

Before the
Federal Communications Commission
Washington, D.C. 20554

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

**REPLY COMMENTS OF
SBC COMMUNICATIONS, INC. AND
THE VERIZON TELEPHONE COMPANIES**

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This proceeding poses a straightforward question: must ILECs improve the profit margins of IXCs by allowing those carriers to re-price their existing special access circuits at UNE rates. The answer to this question is equally straightforward. The Supreme Court has held in no uncertain terms that carriers are entitled to a UNE only when they are impaired in their *ability* to offer service without it. They are not entitled to a UNE just because that UNE would enable them to earn higher profits.

The simple fact is, a special access conversion necessarily assumes that a special access circuit already is being used by the carrier seeking the conversion. Because these carriers are competing successfully without relying on combinations of UNEs, this fact is dispositive in this proceeding. But, as SBC and Verizon showed in their comments, it is only one of many reasons the Commission must reject claims that special access circuits may be converted into UNEs. Special access services have been subject to competition for seventeen years. CLECs already have gained a 36 percent share of special access revenues, and that share is growing every year.¹

¹ As in our opening comments, we use the term “special access” to include special access and
(Continued...)

The IXCs make no attempt to refute this evidence. Instead, they ask the Commission to ignore it, resurrecting their previously-rejected argument that the Commission cannot consider impairment on a service-specific basis. That claim, however, disregards the Supreme Court's decision as well as the plain language and fundamental goals of the Act.

I. INTRODUCTION AND SUMMARY

There are a multitude of competitive choices for special access services. Hundreds of competitors have invested billions of dollars in new fiber networks. Those networks now serve virtually any area where special access demand is found, and they can readily be extended to reach any potential customer whom they do not already serve.

By ignoring (or worse yet, denying) the plethora of competitive alternatives, the IXCs (and some but not all CLECs) urge the Commission effectively to prescribe TELRIC pricing of special access services by permitting unlimited conversion of existing special access circuits. Some parties even ask the Commission to allow carriers to order special access circuits as UNEs from the start. But this is nothing more than an effort by the long distance incumbents to pad their profit margin by engaging in regulatory arbitrage. Their claims are squarely contrary to law and sound public policy and must be rejected.

In performing its impairment analysis, the Commission must look at the services requesting carriers wish to provide. Section 251(d)(2) requires the Commission, in determining whether to mandate access to particular network elements to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications

(...Continued)
private line service.

carrier seeking access to provide *the services that it seeks to offer.*² The Supreme Court has held that this statutory mandate must be read to “apply *some* limiting standard, rationally related to the goals of the Act.”³ In that regard, the Court stated that the Commission must consider alternatives outside the ILEC’s network and cannot assume that “*any* increase in cost (or decrease in quality ... causes the failure to provide that element to ‘impair’ the entrant’s ability to provide *its desired services.*”⁴ On remand, the Commission recognized that it must look at “marketplace evidence” to determine whether a requesting carrier’s ability to provide the service it wishes to offer would be “materially diminished” if it were denied access to a specific UNE.⁵ The Commission also has emphasized that, even if a network element is found to meet the impairment standard for one market, Section 251(d)(2) does not compel the Commission to grant competitors automatic access to that network element “solely or primarily for use in a different market.”⁶

Special access services are distinct from local exchange services in several critical respects that bear on the impairment analysis. First, there are relatively few special access customers. They are a small subset, not only of the entire universe of subscribers, but even of business customers. Second, although few in number, they are the largest users, and they consequently generate significant revenue. Third, in comparison to demand for ordinary POTS lines, demand

² 47 U.S.C. § 251(d)(2) (emphasis added).

³ AT&T v. Iowa Util. Bd., 119 S. Ct. 721, 734-35 (1999).

⁴ *Id.* at 735 (second emphasis added).

⁵ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696 (1999), ¶¶ 51, 66 (“UNE Remand Order”)

⁶ Supplemental Order Clarification, ¶ 15.

for special access services is exploding.⁷ Fourth, special access customers are clustered in certain areas – downtown business districts and suburban office parks. Consequently – and irrespective of the merits of the Commission’s impairment analysis for mass market local service – an impairment analysis for special access services is fundamentally different from an impairment analysis for mass market local exchange services; special access services present a far greater revenue opportunity for far less cost. Indeed, with a limited fiber deployment in specific geographic areas, targeting the buildings or office parks where special access demand is heavily concentrated, a CLEC can serve a very high percent of the special access customers in the entire market, thereby garnering significant revenues for a limited investment. It also need not incur the cost of mass market advertising or establishing a mass market customer care organization.

Prohibiting special access conversions cannot impair the ability of any carrier to provide the services it wishes to offer. The IXCs (and certain CLECs) seek to reduce existing, competitively-priced special access circuits to TELRIC-based rates, even though they have been offering interexchange and other services (including competitive local services) using tariffed special access services of ILECs and competitive access providers, as well as their own facilities. In the context of conversions, it is indisputable that these carriers do not need UNEs to provide the services they seek to offer. By definition, they already are providing those services (and quite successfully, at that) – otherwise there would be nothing to convert. This proceeding, therefore, is not about the “ability” of a requesting carrier to offer service without employing ILEC special access; it is about whether they should obtain an arbitrary price discount for doing so. The

⁷ See WorldCom 33 (demand for special access services has been growing at approximately 25 percent per year).

answer to that question must be “no”: mandating a lower price for existing circuits would violate the Supreme Court’s admonition that a mere increase in cost does not amount to impairment.

The market evidence demonstrates that CLECs are not impaired in providing special access/private line services without access to UNE combinations. Facilities-based competitors enjoy a 36 percent share of the special access market. They operate more than 600 fiber networks in the top 150 MSAs, and they have collocated in wire centers accounting for a majority of special access revenues. Add in the emergence of a vibrant wholesale market for fiber and collocation space, and it is evident that CLECs can serve virtually any customer that is likely to demand special access service.

In fact, an empirical marketplace analysis confirms that competitors are able to serve the large majority of existing and potential special access customers without access to UNE combinations. As shown in the Declaration of Robert W. Crandall (attached to USTA’s reply comments), it would be cost-effective for existing CLEC facilities to be extended to serve buildings housing customers generating 97 percent of all special access revenues.⁸ And, of course, as CLECs continue to build out their networks (assuming Commission action does not put a halt to CLEC facilities deployment), these percentages will grow still larger.

In the face of this significant competition, IXCs are left to claim that alternative access facilities do not exist for *all* customers and *all* wire centers. This claim is specious. The nature of the special access customer base, the fact that alternative special access facilities *do* exist in a broad cross-section of markets, large and small, and that these facilities *today* can be used to serve

⁸ Declaration of Robert W. Crandall, attached to the Reply Comments of USTA (“Crandall Decl.”), at ¶ 47, Figures 3, A1-A5.

most potential special access customers, demonstrates that those facilities *can* exist wherever there is demand for them. Put another way, “[b]ecause so many CLECs are contesting the market for special access services through their own facilities, one cannot conclude that CLECs would be impaired in the delivery of special access services if they lacked access to unbundled network elements.”⁹

The extent to which CLECs have obtained facilities-based collocation space in ILEC central offices further confirms that CLECs are not impaired in the special access market without access to UNE combinations. As a result of such collocation, markets generating 80 percent of BOC special access revenue qualify for Phase I pricing flexibility and markets generating nearly two-thirds of such revenues qualify for Phase II relief. “The same reasoning that led the Commission to remove regulations that protect CLECs from exclusionary pricing for ILEC special access services based on the presence of their irreversible investment in facilities compels the conclusion that CLECs are not impaired in their provision of special access services if they are not allowed to convert the ILECs’ special access services into combinations of unbundled elements.”¹⁰ Indeed, this collocation is so widespread that it provides clear evidence that, as a general matter, carriers are not impaired anywhere in their ability to provide special access services.¹¹

Mandating unbundling where it is not necessary would depress competition, investment, and innovation. The deleterious effects of overbroad unbundling on competition and investment

⁹ Crandall Decl., ¶ 27.

¹⁰ *Id.*, ¶ 24.

¹¹ Crandall Decl., ¶ 25.

are well-understood by the Commission, the Supreme Court, and leading industry analysts. They are also underscored by the comments of Time Warner Telecom, which cautions that “restricting requesting carriers’ ability to arbitrage special access rates by ordering loop-transport UNE combinations or ‘flipping’ existing special access circuits is essential to assure the growth of facilities-based competition in the special access market. ... Lowering prices to TELRIC could very well diminish or even eliminate the incentive for entrants to enter or expand entry in the special access market.”¹²

The IXCs nonetheless contend that allowing unrestricted special access conversions would promote competition and economic investment. All it would promote, however, is uneconomic arbitrage. For example, AT&T claims that TELRIC-based rates will not deter competitive investment because competitors want to avoid relying on ILEC facilities. That argument is facile. Of course, competitors would prefer to use their facilities, rather than ILEC facilities, *all things being equal*. But if a CLEC can avoid investment risks by using UNEs rather than constructing its own facilities, it will do so regardless of whether it could compete viably with its own facilities. This is particularly true where, as here, the facilities at issue are simply transmission facilities that are largely fungible.¹³

EELs are not necessary to discipline special access rates. Even though competitors are not impaired without access to EELs, given the plethora of competitive alternatives, several

¹² Time Warner Telecom 9.

¹³ In other words, “[r]egulatory intervention can raise costs, distort market development, [and] impede the flow of capital,” and can “inhibit efficient entry and competition.” Statement of Commissioner Powell, En Banc Hearing on the AOL/Time Warner Merger (July 27, 2000); Opening Statement of Commissioner Powell Before the House Subcommittee on Telecommunications, Trade, and Consumer Protection, Oct. 26, 1999.

carriers nonetheless state that EELs are necessary to constrain ILEC special access prices. In particular, these carriers accuse the ILECs of engaging in “monopolistic” pricing of special access services, based on the untenable assumption that a competitive market would produce TELRIC-based rates.

Special access rates, however, are competitively constrained, as the Commission has recognized by removing price caps in wire centers accounting for the majority of special access revenues. The IXCs ignore this fact and instead propose that regulators have the omniscience needed to design a cost model that accurately replicates the workings of a competitive market.¹⁴ The Commission, of course, does not share in this belief, having long recognized that competition determines economically efficient rates far better than regulation.¹⁵ As Chairman Powell has noted,

it is hubris to believe that regulators can (better than businesses) craft the optimal terms and conditions to govern the fundamental rules for market operation, particularly when innovation is at a premium and new and novel technologies are at stake. The beauty of market mechanisms has always been that the give and take among competitors and consumers produces an optimal set of terms and conditions.¹⁶

Thus, even if the Commission could mandate the availability of UNEs, such as EELs, that do not meet the impairment standard – which it may not – the contention that EELs are needed to control ILEC special access rates is baseless.

¹⁴ In reality, their argument is a collateral attack on the Access Reform and Pricing Flexibility Orders, both of which have been judicially affirmed.

¹⁵ See Access Charge Reform, First Report and Order, CC Docket No. 96-262, FCC 97-158 (rel. May 16, 1997), at ¶ 263.

¹⁶ Separate Statement of Commissioner Powell, AOL/Time Warner Memorandum Opinion and Order, CS Docket No. 00-30, FCC 01-12 (Jan. 22, 2001).

The restriction on “commingling” is necessary to avoid evasion of the limits on conversion. If the Commission decided to continue to permit conversions where the significant local use requirement is met – which would be contrary to Section 251(d)(2) – it must retain the ban on commingling in order to ensure that the local use requirement is not evaded. Even assuming the evasion issue could be satisfactorily addressed without a ban on commingling, there is no legal basis for permitting carriers to combine UNEs and access services on the same facility. Commingling effectively represents the establishment of a new UNE – an individual channel on a DS-1 or DS-3 facility – that has never been recognized by the Commission or subjected to the required impairment test. Moreover, commingling would unlawfully eviscerate the distinction between UNEs and services.

* * *

Denying competitors access to EELs (including high-capacity loop/dedicated transport combinations) does not impair their ability to provide special access services. If the Commission nonetheless decides to continue to permit conversions of some circuits under some circumstances, it should reject requests to broaden the safe harbors and must retain the commingling prohibition.

II. THE COMMISSION MUST UNDERTAKE AN INDEPENDENT IMPAIRMENT ANALYSIS FOR SPECIAL ACCESS.

A. The Statute Requires the Commission To Impose Rational Limits on Unbundling and To Consider Whether Denying Access to a UNE Impairs Competitors in Providing the Specific Services They Seek To Offer.

The statute permits the Commission to mandate access only to those unbundled network elements that satisfy a strict, service-specific standard: specifically, the Commission must consider whether “the failure to provide access to such network elements would impair the ability

of the telecommunications carrier seeking access to provide *the services that it seeks to offer*.”¹⁷

The impairment test requires the Commission to apply “*some* limiting standard.” Moreover, the Commission must consider “the availability of elements outside the incumbent’s network” and must not assume “that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element ‘necessary,’ and causes the failure to provide that element to ‘impair’ the entrant’s ability to provide its desired services”¹⁸

On remand, the Commission concluded that the impairment standard would be met if denial of access to a UNE would cause a requesting carrier to be “materially diminished” in providing the service it seeks to offer. The Commission also has emphasized that, undertaking this analysis, “we properly look to actual developments in the telecommunications marketplace before imposing additional unbundling obligations on incumbent LECs; we generally do not impose such obligations first and conduct our ‘impair’ analysis afterwards.”¹⁹ Therefore, the Commission cannot compel access to UNE combinations as replacements for special access services unless it finds, after considering the multitude of marketplace alternatives for those services, that denying such access would materially diminish the ability of requesting carriers to provide services relying on those UNE combinations.

¹⁷ 47 U.S.C. § 251(d)(2).

¹⁸ Iowa Util. Bd., 119 S. Ct. at 734-35.

¹⁹ Supplemental Order Clarification, ¶ 16.

B. Special Access Services Are Distinct from Mass Market Local Exchange Services.

In our opening comments, we explained that the customer bases for special access services and mass market local exchange services are distinct (with special access customers being large businesses, including IXC's) and that special access demand, unlike demand for mass market local exchange services, is concentrated (with 80 percent of special access revenues coming from roughly 20 percent of wire centers). For these reasons, we noted, special access services are "both economically and technically distinct from the mass market" and are "tailor-made for competitive entry."²⁰

Several IXC's nonetheless assert that the special access and local exchange services are inseparable. They claim that if a CLEC requires the use of ILEC loop and transport facilities to gain connectivity to a particular end user location, such facilities are required regardless of the service being offered. By way of analogy, AT&T proffers that "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."²¹ Some IXC's argue, further, that there are no alternative sources of facilities for special access that are not available for local exchange services.²² These contentions are insupportable.

Those who argue that if alternative facilities are unavailable for mass market local services they are necessarily unavailable for special access services ignore that the availability of facilities is

²⁰ SBC/Verizon 12-15.

²¹ AT&T 3.

²² Sprint 3-4, 6-7; AT&T 6; Global Crossing 3-4.

dictated by economics, and the economics of providing facilities-based special access services are fundamentally different from the economics of providing facilities-based local exchange services. AT&T's analogy to steel thus misses the point. Unlike manufacturers who depend on steel that is not available in the open market, carriers who wish to build their own special access facilities are entirely capable of obtaining the resources necessary to build those facilities. To the extent they face constraints at all, those constraints have to do with the cost of building alternative facilities relative to the revenues that can be generated from them.

It is in this respect that the differences between the provision of special access and mass market local exchange services are paramount. A carrier that seeks to provide special access services with its own facilities faces a far different cost structure and revenue opportunity than does a carrier seeking to provide facilities-based mass market local exchange services.

First, special access customers (including IXCs) are relatively few in number. They are a small subset, not only of the entire universe of subscribers, but even of business customers.²³

Second, although few in number, they are the largest users,²⁴ and they consequently generate significant revenues. The IXCs themselves comprise the largest segment of special access demand.²⁵ Looking beyond the IXCs, end user purchasers of special access are almost exclusively large business customers: the average subscriber to high-cap services has 102 on-site employees, realizes over \$35 million in annual revenues, and spends more than \$45,000 annually

²³ Crandall Decl., ¶¶ 31-32 & n.38.

²⁴ See Access Charge Reform, 14 FCC Rcd 14221, ¶ 142 (1999); *WorldCom v. FCC*, 238 F.3d 449, 453 (D.C. Cir. 2001).

²⁵ While the IXCs use special access as an input to competitive service in some instances, they also are the largest end user customers of special access services.

on telecommunications. In contrast, the average non-high cap business subscriber customers has 8 on-site employees and \$5.2 million in annual revenues and spends less than \$1700 per year on telecommunications.²⁶

Third, in comparison to demand for ordinary POTS lines, demand for special access services is exploding.²⁷ The special access “pie,” unlike the mass market “pie,” is thus growing larger. More importantly, unlike the rates for basic residential service, which historically were set below cost for social policy reasons and in most cases remain so, special access rates are largely market-based. The revenue opportunity from providing special access services is thus much greater than from mass market services.

Fourth, unlike mass market customers, who are dispersed throughout broad geographic areas, special access customers are clustered in certain areas – downtown business districts and suburban office parks. Thus, with a limited fiber deployment in specific geographic areas – one that targets the buildings or office parks where special access demand is heavily concentrated – a CLEC can serve a very high percent of the special access customers in an entire market, thereby garnering significant revenues for a limited investment. It also need not incur the cost of mass market advertising or of establishing a mass market customer care organization.

In short, unlike the local exchange market, there are “opportunities for large economies of density – that is, investment along one major artery in a CLEC fiber network can yield a

²⁶ Crandall Decl., ¶ 18. The focus on high-cap (DS-1 and above) services is appropriate because between 78 and 89 percent of special access revenues is generated from customers using such circuits. *See* “Competition for Special Access Services, High-Capacity Loops, and Interoffice Transport,” April 5, 2001 (“Fact Report”), at 4 (attached to USTA’s comments).

²⁷ *See* WorldCom 33 (demand for special access services has been growing at approximately 25 percent per year).

substantial return”²⁸ These economies render an impairment analysis for special access services fundamentally different from an impairment analysis for local exchange services.

The IXCs’ claim that the same facilities are used for local exchange and special access services is, in any event, inaccurate. While high-capacity loop/transport combinations can be used to provide local exchange service to businesses that also are special access customers, such combinations are not used to provide mass market local exchange services. Put simply, not even the most wired family needs a DS1 connection to the phone network. (Of course, if there were such a family, a CLEC might well be willing to run fiber to their home.)²⁹

Finally, the contention that there are no additional sources of supply for special access service than for local exchange service is patently absurd. It is enough to note that competitors have captured 36 percent of the special access market compared with eight percent of the local exchange mass market.³⁰ The pervasiveness of facilities-based special access competition is discussed further below.

Using any relevant criteria, special access and local exchange services are economically and technically distinct. The Commission therefore must employ a separate impairment analysis

²⁸ Crandall Decl., ¶ 19.

²⁹ The Commission’s determination in the UNE Remand Order that the lack of access to high-capacity loops impairs competing providers of local exchange service to large business customers does not compel a finding that the special access and local exchange markets are inseparable. That finding, whatever its validity when made in September 1999 (based on record evidence dating to year-end 1998), is no longer valid, as demonstrated in the Joint Petition and as WorldCom (at 39) effectively concedes by acknowledging that the Commission may find a lack of impairment in some areas upon reviewing market developments. In fact, considering the local exchange and special access markets together for large business customers compels a conclusion that competitors are not impaired in providing either type of service to that customer segment.

³⁰ See Fact Report at 4.

for special access services. As discussed below, that analysis compels a conclusion that competing providers in that market are not impaired without access to loop/transport combinations.

III. DENYING ACCESS TO LOOP/TRANSPORT COMBINATIONS DOES NOT MATERIALLY DIMINISH THE ABILITY OF REQUESTING CARRIERS TO PROVIDE THE SERVICES THEY SEEK TO OFFER.

In our opening comments, we demonstrated that competitors are not “impaired,” within the meaning of Section 251(d)(2), without access to ILEC loops/transport combinations.³¹ The marketplace evidence in this regard is incontrovertible. For example, facilities-based CLECs are collocated in thousands of wire centers, to such an extent that markets generating 80 percent of BOC special access revenue qualify for Phase I pricing flexibility and markets generating nearly two-thirds of such revenues qualify for Phase II relief.³² This fact, in itself, is compelling evidence of a lack of impairment: given that there is sufficient special access competition to warrant the elimination of price cap regulation in markets generating two-thirds of the BOCs’ special access revenue, the CLECs’ claim that they need UNEs cannot be credited.

Collocation data, though, are just the tip of the iceberg. Scores of competitors demonstrate every day that they are willing and able to extend facilities to serve potential customers of high-capacity services, whether located within or outside urban areas. Already, facilities-based competitors have captured 36 percent of the special access market and deployed 635 fiber networks in the top 150 MSAs. Supplementing those facilities, dozens of fiber

³¹ SBC/Verizon 15-23. We also explained that the Commission cannot require a UNE combination to be unbundled where, as is true here, the underlying components (high-capacity loops and dedicated transport) do not meet the “impair” test. *Id.* 23-24.

³² Fact Report at 6-7 and Tables 4, 5.

wholesalers have constructed and continue to build carriers' carrier networks providing scalable, timely, and efficient capacity to new entrants, and collocation hotels represent a pervasive and attractive alternative to ILEC collocation.

In marked contrast to this comprehensive documentation, the IXCs either repeat without substantiation the Commission's outdated conclusions about the lack of alternative loop and transport facilities in the UNE Remand Order,³³ or offer anecdotal claims that they remain heavily reliant on ILEC special access service.³⁴ Their claims are inconsistent with the verifiable evidence of a vibrantly competitive special access marketplace.

A. There Can Be No Impairment With Respect to Special Access Conversions.

Although SBC and Verizon have presented a considerable body of data relating to special access competition, in reality, that evidence is not necessary to a decision in this matter. The very nature of the question posed in the Public Notice – whether competitors are impaired by being prohibited from converting existing special access circuits to UNEs – must be answered in the negative wholly apart from the evidence. To state the obvious, a special access *conversion* necessarily can occur only when a competitor already is using a special access circuit to provide services to its customers. Thus, it could not possibly be impaired in its *ability* to provide those services if it is unable to convert its special access circuits to UNEs. In this respect, this

³³ See, e.g., AT&T 17 (asserting without support that competition is limited to facilities serving a small percentage of high volume customers in high density urban areas); Norlight 4-5; BroadRiver et al. 2, 5.

³⁴ Sprint 5-6 (stating that it depends on ILECs for half of dedicated transport and 100 percent of channel terminations in areas where its local networks are deployed); WorldCom 19 (asserting that it is buying Pacific Bell DS1s in 105 of 109 wire centers in the Los Angeles MSA and that CLECs offer transport to only 24 of those wire centers).

proceeding is not about the *ability* of carriers to provide the services they seek to offer; it is inherently about whether they should be able to get a discount on the facilities they already are using to provide those services. The Supreme Court has spoken directly to this issue. It squarely held that unbundling cannot be required simply to confer a discount on a service that a CLEC is otherwise able to offer without UNEs.³⁵ Thus, CLECs *cannot* be impaired without the ability to convert their special access circuits to UNEs.

Far from disputing this dispositive fact, the comments only underscore it. None of the proponents of unlimited conversions suggests that they are seeking anything other than a lower price for the same facilities. Indeed, WorldCom actually acknowledges that ILEC special access services are a “practically ... available” means of entering the market.³⁶ Focal also underscores that it simply wants the same service at a reduced rate when it complains (without any legal basis) that ILECs are setting up an “apartheid network for EELs” because UNEs may not have all the monitoring that special access services do.³⁷

To be sure, the Commission has held that it would not consider ILEC tariffed offerings as part of the impairment analysis.³⁸ Whatever the merits of that decision as a general matter, it cannot hold true in the context of conversions of special access circuits. Disregarding the fact that an IXC *already is using* the very special access circuit it seeks to convert cannot be

³⁵ AT&T v. Iowa Util. Bd., 119 S. Ct. 721, 735 (1999).

³⁶ WorldCom 35.

³⁷ Focal 8-9.

³⁸ See UNE Remand Order, ¶¶ 67-70.

reconciled with the Supreme Court's holding that a simple increase in profit margin does not amount to impairment.³⁹

B. The Prevalence of Collocation By Facilities-Based CLECs Demonstrates that Competitors Are Not Impaired Without Access to UNE Combinations.

Notably absent from the IXCs' comments – undoubtedly because it belies their portrayal of a market where ILECs continue to wield monopoly power – is any mention of the fact that the Commission already has largely deregulated special access rates in a broad cross-section of MSAs accounting for more than 50 percent of RBOC special access revenues.⁴⁰ That fact, standing alone, demonstrates that competing providers of special access services are not impaired without access to UNE combinations, not just in those geographic areas, but for the entire market. If competitive entry is so widespread over such diverse areas, it is clear that carriers can compete without reliance on unbundled elements and therefore they are not impaired, regardless of the number of facilities-based collocators in a given wire center.

As Dr. Crandall states:

Because it focuses on the ability to raise prices on end users, the pricing-flexibility test is a *consumer*-based test. By contrast, the impairment test asks whether a competitor would be impaired without access to a network element of a rival – hence, the impairment test is a *competitor*-based test. Clearly, if there is sufficient competition to protect consumers

³⁹ Whether or not, as a general matter, and apart from the context of a conversion to UNEs, a tariffed service or resale offering should be considered in an impairment analysis thus poses a different question. Absent a conversion, it is not the case that the requesting carrier necessarily is using the tariffed service or resale offering in every situation in which a UNE offering could be substituted.

⁴⁰ The only reference to this fact comes from WorldCom (at 25-26), which erroneously claims that the combination of special access pricing flexibility with the restriction on conversions enables ILECs to engage in a price squeeze. See section VI, *infra*.

from anticompetitive pricing, then it necessarily follows that competitors could not be impaired in their *ability* to offer a competing service.⁴¹

In any event, as discussed below, evidence of competition here goes far beyond the Commission's test for pricing flexibility.

C. An Addressability Analysis Further Confirms that No Competitor Is Impaired Without Access to UNE Combinations.

As noted above, our opening comments documented that there are a multitude of competitive alternatives wherever special access customers are located. "Because so many CLECs are contesting the market for special access services through their own facilities, one cannot conclude that CLECs would be impaired in the delivery of special access services if they lacked access to unbundled network elements."⁴² Put another way, as Chairman Powell has recognized, evidence of facilities deployment "strongly suggests" that competitors "are not significantly impaired," both in areas where they have deployed "and in areas in which they have not done so."⁴³

The validity of both that recognition and the evidence presented in our opening comments is further confirmed by Dr. Crandall's analysis. Looking first at existing deployment, he found that there are multiple sources of supply for likely special access customers regardless of the size of the geographic area examined: In cities with a population greater than 500,000, 94 percent of

⁴¹ Crandall Decl., ¶ 23.

⁴² *Id.*, ¶ 27.

⁴³ See 1999 FCC LEXIS 5663 at **49. Time Warner Telecom recently echoed this conclusion, stating that its "[m]assive core network infrastructure enables Time Warner Telecom to create new services through incremental investment." Presentation of Time Warner Telecom before the CIBC Internet Conference (April 2001), at 7.

potential special access customers are within 2000 feet of at least one CLEC fiber line, and 78 percent of such customers are that close to at least two CLEC fiber lines.⁴⁴ In cities with populations between 250,000 and 500,000, the corresponding figures are 72 percent for one CLEC fiber line and 45 percent for at least two CLEC fiber lines. And for small cities, with a population less than 250,000, the figures are 65 percent for at least one CLEC fiber line and 38 percent for at least two. These figures, as would be expected, rise when the radius is extended to 4000 feet.⁴⁵ Equally impressive numbers resulted from an examination of the addressability of central offices in these cities.⁴⁶ Based on these statistics, Dr. Crandall concluded that “a CLEC would not be impaired in the delivery of special access service without access to an ILEC’s unbundled loop-transport combinations.”⁴⁷

Even these numbers, however, do not fully describe the level of competition in the provision of special access services. As explained in our opening comments and quantitatively verified by Dr. Crandall, CLECs can and regularly do extend their facilities to serve potential customers. After considering the expected revenue from serving a building housing a potential special access customer and the cost of extending a CLEC’s fiber network to that building, Dr. Crandall determined that:

[A]pproximately 89 percent of all buildings that contain potential special access customers are sufficiently attractive and sufficiently close to a neighboring CLEC fiber line such that it would be cost-effective for a CLEC to extend its facility and provide special access

⁴⁴ Notably, the largest city considered in the analysis is Seattle (MSA 21). Undoubtedly, the competitive situation in larger markets is even more robust.

⁴⁵ Crandall Decl., ¶¶ 45-46 & Tables A3, A4.

⁴⁶ *Id.*, ¶¶ 48-49, Tables A6, A7.

⁴⁷ *Id.*, ¶ 10.

services to such customers' premises. When those buildings are weighted by their expected revenues, 97 percent of all special access revenues are sufficiently close to a neighboring CLEC fiber line such that it would be cost-effective for a CLEC to extend its facility and provide special access services to such customers' premises.⁴⁸

D. The IXCs' Anecdotal Claims Regarding the Lack of Competitive Alternative Are Misleading and Demonstrably False.

The proponents of conversion submit scant data regarding the availability of alternatives to ILEC facilities, and what little information they do provide fails to show that competing providers of special access services are impaired without loop/transport combinations. WorldCom, citing a year-end 2000 report that one CLEC, XO Communications, served 3.6 percent of its end users' buildings using its own facilities, leaps from that example to a conclusion that "few end user locations have sufficient traffic density for CLECs to viably self-provision loop facilities."⁴⁹ The example establishes nothing of the sort. WorldCom (which offers no information about any other CLECs, including, conspicuously, its own affiliates) unreasonably assumes that the status quo at the end of 2000 is as good as it is going to get, but XO's 10-K (the source of the data) paints a very different picture⁵⁰:

- XO is committed to connecting its end users directly to its network and expects to be able to reach a "high percentage" of the commercial buildings in its serving area.⁵¹

⁴⁸ *Id.*, ¶ 47, Figures 3, A1-A5.

⁴⁹ WorldCom 17.

⁵⁰ XO recently announced very strong first quarter results, but indicated that it would reduce capital spending in certain respects, including slowing planned expansions in its existing U.S. metropolitan fiber networks. At the same time, though, XO stated that it enjoyed a 162 percent increase in revenues in the first quarter of 2001 over the first quarter of 2000 and secured an additional \$250 million in private equity funding, sufficient to fund it "well into the first half of 2003." See "XO Communications Reports Strong First Quarter Results," available at www.xo.com/news/66.html.

⁵¹ XO Communications, Inc., 2000 SEC Form 10-K, at 3 ("[b]y building our metro fiber networks
(Continued...)

- XO will build out to any location, including suburban areas, “where business development supports the capital required for network build.”⁵²
- XO believes that it can operate more efficiently than ILECs: “[b]ecause our fiber optic networks have been recently installed compared to those of the incumbent carriers, our networks’ dual path architectures and state-of-the-art technology may provide us with cost, capacity, and service quality advantages over some existing incumbent carrier networks.”⁵³
- XO’s operating expenses as a percentage of revenue decreased from 80.8% in 1999 to 65.8% in 2000, and XO expects that percentage to continue to decline as it connects more customers to its network.⁵⁴
- Between year-end 1999 and year-end 2000, XO’s on-net buildings increased by 47.5%, its off-net buildings increased by 79.2 percent, its customer base almost doubled (to 87,755), its monthly revenue-per-customer increased 40% (to over \$900), and its revenues increased 163.9% (to \$723.8 million).⁵⁵

XO’s financial report therefore shows that XO has been able to build to new locations – not, as WorldCom would have it, that there are few end-user locations justifying direct connections.

WorldCom next asserts that it “provides service to end users over ILEC special access services in virtually all wire centers in virtually all cities.”⁵⁶ Notwithstanding the sweeping nature

(...Continued)

in central business districts, we can connect a high percentage of the area’s commercial buildings using these technologies, rather than connections leased from third parties.”). Moreover, “[i]n 2000, we deployed fixed wireless services in 27 markets to extend the reach of our metro fiber networks to additional customers and connect these customers directly to our networks.” *Id.* at 4.

⁵² *Id.* at 10.

⁵³ *Id.* at 22.

⁵⁴ *Id.* at 39.

⁵⁵ *Id.* at 37.

⁵⁶ WorldCom 18-19.

of this statement, WorldCom cites just one example: Los Angeles, where it says that it uses Pacific Bell DS1s in 105 out of 109 wire centers and that a CLEC would have to build transport facilities to 74 of those wire centers to cover 95 percent of the DS1 circuits WorldCom currently obtains from Pacific Bell.⁵⁷ The Los Angeles MSA, as the Commission can imagine, extends well beyond the urban core, making this an unrepresentative example. That is, much of the MSA covers areas where there is unlikely to be much special access demand. Indeed, WorldCom fails to disclose how many wire centers CLECs would have to reach in order to cover, for example, 70 or 80 percent of its special access revenues; the 95 percent of circuits figure may be misleading because a large subset of that number may be located in far fewer than 74 wire centers.⁵⁸ In any event, even if Los Angeles were representative and the figures cited by WorldCom were meaningful, WorldCom still has failed to show that it is impaired without access to loop/transport combinations.

Sprint claims that in the twenty cities where it is building metropolitan networks, it will remain dependent on ILEC facilities for 49 percent of dedicated transport and 100 percent of channel terminations.⁵⁹ This assertion is irrelevant to the impairment questions. First, the inverse of Sprint's statement is it will use its own facilities for more than half of its dedicated transport. Second, Sprint does not assert that alternative facilities are not available in those cities, and any such assertion would not be credible, given the number of competitive fiber networks throughout

⁵⁷ *Id.* at 19.

⁵⁸ The 24 wire centers in the Los Angeles MSA where facilities-based CLECs are collocated account for 57 percent of Pacific Bell's special access revenues in that MSA. Nationally, special access revenues are even more concentrated. As shown in the Fact Report (at 3), roughly 20 percent of ILEC wire centers generate roughly 80 percent of special access revenues.

⁵⁹ Sprint, Appendix 1 (Declaration of Robert Runke).

the top 150 MSAs and beyond. Apparently, it just would rather not use those alternatives. Sprint says, for example, that it is reluctant to buy local access facilities from its IXC competitors (WorldCom and AT&T) and that it considers buying from CLECs to be risky.⁶⁰ This is not the stuff of impairment.

IV. APPLICATION OF THE IMPAIR STANDARD ON A SERVICE-SPECIFIC BASIS IS REQUIRED BY THE ACT AND ADMINISTRATIVELY WORKABLE.

In the Supplemental Order Clarification, the Commission properly recognized that Section 251(d)(2), by focusing on “the services” that the requesting carrier seeks to offer, requires a market-by-market analysis⁶¹: “section 251(d)(2) does not compel us, once we determine that any network element meets the ‘impair’ standard for one market, to grant competitors automatic access to that same network element solely or primarily for use in a different market.”⁶² This was not a sudden change in the Commission’s approach.⁶³ In previous decisions, the Commission has explained that “it is appropriate to consider the specific services and customer classes a requesting carrier seeks to serve when considering whether to unbundle a network element”⁶⁴ and that application of the impairment test must “consider the particular types of customers that the carrier

⁶⁰ Sprint at 5-6.

⁶¹ Supplemental Order Clarification, ¶ 18.

⁶² *Id.*, ¶ 15.

⁶³ *Cf.* AT&T 2.

⁶⁴ Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (rel. Dec. 9, 1999), ¶¶ 31-34 (“Line Sharing Order”) (finding no impairment with respect to SDSL and HDSL services and limiting the availability of the line-

(Continued...)

seeks to serve.”⁶⁵ As the Commission recognized, “[t]o conclude otherwise would be to ignore the statutory directive in section 251(d)(2) that requires the Commission to consider whether a requesting carrier is impaired ‘to provide the services that it seeks to offer.’”⁶⁶

Several IXCs nonetheless resurrect already-rejected challenges to the Commission’s legal authority to engage in a service-specific analysis. (They also mischaracterize the Commission’s service-specific application of the impairment standard as a use restriction.) WorldCom adds that a service-specific impairment analysis is “impractical,” even if legally authorized. In reality, the Commission has no choice but to limit use of a network element if such denial would not impair competitors in providing the services they seek to offer. Doing so is explicitly required by Section 251(d)(2) as well as the Supreme Court’s admonition that the Commission must adopt meaningful limits on the unbundling obligation.⁶⁷ Moreover, the Commission has authority to limit the availability of UNEs as replacements for access service under Section 251(g). Finally, a service-specific impairment analysis is eminently practical.

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sharing UNE for providing voice-compatible forms of xDSL).

⁶⁵ UNE Remand Order, ¶ 81.

⁶⁶ Line Sharing Order, ¶ 49; *see also id.*, ¶ 44 (“We believe that if competitive LECs were to provide voice services in addition to xDSL-based service, they would be impaired in their ability to provide *the data services* they seek to offer.”) (Emphasis added.)

⁶⁷ AT&T Corp. v. Iowa Util. Bd., 110 S. Ct. 721, 734 (1999).

A. Section 251(c)(3) Invites Rather than Bars Service-Specific Limitations on the Use of UNEs.

The Commission already has rejected IXC claims that Section 251(c)(3) prohibits a market-specific impairment analysis, and that conclusion is correct.⁶⁸ First, that provision states that UNEs identified consistent with Section 251(d)(2) – which, again, focuses on “the services” a requesting carrier seeks to offer – must be made available “for the provision of a telecommunications service.” The IXCs persist in their longstanding, but still mistaken, belief that the word “a” means “any.” It does not. When Congress intended “any,” it said so, as in the preceding clause of Section 251(c)(3) (“any requesting telecommunications carrier”). Such differences in terminology must be presumed intentional.⁶⁹

Moreover, even if the Commission accepted the IXCs’ invitation to re-write the statute by substituting “any” for “a,” Section 251(c)(3) authorizes “just, reasonable, and non-discriminatory” conditions on access to UNEs. The IXCs’ argument that a UNE must be made available for all purposes improperly would read this limitation out of the statute.⁷⁰ It defies logic to suggest that,

⁶⁸ Supplemental Order Clarification at n.45 (rejecting AT&T’s argument that Section 251(c)(3) prohibits a market-specific analysis and noting the Supreme Court’s caution that the Act does not create a duty to provide all UNEs for which it is technically feasible to provide access).

⁶⁹ *See, e.g.,* Russello v. United States, 464 U.S. 16, 23 (1983). Congress also used the same basic formulation as in Section 251(c)(3) in Sections 251(c)(2) and 251(b)(5) – provisions that the Commission has read as “impos[ing] limits” on the purposes for which a carrier may invoke the statutory arrangements. As SBC explained in refuting the same “a” means “any” argument the last time the IXCs raised it, “this type of statutory formulation – which is the same formulation used in section 251(c)(3) – addresses the outer boundaries of what a requesting carrier may seek, not the terms and conditions under which the incumbent must provide facilities and services.” Comments of SBC Communications, Inc., CC Docket No. 96-98, filed Jan. 19, 2000, at 21.

⁷⁰ *See, e.g.,* Mississippi Poultry Ass’n v. Madigan, 31 F.3d 293, 304 (5th Cir. 1994) (“[A] statute should be interpreted so as not to render one part inoperative.”).

while the Commission has the authority to identify all network elements, decide which ones must be made available, and establish rules that govern their pricing, it lacks the authority to establish reasonable and nondiscriminatory limits on their availability that further important public and statutory goals. Given the detrimental impact on competition, investment, and innovation of permitting UNE combinations to be used in place of special access, a restriction on such use is just and reasonable.

B. The Local Competition Order and the Commission’s Rules Provide No Support for the IXCs’ Position.

The IXCs fare no better in relying on the Local Competition Order and Rules 51.307(c) and 51.309(a). The cited passages from the Order – as well as the referenced rules, which are intended to implement those passages – all stem from the assumption that Section 251(c)(3) “imposes on an incumbent LEC the duty to provide all network elements for which it is technically feasible to provide access.”⁷¹ The Supreme Court, however, rejected this premise in holding that the Commission must give effect to the Act’s requirement that UNEs be made available only where their denial would impair a carrier’s ability to provide the service it seeks to offer.⁷² Indeed, the Commission already has demonstrated that the statements in the Local

⁷¹ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15646-47 (1996) (“Local Competition Order”).

⁷² Iowa Util. Bd., 119 S. Ct at 736. Even if the cited passages from the Local Competition Order survived the Supreme Court’s decision, which they do not, the Commission is not bound forever by its earlier determinations. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984); *Motor Vehicle Manufacturers Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (permitting an agency to alter its interpretation of the law as long as it provides a reasoned analysis for doing so). Indeed, the Commission must re-assess the validity of these statements. *Cf. Pine Mountain Coal Co. v. Mays*, 176 F.3d 753, 767 (4th Cir. 1999) (“An agency willing to study a statute and legislative history and, where appropriate, to amend its interpretation is more deserving of the respect and deference of the courts than an agency that foolishly stays on the

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Competition Order cannot be interpreted as broadly as the IXCs claim, both in the Supplemental Order Clarification and in the UNE Remand Order, where it provided that requesting carriers are not entitled to obtain the circuit-switching UNE to provide service to business customers with more than four lines in certain geographic areas.

In any event, even if the rules remained valid,⁷³ they do not necessarily have the effect ascribed to them by the IXCs. Rule 51.307(c) requires an ILEC to provide access to a network element in a manner that allows the requesting telecommunications carrier “to provide any telecommunications service that *can be offered* by means of that network element.” This rule does not prohibit the Commission from limiting the service that can be offered using a particular UNE; nor could the rule be read to impose such a constraint consistent with Sections 251(c)(3) and 251(d)(2). And Rule 51.309(a) bars an ILEC from imposing only those “limitations” or “restrictions” on the “use of” a UNE “that would impair the ability of a requesting carrier to offer a telecommunications service in the manner the requesting carrier intends.” Other limitations – those that would not “impair” the requesting carrier – therefore are permitted. Because denying UNE combinations does not “impair” requesting carriers wishing to provide special access services, Rule 51.309(a) is irrelevant.⁷⁴ (In fact, even if there were an impairment under Section 251(d)(2), Rule 51.309(a) constrains only the ILEC, not the Commission.)

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wrong path merely because it is well worn.”).

⁷³ Because the validity of these rules was not before the Supreme Court, they were not expressly invalidated. Nonetheless, the Court’s opinion undermines the asserted basis for the rules.

⁷⁴ Moreover, that focus of the rule is on “the manner” in which a carrier seeks to offer the service, not the services that may be offered.

C. Section 251(g) Confers Independent Authority To Prohibit the Use of UNEs to Replace Special Access.

Finally, Section 251(g) authorizes the Commission to limit the use of UNEs in a manner that would disrupt the access charge regime. That provision requires LECs to “provide exchange access ... in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)” that applied immediately prior to the Act’s passage, until “expressly superseded by regulations prescribed by the Commission”

As the Commission recently emphasized, “Congress preserved the pre-Act regulatory treatment of all the access services enumerated under Section 251(g). These services thus remain subject to Commission jurisdiction under Section 201 ... whether those obligations implicate pricing policies ... or reciprocal compensation.”⁷⁵ Section 251(g) therefore “is properly viewed as a limitation on the scope”⁷⁶ of other, potentially conflicting obligations in Section 251 – not just the reciprocal compensation provision of Section 251(b)(5), but of any requirement that would interfere with the pre-existing, Section 201-based “compensation” for access services.⁷⁷ This interpretation is confirmed by the legislative history of Section 251(g), which explains that the “obligations and procedures prescribed in [Section 251] do not apply to interconnection

⁷⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) (“Reciprocal Compensation Remand Order”), at ¶ 39.

⁷⁶ *Id.*, ¶ 35.

⁷⁷ Indeed, using its Section 251(g) authority, the Commission on several occasions has taken action to protect the access charge regime. *See* Local Competition Order, 11 FCC Rcd at 16017-18 (relying on Section 251(g) to limit TELRIC-based reciprocal compensation to local traffic); *Id.* at 15864-66 (imposing temporary access charges on carriers that use unbundled switching to originate and terminate interstate traffic). This latter action was affirmed in Competitive

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arrangements between local exchange carriers and telecommunications carriers under section 201 of the 1934 Act for the purposes of providing interexchange service, and nothing in [section 251] is intended to affect the FCC's access charge rules.”⁷⁸

Permitting conversions of special access services is tantamount to substituting Section 251-based interconnection for Section 201-based access charges, in direct contravention of Section 251(g). Section 251(g) therefore independently compels a continued prohibition on the use of UNE combinations to replace special access, as well as further demonstrating that such a prohibition is “just and reasonable” under Section 251(c)(3).

D. A Service-Specific Impairment Analysis Is Practical.

WorldCom warns that the Commission, having embarked upon a service-specific examination of impairment with respect to special access, necessarily would have to “undertake for *all* network elements an impairment analysis for *every* service that a requesting carrier might seek to offer.”⁷⁹ The alternative, however, is an unlawful and absurd result where impairment could be established for a specific type of service and then competitors would be free to use that network element for completely different purposes where they are not impaired. Moreover, a service-specific impairment analysis is hardly “impractical.”⁸⁰ The impairment analysis is driven in

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Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997).

⁷⁸ S. Rep. No. 104-23, 104th Cong., 1st Sess., at 19 (1995).

⁷⁹ WorldCom 11.

⁸⁰ WorldCom 11-12.

large part by the type of customer a carrier wishes to serve.⁸¹ A long line of Commission precedent holds that there are at most three relevant classes of customers: residential and small business, medium-sized business, and large business.⁸² In addition, the Act establishes a few overarching service categories – exchange service, exchange access, and toll service, for example.⁸³ Within each of these categories, there are a limited number of major divisions, such as between switched and special access or between voice grade and high-capacity services.

The Commission’s task, therefore, is eminently impractical. It need only consider whether a carrier would be impaired in providing one of these broad services to a particular class of customers if denied access to a specific UNE. While WorldCom is correct that Section 251(d)(2) focuses on “the service” a requesting carrier seeks to offer, the Commission has discretion to interpret the term “service” in a manner that is administratively workable yet faithful to the Act.

V. MANDATING THE AVAILABILITY OF UNE COMBINATIONS TO REPLACE SPECIAL ACCESS WOULD HAVE A DEVASTATING IMPACT ON COMPETITION, INVESTMENT, AND INNOVATION.

In our opening comments, we explained that overbroad unbundling is inimical to the development of facilities-based competition, disincentivizes investment by both CLECs and ILECs,

⁸¹ UNE Remand Order, ¶¶ 54, 81; *see also id.* ¶ 276 (limiting the availability of the circuit switching UNE to serve certain types of customers); WorldCom 20 (acknowledging that the decision to build facilities is “driven by an analysis of potential revenues and costs”; any such analysis, of course, will be greatly affected by the type of customer the carrier seeks to serve).

⁸² *See, e.g.*, Bell Atlantic/NYNEX Merger Order, File No. NSD-L-96-10, FCC 97-286 (rel. Aug. 14, 1997), at ¶ 53; MCI/WorldCom Merger Order, CC Docket No. 97-211, FCC 98-225 (rel. Sept. 14, 1998), at ¶ 24 (distinguishing mass market residential and small business customers from medium and large business customers).

⁸³ *See* 47 U.S.C. §§ 153(16) (defining “exchange access”), 153(47) (“telephone exchange service”), 153(48) (“telephone toll service”).

and flouts the Act’s fundamental deregulatory goal. We likewise demonstrated that arbitrarily re-pricing special access services would deprive ILECs of revenues used, *inter alia*, to provide advanced services, particularly in rural areas. The Commission understands these risks (as demonstrated by its decision to limit unbundling of packet switching in most cases), and both the Chairman and respected industry analysts have cautioned that too much unbundling will stifle innovation and prevent transformational changes in technology.⁸⁴

Several IXCs nonetheless claim that precluding them from obtaining special access-equivalent UNEs would deter investment in competitive facilities. Their arguments take a variety of forms, all of which are wrong.

For example, WorldCom says that restricting the availability of EELs for special access “runs the risk of diverting investment from the development of innovative services to inefficient construction of duplicate transport and loop plant,” and that “concerns about the consequences of EELs for facilities-based competitive access providers are misplaced.”⁸⁵ These claims are specious – resting, as they do, on the erroneous belief that existing special access rates are “too high” – and ignore marketplace realities. As Time Warner explains, EELs deter efficient investment; they do not invite inefficient investment:

restricting requesting carriers’ ability to arbitrage special access rates by ordering loop-transport UNE combinations or “flipping” existing special access circuits is essential to assure the growth of facilities-based competition in the special access market. ... Lowering prices to TELRIC could very well diminish or even eliminate the incentive for entrants to enter or expand entry in the special access market. While there can be no questions that the most efficient price for a good or service is equal to marginal cost (including a reasonable profit), the ore important question for the purposes of this proceeding is how to achieve such efficient price signals in the access market. If setting

⁸⁴ SBC/Verizon 24-29.

⁸⁵ WorldCom 31.

prices based on TELRIC substantially reduces the likelihood for entry or expansion of entry in a market in which facilities-based competition has demonstrably developed, then policy makers should avoid setting prices at TELRIC.⁸⁶

Indeed, WorldCom's argument is internally inconsistent: it bemoans the asserted lack of competitive alternatives for special access facilities, but in the next breath protests that high special access rates invite "inefficient" investment in such facilities. WorldCom cannot have it both ways.

AT&T maintains that permitting conversions will not deter investment because competing carriers will build their own facilities whenever economically feasible in order to avoid reliance on the ILEC.⁸⁷ By definition, however, the Commission's pricing methodology for UNEs – which assumes a hypothetical, maximally efficient network design using the most modern technology – assures that no competitor will find it economical to deploy its own facilities. "The problem ... is that such low prices (significantly below current prices notwithstanding the presence of widespread entry) could well push the incumbent's price near or below the limit, entry-forestalling price. This would limit or eliminate the incentive for firms such as TWTC to enter new markets or expand entry in markets they currently serve."⁸⁸

⁸⁶ Time Warner Telecom 9-10.

⁸⁷ AT&T 16-17. AT&T also contends (at 17) that "even where construction of facilities is economic, unrestricted availability of UNEs is still critical." The statute, of course, permits no such thing: if a competitor is not impaired without access to a UNE, the Commission cannot compel access to that UNE. The supposed "proven difficulties in constructing facilities" cited to by AT&T are vastly overstated, as demonstrated in our opening comments, in the Joint Petition, and most importantly, but the tremendous amount of competitive facilities that already have been deployed.

⁸⁸ Time Warner Telecom 11 (footnote omitted).

Just as the proponents of UNE-based special access belittle the detrimental impact on CLECs, they assert that unlimited conversion of special access circuits would not harm ILECs and their customers. They are wrong here as well. For example, several parties claim that there is no longer any need for “use restrictions” on EELs because special access does not contain universal service support and switched access support has been made explicit.⁸⁹ These parties ignore the adverse impact that drastic cuts in special access revenues would have on the ability of ILECs to continue offering affordable, high quality service. The 2000 USTA Fact Report showed that, even after taking termination liability into account, ILECs would suffer revenue reductions in the billions of dollars.⁹⁰ Faced with a revenue drain of this magnitude, ILECs could not maintain their current pace of investing in broadband facilities, developing new services, and upgrading service quality and availability – particularly in rural areas where the prospective returns already are more speculative. Importantly, this revenue loss is not a result of eliminating “supra-normal” returns: special access rates recover actual costs and are competitively disciplined. TELRIC-based rates, in contrast, represent the substitution of imperfect regulatory judgment for the workings of a competitive marketplace.

The inescapable economic reality is that compelling ILECs to make UNE combinations available for the provision of special access would deter investment and innovation by both ILECs

⁸⁹ See, e.g., CompTel 6-8, AT&T 13-15, WorldCom 32-34.

⁹⁰ 2000 Fact Report at 13 & Tables 8, 9. Thus, WorldCom (at 33) is wrong in asserting that the existence of termination liability will ameliorate the revenue impact of unlimited conversions on ILECs. It is likewise mistaken to suggest, as WorldCom does, that the revenue impact of conversions “would be almost immediately offset by growth in demand”: according to this theory, it is acceptable for the ILECs to lose money on each converted service arrangement because they will make it up in volume. Such a business strategy is unlikely to be endorsed by the capital markets.

and CLECs. Try as they might, the IXCs' efforts to turn this conclusion on its head are patently unavailing. The Act commands the Commission to promote competitive investment, foster the deployment of advanced broadband services, and pursue deregulation wherever possible. The only appropriate course from a policy standpoint is to further the Act's goals by prohibiting the conversion of special access circuits into UNEs.

VI. EEL-BASED COMPETITION IS NOT NEEDED TO ASSURE COST-BASED SPECIAL ACCESS RATES AND LIMITATIONS ON THE USE OF UNES PROMOTE RATHER THAN IMPEDE THE COMMISSION'S ACCESS REFORM POLICIES.

In their quest for a multi-billion dollar handout, a number of IXCs claim that ILEC special access rates are uneconomically high and that they will not become cost-based unless the Commission permits special access services to be converted into UNE combinations.⁹¹ In variations on this argument, a few parties maintain that high special access rates enable the RBOCs to engage in a price squeeze once they receive Section 271 authority⁹²; AT&T argues that restrictions on the availability of UNE combinations are inconsistent with access reform⁹³; and Focal asks for a "fresh look" period in conjunction with conversion authority, claiming that high special access rates force many CLECs to enter long-term special access arrangements in order to obtain term discounts.⁹⁴ None of these claims has any merit.

⁹¹ See, e.g., WorldCom 31, Global Crossing 9.

⁹² Sprint 4, WorldCom 25-26; Global Crossing 9-10 & n.22.

⁹³ AT&T 13 n.11, 15.

⁹⁴ Focal 12-14.

Special access prices are competitively determined. The main underlying argument – that special access rates are monopolistic – is ludicrous. As the Commission has confirmed in granting special access pricing flexibility to BellSouth, SBC, and Verizon, special access rates are competitively disciplined. Crediting unsupported and conclusory claims to the contrary essentially would mean that the Commission either willfully turned a blind eye to the marketplace or acted arbitrarily and illogically in adopting the pricing flexibility framework in the first place. The first alternative is patently wrong and the second was rejected by the D.C. Circuit, which upheld the Pricing Flexibility Order and specifically affirmed the Commission’s judgment that once the collocation-based triggers were met, competition would adequately constrain ILEC special access rates.⁹⁵

Implicit in this main argument is an equally erroneous premise: that special access rates are excessive if they are not TELRIC-based. This argument ascribes to the Commission the ultimate in hubris,⁹⁶ asking it to assume that its hypothetical cost model will do a better job determining economically efficient rates than marketplace competition. That contention is one that the Commission has rightly and repeatedly rejected.⁹⁷ It also reflects an ill-informed understanding of basic economics. As Qwest explains:

⁹⁵ WorldCom v. FCC, 238 F.3d 449, 458 (D.C. Cir. 2001).

⁹⁶ See note 16, *supra*.

⁹⁷ See, e.g., Access Charge Reform, First Report and Order, CC Docket No. 96-262, FCC 97-158 (rel. May 16, 1997), at ¶ 263 (“We decide that adopting a primarily market-based approach to reforming access charges will better serve the public interest than attempting immediately to prescribe new rates for all interstate access services based on the long run incremental cost or forward-looking economic cost of interstate access services. *Competitive markets are superior mechanisms for protecting consumers* by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production.”) (Emphasis added.)

(Continued...)

[T]he reason the TELRIC costs for high capacity special access circuits are so much lower than market rates for the service is fairly simple. ... TELRIC assumes all builds are designed to serve the total demand, not just the incremental increase in demand. In adding to the existing network the economies of scope and scale inherent in the TELRIC method can never be achieved. In an era of rapidly changing and developing technology, no rational business would install a particular type of new technology on a scale sufficient to meet the entire range of existing and potential demand. ... In fact, it would be economically irresponsible for a company to deploy new technology in the manner assumed by the TELRIC rules.⁹⁸

Conversions, in short, would create another opportunity for uneconomic arbitrage; they would not produce more efficient special access rates.

ILECs cannot engage in a price squeeze. Nor are the commenters' professed price squeeze concerns legitimate. The Commission rejected precisely this same argument – that an ILEC's 272 affiliate would be able to price based on the “economic cost” of special access rather than the full tariffed rate – in the Supplemental Order Clarification. It also rejected the same price squeeze argument in the context of switched access in its decision holding that such affiliates should be considered non-dominant.⁹⁹ The addition of Phase II pricing flexibility into the mix does not alter these conclusions. Indeed, a price squeeze is not even theoretically possible unless

(...Continued)

See also, Speech of Commissioner Michael Powell before the Progress and Freedom Foundation, Dec. 8, 2000 (“We must avoid the temptation to ‘shape the development of markets and instead let the market mechanism make those decisions.’”); Opening Statement of Commissioner Michael Powell before the Subcommittee on Communications of the Senate Committee on Commerce, June 10, 1998 (“Markets have always proven to be better than central planning models at empowering consumers to bring technology and services to their highest and best use.”).

⁹⁸ Qwest 16-17 & Attachment A.

⁹⁹ *See* Supplemental Order Clarification, ¶¶ 19-20; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-172 (rel. April 18, 1997), at ¶ 91.

there are no alternative sources of special access and no competitive constraints on special access pricing. Obviously, that is not the case, particularly in markets where ILECs have been granted Phase II pricing flexibility, which are the focus of AT&T's argument.

Prohibiting conversions is consistent with access reform. AT&T argues that prohibiting conversions of special access services is inconsistent with the Commission's approach to access reform, claiming that (1) competition will not drive access charges to cost if competitors cannot use UNEs, and (2) the Commission cannot grant ILECs special access pricing flexibility based on the existence of competition while permitting them to "withhold UNEs from requesting carriers for use in their provision of those same 'competitive' services."¹⁰⁰

AT&T unreasonably assumes that TELRIC-based rates would prevail if special access services were truly competitive. As discussed above, this is an untenable argument. In any event, AT&T has things backwards: it is TELRIC-based pricing of special access (or any regulatory prescription) – not the limitation on converting special access circuits to UNEs – that is inconsistent with access reform. The Commission made the considered judgment to allow market forces, not regulatory prescription, to drive access rates toward economic costs.¹⁰¹ Allowing special access competition to continue to develop will ensure that marketplace pressures constrain access pricing for all competitors. Permitting unlimited conversions, in contrast, would choke off competition.

¹⁰⁰ AT&T 13 n.11, 15.

¹⁰¹ Access Reform Order, ¶¶ 258-84. To the extent the Commission assumed that UNE-based competition would be needed to exert downward pressure on access charges (AT&T 15, *citing* Access Reform Order, ¶¶ 269, 337), that assumption has not been borne out by developments in the intervening four years. Facilities-based access competition is thriving, without the need for competitors to use UNEs.

AT&T also fails to understand that the pricing flexibility granted for special access services reflects the fact that competing providers are deploying their own facilities in markets accounting for the vast majority of special access revenues – that is, that UNE-based competition is unnecessary (and, as explained in section V, counter-productive). Its real complaint therefore is with the Pricing Flexibility Order itself – a battle that AT&T already has lost.¹⁰²

There is no basis for a “fresh look” period. Focal asks the Commission to permit CLECs seeking to convert ILEC special access services into UNE combinations to abrogate their existing service arrangements without any termination penalties or other consequences, claiming that “[b]ecause special access rates are very high, many CLECs can only afford to order special access circuits with term discounts that are as long as five or seven years.”¹⁰³ There is no basis for granting such an extraordinary request, even assuming that the CLECs were correct (which they are not) in arguing that the Commission should continue to allow conversions under some circumstances.

First, special access rates are competitively disciplined and therefore already are set at economic levels. Second, Focal and other CLECs have enjoyed competitive alternatives for special access for more than 15 years. Unlike the only other instances where the Commission has overridden private contractual arrangements, this is not a case where new competitors suddenly appear and a fresh look period arguably would help competition take hold.¹⁰⁴ Granting the relief

¹⁰² Notably, the Commission granted pricing flexibility in an environment where special access circuits are not available for conversion for the purpose of competing in the special access market. Clearly, then, the Commission was not concerned about withholding loop/transport combinations from special access competitors.

¹⁰³ Focal 12.

¹⁰⁴ See, e.g., Second Expanded Interconnection Reconsideration Order, 8 FCC Rcd 7341, 7342- (Continued...)

Focal seeks would be unprecedented, since the Commission has never sanctioned abrogation of a service arrangement in order to jump to a lower-priced arrangement from the same carrier. Third, allowing CLECs to renege on their term commitments would prevent ILECs from recovering their costs. Term commitments enjoy substantial discounts in part because an ILEC can extend its cost recovery over a longer period of time. Aborting the service term necessarily precludes full cost recovery.

VII. THE PROHIBITION ON COMMINGLING MUST REMAIN IN EFFECT.

The large IXCs and their supporters urge the Commission to eliminate the ban on commingling, asserting familiar (and previously rejected) claims regarding supposed network inefficiencies as well as a few new contentions that are equally without merit.¹⁰⁵ The debate over commingling should be moot, since the record evidence compels the Commission to disallow conversion of special access circuits to UNE combinations regardless of the amount of local usage and (as explained in the Joint Petition) to eliminate mandatory unbundling of high-capacity loops and transport. Nonetheless, even if commingling were legitimately still an issue, no justification has been offered to lift the Commission's ban on combining unbundled loops with access services.

Before explaining why the pro-commingling parties' arguments are wrong, it is important to understand what they are really asking for: not the combination of a UNE with an access service (which already may be accomplished through any of the thousands of CLEC collocation arrangements), but rather the combination of UNEs and access services on the same transport

(...Continued)
59 (1993).

¹⁰⁵ See AT&T 21-23, Sprint 7, Focal 10-11, WorldCom 38-39.

facility. In fact, several commenters go even farther, arguing that the Commission should permit “ratcheting” – that is, the re-pricing of individual channels on the DS3 at TELRIC rates while the remainder of the channels are priced at access rates.¹⁰⁶ There is no basis for granting either of these requests.

No commenter challenges the Commission’s finding that allowing commingling inevitably would result in UNE combinations being used to provide special access service where the safe harbors are not met.¹⁰⁷ The best anyone can offer is WorldCom’s suggestion that the ILECs’ access tariffs can contain a restriction on commingling.¹⁰⁸ While this concession at least recognizes that the Commission enjoys authority to limit the combination of UNEs with access services, it would not effectively constrain the ability of IXCs to evade the local usage requirements, since it would further the “catch us if you can” mentality already prevalent among certain entities seeking to convert existing special access circuits (as discussed in the next section).¹⁰⁹

¹⁰⁶ See AT&T 23 n.17, Joint CLEC Commenters 12.

¹⁰⁷ Supplemental Order Clarification, ¶ 28. Indeed, Focal (at 11) effectively concedes as much, acknowledging that removing the ban on commingling would result in a loss of ILEC special access revenues.

¹⁰⁸ WorldCom 40.

¹⁰⁹ WorldCom’s proposed restriction would in effect prevent a carrier from converting to UNEs channel terminations that are connected to access transport and that do not meet the local service test. Absent this restriction, the elimination of commingling restrictions could result in the immediate conversion to UNEs of all channel termination facilities, irrespective of whether they carry any local traffic at all. Such an occurrence would prove devastating to ILECs, as channel terminations account for a sizable percentage of special access revenue.

Even assuming the evasion issue could be satisfactorily addressed, which it cannot, there is no legal basis for permitting carriers to combine UNEs and access services on the same facility.¹¹⁰ Doing so would require the Commission to mandate access to a previously unidentified UNE – the individual-channels-on-a-DS1-or-DS3 facility. The Commission has never identified any such UNE, much less made the requisite impairment finding. Nor could such a finding be made, given that we are talking about conversions of *existing* special access circuits and that the special access market is competitive. Permitting commingling would also create tremendous implementation difficulties, as explained in our opening comments.¹¹¹

Indeed, requests that the Commission require ILECs to unbundle the individual channels on a high-cap loop or transport facility only underscore the extent to which carriers seek nothing more than a discount on their existing service. In the Local Competition Order, the commission rejected arguments that the UNE platform was indistinguishable from resale. It emphasized that UNEs were different from services, explaining that they carried different responsibilities and risks.¹¹² Those who propose commingling would obfuscate everything but the price distinction between UNEs and services; the sole effect of commingling would be to ratchet down ILEC special access rates. In this respect, commingling is inconsistent, not only with the Commission’s

¹¹⁰ Contrary to the claim of CBeyond et al. (at 7), the Commission’s EEL rules do not allow CLECs to convert circuits to EELs on a circuit-by-circuit basis. Rather, the safe harbor options confirm that each DS-1 that is multiplexed onto a DS-3, as well as the DS-3 as a whole, must meet the local service test: “the active channels on the facility, *and the entire facility*,” must carry the amount of local traffic specified in the option. Supplemental Order Clarification, ¶ 22 (emphasis added).

¹¹¹ SBC/Verizon 29-30.

¹¹² See Local Competition Order, ¶ 331 (“We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors.”)

Pricing Flexibility Order, but with the very concept of a UNE.¹¹³ If a facility has even one channel used for access service, the ILEC must treat the entire facility as an access circuit, depriving the remainder of the facility of any UNE characteristics other than the price. Consequently, the Commission must retain its prohibition on commingling if it continues to permit existing special access services to be converted into UNE combinations under certain circumstances.

VIII. THE COMMISSION SHOULD ELIMINATE THE ABILITY OF CARRIERS TO CONVERT SPECIAL ACCESS CIRCUITS TO EELS, BUT IF IT DOES NOT DO SO, IT SHOULD NOT ALTER THE EXISTING “SAFE HARBORS”.

Because requesting carriers are not impaired in their ability to provide special access services without access to EELs, the Commission must hold that ILECs are not compelled to make such combinations available for that purpose. As a result, the various comments suggesting problems with the EEL conversion process or modifications to the local service safe harbors are irrelevant. Even assuming that conversions remained appropriate in some circumstances, which they do not, the Commission should not alter the existing safe harbors.¹¹⁴

Some commenters contend that they have been subjected to unlawful “pre-audits” that have resulted in rejection of a large percentage of conversion orders.¹¹⁵ Such complaints about

¹¹³ The related claim that the commingling prohibition is discriminatory because it prevents CLECs from combining switched and special access services on the same transport facilities is simply wrong. *See* CBeyond et al. 12. CLECs can and do mix both types of access traffic on the same trunks. The commingling prohibition only applies to combinations of UNEs and access services, not of two different types of access services.

¹¹⁴ Notably, the majority of commenters do not oppose restrictions on the use of EELs. *See, e.g.*, ALTS; CBeyond et al. Instead, they focus on perceived implementation problems – which, as discussed below, are overstated.

¹¹⁵ *See, e.g.*, Focal 3-6; BroadRiver et al. 11-19, CBeyond et al. 4-8

“pre-audits” are invalid. A conversion request that involves unlawful commingling is identifiable as such from the face of the request. In such circumstances, the requests may be rejected. This is no more an audit than would be the case if the Internal Revenue Service rejected an unsigned tax return. As the Commission understands, an audit involves a request to produce and examine records; that is not what is going on here.¹¹⁶ If a large number of conversion requests have been rejected, that is because some carriers have willfully ignored the commingling restrictions and have submitted requests that, on their face, are invalid. They have no legitimate grounds for complaint.

Nor should the Commission heed complaints that the current safe harbors are “unworkable.”¹¹⁷ The safe harbors work fine for carriers that are trying to convert circuits meeting the requisite criteria: the safe harbors properly exclude facilities used predominantly for access purposes. Similarly, the lament that data CLECs cannot convert legitimately local circuits is unavailing.¹¹⁸ The provision of packet-switched services is robustly competitive, notwithstanding the focus of the safe harbors on voice traffic. Data-oriented carriers therefore are not impaired by being unable to convert special access circuits to EELs. In addition, to the extent these carriers are providing DSL services, they already have a right to an unbundled loop, which

¹¹⁶ See, e.g., Supplemental Order Clarification, ¶¶ 31-32 (discussing audit procedures in a manner that confirms that the Commission means “audit” in the typical sense of a request for documentary justification).

¹¹⁷ See WorldCom 27-28; AT&T 19. While AT&T claims that it cannot measure local and access traffic separately, other carriers do not seem to have such difficulties. In any event, the percent local use certification is akin to the percent interstate use certification that has long been used to determine whether mixed-use special access circuits are jurisdictionally interstate – a process that AT&T has been fully capable of utilizing.

¹¹⁸ See El Paso 15-16 (safe harbors impractical for packet-based networks), CBeyond et al. 17.

is all they require. An EEL is no additional help to such carriers because the length of the circuit would exceed the distance limitations of the DSL service in the majority of cases.

The other EEL-related requests are likewise inappropriate. Several commenters urge the Commission to skip the conversion requirement altogether and permit requesting carriers to order EELs without first ordering special access circuits.¹¹⁹ Doing so would be contrary to the Act, as the Eighth Circuit has made clear. Section 251(c)(3) expressly does not require ILECs “to do *all* the work” in combining elements, and therefore the statute cannot be read to compel ILECs to assemble UNEs that are not already combined, as would have been required under vacated Rules 315(c)-(f).¹²⁰ BroadRiver’s argument that the Commission can accomplish this same result by interpreting the “currently combines” language in Rule 315(b) to mean “are ordinarily combined” would impermissibly have the Commission do indirectly what it is prohibited from doing directly.

Finally, the Commission must reject requests to adopt national EEL provisioning intervals.¹²¹ To assure the underlying circuit is not inadvertently disconnected during the conversion process, most ILECs handle conversion requests as special projects. Such treatment assures that the ILEC can coordinate the access service request (to discontinue the existing service) and the local service request (to provide the UNE combination). Notably, no CLEC has asserted that the negotiated due dates are unreasonable. There is therefore no need to establish, and no basis to define, national provisioning intervals.

¹¹⁹ See BroadRiver et al. 11-12; Focal 14-15; CompTel 12.

¹²⁰ Iowa Util. Bd. v. FCC, 219 F.3d 744, 759 (8th Cir. 2000), *cert. granted*, Verizon Communications Inc., et. al. v. FCC (No. 00-511)

¹²¹ CBeyond et al. 15-16.

IX. CONCLUSION

Competing carriers are not impaired without access to UNE combinations in place of special access services. As a result, the Commission may not allow such conversions.

Respectfully submitted,

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