

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Deployment of Wireline Services Offering)
Advanced Telecommunications Capability)
)
Implementation of the Local Competition)
Provisions of the Telecommunications)
Act of 1996)

CC Docket No. 98-147

CC Docket No. 96-98

**COMMENTS OF SBC COMMUNICATIONS INC. ON PETITIONS
FOR FURTHER RECONSIDERATION AND CLARIFICATION**

SBC Communications Inc. (SBC) respectfully submits these comments on petitions for reconsideration and/or clarification, filed by CompTel and BellSouth, of the Commission's January 19, 2001, reconsideration order (*Reconsideration Order*) in the above-captioned proceeding.¹ As discussed below, the Commission should reject CompTel's petition for both procedural and substantive reasons. On the other hand, it should grant BellSouth's requested clarification, as BellSouth correctly identifies a discrete factual inaccuracy in the *Reconsideration Order*.

I. The Commission Must Reject CompTel's Request for New UNE Obligations.

CompTel asks the Commission to "clarify" that the low frequency portion of the local loop satisfies the Commission's definition of a subloop unbundled network element (UNE) and, therefore, must be made available on an unbundled basis by incumbent LECs (ILECs). It claims that the clarification it seeks "will help to ensure that CLECs needing only a portion of the loop

¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Dockets Nos. 98-147 and 96-98, FCC 01-26, released January 19, 2001.

to provide services requested by a consumer are entitled to obtain such access without having to pay for the entire loop.”² CompTel’s request should be denied for both procedural and substantive reasons.

First, CompTel’s request is procedurally improper because it does not relate to modifications that were made to Commission requirements in the *Reconsideration Order*. Section 1.429(i) of the Commission’s rules permits parties to seek further reconsideration or clarification of an order on reconsideration to the extent the order on reconsideration modifies the original order:

Any order disposing of a petition for reconsideration which modifies rules adopted by the original order, is *to the extent of such modification*, subject to reconsideration in the same manner as the original order (emphasis added).

Parties may not, however, raise brand new issues; otherwise, the reconsideration process could go on forever.

The *Reconsideration Order* modified or clarified the *Line Sharing Order*³ in three respects only. First, it clarified that ILECs must provide line sharing for customers served by digital loop carrier equipment. Second, it required ILECs to permit CLECs to engage in line splitting if they provide their own splitter. Third, it clarified the line sharing obligations of rural ILECs. The Commission made no other changes or modifications to the *Line Sharing Order*; to the contrary, it rejected all other reconsideration/clarification requests.

² CompTel Petition at 3-4.

³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*)

CompTel's request that the Commission order ILECs to provide unbundled access to the low frequency portion of the loop in no way relates to these clarifications or modifications. It raises an entirely new issue. For that reason alone, CompTel's request must be denied.

Second, not only is CompTel's request beyond the scope of the modifications in the *Reconsideration Order*, it is beyond the scope of the *Line Sharing* proceeding altogether. The Commission has never, in this proceeding or elsewhere, raised the issue of whether ILECs should be required to provide unbundled access to the *low* frequency portion of the loop. Rather, from its inception, this proceeding has focused exclusively on access to the *high* frequency portion of the loop. Thus, in effect, CompTel asks the Commission to issue a new rule without following the rulemaking procedures mandated in section 553(b) of the Administrative Procedure Act. The Commission is not free to do so, and for that reason, as well, CompTel's request must be denied.

Third, procedural infirmities aside, CompTel's request is substantively meritless. For starters, its claim that the low frequency portion of the loop satisfies the definition of a subloop UNE is flatly and demonstrably wrong.

Subloop unbundling affords requesting carriers access to a *segment* of the loop that is accessible at a terminal in an ILEC's outside plant. Subloop unbundling is distinct from line sharing in that it does not entitle a requesting carrier to a portion of the loop spectrum.⁴ The Commission made that eminently clear in the *UNE Remand Order*. In that order, even as the Commission created and defined the subloop UNE, the Commission expressly declined to require loop spectrum unbundling:

⁴ According to CompTel, any portion of the loop that is accessible at the main distribution frame is necessarily a subloop. But the loop itself is, of course, accessible at the main distribution frame; thus, the ability to access a facility at that point cannot in and of itself render that facility a subloop.

A number of parties request that the Commission identify loop spectrum as a separate unbundled network element. In particular, they argue that requesting carriers need access to the high-frequency loop spectrum on an unbundled basis in order to provide advanced telecommunications services, including xDSL. *We decline, at this time, to identify loop spectrum as a separate unbundled network element.* In the *Advanced Services First Report and Order and FNPRM*, we will consider whether the high-frequency spectrum of the loop qualifies as an unbundled network element and the operational issues associated with such unbundling.⁵

Obviously, the Commission would not have rejected requests for loop spectrum unbundling and deferred those requests to the *Line Sharing* proceeding if the subloop UNE, which the Commission created in the *UNE Remand Order*, already required loop spectrum unbundling. Thus, no credible claim can be made that the subloop UNE contemplates or encompasses loop spectrum unbundling, as CompTel argues.

That subloop unbundling addresses access to a physical *segment* of the loop, not a portion of the loop spectrum, is also evident from the Commission's impairment analysis in the *UNE Remand Order*. In concluding that CLECs were impaired without access to subloops, the Commission found that, without subloop unbundling, CLECs might not be able to obtain access to subscribers served by integrated digital loop carrier (IDLC) loops and might not be able to provide xDSL service to subscribers served by fiber feeder or who are located too far from the ILEC central office.⁶ The Commission found further that "to the extent that requesting carriers are denied flexibility in connecting their facilities to the local loop, these carriers are impaired from developing their own network

⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*) at para. 201

⁶ *Id.* at paras. 212, 217-218.

infrastructure.”⁷ The Commission in no way contemplated spectrum unbundling in its impairment analysis.

Of course, an impairment analysis is a prerequisite to any unbundling requirement. As the United States Supreme Court stated: “Section 251(d)(2) [the necessary and impair standard] ... requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the “necessary” and “impair” requirements.”⁸ Because the Commission did not address in the *UNE Remand Order* (or in any order since, for that matter) whether CLECs are impaired without access to the low frequency portion of the loop, the Commission could not have intended to require ILECs to provide unbundled access to that portion of the loop spectrum.

The Commission further underscored that subloop unbundling does not encompass spectrum unbundling in the *Line Sharing Order*. In the *Line Sharing Order*, the Commission created what it described as a *new* UNE: the high frequency portion of the local loop. The Commission left no doubt that this was a *new* UNE: “We amend our unbundling rules to require ILECs to provide unbundled access to a new network element, the high frequency portion of the local loop.”⁹ If CompTel’s theory – that loop spectrum unbundling is required as part of the subloop UNE – then there would have been no need for the Commission in the *Line Sharing Order* to create a new UNE. It simply could have clarified that line sharing was part of its pre-existing subloop

⁷ *Id.* at para. 215.

⁸ *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 736 (1999) (*Iowa Utilities Bd.*).

⁹ *Line Sharing Order* at para. 4.

unbundling obligation. The fact that the Commission chose instead to create and define a new UNE confirms what the Commission made clear in the *UNE Remand Order* - that the subloop network element does not encompass spectrum unbundling.

A requirement that ILECs provide unbundled access to the low frequency portion of the loop also raises daunting technical and operational issues. Under current line sharing arrangements, the ILEC must share the loop with another CLEC. But if the low frequency portion of the loop had to be provided on an unbundled basis, an ILEC could be required to provide a loop UNE to two different CLECs. The Commission has already established a framework for two CLECs to share a loop: it is called line splitting, but in a line splitting situation, the ILEC leases the *entire* loop to a single CLEC. Requiring ILECs to lease different spectrum in the same loop to different CLECs would introduce a whole level of complexity that CompTel does not even begin to address.

Finally, putting aside that the Commission has never declared the low frequency portion of the loop to be a UNE, CompTel does not even make a cursory showing that CLECs would be impaired in their ability to provide voice services without unbundled access to such a UNE. The sole justification it offers is that, with unbundled access to the low frequency portion of the loop, CLECs providing voice services would not have to pay for the entire loop. But such an “end run” around TELRIC loop prices hardly meets the impairment test. As the Supreme Court made clear, a CLEC’s ability to provide a service is not impaired by lack of access to a network element merely because it is less profitable than it would be if it obtained such access.¹⁰ Rather, under the *UNE Remand Order* standard, a CLEC must show that lack of access to the UNE would materially

¹⁰ *Iowa Utilities Bd.*, 119 S. Ct. at 735.

diminish its ability to provide the services it seeks to offer. CompTel has not made, and could not make, any such showing. For that reason, as well, its request must be denied.

II. ILECs Have no Obligation to Provide Splitters to CLECs Who Engage in Line Splitting, Irrespective of Whether They Provide Splitters to CLECs With Whom They Engage in Line Sharing.

In addition to seeking unauthorized and unwarranted spectrum unbundling, CompTel asks the Commission to require ILECs to provide line splitters to CLECs engaged in line splitting. It does not do so directly but, rather, bases its request entirely on a misconceived discrimination theory. Specifically, claiming that the availability of ILEC-provided splitters for line sharing, but not line splitting, would be discriminatory, it asks the Commission to require ILECs that have agreed voluntarily to provide the splitter for line sharing arrangements to provide the splitter for line splitting arrangements as well.¹¹

The Commission should reject this request. The Commission has never required ILECs to provide splitters for either line sharing or line splitting. The Commission has neither defined the splitter as a separate UNE, nor has it defined the local loop to include the splitter. The Commission has, however, recognized that ILECs may wish to own and control a splitter used for *line sharing*. Specifically, the Commission acknowledged ILEC concerns that “passing incumbent LEC voiceband traffic through competitive LEC facilities could lead to voiceband service degradation.”¹² It is, at least in part, for this reason that the Commission decided to *permit* (but not require) ILECs to own and control the splitter used in line sharing arrangements.

¹¹ CompTel Petition at 6.

¹² *Line Sharing Order* at para. 76.

The Commission likewise permits – but does not require – ILECs to provide splitters for line splitting arrangements.¹³ In line splitting arrangements, however, ILECs do not have the same interest in owning and controlling the splitter as they do in the line sharing context because they provide no services to – and have no relationship with – the end user.

In this respect, it is entirely reasonable for an ILEC to provide a splitter for use in line sharing arrangements only. That is not discriminatory; it is a legitimate exercise of the ILEC's prerogative to maintain control over the quality of the services it provides to its end-users. There is no legal basis upon which the Commission may penalize ILECs who exercise that prerogative by subjecting them to unique unbundling obligations.

Finally, CompTel's request runs afoul of the 8th Circuit's holding that ILECs may not be required to combine network elements that are not already combined in their networks.¹⁴ An ILEC splitter will be connected to a loop only if the loop was previously used for line-sharing with an ILEC splitter. Outside this one, narrow context, an ILEC splitter would not be attached to the loop. Because the Commission may not require new UNE combinations, the Commission may not require ILECs to add the splitter to the loop (along with all of the wiring necessary to make the splitter functional on the loop).

¹³ See, e.g., *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354 (2000) at para. 325 (“incumbent LECs have an obligation to permit competing carriers to engage in line splitting over the UNE-P where the competing carrier purchases the entire loop and provides its own splitter”); *id* at n. 902 (“nothing in our rules prohibits an incumbent LEC from voluntarily providing the splitter in this line splitting situation”). See also *Reconsideration Order* at para. 19 (incumbent LECs must permit competing carriers engage in line splitting using the UNE-platform where the competing carrier purchases the entire loop and provides its own splitter.”)

¹⁴ *Iowa Utilities Board v. FCC*, 219 F.3d 744, 759 (8th Cir. 2000) (“Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carries who shall combine such elements. It is not the duty of the ILECs to perform the functions necessary to combine unbundled network elements in any manner.”)

III. ILECs Should be Permitted to Assess Loop Qualification Charges When a CLEC Requests That the Loop be Qualified for DSL Service.

CompTel also asks the Commission to “clarify that once an ILEC qualifies a loop for DSL service – provided by either the ILEC or a CLEC – the ILEC may not assess additional qualification charges on carriers that subsequently wish to provide service over the previously qualified loop.”¹⁵ CompTel claims that such clarification will ensure that ILECs do not over-recover by assessing additional loop qualification charges on previously-qualified loop.

As far as SBC is concerned, CompTel’s request is misconceived. SBC does not charge for loop qualification unless a CLEC requests loop qualification. It does not require CLECs to qualify their loops for DSL service; loop qualification is strictly optional. In some cases, a CLEC may need loop qualification to determine if a loop is suitable for its desired service even when that same facility was previously used by another CLEC for xDSL service. If a CLEC avails itself of that option by requesting that SBC qualify a loop, SBC should be paid for the work involved, irrespective of whether another CLEC previously qualified the same loop for *its* DSL service. If, on the other hand, the CLEC does not want loop qualification, it simply would not request, and would not be charged for, qualification. This is as it should be, and the “clarification” sought by CompTel is unnecessary and unwarranted.

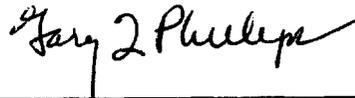
IV. BellSouth Correctly Points Out that Wiring Changes Are Generally Required During a Migration From Line Sharing to Line Splitting.

BellSouth asks the Commission to correct an inaccuracy in the *Reconsideration Order* – specifically, the Commission’s statement that no wiring changes are necessary in a conversion from line sharing to line splitting. BellSouth notes that, in most such conversions, central office wiring changes – and consequently some end-user service disruption - are necessary.

¹⁵ CompTel Petition at 8.

The Commission should grant BellSouth's request. While central offices wiring changes are not necessary when the DSL provider that has provided the splitter for the line sharing arrangement continues to provide DSL service in the line splitting arrangement, in all other cases, wiring changes, and consequently some service disruption, is required. Because the *Reconsideration Order* assumes that a service disruption is never necessary, it should be corrected.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of the **Comments of SBC Communications Inc. on Petitions for Further Reconsideration and Clarification** has been served on the parties below via first class mail – postage prepaid on this 12th day of April 2001.

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