

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

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

**COMMENTS OF EL PASO NETWORKS, LLC**

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El Paso Networks, LLC (“EPN”),<sup>1</sup> by its undersigned counsel, respectfully submits these comments in response to the Public Notice issued by the Federal Communications Commission in this proceeding.<sup>2</sup> EPN urges the Commission to determine that requesting carriers are entitled to use unbundled network elements (“UNEs”), including combinations of loops and transport to provide interstate access services, without restriction.

El Paso Networks, LLC offers wholesale telecommunications services that provide end-to-end connectivity and service innovation to its customers, who generally are themselves providers of telecommunications or information services (or both). The company’s goal is to enable its customers to compete effectively in their respective markets. Toward that end, EPN’s offerings include a full suite of services from collocation to enhanced Internet access as well as a variety of value-added services that will be unique to the marketplace. Currently, EPN is operating its network in Austin, Dallas, and San Antonio, Texas while its networks in Houston and Fort Worth, Texas are near completion. Similar to other CLECs, EPN relied heavily on the ability to obtain UNEs from the ILEC in order to construct its network and serve its customers.

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<sup>1</sup> El Paso Networks, LLC was formerly known as Waller Creek Communications, Inc. d/b/a Pontio Communications, Inc. On Nov. 30, 2000, Waller Creek Communications became a wholly owned subsidiary of the El Paso Corporation. Waller Creek Communications subsequently changed its name to El Paso Networks, LLC.

In addition EPN was required to engage in lengthy and costly proceedings before the Texas Public Utility Commission in order to enforce the unbundling obligations imposed by the FCC and the Texas PUC.<sup>3</sup>

In its five-city network deployment in Texas, EPN has collocated equipment in a large number of SWBT's central offices. There are, however, central offices outside of EPN's network where it is not economical for EPN to collocate its equipment. It is not economical because the current potential volume of traffic in that area could not justify the investment necessary to collocate. There are, however, current or potential customers who would like to obtain EPN service in those areas. If EPN could obtain the EEL, unfettered by the cumbersome and unlawful "temporary" usage restrictions currently in force, it could begin to serve customers at locations not currently on its network. As it attracted more customers in this manner it could then decide to invest in facilities, either collocating its equipment in the SWBT central office or even building its own link between the central office and the customer.

## **I. INTRODUCTION**

In its previous orders in this docket, pursuant to section 251(d)(2) of the Communications Act,<sup>4</sup> the Commission determined that without unbundled loops and transport, CLECs would be impaired in their ability to offer the services they seek to offer, and thus ILECs must make these elements available on an unbundled basis.<sup>5</sup> The Commission also determined that when loop

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<sup>2</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Public Notice*, DA 01-169, rel. January 24, 2001 ("Notice").

<sup>3</sup> *See, e.g., Southwestern Bell Telephone Co. v. Waller Creek Communications*, 221 F. 3d 812 (5th Cir. 2000).

<sup>4</sup> 47 U.S.C. § 251(d)(2).

<sup>5</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, 15 FCC Rcd

and transport elements are currently combined in the ILEC network, CLECs may order those elements in combination.<sup>6</sup>

The *UNE Remand Order*, however raised the issue, originally posed by the ILECs, that the substitution of EELs for ILEC special access service “potentially could cause a significant reduction of the incumbent LEC’s special access revenue prior to the full implementation of access charge and universal service reform.”<sup>7</sup> The Commission thus deferred a decision on whether CLECs could obtain entrance facilities on an unbundled basis until it had a further opportunity to develop the record on that precise question. The Commission, in the *Fourth FNPRM* that accompanied the *UNE Remand Order*, then asked parties to comment whether the Act or Commission rules permitted an ILEC to decline to provide entrance facilities as UNEs and whether in fact a reduction in special access revenue would have any impact on the Commission’s universal service program.<sup>8</sup>

Following release of the *UNE Remand Order*, ILECs asked the Commission to expand its deferral to include the loop and transport combinations (the EEL) that combined with an entrance facility constitute a special access circuit. In response to ILEC concerns, the *Supplemental Order* temporarily permitted ILECs to limit access to the EEL for carriers that intended to use the EEL as a substitute for the ILECs’ tariffed special access services.<sup>9</sup> The Commission allowed the ILECs to impose this constraint because its concerns that such substitution could erode ILEC

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3696, (rel. Nov. 5, 1999) (“*UNE Remand Order* or *Fourth FNPRM*”); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”).

<sup>6</sup> *UNE Remand Order* at ¶ 480; See 47 U.S.C. 315(b).

<sup>7</sup> *Id.* at ¶ 489.

<sup>8</sup> *Id.* at ¶ 494.

<sup>9</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order*, FCC 99-370, 15 FCC Rcd 1760 at ¶ 2, (rel. Nov. 24, 1999).

special access revenue prior to the Commission's complete evaluation of the potential impact such a decline in revenue would have on universal service.<sup>10</sup>

Therefore, the *Supplemental Order* expanded the scope of the Commission's *Fourth FNPRM* to the issue of whether there is any basis in the statute or the Commission's rules that would allow ILECs to decline to provide existing combinations of loops and transport at UNE prices.<sup>11</sup> Many respondents to the inquiry posed in the *Supplemental Order* stated that there was no legal basis for the temporary restriction that the Commission imposed in that order.<sup>12</sup> The ILECs meanwhile proposed that the Commission could restrict use of a particular element or combination of elements solely for exchange access through application of the statutory "impair" test in section 251(d)(2).

In the *Supplemental Order Clarification*, the Commission rejected the position that a finding of impairment in one market automatically grants carriers access to that element in other markets.<sup>13</sup> Instead the Commission found that it "may consider the markets in which a competitor 'seeks to offer' services" and thus is permitted to "ground the unbundling obligation on the competitor's entry into those markets."<sup>14</sup>

Based on that reasoning the Commission postulated that it must "gather evidence on the development of the marketplace for exchange access in the wake of the new unbundling rules"

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<sup>10</sup> *Id.* ¶ 4.

<sup>11</sup> *Id.* at ¶ 6.

<sup>12</sup> Comments of WorldCom, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, filed January 19, 2000; comments of RCN, CC Docket No. 96-98, filed Jan. 19, 2000; Comments of Comptel, CC Docket No. 96-98, filed Jan. 19, 2000.

<sup>13</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, FCC 00-183 at ¶ 15.

<sup>14</sup> *Id.*

adopted in the *UNE Remand Order*.<sup>15</sup> The *Supplemental Order Clarification* stated that the Commission would issue a public notice early in the year 2001 to gather such evidence.<sup>16</sup>

In its *Notice*, the Commission states that it intends to determine “whether combinations of unbundled network elements should be made available for the sole or primary purpose of providing exchange access service.”<sup>17</sup> The Commission further asks whether the exchange access and local exchange access markets are truly distinct, thus requiring the Commission to conduct a separate impairment analysis for the exchange access.<sup>18</sup> Further, the *Notice* inquires whether exchange access providers can self-provision the facilities necessary to serve exchange access customers without unbundled access to the ILEC’s network elements.<sup>19</sup>

As an initial matter, EPN believes the approach the Commission has taken with respect to protecting ILEC special access revenues is misguided. EPN agrees with those parties that have questioned the Commission’s statutory authority to sanction the “significant local usage” requirement set forth in the *Supplemental Order* and *Supplemental Order Clarification*. Not only does this temporary constraint stand on shaky legal footing, its policy footing is equally unsound. While protecting the ILECs’ highly profitable special access revenue, the temporary constraint sparked new disputes between CLECs and ILECs and provided ILECs with additional means to restrain competitive entry. Moreover, the policy grounds on which the Commission based its reasoning are flawed as well. EPN agrees with comments that suggest that making the EEL

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<sup>15</sup> *Id.* at ¶ 16.

<sup>16</sup> *Id.* at ¶ 16-17.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

available as a replacement for special access is unlikely to have a significant impact on universal service. The ILECs' expressed concerns in this regard are unfounded and unsupportable.

The remainder of these comments will focus on the following specific issues. First, the exchange service and exchange access markets are so intertwined that new entrants into the exchange access markets are impaired without access to UNEs as long as new entrants into the local exchange service market are similarly impaired. Second, EPN will show a range of policy considerations that should lead the Commission to lift the temporary constraint it allowed the ILECs to impose on the use of EELs. EPN believes that lifting the temporary local usage constraint will invigorate competition in the exchange access market that, consistent with the Commission's market based approach to access charge reform, will drive access charges closer to cost. Moreover, the local usage restriction is misguided because it is rooted in the policies of a switched voice world and ignores the revolution sparked by digital communications.

## **II. THE COMMISSION'S IMPAIRMENT ANALYSIS UNDER SECTION 251(D)(2) ALLOWS REQUESTING CARRIERS TO USE UNES SOLELY FOR EXCHANGE ACCESS SERVICE**

The Commission's impairment analysis, whether conducted separately for the exchange service and exchange access market or for the two markets together, should lead the Commission to conclude that without access to UNEs, requesting carriers will be impaired in their ability to offer exchange access service. The market conditions that the Commission described in its unbundling analysis for loops and transport in the *UNE Remand Order* all persist today. Although the Commission's unbundling rules adopted in the *UNE Remand Order* have increased opportunities for CLECs to compete with the ILECs, the ILECs continue to frustrate the pace of competition raising legal, regulatory, and operational obstacles at every turn.

**A. The Exchange Access and Local Exchange Market are So Technically and Economically Intertwined That a Finding of Impairment in One Market Necessitates the Same Finding in the Other Market**

In the *Supplemental Order Clarification*, and again in the *Notice*, the Commission asks parties to comment whether the exchange access market is “economically and technically distinct from the local exchange market.”<sup>20</sup> No distinction between the two markets is significant enough to warrant a separate analysis under section 251. Even if the Commission were to conduct a separate analysis, however, it would be difficult for the Commission to distinguish between the two markets for the purposes of conducting its impairment analysis.

The exchange access and exchange service markets are intertwined largely because carriers use identical facilities to serve both markets. The ILECs have not created duplicative networks, one for exchange access, and one for local exchange service – *especially* not in the loop portion of the network. Rather, the ILECs and competitive carriers as well, generally seek to aggregate as much traffic, regardless of regulatory classification, on a single network. By avoiding duplicative networks, carriers can benefit from economies of scale, and bring those benefits to customers with more flexible and cost effective services. The only significant portion of the network in which separate local and access facilities often exist is in tandem switching, although even there many ILECs do operate combined local and access tandems – but this separation is irrelevant to the present case, which deals only with loops and transport.

Network elements, particularly loops and transport, are capable of carrying many different types of traffic. A loop, for example, can carry local, interLATA, and intraLATA voice services: it can carry xDSL services as well as other packet based data services.

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<sup>20</sup> *Notice* at 2.

Since the markets are so closely related, it is not possible for the Commission to engage in a distinct analysis for the access market and the local service market. To engage in such a process would require the Commission to review evidence concerning the exact same facilities it would review while conducting an impairment analysis for the local exchange market.

**B. The Commission's Impairment Finding Requiring ILECs to Provide Unbundled Access to Loops and Transport Elements in the UNE Remand Order applies Equally to the Access Market**

The Commission need not conduct a new and separate analysis to determine whether requesting carriers seeking to provide exchange access services are impaired in their ability to offer that service without access to the ILEC's network elements, precisely because the Commission's unbundling analysis in the *UNE Remand Order* is still persuasive. Moreover, the Commission should not revisit its loop and transport unbundling analysis since it stated in the *UNE Remand Order* that it would not alter its list of UNEs until late in the year 2002.

**1. Loops**

The *UNE Remand Order* analysis for unbundling loops is still valid today and still requires ILECs to unbundle loops for local exchange service as well as exchange access. The Commission concluded that "it would be unreasonable to expect a competitive LEC to invest the large sums of capital needed to build out ubiquitous loop plant before the competitive LEC has established a substantial and secure customer base."<sup>21</sup> The Commission specifically rejected ILEC suggestions that it not require unbundling of high capacity loops because CLECs have, in some instances, self provisioned loops to high volume business customers. The Commission further rejected proposals that would carve out an exception to the unbundling requirement in the more dense Special Access pricing Zones, noting that "it would be extremely difficult for

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<sup>21</sup> *UNE Remand Order* at ¶ 183.

competitive LECs to overbuild the ubiquitous loop plant that the incumbents have built over decades, even to serve business in urban districts.”<sup>22</sup>

In rejecting the ILEC proposals for carving out a large business end user exception to the loop unbundling requirement, the Commission determined that evidence of self-provisioning to certain large users merely indicates that the particular CLEC found it economical to serve that particular customer with self-provisioned facilities. Instead of finding the limited deployment of CLEC facilities grounds for limiting unbundling, the Commission observed that “this evidence tells us nothing about the customer the competitor would like to serve but cannot because the cost of building a loop from the customer premises to the competitive LEC’s switch is prohibitive.”<sup>23</sup> In addition to the economic barrier CLECs face in replicating the ubiquitous ILEC loop network, the Commission recognized that construction of new facilities and the process of obtaining right of way to build those facilities, would impose unnecessary delay on competitors ability to bring service to consumers.

As a wholesale provider of telecommunications services, EPN follows market developments in the wholesale market for telecommunications. It is EPN’s experience that the same factors the Commission applied in its loop unbundling analysis in 1999 applies today as well. From EPN’s experience in building its network in Texas, the incumbent LEC is usually the only source of loops, even for high capacity loops used to serve high volume businesses and other carriers.

As the Commission found in the *UNE Remand Order*, in some urban areas it may be economical for EPN to construct a dedicated link to a particular customer or a particular ILEC

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<sup>22</sup> *Id.* at ¶ 185.

<sup>23</sup> *Id.* at ¶ 184.

central office. EPN's business plan contemplates gradual construction of its own facilities, provided the expected demand exists to justify the economic investment. These links, however are often only point to point links, and EPN will not initially offer the ubiquity and economies of scale offered by the ILEC. In addition, even on a route where EPN believed demand justified an investment in constructing its own facility, EPN would require access to the unbundled loop in order for it to provide service immediately. Having the capability to provide service rapidly to its customers is essential so EPN can attract customers to its network and generate traffic and revenue sufficient to justify an investment in new facilities. Thus, in many instances, EPN will continue to rely on UNEs obtained from the ILEC to serve its customers.

## **2. Transport Elements**

In the *UNE Remand Order*, the Commission found that competitors were impaired without access to the ILECs' dedicated and shared transport network. The Commission concluded "self-provisioning ubiquitous interoffice transmission facilities, or acquiring these facilities from non-incumbent LEC sources, materially increases a requesting carrier's costs of entering a market or of expanding the scope of its service, delays broad-based entry and materially limits the scope and quality of a requesting carrier's service offerings."<sup>24</sup> There is no reason for the Commission to reach a different conclusion in this proceeding.

In its decision to require ILECs provide unbundled access to transport elements, the Commission rejected ILEC proposals that would have carved out exceptions to the unbundling requirement for carriers serving large volume business users. The Commission recognized that although certain CLECs "have deployed transport facilities along certain point-to point routes, the record also demonstrates that self-provisioning transport is not sufficiently available as a

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<sup>24</sup> *Id.* at ¶ 321.

practical, economic and operational matter to warrant exclusion of interoffice transport from an incumbent LEC's unbundling obligations at this time."<sup>25</sup> EPN believes that although certain CLECs have deployed additional transport capacity since the release of the *UNE Remand Order* in November 1999, the market conditions the Commission described remain today.

As part of its unbundling analysis for transport, the Commission determined that requesting carriers would be impaired in their ability to provide service without unbundled access to the ILECs entrance facilities. The Commission reached this conclusion despite acknowledging that the entrance facility market was the most mature segment of the transport market.<sup>26</sup> Thus even though competitive entrants in specific areas and on specific routes could obtain alternative elements from other carriers, the Commission specifically determined that it could not determine that CLECs would have "effective alternatives to unbundled transport for all, or substantially all of the routes" they would need to provide the services they seek to offer.<sup>27</sup> Despite this finding, the Commission deferred any decision to require national unbundling of entrance facilities solely to provide access service until it had further opportunity to obtain comments and develop a record on that precise question.

It has been EPN's experience that interoffice transport capacity, whether between ILEC end offices or between an ILEC end office and an IXC POP, is rarely available from sources other than the ILEC. This is particularly true when a CLEC seeks to acquire interoffice transport capacity in suburban and other less densely populated markets. Even in metropolitan areas, competitive carriers frequently serve only a handful of the incumbent's end offices. Therefore,

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at ¶ 348.

<sup>27</sup> *Id.*

although there are specific locations where competitive transport is available, a requesting carrier cannot build a ubiquitous transport network without significant reliance on the ILEC's facilities.

There is additional evidence that the transport market is not truly competitive. Competitive Fiber Providers ("CFPs"), who seek to provide facilities-based advanced fiber transport services in competition with the ILECs are routinely frustrated in their attempts to provide those services to CLECs. In order to provide such service, CFPs need access to the CLECs equipment collocated in the ILEC central office. The ILECs however, generally do not allow CFPs to "extend fiber into ILEC central offices to connect with CLECs there or to place associate fiber distribution frames in the central office."<sup>28</sup> It is obvious that barriers remain in the competitive transport market and that the Commission must require ILECs to provide unbundled access to transport elements, whether used for local exchange service or solely for exchange access service.

Even if the Commission is inclined to alter its unbundling rules most recently expressed in the *UNE Remand Order*, now is not the proper time to conduct this inquiry. In the *UNE Remand Order*, the Commission announced that it would not revisit its list of which network elements to unbundle for an additional three years, which would be in the fall of 2002. There is no reason for the Commission to undertake that analysis now, approximately halfway before that three-year period expires.

### **III. ALLOWING CLECs TO USE UNES SOLELY TO PROVIDE EXCHANGE ACCESS SERVICE IS CONSISTENT WITH THE POLICY GOALS OF THE 1996 ACT**

In addition to concluding that application of the Act's impairment analysis allows requesting carriers to use UNEs solely for exchange access without restriction, the Commission

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<sup>28</sup> *Petition for Declaratory Ruling filed by the Coalition of Competitive Fiber Providers*, CC Docket No. 01-77, March 15, 2001.

will also determine this result is sound policy consistent with the policy goals of the 1996 Act. By allowing competitors in the access market to compete with the ILECs using UNEs, the Commission will further its stated goal of driving access charges closer to cost. In addition, the Commission must recognize that with the shift towards packet-based communication it is highly inefficient for the Commission to require carriers to segregate traffic based on a wholly regulatory distinction.

The Telecommunications Act of 1996 was intended to establish “a pro-competitive, de-regulatory national policy framework” designed to “promote competition and reduce regulation ... to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>29</sup> The Commission recognized that the competition envisioned in the 1996 Act would undermine the existing structure of implicit support for universal service embedded in switched access charges.<sup>30</sup> The Commission thus initiated major reform of the access charge system in order to eliminate implicit subsidies from access charges and develop a system of explicit and portable universal service support according to the mandate of the 1996 Act.<sup>31</sup>

The Commission has determined that the “primary method for bringing about cost-based access charges was by letting competition establish efficient rates.”<sup>32</sup> The Commission previ-

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<sup>29</sup> S. Conf. Rep. No. 230, 104th Cong. 2d Sess. 1 (1996).

<sup>30</sup> *Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users*, CC Docket No. 99-249 Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 11th Report and Order, FCC 00-193, 15 FCC Rcd 12962, at ¶ 24 (rel. May 31, 2000) (“*CALLS Order*”).

<sup>31</sup> *Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *Transport Rate Structure And Pricing*, CC Docket No. 91-213, *End User Common Line Charges*, CC Docket 95-72, First Report and Order, FCC 97-158, 12 FCC Rcd 15982 at ¶ 4-5 (rel. May 16, 1997) (“*Access Reform Order*”). See also 47 U.S.C. § 254(d)-(e).

<sup>32</sup> *CALLS Order* at ¶ 20.

ously recognized that “the introduction of competition inevitably will help to remove implicit support from the incumbent LECs’ access charges.”<sup>33</sup> In the *Access Reform Order*, the Commission made clear its preference for “replacing regulation with competition as the primary means of setting prices and facilitating investment decisions.”<sup>34</sup>

Further, and most significantly, the Commission recognized that by requiring incumbent LECs provide unbundled access to network elements at cost-based rates, the 1996 Act:

provided IXCs an alternative avenue to connect to and share the local network. Thus, where existing rules require an incumbent LEC to set access charges above cost for a high-volume user, a competing provider of exchange access services entering into market can lease unbundled network elements at cost, or construct new facilities to circumvent the access charge.<sup>35</sup>

Thus, the Commission found that its market-based approach is “most consistent with the pro-competitive, deregulatory policy contemplated in the 1996 Act.”<sup>36</sup> The subsequent *CALLS Order* reiterated the Commission’s finding that market forces remained the best approach for driving access charge rates closer to actual cost.<sup>37</sup> The Commission’s current policy with respect to the use of UNEs solely for exchange access is inconsistent with that finding.

Any local usage restriction that the Commission imposes, whether through the current temporary restriction on conversion of special access circuits to EELs or a decision to exempt ILECs from unbundling UNEs for exchange access is untenable in the packet-based telecommunications networks carriers are currently deploying for the present and future. When an EPN

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<sup>33</sup> *Access Reform Order* at ¶ 7.

<sup>34</sup> *Id.* at ¶ 14.

<sup>35</sup> *Id.* at ¶ 32.

<sup>36</sup> *Id.* at ¶ 44.

<sup>37</sup> *CALLS Order* at ¶ 44.

customer transmits telecommunication across its network, EPN has no capability to differentiate that traffic according to its regulatory classification. In other words to EPN, a bit is a bit.

In order to deploy its network efficiently EPN must funnel as much traffic on its network as possible. By maximizing the efficiency of its network, EPN will be better able to compete and serve its customers. In order to maximize its efficiency, EPN must have one network not two, three, or more. One network for voice, video, and data, whether its interLATA, intraLATA, interstate or intrastate, exchange access or local exchange. The most efficient manner in which to combine all this traffic on a single network is to use packet based telecommunications technology.

Even if the Commission's rules somehow required EPN to maintain separate networks for traffic depending on regulatory classification, irrespective of the fact that the ILECs do not maintain such separation, it would be unlikely that EPN could determine the nature of its wholesale traffic to meet such a Commission requirement. With packet based technology it is impossible for EPN to monitor its traffic and determine whether each bit of information is being routed to the proper network path according to a regulatory classification dependent on a final destination that is unknown to EPN.

#### **IV. CONCLUSION**

For the aforementioned reasons the Commission should determine that the 1996 Act not only contemplates, but requires that the Commission order ILECs to provide unbundled access to network elements, including loops and transport, so that requesting carriers, whether CLECs or IXCs, can provide a telecommunications service, including solely providing exchange access service, without restriction.

Respectfully submitted,

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I, Jacquelyne E. White hereby certify that the foregoing Comments of El Paso Networks, LLC were filed this 5th day of April, 2001 and copies of same were sent via electronic filing, hand delivery and/or first class mail upon the following:

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