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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

Deployment of Wireline Services Offering Advanced Telecommunications Capability	))	CC Docket No. 98-147
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-98

REPLY OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits its reply in support of CompTel's Petition for Reconsideration and Clarification ("Petition") in the above-captioned proceedings.

I. INTRODUCTION AND SUMMARY

CompTel notes that all parties representing competitive interests, including ASCENT, AT&T, Covad, Sprint, and Z-Tel, support CompTel's request that the Commission:

1. Clarify and confirm that the "low frequency" portion of the local loop satisfies the Commission's definition of a subloop unbundled network element ("UNE"), and that nothing in either the *Line Sharing Order* or *Line Sharing Reconsideration Order* precludes a competitor from purchasing the "low frequency" portion of the loop as a subloop UNE to provide voice service.

2. Clarify that competitive local exchange carriers ("CLECs") using a UNE loop ("UNE-L") entry strategy as well as CLECs using a UNE Platform ("UNE-P") entry strategy may engage in line splitting arrangements with competitive DSL providers.

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3. Clarify that once an ILEC qualifies a loop for DSL service – provided by either the ILEC or a CLEC – the ILEC may not assess an additional qualification charge on carriers that subsequently wish to provide service over the previously-qualified loop.

As Sprint and other commenters point out, the consistency of these items with existing Commission rules is obvious.[1] However, concern about Bell Operating Company ("BOC") efforts to thwart clear Commission rulings through hyper-technical "analysis" compelled CompTel to filed its Petition. Unfortunately, "the tendency of some RBOCs to seize upon any conceivable ambiguity in the Commission's orders and rules to obstruct local competition"[2] requires such vigilance.

As expected, the BOCs through their oppositions have demonstrated the need for immediate Commission grant of CompTel's Petition. Indeed, in their comments, BellSouth, SBC, and Verizon unequivocally express their collective intention to utilize "any conceivable ambiguity in the Commission's orders and rules" to deny new entrants a meaningful opportunity to compete. To neutralize these efforts, the Commission should (1) reject the BOCs' hypertechnical and illogical "interpretations" of the Commission's line sharing and line splitting rules and (2) grant CompTel's Petition.

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1 Sprint, 2.

2 *Id.*

II. COMPTEL'S PETITION PROPERLY REQUESTS THE COMMISSION TO CLARIFY THAT THE "LOW FREQUENCY" PORTION OF THE LOCAL LOOP SATISFIES THE DEFINITION OF THE COMMISSION'S EXISTING SUBLOOP UNE

In its Petition, CompTel demonstrated the need for the Commission to confirm and clarify that the "low frequency" portion of the local loop satisfies the Commission's definition of a subloop UNE, and that nothing in either the *Line Sharing Order* or *Line Sharing Reconsideration Order* precludes a competitor from purchasing the "low frequency" portion of the loop to provide voice service. Without such a holding, the ILECs likely would refuse to provide subloops in order to undermine competitive local entry. As demonstrated by the BOC oppositions, CompTel's suspicions have unfortunately proven to be well-founded.

Initially, the BOCs attack CompTel's request on procedural grounds, alleging that the lower loop frequencies must qualify as a UNE in their own name, or not at all.[3] The BOCs note that the Commission conducted a separate impairment analysis for the upper frequency portion of the loop; they conclude, therefore, that no subloop may qualify as a mandatory UNE unless the Commission undertakes a separate impairment analysis. The Commission must reject this tortured approach to Section 251(c)(3) and its UNE rules because it would essentially wipe out the subloop UNE. While the Commission has the discretion to undertake a separate

[3] SBC, 1-6. SBC is wrong when it alleges that CompTel's petition violates 47 C.F.R. § 1.429(i). The issue whether the lower loop frequencies qualify as a subloop is directly related to the Commission's decision regarding line splitting, as well as its decision not to consider AT&T's concerns about voice/DSL bundling. As such, the petition addresses the Commission's "modification[s]" to its previous decision in this proceeding.

impairment analysis for a particular subloop UNE (as it did with the higher frequency portion of the loop), the Commission is not required to do so. The Commission deliberately crafted a "broad definition of the subloop" to ensure that carriers would have "maximum flexibility" to provide competitive local services as Congress desired.[4] As a result, any functionality, such as the lower loop frequency band, qualifies as a UNE if it satisfies the Commission's subloop definition. The BOCs' desire for a subloop-by-subloop impairment analysis is meritless and only underscores the need for immediate clarification by the Commission.[5]

Next, the BOCs assert the low frequency portion of the loop does not satisfy the definition of the Commission's existing subloop UNE.[6] There is no doubt, however, that the lower frequency portion of the loop qualifies as a "subloop" under applicable rules. The Commission has defined the subloop UNE as follows:

> "The subloop network element is defined as any portion of the loop that is technically feasible to access at terminals in the incumbent LECs' outside plant, including inside wire. An accessible terminal is any point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within. Such points include, but are not limited to ... the main distribution frame."[7]

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4 *UNE Remand Order*, ¶ 207.

5 Several BOCs note that the Commission declined to order loop spectrum unbundling as a "separate unbundled network element." *See UNE Remand Order*, ¶ 201. That holding is fully consistent with CompTel's request for clarification that the lower loop frequencies qualify as a subloop UNE. In order to declare the lower frequencies as a UNE in their own name, the Commission would have been required to make findings on technical feasibility. By contrast, the Commission's approach to subloop UNEs is to allow state regulators to conduct any necessary technical feasibility analysis for subloops on a case-by-case basis. *UNE Remand Order*, ¶ 224. Therefore, the Commission's declination to mandate loop spectrum unbundling does not preclude a clarification that the lower loop frequencies qualify under the Commission's subloop definition.

6 SBC, 5; Verizon 3-4.

7 47 C.F.R. § 51.319(a)(2).

Verizon attempts to inject into this UNE a "physical slice" standard,[8] but the Commission's existing definition clearly refers to "any portion" of the loop. The UNE Remand Order makes clear that the Commission intended for the subloop UNE definition to be construed broadly.[9] The lower frequencies are a "portion" of the loop, and access to the lower frequencies is technically feasible at the main distribution frame.[10] Thus, the "lower frequency" portion of an unbundled loop fits squarely within the Commission's existing definition of the subloop UNE.

Finally, the BOCs argue that the Commission must conduct a service-by-service "impairment" analysis for UNEs, and that it should limit the use of existing UNEs to the services which the Commission had uppermost in mind at the time when it conducted the impairment analysis.[11] These BOC positions are foreclosed by the statutory language regarding UNEs. CompTel recently filed extensive comments with the Commission in the UNE remand proceeding (CC Docket No. 96-98) which repudiate these BOC positions. CompTel attaches those comments to this reply, and hereby incorporates them into the record in this proceeding.

In sum, CompTel felt it prudent to request Commission clarification to defuse anticipated BOC resistance to the Commission's rules. The BOCs have proven CompTel's suspicions correct, thereby underscoring the need for rapid Commission action to avoid additional meritless BOC delay.

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8 Verizon, 4.

9 *UNE Remand Order*, ¶ 207.

10 *Line Sharing Order*, ¶¶ 63-68.

11 BellSouth, 5-6; SBC, 6; and Verizon, 4.

III. THE BOC COMMENTS DEMONSTRATE THE NEED FOR THE COMMISSION TO CLARIFY THAT THE LINE SPLITTING OBLIGATION APPLIES EQUALLY TO CLECS USING THE UNE-P AND UNE-L ENTRY STRATEGIES

In its Petition, CompTel demonstrated the need for the Commission to clarify that CLECs adopting a UNE-P and/or UNE-L market entry strategy may utilize line splitting arrangements. CompTel also demonstrated the need for the Commission to hold that, to the extent that an ILEC has agreed voluntarily to provide the splitter for line sharing arrangements, the ILEC similarly should be required to provide the splitter for line splitting arrangements. Any other result would sanction ILEC discrimination in favor of line sharing over line splitting.

As CompTel predicted, BellSouth attempts to utilize an illustrative statement by the Commission as an excuse to preclude UNE-L carriers from engaging in line splitting. Specifically, BellSouth alleges that the "line splitting contemplated in the *Line Splitting Order* is applicable to situations where the ILEC is providing the switching services to the CLEC through a UNE-P arrangement."[12] In the *Line Splitting Order*, the Commission clearly used UNE-P in an illustrative manner, not in a comprehensive manner. Commission clarification obviously is needed immediately.

IV. THE BOC COMMENTS DEMONSTRATE THE NEED FOR THE COMMISSION TO CLARIFY THAT MULTIPLE LOOP QUALIFICATION CHARGES ON THE SAME LOOP ARE INAPPROPRIATE

CompTel also requested that the Commission clarify that once an ILEC qualifies a loop for DSL service – provided by either the ILEC or a CLEC – the ILEC may not assess

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[12] BellSouth, 8.

additional qualification charges on carriers that subsequently wish to provide service over the previously qualified loop. In so doing, CompTel noted that the Commission would ensure that CLECs and ILECs pay their fair share for loop qualifications, and that the ILEC would not over-recover by assessing additional loop qualification charges on previously qualified loops.

Although it would seem elementary that assessing multiple charges for already-completed work violates the Commission's forward-looking pricing rules, BellSouth unabashedly notes that it "charges a [loop qualification] fee each time the loop qualification database is queried, regardless of the facility being queried."[13] Furthermore, BellSouth argues that, in spite of its monopoly control over loops, it should "not be the ILEC's job to ensure that a CLEC will never have to qualify a loop again if it was qualified at one time in the past."[14] This position shows that the Commission should grant CompTel's petition immediately to prevent substantial and unwarranted over-recovery by BellSouth and other BOCs.

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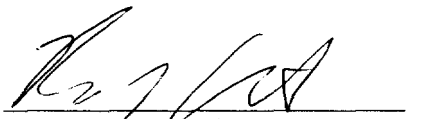
[13] *Id.*, 11.

[14] *Id.*

V. CONCLUSION

Consistent with the foregoing, the Commission should grant the requests for reconsideration and clarification contained herein.

Respectfully submitted,



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ATTACHMENT A

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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	)	
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COMMENTS OF

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SUMMARY

The time has come to lift the illegal restrictions on the use of EELs that the Commission imposed in the *Supplemental Order* and extended in the *Supplemental Order Clarification*. Since issuing the *UNE Remand Order*, the Commission has charted a tortuous path towards ever more complicated use restrictions on EELs with increasingly vague and remote policy justifications. The Commission took this path despite the fact that use restrictions violate the plain and unambiguous language of the 1996 Act, as the Commission itself has repeatedly recognized.

Time has proven the wisdom of Congress's decision not to tolerate any type of restriction on the use of UNEs. In the 18 months since the Commission imposed the use restrictions, EELs have largely been unavailable to competing carriers for ***any*** services, despite the fact that the Commission intended to restrict the use of EELs only in certain situations. Requesting carriers, including those that carry a "significant amount of local exchange traffic," have been forced to order EEL-equivalent services (*e.g.*, T1 loops, multiplexing and transport) out of the ILECs' tariffs as higher-priced special access services.

There is absolutely no rational public policy basis for imposing restrictions on the use of EELs. The use restrictions are not necessary to protect universal service, because there are no universal service support subsidies in special access (or even switched access) rates. The only effect of the use restrictions is to guarantee the ILECs a certain revenue stream from their tariffed special access services. However, protecting ILEC revenues is not a permissible policy objective for the Commission. The goal of the Commission must be to promote competition, not to protect incumbent monopoly profit streams.

The use restrictions are also fundamentally inconsistent with the Commission's application of the impair standard, as well as its competitive policies. Those restrictions not only have decreased the speed with which competition is introduced and reduced certainty in all markets due to disputes about whether a competitive carrier meets the qualifications, but also have emboldened ILECs to refuse to provide EELs to ***any*** requesting carriers. Accordingly, few carriers have been able to integrate EELs into their business plans, even if they provide a "significant amount of local exchange service," and entry is delayed because carriers do not have accurate information about the availability of EELs. Moreover, the illegal use restrictions interfere with facilities-based competition because they generate inefficient entry and investments decisions. In any event, the illegal use restrictions are simply not practical from an administrative standpoint because they focus on factors that are beyond the ability of the requesting carrier (and for some options, even the customer) to control or know.

In the end, the losers under the illegal use restrictions are consumers, many of whom are still waiting to see any benefits from the market-opening provisions of the Telecommunications Act of 1996. In fact, the only winners under the illegal use restrictions are ILECs, whose supra-competitive special access prices and monopoly profit stream continue to be shielded from competitive forces by a Commission umbrella, as they have been for over five years. Therefore, the Commission should return immediately to the path charted by Congress when it adopted Section 251 of the 1996 Act – restrictions on the use of UNEs are strictly forbidden – by immediately lifting the use restrictions it imposed on an "interim" basis in the *Supplemental Order* and extended indefinitely in the *Supplemental Order Clarification.*

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

To: The Commission

COMMENTS OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the Commission's *Public Notice* in the above-captioned proceeding.[1] CompTel is the premier industry association representing competitive telecommunications providers and their suppliers. CompTel's members provide local, long distance, international, Internet and enhanced services throughout the nation. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future.

CompTel has long supported the ability of requesting carriers under Section 251 of the Communications Act to use unbundled network elements ("UNEs"), individually and in combinations, without restrictions on the types of services that may be provided. In this

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[1] *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, Public Notice, DA 01-169 (rel. Jan. 24, 2001) ("*Notice*"). *See also Common Carrier Bureau Grants Motion for Limited Extension of Time for Filing Comments and Reply Comments on the Use of Unbundled Network Elements to Provide Exchange Access Service,* CC Docket No. 96-98, Public Notice, DA 01-501 (rel. Feb. 23, 2001) (extending filing dates for comments to April 5, 2001 and for reply comments to April 30, 2001).

proceeding, CompTel has strongly supported the UNE combination of loop, multiplexing, and transport – known as the enhanced extended loop ("EEL") – as an important tool for bringing competition to consumers. However, most incumbent local exchange carriers ("ILECs") have refused for more than five years to provide EELs as required by the statute, and local competition has been thwarted as a result. Unfortunately, the Commission shares some of the fault for this unfortunate state of affairs, because it first looked the other way while ILECs refused to provide EELs and then issued a series of orders imposing ever more complicated "interim" use restrictions on EELs. Those restrictions are patently contrary to the statutory language and the Commission's own rules, and they should be removed immediately.

The wisdom of Congress' approach to UNEs – tolerating no use restrictions on UNEs of any kind whatsoever – has been abundantly proved by recent experience with the Commission's interim restrictions. Although the Commission intended to restrict the use of EELs only for certain services, the result has been that EELs have largely been unavailable to competing local carriers for ***any*** services. Requesting carriers have been forced to order EEL-equivalent services (*e.g.*, T1 loops, multiplexing and transport) out of the ILECs' tariffs as higher-priced special access services. The beneficiaries of these rules have been the ILECs, whose supra-competitive special access prices and monopoly profit stream have been shielded by a Commission umbrella from competitive forces and market entry for more than five years. The losers under these rules are consumers, many of whom are still waiting to see any benefits from the market-opening provisions in Section 251 of the Telecommunications Act of 1996.

During the debates on EELs that led to the *Supplemental Order* and *Supplemental Order Clarification*, the ILECs fooled the Commission, the public and, regrettably, a few CLECs through assurances that they would readily convert special access circuits to EELs so long as the

Commission adopted interim restrictions to prevent a reduction in their special access revenues through EEL conversions by long distance carriers. Based on these assurances, the Commission adopted the requested use restrictions, claiming that the restrictions were "interim" in nature and necessary to protect universal service subsidies. Time has proven both that the ILECs have no intention of providing EELs in a timely and cost effective manner and that the "interim" restrictions do not protect universal service subsidies. The only purpose served by these restrictions is to protect a monopoly revenue stream of the ILECs from being eroded by the market-opening provisions in Section 251. However, the goal of the Commission must be "to promote competition . . . , not to protect competitors."[2] Therefore, the time has come to lift these illegal use restrictions entirely before they do even more damage to competition than they have already done.

BACKGROUND

In the *UNE Remand Order*, the Commission reaffirmed its previous conclusion in the *Local Competition First Report and Order* that Section 251(c)(3) entitles a requesting carrier to use a UNE, or UNE combination, to provide any telecommunications service it seeks to offer.[3] Finding the statutory language "unambiguous," the Commission agreed that the Act does not permit restrictions on a requesting carrier's access to or use of network elements.[4] Accordingly, the Commission reaffirmed Section 51.309 of its Rules, which prohibits ILEC use restrictions.[5]

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2 *CompTel v. FCC*, 87 F.3d 522, 530 (D.C. Cir. 1996), *quoting WATS-Related and Other Amendments of Part 69 of the Commission's Rules,* 59 RR 2d 1418, 1434-35 (1986).

3 In addition, the Commission confirmed again that the Act opens all pro-competitive entry strategies to competitors, allowing them to choose among these strategies as they see fit. *See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3910-13, ¶¶ 483-89 (1999)("*UNE Remand Order*").

4 *Id.* at ¶ 484.

5 *Id.*

The Commission also clarified that requesting carriers may obtain and use EELs, explaining that requesting carriers are permitted to order this combination under the ILECs' special access tariffs, and convert the pre-existing combination to UNEs pursuant to Section 315(b) of the Commission's rules.[6]

Based upon a flurry of last-minute *ex parte* contacts from ILECs making unsupported allegations that EELs may threaten universal service, the Commission subsequently took the unusual step of issuing a *sua sponte* order imposing a restriction on the use of EELs.[7] Specifically, the Commission modified the *UNE Remand Order* less than one month after its release by permitting ILECs to deny EELs to requesting carriers unless such carriers will use them to carry a "significant amount of local exchange service." The Commission stated that this restriction would apply until final resolution of the *Fourth FNPRM*, which it assured parties would occur no later than June 30, 2000.[8]

Six months later, the Commission issued the *Supplemental Order Clarification*.[9] In this decision, the Commission recognized that the recent *CALLS Order* had removed the universal service subsidies in switched access charges.[10] Nevertheless, the Commission continued to suggest that EEL conversions implicate universal service concerns, while claiming that "a number of additional considerations" required an indefinite extension of the use

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6 *Id.* at ¶¶ 486-89.

7 *Implementation of the Local Competition Provisions of the Telecommunications* Act, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) at ¶ 6. ("*Supplemental Order*").

8 *Id.* at ¶ 2.

9 On June 23, 2000, CompTel filed the instant appeal of the *Supplemental Order Clarification*, FCC 00-183, released by the Commission on June 2, 2000 in the proceeding captioned *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 ("*Supplemental Order Clarification*").

10 *Id.* at ¶ 8.

restriction on EELs. Specifically, the Commission held that it needed more time to "gather evidence on the development of the marketplace for exchange access in the wake of the new unbundling rules adopted in the [*UNE Remand Order* to] determine the extent to which denial of access to network elements would impair a carrier's ability to provide special access services."[11] The Commission also claimed that an extension would give the Commission and the parties "more time to evaluate the issues raised in the record in the *Fourth FNPRM*"[12]; and it would avoid an "immediate transition to unbundled network element-based special access [that] could undercut the market position of many facilities-based competitive access providers."[13] The Commission also sought to provide more specificity on the nature and scope of the "significant amount of local exchange service" standard. Accordingly, the Commission held that a requesting carrier must satisfy one of three complex options before it could obtain an EEL from an ILEC and use it to provide telecommunications services.[14] The result is that a relatively simple use restriction intended to last for approximately six months became a complex set of restrictions with a life of their own.

Ever since issuing the *UNE Remand Order*, the Commission has charted a tortuous path towards ever more complicated use restrictions on EELs with increasingly vague and remote policy justifications. The Commission needs to return immediately to the path charted by Congress when it drafted Section 251 – no use restrictions on UNEs. As it is now evident to the Commission and the industry alike that EEL restrictions have no discernible tie to universal service, the only purpose served by EEL restrictions in today's market is to protect a

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11 *Id.* at ¶ 16.

12 *Id.* at ¶ 17.

13 *Id.* at ¶ 18.

14 *Id.* at ¶ 22.

monopoly revenue stream for the ILECs. This is a patently illegal policy. The ILECs have had more than five years since passage of the 1996 Act to get used to the reality of UNE combinations such as EELs, and the ILECs have had approximately eighteen months since the *UNE Remand Order* to adjust for the loss of special access revenues due to EEL conversions. The Commission must remove all EEL restrictions and do so immediately to promote telecommunications competition as intended by Congress.

I. USE RESTRICTIONS ARE UNNECESSARY AND WOULD NOT SERVE THE PUBLIC INTEREST

There is no rational public policy basis for imposing restrictions on the use of EELs. The use restrictions are not necessary to protect universal service, because there are no universal service support subsidies in special access (or even switched access) rates. The only effect of the use restrictions is to guarantee the ILECs a certain revenue stream from their tariffed special access services. However, protecting ILEC revenues is not a permissible policy objective for the Commission. Moreover, use restrictions are fundamentally inconsistent with the Commission's application of the impair standard, as well as its competitive policies. Certainly, the Commission cannot deny that the practical effect of its EEL restrictions has been to ensure that EELs are largely unavailable to requesting carriers for the past eighteen months. For these reasons, the Commission should immediately lift the use restrictions it imposed on an "interim" basis in the *Supplemental Order* and extended indefinitely in the *Supplemental Order Clarification.*

A. There Is No Universal Service Support In Interstate Access Charges.

The Commission's primary justification for extending the "interim" use restrictions in the *Supplemental Order Clarification* was its desire to preserve the special access

issue raised in the *Fourth FNPRM*. Specifically, the Commission claimed that "allowing use of combinations of unbundled network elements for special access could undercut universal service by inducing IXCs to abandon switched access for unbundled network element-based special access on an enormous scale."[15] However, there are no universal service subsidies built into the rates for special access (or even switched access) services.

The Commission has *never* prescribed specific rate elements for the ILECs' special access services, nor has it established any universal service support mechanisms in its special access orders.[16] To the contrary, ILECs have always enjoyed considerable flexibility in determining the pricing of individual special access products and services, provided an overall revenue requirement was met, without any built-in subsidies to support universal service. Of course, this flexibility was intended to enable ILECs to *lower* rates in response to "competitive pressures." To CompTel's knowledge, the Commission's primary motivation in special access policies has been to reduce special access rates closer to cost, not to keep them artificially high. The Commission has already found, and the ILECs themselves have agreed, that there are no universal service subsidies in special access rates, as CompTel demonstrated in its earlier comments in this proceeding.[17]

With respect to switched access services, the Commission removed universal service support from switched access rates a few days before it released the *Supplemental Order Clarification*. Specifically, as required by Section 254(e) of the Act, the Commission removed all implicit subsidies from the interstate access charge system and replaced them with a new

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15 *Id.* at ¶ 7.

16 *Access Charge Reform,* 14 FCC Rcd 14221, ¶ 8 (1999) (*Access Reform Fifth Order).*

17 Comments of the Competitive Telecommunications Association, CC Docket No. 96-98 (filed January 19, 2000) at 4-8.

interstate access universal service support mechanism in the *CALLS Order*.[18] The Commission has described the *CALLS Order* as a comprehensive approach to resolving outstanding issues concerning access charges and universal service.[19] Thus, the *CALLS Order* eliminated the only rationale relied on by the Commission when it adopted the use restriction in the *Supplemental Order*: concern about impact of EELs on universal service "prior to full implementation of access charge and universal service reform."[20]

B. The Use Restrictions Serve Only To Preserve a Supra-Competitive Revenue Stream for the ILECs and Protect Inefficient Competitive Access Providers.

In the *Supplemental Order Clarification*, the Commission speculated that EELs might undermine universal service support built into switched access rates by creating incentives for carriers to migrate from switched access configurations to EELs.[21] However, that concern does not have even theoretical validity because there are no longer any significant implicit

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18 *Access Charge Reform*, 15 FCC Rcd 12962, 12964, ¶ 3 (2000) ("*CALLS Order*").

19 *Id.* at 12974, ¶ 28; *see also Modified CALLS Proposal* at 22, ¶ 6 ("The signatories agree that this proposal, without modification, is a fair and reasonable compromise plan to resolve issues relating to access and universal service for price cap LECs."). *See also First CALLS Memorandum* at 27 ("This proposal, taken as a whole, achieves statutory universal service goals for this five year period.").

20 *Supplemental Order* at ¶¶ 2,7. Although it is true that the Commission has not completed access reform for rate of return regulated ILECs, this cannot justify keeping the current "interim" EEL restrictions, which apply to price cap ILECs as well. Further, there is no empirical basis in this proceeding for concluding that the special access rates of rate of return regulated ILECs have any universal service component, nor is there any evidence that eliminating this restriction would undermine the universal service support (to the extent there is any, which CompTel doubts) in the switched access rates of such ILECs. CompTel would note that the Commission currently is considering a proposal in CC Docket No. 96-262 to institute comprehensive reform of these ILECs, which further lessens the need for any UNE restrictions applicable to rate of return regulated ILECs.

21 *Id.* at ¶ 7.

subsidies in switched access rates.[22] Thus, the only effect of the EELs restriction is to protect the ILECs' special access revenue stream from competitive market conditions. However, the Commission itself has recognized that the protection of ILECs' revenues is not a legitimate policy objective under the 1996 Act.[23] Even before the 1996 Act, both the Commission and the Court of Appeals for the District of Columbia observed that "the goal of the agency 'is to promote competition . . . not to protect competitors.'"[24]

Further, there is no longer any need (if there ever was) to give the ILECs a transition period in order to adapt to the loss of revenues from supra-competitively priced special access services. The ILECs have already had over five years since passage of the 1996 Act – and 18 months since the *UNE Remand Order* – to adjust to a lesser revenue stream. These time periods are a more than generous transition period for the ILECs.[25] Under similar circumstances

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22 The amount of traffic that migrates from switched access to special access is irrelevant because there are no universal service subsidies in switched access rates. However, even if there still were implicit subsidies in switched access rates, the steep reduction in per-minute charges under CALLS reduces the incentives to migrate from switched access to special access. Accordingly, there is no empirical data of any kind to support speculation that unrestricted use of EELs will harm universal service through a migration of traffic from switched access to special access. Given that special access rates have been declining for a decade with no apparent harm to universal service, this empirical evidence obviously cannot be assumed.

23 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 725 ("*Local Competition Order*"), *aff'd in part, vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("The fact that access or universal service reform have not been completed by that date would not be a sufficient justification [for extending the use restriction], *nor would any actual or asserted harm to the financial status of the incumbent LECs*.") (emphasis added).

24 *CompTel v. FCC* at 530, *quoting WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, 59 RR 2d 1418, 1434-35 (1986).

25 The ILECs do not need financial protection, particularly in comparison with competitive carriers. *See, e.g.*, Vikas Bajaj, *Critics Call Telecom War an Unfair Fight*, DALLAS MORN. NEWS, <http://www.dallasnews.com/cgi-bin/print.cgi?story=http://www.dallasnews.com/technology/314675_babybells_18bu.html> (Mar. 18, 2001).

where the Commission claimed that it had "proceeded with caution" in order to "minimize rate shock for customers" and "impose the least burden upon the smallest competitors," the Court of Appeals for the District of Columbia held that the Commission had failed to justify the need to protect a subsidy that IXCs paid to ILECs.[26]

In addition to being unnecessary, protection of the ILECs' high special access rates actually destabilizes emerging competition in the special access market segment. The Commission recently granted several petitions for flexibility in the pricing of access services by certain ILECs.[27] These ILECs can now cross-subsidize their special access services subject to pricing flexibility where they face competition using revenue from high special access rates where they face no competition. Thus, the Commission has created the incentive and the ability for ILECs to engage in anti-competitive price discrimination through its use restrictions.

The impropriety of protecting ILEC revenue streams through use restrictions is highlighted by the Commission's decision not to protect the revenue streams of new entrants in other proceedings.[28] For example, the Commission is currently considering rules that would drastically curtail reciprocal compensation revenues for some CLECs in response to sustained challenges by the ILECs.[29] Similarly, the Commission is currently considering rules that would

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26 *Id.* at 529-32.

27 *See, e.g., BellSouth Petition for Phase I Pricing Flexibility for Switched Access Services*, CCB/CPD No. 00-21, FCC 01-76 (rel. Feb. 27, 2001); *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-20, DA 00-2793 (Rel. Dec. 15, 2000); *Petition of Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, and Ameritech Wisconsin for Pricing Flexibility; Petition of Pacific Bell Telephone Company for Pricing Flexibility; Petition of Southwestern Bell Telephone Company for Pricing Flexibility*, CCB/CPD Nos. 00-26, 00-23, 00-25, DA 01-670 (rel. March 14, 2001).

28 *See, e.g., Access Charge Reform*, 14 FCC Rcd 14221 (1999).

29 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 99-68 & 96-96.