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May 21, 2001

VIA MESSENGER

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Michelle Carey, Chief
Policy & Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12 Street, S.W., Room 5C122
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Joint Petition of BellSouth, SBC, and the Verizon Companies
or Elimination of Mandatory Unbundling of High-Capacity Loops
and Dedicated Transport ("Joint Petition"), CC Docket No. 96-98

Dear Ms. Carey:

Mpower Communications Corp. ("Mpower"), through undersigned counsel, strongly supports the Motion to Dismiss Joint Petition that NewSouth Communications ("NewSouth") has filed in the above-referenced proceeding.¹ Mpower urges the Commission to dismiss this premature and inappropriate Joint Petition.

In its *Local Competition Orders*,² the Commission established a reasonable and workable framework for transitioning from pure monopoly telecommunications markets to the competitive

¹ See NewSouth Motion to Dismiss Joint Petition, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 25, 2001) ("Motion"). See also, Comments of Time Warner Telecom in Support of NewSouth's Motion to Dismiss Joint Petition, CC Docket No. 96-98 (filed May 7, 2001).

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) & *Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *affirmed in part, reversed in part, and remanded sub nom. AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999), *aff'd in part and vacated in part on remand*, 2000 WL 979117 (2000), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *Third Order on Reconsideration and Further Proposed Rulemaking*, 12 FCC Rcd 12460 (1997), *further recon. pending*.

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markets the Congress intended to foster under the Telecommunications Act of 1996 (“1996 Act”). Specifically, the Commission (1) identified certain unbundled network elements (“UNEs”) that ILECs must generally make available to CLECs; (2) established the “necessary” and “impair” tests to ensure that CLECs have reasonable access to these network elements, and (3) proposed not to disturb this framework for a period of three years.³ Allowing facilities-based competitive carriers such as Mpower to interconnect using UNEs pursuant to this framework represents an essential step in the development of a market in which traditional free market business arrangements, and not onerous regulatory models, will prevail. But, merely establishing the framework will not allow competition to develop. Clearly the UNEs the Commission identified must remain available for a period of time that reasonably allows start-up companies to mature to the point that they can achieve sustainable market entry.

It must be reiterated that the captive ratepayer-funded networks of the ILECs took decades to build, and it will take substantially longer than the little over one year that has elapsed since the Commission identified the “necessary” advanced UNEs in the *UNE Remand Order*,⁴ for the transition to a competitive market to be complete. During the three-year “quiet period” established by the *UNE Remand Order*, Mpower submits that the Commission’s “necessary and impair” tests will adequately protect the ILECs’ interests, while ensuring a smooth transition. The Joint Petition represents a premature effort to effectively extinguish the advanced UNE framework – and all its components – and it should be summarily dismissed before the parties unnecessarily expend substantial time and valuable resources. At the very least, the Commission should postpone the due date of the comments on the Joint Petition and extend the reply comment date accordingly, until it rules on NewSouth’s motion.⁵

Moreover, there is little to recommend any change to the Commission’s wise adoption of a three-year window before reviewing the list of available advanced service UNEs. To the contrary, the downturn in the facilities-based CLEC industry would support an extension – not a contraction – of that window. The current financial state of the CLEC industry simply should not be further destabilized by unnecessary regulatory shock, especially when Wall Street is focused on CLEC market stability and financial predictability. Nor should the CLEC industry

³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3766 (1999) (“*UNE Remand Order*”).

⁴ *See UNE Remand Order*. Although most UNEs were available February 17, 2000, certain others were not available until May 18, 2000. 65 Fed. Reg. 2542 (Jan. 18, 2000).

⁵ On April 23, 2001, in DA 01-1041, the Common Carrier Bureau granted a Motion for Extension of Time for Filing Comments and Reply Comments on BOC Joint Motion Regarding Unbundled Network Elements to allow interested parties to gather data for submission with their comments. The Commission should grant a further extension so that these carriers can conserve resources and not compile data unnecessarily.

have to waste critical resources responding to this facially defective RBOC petition at a time when conserving capital is critical to the ultimate success of many competitors.

The Joint Petition seeking premature Commission intervention is but the latest RBOC assault on the unbundled access provisions of the 1996 Act.⁶ The RBOCs have filed petitions for reconsideration of the *UNE Remand Order*, appealed the *UNE Remand Order* to the D.C. Circuit Court, and appear unwilling to await a disposition of petitions for reconsideration before the FCC.⁷

The ILECs have aggressively pursued new anticompetitive legislation as well. In the Congress, they are powerful backers of a bill that essentially would eliminate the need to provide advanced service UNEs. Now, the Joint Petition proposes the regulatory equivalent of the Tauzin Broadband Bill.⁸ The very appearance of these efforts at this time – including the Joint Petition – suggests a disconnect between the regulatory and business strategies of these companies. By seeking to deny their key wholesale customers assured network access, this RBOC regulatory initiative would undermine one of the fastest growing ILEC market segments. According to SBC's 2000 Annual Report to its shareholders, demand for wholesale services nearly doubled between 1999 and 2000.⁹ Verizon similarly has experienced "continuing expansion" of the market for "high-capacity, high-speed digital services."¹⁰ Just as the framework the Commission established in the *Local Competition Order* is beginning to work for CLECs and ILECs alike, this RBOC regulatory initiative seeks to undermine it.

In conclusion, if granted, the Joint Petition will have the ironic effect of undercutting one of the RBOCs' fastest growing business sectors. As competition flourishes, the telecommunications market will expand. By definition, the success of new entrants will take market share from the RBOCs, although this will be mitigated by the RBOCs' total revenues continuing to grow as the overall market grows. Even though the success of new entrants may force the RBOCs to give up a larger piece of pie, there is no denying that the pie itself continues to grow. In this context, it seems most unwise to replace a workable paradigm with such an extreme solution as the Joint Petition proposes. Extreme proposals may give rise to extreme counterproposals – such as structural separation. To avoid engaging in such extremism, the

⁶ See 47 U.S.C. § 251(c).

⁷ See Petitioner's Motion to Return the Petitions for Review to the Court's Active Docket, *United States Telecom Ass'n v. FCC*, No. 00-1015 (consolidated with No. 00-1025) (D.C. Cir. filed Feb. 9, 2001).

⁸ Rep. Billy Tauzin (R-LA) introduced HR 1542, The Internet Freedom and Broadband Deployment Act of 2000.

⁹ SBC Communications, Inc. Annual Report 2000, p. 7.

¹⁰ Verizon Communications Annual Report 2000, p. 18.

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RBOCs should instead embrace the current wholesale/retail transition model to competition. This model is sustainable and represents a reasonable means of achieving the goal of a vibrant and competitive local telecommunications market.

For the foregoing reasons, in addition to those already articulated by NewSouth and Time Warner Telecom, Mpower asks the Commission to dismiss the Joint Petition as premature.

Sincerely,



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