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FACSIMILE 202 736 8711

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FOUNDED 1866

WRITER'S DIRECT NUMBER
(202) 736-8224

WRITER'S E-MAIL ADDRESS
cbeckner@sidley.com

April 5, 2001

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APR 5 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Office of Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 2055

Re: Use of Unbundled Network Elements to Provide Exchange Access
Service, CC Docket No. 96-98

Dear Ms. Salas:

Enclosed for filing please find the Comments of AT&T Corp. ("AT&T") in the above referenced proceeding. Pursuant to the Public Notice issued on January 24, 2001, AT&T is submitting the original and four (4) copies of its Comments.

Please contact me if you need any additional information.

Yours truly,



C. Frederick Beckner III

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

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APR 5 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

COMMENTS OF AT&T CORP.
ON USE OF UNBUNDLED NETWORK ELEMENTS
TO PROVIDE EXCHANGE ACCESS SERVICES

Mark C. Rosenblum
Richard H. Rubin
AT&T Corp.
295 North Maple Avenue
Basking Ridge, N.J. 07920

Peter D. Keisler
James P. Young
C. Frederick Beckner III
Sidley & Austin
1722 I Street, N.W.
Washington, D.C. 20006

Counsel for AT&T Corp.

April 5, 2001

Executive Summary

The interim “use restrictions” authorized by last June’s *Supplemental Order Clarification* permit incumbent local exchange carriers (“LECs”) to prohibit competitors from using combinations of the loop and transport network elements solely or predominantly to provide special access services. These restrictions violate both the law and the Commission’s pro-competition policies and cannot rationally be permitted to stand on a permanent basis.

As shown in Part I below, the local exchange and exchange access markets are inextricably “interrelated” in the only sense that matters here, because the same loops and transport facilities are essential components of both services. Therefore, the Commission’s prior correct findings in the *UNE Remand Order* that the loop and transport elements meet the statutory “impair” standard necessarily mean that loop and transport elements meet the “impair” standard with respect to all services provided over those facilities. Accordingly, even if it were permissible for the Commission to conduct a “service by service” impairment inquiry under 47 U.S.C. § 251(d)(2) (which it is not), there is no rational basis upon which the Commission could find that an impairment is present with respect to local exchange services but absent with respect to exchange access services.

Critically, the only stated basis for the interim use restrictions – the Commission’s concern about the possible effects on universal service – also cannot justify continued application of these use restrictions. *See* Part II below. The Commission has long recognized, and expressly stated in the *UNE Remand Order*, that special access has never subsidized universal service. Moreover, the CALLS plan now requires the removal of *all* implicit subsidies from interstate access charges. Thus, there is simply no basis upon which to find that use restrictions are necessary to implement the goal of universal service. Indeed, the Commission’s universal service and access reform policies are focused upon *eliminating* the implicit subsidies generated by above-cost access rates, and the Commission put the incumbent LECs on notice over four years ago that market-based competition for access services, including the use of unbundled network elements by competitive carriers to provide such services, was the

Commission's chosen vehicle to drive access rates to cost. Those policies are entirely inconsistent with, and would be directly undermined by, the maintenance of use restrictions. Nor would elimination of use restrictions discourage facilities-based competition, because competitive carriers will still have incentives to construct their own facilities wherever it is practically and economically feasible for them to do so. Indeed, unrestricted access to UNEs will permit carriers to complete facility routes that otherwise would not be built, by enabling them to use UNEs where the lack of rights of way or other impairments prevent them from building a complete end-to-end facility.

Finally, Part III below demonstrates that use restrictions are contrary to the deregulatory policies underlying the Telecommunications Act of 1996, because they require substantial additional layers of Commission regulation and oversight and impose unneeded and unworkable burdens on competitive carriers. In particular, the "safe harbors" that the Commission established to determine whether a competitive carrier is providing "enough" local service to escape the use restrictions have been completely inaccessible, because competitive LECs simply do not have access to the information and cannot make the measurements that are required to demonstrate that they comply with these standards. Moreover, the Commission's prohibition on the "co-mingling" of access and UNE traffic is technically, practically and economically insupportable and blatantly discriminatory against competitive carriers. Such "co-mingling" is indisputably technically feasible, and in fact is routinely practiced by the incumbent LECs, who have always been able to maximize their efficiencies by using any of their network facilities to provide any service they choose. Requiring only competitive carriers to separate UNE and access traffic on different facilities forces them alone to suffer added costs and inefficiencies that effectively bar them from converting access circuits to UNEs, even if they could otherwise demonstrate that they meet one of the safe harbor requirements.

In sum, the interim use restrictions and the "safe harbors" have to date been "safe" only for incumbent LECs and they have not fostered competition of any kind. Indeed, they have had precisely the opposite effect. First, they have enabled the incumbents to preclude

access competition that could have driven down excessive access rates and lowered the cost of telecommunications to consumers. At the same time, they perpetuated a form of discriminatory treatment that has prevented competitive LECs from obtaining the same efficiencies from UNEs that the incumbents routinely enjoy. The interim use restrictions are thus completely antithetical to the mandates of the Act and the Commission's pro-competition policies. They must be eliminated.

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

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

**COMMENTS OF AT&T CORP.
ON USE OF UNBUNDLED NETWORK ELEMENTS
TO PROVIDE EXCHANGE ACCESS SERVICES**

Pursuant to the Commission's Public Notice, DA 01-169, dated January 24, 2001,¹ AT&T Corp. ("AT&T") respectfully submits these comments on the use of unbundled network elements ("UNEs") to provide special exchange access services.

INTRODUCTION AND SUMMARY

This proceeding is a follow-on to the *Supplemental Order Clarification* issued last June.² The *Supplemental Order Clarification* addressed the question of whether incumbent local exchange carriers ("LECs") may impose use restrictions that would prohibit competitive carriers from using combinations of the loop and transport network elements solely or primarily to provide special access services. In fact, that is a question that the Commission expressly asked and answered in the negative over four years ago. The Commission's initial *Local Competition Order* held that "incumbent LECs may not impose restrictions upon the uses to which requesting carriers put . . . network elements," and that "there is no statutory basis by which we could reach

¹ See Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service, CC Docket No. 96-98, DA 01-169 (Jan. 24, 2001) (*Notice*).

² See Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 9587 (2000) (*Supplemental Order Clarification*).

a different conclusion.”³ No legal or factual changes since that time justify any modification to the Commission’s initial determination.

While not purporting to call that earlier holding into question, the *Supplemental Order Clarification* paradoxically held that use restrictions could possibly be imposed through a new way of applying the “necessary” and “impair” standards of section 251(d)(2). Specifically, although neither of the Commission’s two prior, comprehensive orders identifying network elements had ever engaged in such an analysis,⁴ the *Supplemental Order Clarification* held that the Commission was not statutorily precluded from conducting a service-by-service impairment inquiry, so that a network element could potentially be required to be unbundled and made available for the provision of one telecommunications service but not for another. The *Supplemental Order Clarification* further stated that the Commission would initiate a proceeding in early 2001 to examine whether loop-transport combinations should be available to competitive carriers who wish to use them solely or primarily to provide special access services. In the interim, the Commission permitted incumbent LECs to impose use restrictions on loop-transport combinations on the ground that there might otherwise be a potential impact on universal service.

The Commission now seeks comment on whether the interim use restrictions should be maintained. In particular, the Commission asks whether the exchange and exchange access markets are sufficiently “interrelated” that its previous finding that a network element meets the “impair” standard and should be made available for use in providing competitive local exchange service necessarily means that it meets that same standard with respect to exchange

³ See First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 27, 356 (1996) (*Local Competition Order*).

⁴ See *id.*; see also Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696 (1999) (*UNE Remand Order*).

access services. As shown below in Section I, the answer is certainly yes because identical inputs – incumbent LEC loops and transport facilities – are used to provide both services.

Based on an extensive record, the Commission’s *UNE Remand Order* found that competitive LECs are impaired without access to incumbent LEC loops and transport, because it is economically infeasible to duplicate or obtain such facilities from third parties. *A fortiori*, because those same carriers also use the same facilities as inputs to provide other telecommunications services, including special access services, they must also be impaired if they cannot access those network elements to provide such other services. To illustrate, if the supply of steel were monopolized and steel were thereby difficult to obtain, it would impair all manufacturing that depends on steel, whether of automobiles or girders. If loops and transport facilities are difficult to obtain, then the competitive provision of *all* services that depend on those facilities will similarly be impaired across the board.

At the same time, allowing incumbent LECs to impose use restrictions that prevent competitive LECs from using loops and transport network elements to provide special access is inherently discriminatory in violation of the Telecommunications Act of 1996 (“Act”). In direct violation of section 251(c)(3), use restrictions anticompetitively prevent competitive LECs from (i) obtaining access to network elements that is equal in quality to the access enjoyed by the incumbent LECs and (ii) competing against incumbent LECs on the merits. Moreover, permitting the incumbent LECs to make their interim special access use restrictions permanent establishes a precedent that could be anticompetitively exploited by the incumbent LECs. There can be little doubt that if the Commission sanctions the imposition of use restrictions on UNEs, incumbent LECs would refuse to provide numerous other network elements on the ground that the element (or combination of elements) is also used to offer some service that the incumbent LECs claim the requesting carrier would not be impaired in providing without access to that element (or combination of elements). The Commission has recognized that regulatory stability is essential for competitive LECs to plan network development, *UNE Remand Order* ¶ 150, but no such stability would exist if incumbent LECs are given the green light to dictate to

competitive LECs what services they can provide with UNEs. And it was precisely for these reasons that the Commission's *Local Competition Order* held that section 251(c)(3) requires network elements to be made available at cost-based rates for use in the provision of any "telecommunications service." *See also* 47 C.F.R. § 51.307(c).

The incumbent LEC loops and transport facilities used to provide local exchange services are the very same loops and transport facilities that are used to provide exchange access services, and they perform an identical physical function in both instances. To treat them differently in such circumstances would perversely perpetuate and expand in this context, "a complex and frequently arbitrary patchwork" of regulations "that treats different classes of interconnecting parties and different types of services quite disparately even though there may be little different in the costs that they generate." *See* P. DeGraba, OPP Working Paper Series, *Bill and Keep at the Central Office as the Efficient Interconnection Regime*, ¶¶ 10, 16 (Dec. 2000). This, in turn, would "distort usage of the network and deployment of facilities, impede the development of competition and the relaxation of regulation, and threaten the continued viability of the existing system." *Id.*

Critically, the only affirmative justification the Commission has offered for allowing use restrictions – a concern about a hypothetical effect on universal service during an interim transitional period – no longer has any relevance (if indeed it ever did). The *UNE Remand Order* itself recognized that special access *never* subsidized universal service, and in all events the "CALLS plan" has removed all implicit subsidies from interstate access charges. Moreover, the Commission's stated policies on universal service and access charge reform affirmatively require the elimination of the implicit subsidies created by non-cost-based access charges and the use of explicit subsidies to support universal service. These policies also require the use of market-based competition to drive access rates to cost. Maintaining the interim use restrictions on the basis of universal service concerns would be directly contrary to those policies. Nor would elimination of use restrictions discourage facilities-based competition, as the incumbent LECs have claimed. Competitive carriers will still have incentives to construct

their own facilities wherever it is practically and economically feasible for them to do so. In fact, in many cases the availability of network elements facilitates the ability of competitive LECs to deploy their own facilities. *See infra* Part II.

Furthermore, as shown in Part III below, maintaining the interim use restrictions would require substantial Commission regulation and oversight. These use restrictions forbid a carrier from “convert[ing] special access services to combinations of unbundled loop and transport network elements” unless that carrier can show that it “provide[s] a significant amount of local exchange service, in addition to exchange access service, to a particular customer.” *Supplemental Order Clarification* ¶ 5. Because the “significant amount of local exchange service” standard is not self-executing, the Commission was forced to promulgate a series of rules to determine whether a particular competitive carrier is entitled to use loops and transport network element combinations to provide special access service. *Id.* ¶¶ 22-24. However, the Commission’s “safe harbors” are unworkable.⁵ Competitive LECs simply do not have mechanisms that would enable them to measure the percentage of local traffic for purposes of certifying whether or not they have met the Commission’s arbitrary standard for conversion of access circuits to UNEs. Indeed, the Commission’s certification process incorrectly assumes that carriers have access to (i) customer information that few customers maintain or would willingly provide to the carrier and (ii) measurement capabilities that carriers do not possess and cannot develop. As a result, the “safe harbors” adopted by the *Supplemental Order Clarification* have proved safe only for the incumbent LECs.⁶

⁵ It is hardly surprising that these “safe harbors” do not even permit competitive LECs to use loops and transport combinations to provide local service. These “safe harbors” were proposed by the incumbent LECs and opposed by the majority of the competitive LEC commenters, including AT&T. *Supplemental Order Clarification* ¶¶ 21-33.

⁶ This is true not just in the context of wireline services, but also of wireless services. Since the *Supplemental Order Clarification*, incumbent LECs have repeatedly refused wireless carriers’ requests to convert special access facilities into UNEs because they purportedly do not fit within one of the Commission’s “safe harbors,” even though these facilities are used predominantly to carry local wireless traffic.

But even if competitive LECs somehow had the means to comply with the Commission's certification process, the Commission's prohibition on the "co-mingling" of access and UNE traffic on the same facilities would independently thwart attempts at conversion. Thus, the ban on "co-mingling" is also completely unworkable and would preclude competitive carriers from converting special access facilities to UNEs, even when those UNEs are in fact used to provide a significant amount of local service. The limitation on co-mingling would force competitive carriers to adopt inefficient network designs and put them at a significant disadvantage compared to the incumbents, who may use any network element to provide any service. Such discrimination is expressly forbidden by the Act. And in all events, permitting incumbents to impose limitations on co-mingling would impose needless burdens on all parties that could be avoided if the Commission eliminates the use restrictions.

ARGUMENT

I. THE COMMISSION'S FINDINGS IN THE *UNE REMAND ORDER* MANDATE ELIMINATION OF THE INTERIM USE RESTRICTIONS.

The *Notice* asks if the "exchange access and local exchange markets are so interrelated from an economic and technological perspective that a finding that a network element meets the 'impair' standard under section 251(d)(2) of the Act for the local exchange market would itself entitle competitors to use that network element solely or primarily in the exchange access market." *Notice* at 1. The answer to this question is plainly yes.

The exchange access and local exchange services markets are "interrelated" in numerous ways, and they are inextricably bound together in the only sense that is relevant to this inquiry: both services use the very same loops and transport facilities. There is absolutely no difference between the loops and transport facilities used for local services and for those used to provide exchange access services. In both cases, the same wires are used to perform the same function – transporting communications from one point to another – regardless of the regulatory

classification of the service that is being offered to end users. Even the incumbent LECs do not – and cannot – argue otherwise.⁷

Because of these uncontested – and incontestable – facts, the Commission’s findings in the *UNE Remand Order* foreclose application of use restrictions in this context. In that order, the Commission, based on an extensive factual record, found that competitive LECs generally could not self-provide loops and transport, including high capacity loops and transport used for special access services, or acquire such facilities from third-parties. *UNE Remand Order* ¶¶ 176-78, 323-324. With regard to high-capacity loops, the Commission concluded:

We disagree with incumbents’ assertions that we should not unbundle high-capacity loops because competitive LECs have successfully self-provisioned loops to certain large business customers. According to these commenters, the call concentration and revenue potential of “high-capacity” lines (DS1 and higher) make self-provisioning high-capacity lines an economically viable alternative to the incumbent LECs’ unbundled high-capacity loops. Building out any loop is expensive and time consuming regardless off its capacity. That some competitive LECs, in certain instances, have found it economical to serve *certain* customers using their own loops suggests to us only that carriers are unimpaired in their ability to serve those *particular* customers. 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.

Id. ¶ 184 (emphasis added). *See also id.* ¶ 182 (“[s]elf-provisioning is not a viable alternative to the incumbent’s unbundled loops, because replicating an incumbent’s vast and ubiquitous network would be prohibitively expensive and delay competitive entry.”).

Likewise, the Commission held that all transport facilities, even those at the DS1-DS3 and OC3-OC96 level, must be unbundled because the factual record demonstrated that the incumbent LECs are generally the only realistic and reliable source of transport, even in large metropolitan areas, and “self-provisioning ubiquitous interoffice transmission facilities, or

⁷ Indeed, the fact that identical facilities are used for access and local services is fundamental to the very notion of the “use” restrictions being advocated by the incumbent LECs. Otherwise, there would be no reason artificially to limit competitive LECs from using loop-transport combinations to provide exchange access services.

acquiring these facilities from non-incumbent LEC sources, materially increases a requesting carrier's costs . . . delays broad-based entry, and materially limits the scope and quality of a requesting carrier's service offerings." *Id.* ¶¶ 321-24, 334-60. In so finding, the Commission expressly rejected the incumbents' contention that transport should not be unbundled merely because *some* carriers "have deployed transport facilities along certain point-to-point routes." *Id.* ¶ 321. Rather, the Commission found that, even in the few areas in which there are alternatives to the incumbent's facilities, "the alternatives generally do not travel the same routes as the incumbent's facilities . . . [so that] competitors more than likely have to route their traffic along indirect, inefficient routing patterns, thereby increasing their costs of transport." *Id.* ¶ 343.⁸

Certainly, having made these express factual findings just over a year ago, there is no reason to believe that the situation has sufficiently changed to warrant a different conclusion now. Indeed, because it was unlikely that the competitive facts relevant to the impairment analysis would change in just a couple years – and because "[e]ntertaining on an *ad hoc* basis" incumbent LEC claims to the contrary during the interim would "threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers" and would not be "administratively practical" – the Commission ruled it would not consider its factual findings in the *UNE Remand Order* until the end of 2002. *Id.* ¶ 150.

⁸ Thus, even to the extent that special access can be characterized as a "point-to-point" market, *Notice* at 3, carriers still need access to the "same routes as the incumbent's facilities," *UNE Remand Order* ¶ 343, because, as the Commission found, competitive carriers can only obtain transport for limited point-to-point routes. *Id.* Moreover, even if the facilities do travel the same route or pass close to particular offices, that would not establish that practical alternatives exist. There would still need to be a technical point of access for the competitive LEC, and the owner of the existing fiber is unlikely to permit it to be severed to insert a splice point. Further, the competitor would need ADM functionality to groom and insert its traffic on the facility. In addition, the immense volumes of traffic involved would also require redundant and physically diverse routing to assure network reliability. Indeed, in this regard, the availability of UNE transport encourages facilities-based entry. The availability of UNE transport permits competitive carriers to invest in the primary route but rely on incumbent facilities to assure against network failure – either by having diverse point-to-point routing or by using the incumbent's facilities to complete a fiber ring.

These findings are the complete answer to the *Notice*'s principal question – *i.e.*, whether competitive LECs are “impaired in their ability to provide special access services without access to loop-transport combinations.” *Notice* at 2. The *UNE Remand Order* examined whether the loop and transport facilities are sufficiently available outside the incumbents’ network, either through self-supply or from an alternative third-party supplier. *UNE Remand Order* ¶ 51. As described above, the Commission determined, on the basis of an extensive factual record, that they were not. Because these are *exactly the same* network facilities that are necessary to provide special access services, the *UNE Remand Order* conclusively establishes – as a matter of both law and fact – that competitive LECs are also “impaired” in providing these services if they do not have access to loop-transport combinations.

The Commission’s impairment analysis in the *UNE Remand Order* did *not* inquire at all into what services would be provided over these network elements for the simple reason that this issue is irrelevant to the unbundling analysis dictated by the Act. That analysis requires the Commission to determine whether a particular network facility is available “outside the incumbent’s network, including self-provisioning by a requesting carrier or acquiring an alternative from a third party-supplier.” *Id.* ¶ 51. *See also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 392 (1999) (“impairment” standard requires an investigation of the “availability of elements outside the network”). Once the Commission determines that “impairment” exists with respect to a specific network element, that impairment necessarily exists for *every* service that relies on the use of that element. Thus, if loops are not practically available as a general matter from a source other than the incumbent LEC, competitive LECs are, by definition, “impaired” if they do not have access to loops as unbundled network elements – regardless of whether a specific carrier uses a specific loop to provide local telephone service, exchange access service, private line service or any other telecommunications service that can be offered using that network element.

It is precisely for that reason that Congress categorically ruled out such a service-by-service impairment inquiry under section 252(d)(2) of the Communications Act, 47 U.S.C.

§ 252(d)(2). It makes no practical or logical sense to examine whether a competitive LEC is “impaired” with respect to each and every different service that can be provided through the use of the same specific network element inputs. Rather, the key question is whether competitive LECs have the ability to self-provision or obtain the functionality or capability of a network element from a source other than the incumbent LEC, irrespective of the service it seeks to provide using that element.

This is fully consistent with the language and the purpose of the Act as the Commission has interpreted it. Section 251(d)(2) requires the Commission to “determin[e] what network elements should be made available” and it expressly requires that an incumbent LEC must provide requesting carriers with unbundled access to its “network elements” if lack of access to those elements would “impair” the competitive LECs’ ability to provide the services they seek to offer. *Id.* “[N]etwork elements,” in turn, are “defined by facilities or their functionalities or capabilities, and *thus, cannot be defined as specific services.*” *Local Competition Order* ¶ 264 (emphasis added). *See also* 47 U.S.C. § 153(29) (defining “network element” as “a facility or equipment used in the provision of a telecommunications service”). The section 251(d)(2) “impairment” determination must therefore be made on a network element-by-network element (not service-by-service) basis and examine whether competitive carriers would be able to compete effectively in the marketplace if they were denied access to the functionality or capability provided by a specific incumbent LEC network element. That is precisely the inquiry the Commission conducted for each of the network elements it examined in the *UNE Remand Order*.

Once the Commission determines that a carrier would be impaired without access to a particular “facility, functionality, or capability” provided by a network element, section 251(c)(3) unambiguously mandates that the network element must be available to competitive carriers for use in the provision of *any* telecommunications service that uses the element as an input. *See* 47 U.S.C. § 251(c)(3). *See also* 47 C.F.R. § 51.307(c) (requesting carrier may use an unbundled network element “to provide any telecommunications service that can be offered by

means of that network element”). Indeed, the Commission has already held that “[s]ection 251(c)(3) does not impose *any* service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements.” *Local Competition Order* ¶ 264 (emphasis added). Therefore, “incumbent LECs are required to allow requesting carriers to combine [network] elements as they choose, and that incumbent LECs may not impose restrictions upon the uses to which requesting carriers put such network elements.” *Id.* ¶ 27. The Commission has underscored this determination by observing that “there is no statutory basis upon which we could reach a different conclusion,” *id.* ¶ 356, and that “the language of section 251(c)(3), which provides that telecommunications carriers may purchase unbundled elements in order to provide a telecommunications service is not ambiguous,” *id.* ¶ 359.⁹

AT&T recognizes that the Commission’s *Supplemental Order Clarification* took a different legal view of the requirements of sections 251(c)(3) and 251(d)(2), and concluded instead that a “service-by-service” impairment inquiry is not foreclosed by the terms of those provisions. The merits of that legal position are the subject of a pending appeal.¹⁰ But even assuming *arguendo* that the Commission is not precluded from examining whether there are differences in the “markets” for different services that impact the “impairment” analysis, the outcome here must necessarily remain the same. That is because the answer to any such examination must always be that, if a network element is not practically available from non-incumbent LEC sources, a competitive carrier will necessarily be “impaired” without access to that element as a UNE for *all* services for which that facility is a necessary input. To the extent the “market” for special access services can be said to be different than the “market” for local

⁹ As telecommunications carriers, providers of commercial mobile radio services (CMRS) are also clearly entitled to use UNEs in combination with their own facilities to provide local telecommunications services to their end users. *See Local Competition Order* ¶ 993. The Commission should reiterate this right to remove any confusion created by the *Supplemental Order Clarification*.

¹⁰ *Competitive Telecommunications Assoc. v. FCC*, No. 00-1272 (D.C. Cir.).

exchange services in a manner relevant to this proceeding, such “differences” can only be due to artificial regulatory intervention and not because of any requirement of technology or the heterogeneous nature of customer purchases.

* * *

In sum, there is no technical, economic or practical basis for the Commission to now conduct a separate “impairment” inquiry for facilities used to provide special access services. At the same time, allowing incumbent LECs to impose use restrictions that prevent competitive LECs from using loops and transport network elements primarily to provide special access is inherently discriminatory in violation of section 251(c)(3) of the Communications Act. Section 251(c)(3) guarantees competitive LECs access to network elements that is equal in quality to the access enjoyed by the incumbent LECs. The incumbent LECs may use their network facilities to provide each and every telecommunications service those facilities can support in the most efficient and economical manner. Use restrictions, on the other hand, artificially prevent competitive LECs from achieving comparable efficiencies and competing on the merits. These discriminatory use restrictions therefore serve no valid public policy purpose but instead are simply a mechanism to enable the incumbent LECs to preserve the monopoly rents that they currently collect from their special access services.

Moreover, it is doubtful that the incumbent LECs would simply remain content to prohibit requesting carriers from using UNEs to provide special access. If the past is prologue, given this inch the incumbent LECs would certainly attempt to take the proverbial mile, refusing to provide a network element because it is also used to offer some service that the incumbent LECs claim the requesting carrier would not be impaired in providing without access to that element. In fact, incumbent LECs have already begun to claim that competitive LECs should be restricted to using unbundled loops – which no one can credibly claim are not essential bottleneck facilities – only for voice services. Likewise, several incumbent LECs have refused wireless carriers’ requests to convert special access circuits to UNEs because those carriers

provide their own wireless “loops” rather than combining ILEC transport and loop facilities. With such a patchwork of impermissible restrictions on network elements, it would be effectively impossible to implement a business plan that relies on using UNEs.¹¹

II. ELIMINATION OF THE INTERIM USE RESTRICTIONS IS ALSO REQUIRED BY OTHER COMMISSION COMPETITION POLICIES.

Elimination of use restrictions is also the only policy that is fully consistent with the Commission’s policies on universal service and access reform. Indeed, the Commission’s concerns regarding universal service expressed in the *Supplemental Order Clarification* (¶ 7) – the principal basis for allowing the interim use restrictions – are simply no longer valid (if indeed they ever were). The Commission has largely completed the first two prongs of its competition trilogy – *i.e.*, adoption of the local competition rules and universal service reform. The removal of use restrictions is critical to complete the third prong – access reform.

The incumbent LECs cannot seriously claim that use restrictions are necessary to protect universal service subsidies. *Cf. Supplemental Order Clarification* ¶ 2. As a threshold matter, the Commission has never considered special access to be a source of implicit universal service subsidies. To the contrary, the Commission’s “established practice” is that “special access will *not* subsidize other services.” *See, e.g.*, First Report and Order, *Access Charge Reform*, 12 FCC Rcd. 15982, ¶ 404 (1996) (*Access Reform Order*) (emphasis added); *see also UNE Remand Order* ¶ 496 n.994 (in universal service proceeding, Commission “did not propose

¹¹ On the other hand, elimination of UNE use restrictions would pave the way for the development of facilities-based competition for special access services, which would certainly be more consistent with incumbent LEC pricing flexibility for those services than the current regime. Under the current lopsided regulatory rules, incumbent LECs can obtain broad-based pricing relief under the Commission’s *Pricing Flexibility Order* for “competitive” special access services, *see, e.g.*, Application for Review of AT&T Corp., *Applications for Review – BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CC Docket No. 01-22, at 4-12 (Jan. 16, 2001), while at the same time using use restrictions to withhold UNEs from requesting carriers for use in their provision of those same “competitive” services. The inconsistency of these rules is striking and should clearly be eliminated.

to treat special access services as if the current prices of those services included implicit support for universal service”).

Moreover, the Commission removed *all* implicit subsidies from interstate access charges in the *CALLS Order*,¹² thus, the incumbent LECs can no longer claim that the availability of unbundled loop-transport combinations will erode universal service subsidies by causing migration from switched access. In that order, the Commission found that “at this time \$650 million is a reasonable estimate of the amount of universal service support that currently is in our interstate access charge regime.” *CALLS Order* ¶ 202 (emphasis added). Accordingly, the Commission removed \$650 million from interstate access charges and replaced it with an explicit \$650 million universal service fund. *See id.* ¶¶ 195, 201. The Commission expressly found that the \$650 million fund would be fully “sufficient to keep [local] rates affordable and reasonably comparable” during the life of the CALLS Plan, and that no additional subsidies from interstate access charges would be necessary. *Id.* ¶ 201. The Commission concluded that the \$650 million “estimate should be reevaluated at the end of the five-year plan to determine the sufficiency of the fund based on the development of competition and market-based pricing.” *Id.* ¶ 203. With the adoption of the CALLS Plan, the incumbent LECs have no conceivable claim that inflated special access rates are necessary to protect universal service subsidies.¹³

The elimination of use restrictions is also consistent with – if not compelled by – the Commission’s access reform policies. The Commission has recognized that access charges

¹² Sixth Report and Order, *Access Charge Reform et al.*, CC Docket Nos. 96-262 *et al.* (2000), *pets. for review pending sub nom. Texas Office of Public Utility Counsel v. FCC*, No. 00-60434 (5th Cir.).

¹³ The Rural Task Force has proposed a parallel plan for removal of universal service subsidies from the interstate access charges of the rate-of-return LECs, and the Federal-State Joint Board has recommended that the plan be adopted effective July 1, 2001. The Commission is currently considering the plan in a rulemaking proceeding, and the plan has broad support from many disparate interests. *See Further Notice of Proposed Rulemaking, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (Jan. 26, 2001).

are not based on forward-looking economic cost, but are generally well above economic cost.¹⁴ However, the Commission decided not to prescribe cost-based access charges; rather, it is relying on competition to drive access rate levels toward cost. *Access Reform Order* ¶ 258-84. In adopting this “market-based” approach, the Commission expressly assumed that competitors would be able to use cost-based network elements to enable them to provide such competition. *Id.* ¶¶ 269, 337 (“[t]he availability of access services at competitive [rate] levels is vital to the general approach we adopt in this Order, which relies on the growth of competition, *including from competitors using unbundled network elements*, to move overall access rate levels toward forward-looking economic cost”) (emphasis added). Such competition cannot develop, of course, if competitors cannot use UNEs to provide competitive access services. Moreover, to the extent that incumbent LECs’ special access rates remain above cost, those are precisely the overcharges that deserve no legal protection and which the Commission *intended* that new entrants should be able to compete away through the use of UNE-based competition.

The incumbents’ concession that access prices are above cost simply emphasizes the fact that their inflated special access rates are a pure deadweight loss to society. These inflated rates artificially reduce the demand for telecommunications services and negatively impact the competitiveness of the end-user industries that rely on those services. Now that the *CALLS Order* has removed all genuine concerns about universal service, retention of use restrictions would represent nothing but pure protectionism for the monopoly incumbent LECs.

¹⁴ *Access Reform Order* ¶¶ 258-84; Seventh Report and Order, *Federal-State Joint Board on Universal Service*, 14 FCC Rcd. 8078, ¶¶ 124-27 (1999) (*Seventh USF Order*). Indeed, the incumbent LECs have effectively conceded here that special access rates are above economic cost. For example, SBC has claimed in this proceeding that “[i]rrespective of whether special access rates continue to harbor universal service subsidies, it is indisputably the case that the revenues derived from these services help to finance the low cost basic service rates that are enjoyed by consumers throughout the country.” Comments of SBC at 15 (Jan. 19, 2000). In other words, the rates SBC charges for special access are “indisputably” higher than necessary to cover the cost of providing special access services. That fact also refutes the incumbent LECs’ suggestion that special access is provided in a competitive market, for if that were truly the case their access revenues would not be able to subsidize other services.

Thus, SBC's earlier claim that eliminating the use restriction would "result in nothing more than a massive diversion of revenues from ILECs and facilities-based CLECs to large businesses and [long distance carriers]" is simply false. *See* Comments of SBC at 15 (Jan. 19, 2000). To the contrary, as the incumbent LECs' inflated special access revenues are competed away, they simply disappear, and the deadweight loss and accompanying market distortions are removed from the economy. Thus, the incumbent LECs have it exactly backwards: elimination of these use restrictions will simply end the requirement that large businesses and long distance carriers subsidize the incumbent LECs.

Nor would eliminating use restrictions discourage facilities-based entry. Congress understood when it enacted section 251(c)(3) that new entrants would not be able to construct expansive facilities-based networks right away (or in some areas at all), and that the availability of unbundled network elements is necessary for new entrants to establish and expand their businesses as a prelude to facilities construction. As the Commission correctly found in the *UNE Remand Order*, "unbundled access to certain incumbents network elements will accelerate initially competitors' development of alternative networks because it will allow them to acquire sufficient customers and the necessary market information to justify the construction of new facilities." *UNE Remand Order* ¶ 112. Indeed, the Commission also recognized that new entrants generally prefer "to deploy alternative facilities as soon as it is technically and economically possible to do so at a cost that is close to incumbent LECs' prices for network elements." *Id.* Thus, competitive LECs use UNEs only reluctantly, when economic, technical or practical barriers preclude them from obtaining or building the necessary inputs on a competitive basis.

That is true here as well. Indeed, AT&T is one of the largest facilities-based providers of special access in the nation, but elimination of use restrictions will not, as some LECs have suggested, "strand" or otherwise negatively impact its investment in such facilities. To the contrary, AT&T (and other competitive LECs) will continue to use those facilities to compete with the incumbents and to build more when the economics warrant it. Thus, use

restrictions do not “protect” or encourage facilities-based competitive LECs; rather, they limit the growth and development of competition in the access market to the pace and scope of facilities-based entry – thus immunizing most of the incumbent LECs’ markets from competition. They also drain the competitive LECs of capital in the meantime by forcing them to pay uneconomic access costs.

Further, facilities-based entry is generally limited to facilities that serve a small percentage of high volume customers in high-density urban areas where competitive carriers can achieve scale economies that begin to approach those enjoyed by the incumbent. The unrestricted availability of loop-transport combinations as UNEs, however, would greatly expand the geographic areas that competitive LECs could serve, which in turn would allow them to gain new customers so they can more quickly and easily justify further facilities buildout.

Indeed, even where construction of facilities is economic, unrestricted availability of UNEs is still critical. There are many proven difficulties in constructing facilities – *e.g.*, rights of way negotiations, costly collocation, expense of laying facilities, need for two diverse routing paths. If UNEs are generally and unconditionally available, a competitive LEC can build facility segments where all the impediments to building can be overcome in a reasonable time period and augment the facility segment with other UNEs to establish the end-to-end facility to serve a customer. If competitive LECs cannot build facilities where it is practical and economic to do so and then supplement them with UNEs where it is impractical to build, there will be no incentive for competitive LEC facility investment, especially if restrictions are imposed on their use of UNEs. The Commission must also recognize that customers generally will not wait longer for a competitor to deliver service than it takes the incumbent to deliver a comparable service. As a result, if competitive LECs are denied unrestricted access to loop and transport UNEs, the competitive LEC will not be able to compete for the customer’s business, and they will not build facilities at all, because the incumbent LEC has already won the customer.

In sum, there is no longer any basis in fact, law, or policy to allow incumbent LECs to continue to impose use restrictions on loop-transport combinations. Such restrictions

serve only to protect the incumbent LECs at the expense of competitors, consumers, and the public interest. It has now been five years since the passage of the 1996 Act, and four years since the Commission adopted the market-based approach to access reform in the *Access Reform Order*. The industry has been on notice for years that new entrants were supposed to be able to obtain access to unbundled network elements and use those elements to provide access services. The only conceivable reason for clinging to this pre-1996 Act regime – the possibility that universal service subsidies might be affected – has now been removed by the *CALLS Order*. Full implementation of the access reform component of the “competitive trilogy” necessary to implement the 1996 Act is long overdue, and any further retention of use restrictions would frustrate implementation of the Act and serve only to protect one access provider – the incumbent – at the expense of its competitors and their customers. *See, e.g., Competitive Telecommunications Ass’n v. FCC*, 87 F.3d 522, 532 (D.C. Cir. 1996) (retention of interim policy favoring one set of competitors not justified after expiration of interim period; “the circumstances that may have justified the Commission’s action [when an interim rule was adopted] do not justify its continued inaction [years later]”).

III. ELIMINATION OF USE RESTRICTIONS WOULD AVOID BURDENSOME RULES AND PROCEDURES NECESSARY TO ADMINISTER THOSE RESTRICTIONS.

Under the Commission’s interim rules, new entrants are forced to order their affairs according to the regulatory “box” in which the Commission has placed the particular services at issue (*i.e.*, “local” vs. “access”), rather than marketplace realities. One could hardly imagine a regulatory scheme more out of step with the deregulatory, pro-competitive thrust of the Act. Moreover, maintenance of such restrictions imposes significant economic and regulatory costs that arise solely because of this jury-rigged regulatory regime. Elimination of the interim use restrictions will allow the Commission to dispense with the burdensome regulations necessary to define and enforce these restrictions.

Experience has shown that the *Supplemental Order Clarification*'s use restrictions on loop-transport combinations are unworkable, for three reasons. First, competitive LECs do not have adequate mechanisms to measure local and access traffic separately. Second, use restrictions are economically inefficient and discriminatory, because they require new entrants to maintain two separate networks to manage their traffic, rather than the single unified network that incumbent LECs may operate in a manner that maximizes their efficiencies of scale, scope and density. Third, use restrictions are *inherently* unworkable, because they require the Commission to maintain two incompatible regulatory regimes over activities that are technologically and economically indistinguishable in the real world.

Retention of the current use restrictions on a long-term basis would impose far more administrative burdens and require far more regulatory oversight than would the elimination of those restrictions, in at least two important ways: (1) the Commission's rules require competitive LECs to certify that particular facilities carry "significant" amounts of local traffic, even though they typically do not have adequate mechanisms in place to make such certifications; and (2) the Commission's current ban on "co-mingling" of access and UNE traffic on the same facilities requires competitive LECs to build two parallel networks, which effectively precludes conversion of any access circuits to UNEs. Such elaborate schemes are administratively burdensome for all parties, and the costs of such unnecessary activities should not be imposed on competitive carriers and their customers. This imposes a significant barrier to entry. The very purpose of UNEs was to allow competitive LECs to compete effectively with incumbent LECs by allowing them to share in the enormous scale and scope economies that the incumbents enjoy, but the ability of the incumbent LECs to impose use restrictions effectively forecloses competitive LECs from enjoying those scale and scope economies.

First, the *Supplemental Order Clarification*'s rules governing when an access circuit can be converted to UNEs are hugely complex and burdensome. *See Supplemental Order Clarification* ¶ 22 (establishing complex "safe harbor" procedures to determine whether a carrier is providing a "significant amount of local exchange service" to a customer). Because carriers provide both local and access service over the same facilities in precisely the same manner, implementation of the interim "safe harbor" rules has led the Commission to establish a burdensome regime of case-by-case carrier certifications concerning the mix of services being provided over a particular circuit. This system is inherently unworkable, however, because competitive LECs' systems – including AT&T's – are not built to provide the kind of data necessary to support such recordkeeping requirements. *See Declaration of Alice Marie Carroll and Cynthia Rhodes* ¶¶ 11, 13, 18-21 ("Carroll-Rhodes Dec.") (attached hereto as Exhibit A). As a result, a carrier's ability to comply with the certification requirement depends on obtaining sensitive information from the customer – *i.e.*, information that the customer may not even maintain and, in all events, usually would not wish to disclose. *Id.* ¶¶ 12, 15. Nor could the existing measurement systems be modified or new ones deployed in an economical manner so as to make such measurements possible. *Id.* ¶ 20.

The Commission has also acknowledged that it cannot fashion rules specific enough to cover all of the circumstances in which conversion of access circuits to UNEs would be permissible, and it has stated that a "requesting carrier may always petition the Commission for a waiver of the safe harbor requirements" in appropriate cases. *Supplemental Order Clarification* ¶ 23. Since then, there has already been one substantial waiver proceeding, involving extensive comments by numerous parties. *See WorldCom Petition for Waiver*, DA 00-2131 (filed September 12, 2000). These case-by-case procedures are inherently burdensome for both the Commission and the affected parties and are inconsistent with the deregulatory thrust of