange access 'service' requesting carriers may provide themselves or others when purchasing unbundled elements."¹⁹ Section 251(g) is therefore irrelevant.²⁰

¹⁵ (...continued)
to an interexchange carrier").

¹⁶ Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd. 12460 (1997).

¹⁷ *See id.* ¶ 60.

¹⁸ *See Local Competition Order* ¶ 362.

¹⁹ *See id.* Indeed, if the BOCs' argument were valid, there is no apparent reason why it would not
(continued...)

The BOCs also claim that the Commission can authorize network element use restrictions that are otherwise in violation of the Act when they are only "interim" in nature (BellSouth *ex parte* at 3-4; SBC *ex parte* at 8-9). According to the BOCs, the Eighth Circuit's decision in *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068 (8th Cir. 1997) ("CompTel") establishes such power. That is wrong.

In *CompTel*, the Eighth Circuit upheld the Commission's decision in the *Local Competition Order* to allow incumbent LECs to impose certain access charges on users of unbundled switching until June 30, 1997. While the Commission recognized in the *Local Competition Order* that the Act required it to move "access charges to more cost-based and economically efficient levels," at the time it issued the *Order* it perceived a conflict arising out of the disparate statutory deadlines for local competition and universal service rules -- specifically, that the Commission was required to adopt its local competition rules before it had even begun to consider universal service issues, and the Commission would not be able to adopt any of the universal service regulations required by Section 254 of the Act, 47 U.S.C. § 254, until May 1997.²¹ Accordingly, the Commission "adopt[ed] a narrowly-focused 10-month transition rule that permitted the imposition of certain interstate access charges on the sale of [network elements] in order to sustain, during a period of uncertainty accompanying the initial implementation of the 1996 Act, the contributions that access charges

¹⁹ (...continued)

also be unlawful for competitive LECs to use network elements to provide exchange access even where they also provide local service. The Commission, however, has squarely rejected this interpretation of Section 251(g). *Local Competition Order* ¶ 362.

²⁰ Nor can 47 U.S.C. § 154(i) supply the missing authority (*see* Bell South *ex parte* at 3), for that provision only authorizes rules that are "not inconsistent with the Act."

²¹ *See Local Competition Order* ¶ 716.

traditionally have made to universal service subsidies."²² The court in *CompTel* found it "significant to our review for unlawfulness that the CCLC and TIC being assessed may be collected no later than June 30, 1997," and upheld the Commission's transitional relief only because of its "brief life."²³

Both the Commission (in its defense of the transitional rule) and the Court (in upholding it) emphasized that this was a highly limited exception to otherwise applicable statutory requirements that was permissible only because of its fixed and short duration and the specific exigency to which it responded during the initial period in which the Act was being implemented. The contrast between that transitional rule and the "interim" rule requested by the BOCs here could not be more stark, for the BOCs propose here a far more extensive limitation in order to address a situation does not remotely present the concerns that led the Commission to adopt a transitional rule in 1996. To begin with, the BOCs proposed rule would not have a "brief life" but an apparently long and indefinite one -- based on precisely the rationale that the Commission rejected in the transitional rule upheld in *CompTel*. Specifically, the Commission in the *Local Competition Order* rejected the requests of several parties, including BellSouth, for "interim" relief that would last until the Commission had completed both its access and universal service reform proceedings:

We can conceive of no circumstances under which the requirement that certain entrants pay [access charges] on calls carried over unbundled network elements would be extended further. The fact that access or universal service reform have not been completed by that date would not be a sufficient justification, nor would any actual or asserted harm to the financial status of the incumbent LECs. By June 30, 1997, the industry will have sufficient time to plan for and adjust to potential revenue shifts that may result from competitive entry.²⁴

²² Brief for Respondents Federal Communications Commission and United States of America, *Iowa Utils. Bd. v. FCC*, No. 96-3321, at 50 (8th Cir. Sep. 17, 1999).

²³ See *CompTel*, 117 F.3d at 1073-75.

²⁴ See *Local Competition Order* ¶ 725.

Accordingly, even though the Commission had not completed its universal service and access charge reform by June 30, 1997, it nonetheless terminated the transitional access charge mechanism -- and the Eighth Circuit then rejected the claims advanced by several incumbent LECs, including these BOCs, that they should be permitted to continue to recover access charges and purported universal service subsidies in connection with the sale of network elements until a new, explicit universal service system is fully operational. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 540-541 (8th Cir. 1998).

Further, we are no longer at the initial stages of implementation of the Act, and, contrary to the BOCs' claims,²⁵ there is in any event no conceivable basis for believing that universal service would be threatened without the proposed restriction. Extended loops could displace not switched access (which was at issue in the transitional rule adopted in the *Local Competition Order* permitting limited imposition of the TIC and CCLC). Instead, it could only substitute for special access, and special access, by contrast, does not include the access charges that have been regarded as providing the principal subsidy for incumbent LECs.²⁶ To the contrary, it is well-established Commission policy that "special access will not subsidize other services" and therefore special access services are not a legitimate source of universal service support.²⁷ Indeed, the BOCs themselves claim that special access is highly competitive (BellSouth *ex parte* at 2; SBC *ex parte* at 6), and if that is so, these services cannot provide universal service subsidies because it is axiomatic that effective competition drives rates towards forward-looking, economic costs.

²⁵ Cf. BellSouth *ex parte* at 6-7; SBC *ex parte* at 4-5.

²⁶ See First Report and Order, *Access Charge Reform*, CC Docket No. 96-262, *et seq.*, ¶¶ 400-02. (FCC May 16, 1997) ("*Access Reform Order*").

²⁷ See *id.* ¶ 404 (emphasis added).

Moreover, in the near term AT&T would be able to use extended loops to serve only a small fraction of even its special access requirements. AT&T and other large interexchange carriers currently have long term arrangements in place governing the purchase of quantities of the DS1-based special access facilities purchased from the incumbent LECs subject to early termination penalties that the incumbent LECs will no doubt invoke if AT&T or any other interexchange carrier were to convert existing circuits to network elements. Thus, even if there were some connection between special access and universal service, use of extended loops in accordance with the Act's terms would not have a significant impact on the incumbents because there could be no "flash cut" to using network elements for access.

3. Finally, the BOCs argue that the prohibition they seek to impose should be regarded as a "just and reasonable" "term" or "condition" of providing access to UNEs, and thus permitted by Section 251(c)(3). That is manifest nonsense. A restriction that is contrary to Section 251(c)(3) cannot be considered "just" or "reasonable." Section 251(c)(3) underscores this point by making clear that the "terms" and "conditions" of access must be "just, reasonable, and nondiscriminatory *in accordance with . . . the requirements of this section.*"

But even if that were not dispositive, the BOCs' policy claims that their restriction would serve the public interest would be meritless in any event. As shown above, there is no threat to universal service in the absence of the restriction, and thus no rationale for its adoption. Moreover, the rule would affirmatively disserve the public interest in two independent respects.

First, the Commission has recognized that access charges currently are not, as required by the Act, based on forward-looking, economic cost.²⁸ Rather, access charges are generally well above costs. Instead of prescribing cost-based access charges, however, the Commission decided to rely on competition to drive access charge rate levels towards costs.²⁹ In this regard, the Commission expressly relied on the availability of cost-based network elements to provide such competition.³⁰ Permitting carriers to use unbundled transport to provide competitive access services for the interexchange traffic of other providers' local exchange customers would allow carriers more quickly and broadly to use network elements to begin the process of "competing" away access rents. By contrast, restricting use of network elements in the manner the BOCs seek will reduce access competition and permit the BOCs to continue to charge supra-competitive prices for access. Contrary to SBC's suggestion (SBC *ex parte* at 6) that access competition is not a significant objective of the Act, "Congress intended the 1996 Act to promote competition for . . . exchange access services."³¹

Second and more fundamentally, the BOCs' rule would impede local exchange competition as well, for it would ensure endless disputes and litigation on a customer-by-customer basis between CLECs and the incumbents over the uses to which individual network elements may be put. In essence, by placing a use restriction on CLEC purchase of network elements, the Commission

²⁸ *Access Reform Order* ¶¶ 258-84; Seventh Report and Order and Thirteenth Order on Reconsideration, *Federal-State Joint Board on Universal Service Reform*, CC Docket No. 96-45, *et seq.*, ¶¶ 124-27 (FCC May 28, 1999).

²⁹ *Access Reform Order* ¶¶ 258-84.

³⁰ *Id.* ¶ 269.

³¹ *Local Competition Order* ¶ 361.

permits, and actually endorses, the incumbent LEC to question the CLEC regarding the services it intends to provide the customer when it purchases the particular element.³² Whether intended or not, this rule would have the practical consequence of setting up the incumbent as the initial arbiter of whether a CLEC is entitled to obtain a network element, or to unilaterally determine what terms or conditions would apply to the elements the CLECs ordered (network element-related or access-related). In addition, the proposed rule could enable the incumbent to deny access based on the incumbent's suppositions regarding how the element will be used (and to what degree it will be so used) or to demand intrusive and competitively sensitive information on the use of those facilities (by demanding audit rights, monitoring equipment or the like) from the CLEC as a precondition to providing access to a network element. That is an intolerable and untenable position in which to place a market entrant vis-a-vis its dominant competitor and would result in the same type of incumbent LEC litigation tactics that have effectively forestalled competition from developing on a broad scale since the Act passed.

³² Compounding this problem is the fact that there is nothing in the EDI-based ordering process which specifies this query. Consequently, the only way an incumbent LEC could administer that restriction would be to manually process every single order that included an extended loop element.