

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)	
)	
Joint Petition of BellSouth, SBC and Verizon)	CC Docket No. 01-___
For Elimination of Mandatory Unbundling of)	
High-Capacity Loops and Dedicated Transport)	

COMMENTS
Of
SPRINT CORPORATION

Norina T. Moy
Brian Staihr
Richard Juhnke
Jay Keithley
401 9th St., N.W., Suite 400
Washington, D.C. 20004
(202) 585-1915

June 11, 2001

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COMMENTS

Sprint Corporation hereby respectfully submits its comments in the above-captioned proceeding in response to the Public Notices released April 25, 2001 (DA 01-1041) and May 14, 2001 (DA 01-1211, which solicited comments on the affidavit of Robert Crandall). As demonstrated below, the Joint Petition should be rejected and the Commission should continue to require the mandatory unbundling of high-capacity loops and dedicated transport.

I. INTRODUCTION AND SUMMARY.

In their Joint Petition, three RBOCs (BellSouth, SBC and Verizon) ask the Commission to find that high-capacity loops and dedicated transport should no longer be subject to mandatory unbundling. They assert that “there are ample alternatives for these elements available outside the ILECs’ networks” (Joint Petition, p. 1), and that requesting carriers “would not be impaired if access to these elements were denied” (*id.*, p. 2). In support of their petition, the three RBOCs cite an internal study submitted by USTA, “Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport” (included as Attachment B to the Joint Petition). On April 30, 2001, the BOCs also filed an affidavit from Robert Crandall (“Crandall Affidavit”) to

further support their claim that requesting carriers would not be impaired by lack of unbundled access to high-capacity loops and dedicated transport.

The Commission must reject the Joint Petition. As discussed below, the USTA study is riddled with factual errors and theoretical deficiencies, and simply does not support a finding by the Commission that requesting carriers would not be impaired by removal of high-capacity loops and dedicated transport from the UNE list. The Crandall Affidavit, which focuses on a single service (special access) rather than on the total market (exchange access), fails to address the question posed by the Commission, namely, whether the exchange access market is economically and technically distinct from the local exchange market. Finally, because the Joint Petition violates the 3-year “quiet period” prescribed by the Commission to inject a level of predictability into the market, it should be dismissed as premature.

II. THE USTA STUDY AND THE JOINT PETITION CONTAIN FATAL FLAWS AND DO NOT SHOW THAT REQUESTING CARRIERS ARE NOT IMPAIRED BY LACK OF UNBUNDLED ACCESS TO HIGH-CAPACITY LOOPS AND DEDICATED TRANSPORT.

In support of their claim that there are “ample alternatives” for high-capacity loops and dedicated transport outside the ILECs’ networks, the Petitioners cite what appears to be an internal study (no author is identified) submitted by USTA on the RBOCs’ behalf. The USTA study also was filed on April 5, 2001 in another phase of CC Docket No. 96-98 relating to the conversion of special access circuits to UNEs. In reply comments in that proceeding, AT&T, Sprint and other parties refuted the USTA study, and exposed so many mortal factual errors and methodological flaws that the study cannot possibly be used as the basis of a finding that requesting carriers are not impaired by lack of access to unbundled high-capacity loops and dedicated transport. For example:

The USTA study overstates CLEC fiber route miles and building coverage. Based largely on press releases issued by various CLECs about their planned facilities deployment, the USTA study proclaims that CLECs now have approximately 218,000 fiber route miles (p. 1) and serve approximately 25% of the commercial offices buildings nationwide (p. 11). However, the USTA study simply adds together the planned (not necessarily deployed) facilities of different CLECs, thereby overstating CLEC coverage by double-counting the facilities of the CLECs who serve the same geographic area.¹ The USTA study also inflates CLEC route miles by double-counting the facilities which are jointly owned by multiple CLECs, and resold facilities obtained from other CLECs.² And, the USTA study makes no attempt to differentiate between long haul and local fiber.³ Because long haul fiber -- which appears to account for the majority of the total route miles cited in the USTA study -- cannot be considered a substitute for local and special access facilities, there is no basis for including long haul fiber route miles in any impairment analysis relating to high-capacity loops and dedicated transport.

The USTA study overstates CLEC on-net building coverage. The USTA study confuses commercial high-rise buildings passed with CLEC on-net buildings. In fact, only a very small percentage -- perhaps as low as 3-5% -- of all such buildings actually have CLEC-provided fiber feeding into them. CLECs still have only very limited "last mile" access to commercial buildings (*i.e.*, access from the manhole to the basement of the building, and from the basement up the riser facility to reach individual tenants).⁴ Furthermore, the USTA study grossly overstates the percentage of commercial buildings penetrated by CLECs because it uses as the relevant market *office buildings* rather than *all commercial buildings*. Use of a correct denominator in the building coverage percentage calculation yields a maximum CLEC penetration rate of 5.7% rather than the 25% calculated in the USTA study.⁵

The USTA study overstates CLEC market share and change in CLEC market share. A check of the FCC data which the USTA study purportedly used to compute CLEC market share data yields a 13.9% CLEC market share figure for 1999 instead of the 33% share calculated by USTA.⁶ In addition, by manipulating data from different sources, the USTA study overstates the increase in CLEC market share from 1999 to 2000.⁷ Had the USTA study adjusted CLEC revenues to exclude resale revenues (access services sold by one party that are subsequently sold by CLECs as part of a retail offering), the resulting CLEC market share figures would have been even lower (*id.*).

¹ See Reply Comments filed on April 30, 2001 by Sprint (p. 4) and AT&T (p. 24).

² AT&T Reply, pp. 20 and 24.

³ AT&T Reply, p. 20 and declaration of C. Michael Pfau, para. 23.

⁴ Sprint Reply, p. 4; AT&T Reply, p. 24.

⁵ AT&T Reply, pp. 25-26.

⁶ Sprint Reply, p. 4.

⁷ AT&T Reply, p. 19.

The USTA study places undue emphasis on collocation counts and ignores CLECs' continued reliance upon ILEC transport facilities. Once a requesting carrier is collocated in an ILEC central office, it (the requesting carrier) must be able to carry traffic from that end office back to its own network. In many cases, the requesting carrier is forced to remain dependent upon the ILEC for interoffice transport facilities because it is uneconomic to self-provision, or because the ILEC has forbidden collocation by transport-only suppliers as well as cross-connects between CLECs in the central office.⁸ Self-provisioning of transport facilities is economic only where the requesting carrier has a substantial volume of traffic to send over those facilities, either its own traffic or the aggregated traffic from other CLECs in the same central office.

The Petitioners also seriously underestimate the difficulties and the costs associated with deploying a new facilities-based local network. For example, they assert that “[t]he costs of building links from an existing ring to new customers are manageable – approximately \$5.25 per foot for trenching and fiber combined, or about \$30,000 for a one mile loop.”⁹ Sprint’s experience indicates that this \$30,000 estimate is only a tiny fraction of the cost incurred by non-RBOC vendors. One of our major alternative access providers has quoted Sprint a rate of over \$1 million per mile (\$200 per foot) to construct fiber loop in metropolitan areas. Given these actual quoted costs, it is clear that investment in fiber facilities is economically viable only in fairly limited situations where the potential revenue stream is very high. Furthermore, if the BOCs’ internal costs for extending their network to new customers are so much lower than those incurred by CLECs, it is difficult to understand how CLECs can be viable competitors to the BOCs on the ubiquitous scale described in the Joint Petition.

It should come as little surprise that CLEC costs to deploy their own loop and transport facilities will in many cases exceed those incurred by the BOCs. New entrants must obtain (generally costly) rights-of-way from local government authorities – which in some cases involves overcoming city-imposed moratoriums on additional construction¹⁰ -- as well as access

⁸ AT&T Reply, pp. 28-29.

⁹ Joint Petition, p. 14, citing a Bell Atlantic petition for forbearance filed January 20, 1999.

¹⁰ See, e.g., *New Buildout Headaches*, Kim Sunderland, *Xchange* magazine, May 2001, p. 8.

to the building in which the customer is a tenant. In contrast, the BOCs generally already have municipal rights-of-way (obtained at a cost far lower than that incurred by new entrants) as well as access to a far greater number of buildings than do new entrants. The time, expense and difficulties experienced by CLECs in their negotiations with both municipal authorities and building landlords are well documented, and the existence of discriminatory barriers to entry led the Commission to adopt several measures to remove obstacles to competitive access to multi-tenant environments.¹¹

The Joint Petition's characterization of a "vibrant wholesale market for high-capacity loops and dedicated transport" (p. 3) is also at odds with recent financial developments in the CLEC sector. Over the past several months, there have been a spate of bankruptcies (Teligent, eSpire, GST, ICG, Jato, NorthPoint, Winstar, Convergent Communications, Pathnet Telecommunications), layoffs (Covad, WorldCom, AT&T Broadband), and sharp declines in CLEC market capitalization generally. These financial difficulties reduce the availability of alternative sources of access; make it more difficult for CLECs to obtain financing for additional network deployment; and cast a pall by making potential customers (including Sprint) more cautious about doing business with alternative access vendors.

Given the critical errors which characterize the USTA study and the Joint Petition generally, the Commission cannot conclude that requesting carriers are not impaired by lack of access to unbundled high-capacity loops and dedicated transport.

¹¹ *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, *First Report and Order and Further NPRM* released October 25, 2000 (FCC 00-366). Among other things, the FCC forbade telecommunications carriers in commercial settings from entering into exclusive contracts with building owners and required utilities (including LECs) to afford telecommunications carriers reasonable and nondiscriminatory access to conduits and rights-of-way controlled by the utility in customer buildings and campuses.

III. THE CRANDALL AFFIDAVIT IMPROPERLY EXAMINES ONLY A PORTION OF THE RELEVANT MARKET AND FAILS TO ADDRESS THE QUESTION POSED BY THE COMMISSION.

On April 30, 2001, USTA filed reply comments in the CC Docket No. 96-98 proceeding relating to the conversion of special access circuits to UNEs. As part of that reply, USTA included a declaration from Robert Crandall (“Crandall Affidavit”) which purports to provide evidence of the scope of competition in the special access market in different sized markets across the country. AT&T has asserted that because USTA has failed to provide the data Dr. Crandall relied upon in reaching his conclusions, the Crandall Affidavit should be stricken as unsupported.¹² As AT&T pointed out, access to the detail underlying Dr. Crandall’s analysis is critical “because the entire basis for Dr. Crandall’s assertions evaporates if the revenue estimates are faulty or unreliable” (*id.*, p. 2). Sprint agrees with AT&T. However, even if USTA were to be more forthcoming with the requested data, the Crandall Affidavit still cannot be the basis for a finding that the exchange access market is distinct from the local exchange market. As shown below, the Crandall Affidavit addresses a different question than the one posed by the Commission, and Dr. Crandall’s conclusions are simply not relevant to the matter at issue here.

The original Public Notice released January 24, 2001 (in response to which the Crandall Affidavit was submitted), asked for comment on whether “the exchange access market [is] economically and technically distinct from the local exchange market” (Public Notice at 2). The Crandall Affidavit, on the other hand, examines whether “special access services are not [or are] distinct from local exchange services” and whether “special access services represent a distinct product from local exchange services” (Crandall Affidavit, pp. 2 and 4.)

¹² See letter from James P. Young, AT&T, to Magalie Roman Salas, Secretary, FCC, dated May 21, 2001 in CC Docket No. 96-98.

While these differences may appear slight, their impact is not. Obviously, special access is one service that is bought and sold in the exchange access market. But by shifting the focus away from the *market*, and toward a single *service* or *product*, the Crandall Affidavit misstates the question posed by the Commission. As a result, the Crandall Affidavit presents conclusions that, while suspect in and of themselves, are not relevant. Furthermore, by limiting the analysis to one portion of the exchange access market (special access), the Crandall Affidavit ignores the dynamics *within* the exchange access market and in essence answers a question it chooses to ask, rather than the question posed in the original Public Notice.

Standard economic literature defines a *market* as the set of sellers and buyers whose activities affect the price at which a particular good or service is sold.¹³ The definition is specific and clear: the *market* is not limited to the supply and demand of a single specific service or product. Rather, the *market* includes the supply and demand of other services that impact the price of the first service. In the case of the exchange access market, the market includes both special access and switched access. In fact, in certain cases it is acceptable to view these two services as a single service. For example, both special and switched access offer a connection between an end user and an interexchange carrier's point of presence, a connection that provides users with the opportunity to place and receive long distance calls. The service is simply packaged in two different ways.¹⁴

But even if one chose to view special access and switched access as separate services, instead of separate versions of the same service, it is still the case that these two services operate

¹³ Baumol, William J. and Alan S. Blinder, *Economics: Principles and Policy*; Harcourt Brace Jovanovich Inc., 1979. This text, often referred to by economists simply as "Baumol and Blinder," has served as a standard in the teaching of economic principles for several decades.

¹⁴"Special access" can include services such as point-to-point private lines that may not involve IXC POPs. But for illustrative purposes here, we focus on interexchange calling capability.

within the same market. This is so because the market forces affecting the supply/demand/price of one service also affect the supply, demand and/or price of the other. This is the standard set of circumstances in situations where two services can and do serve as substitutes for each other. And it is the reason that the courts and the FCC have found that the notion of *substitutability* serves as a key criterion in the proper definition and characterization of a market.

A. Switched and Special Access Are Substitutes for Each Other and Therefore Operate in the Same Market.

Substitutability can take many forms. Two services can certainly be considered substitutes if they are *functionally equivalent*, that is, if they do the same thing and do it in the same way. Special access and switched access would generally not be considered functionally equivalent because although they often perform the same function, they do not perform it in the same way (*i.e.*, switched access requires intervention to route traffic to its destination, special access does not, but both ultimately deliver traffic to an interexchange carrier). But functional equivalence is not required for two services to act as substitutes; it is enough that substitutes satisfy a similar customer demand. In such cases, services that act as substitutes will exhibit *reasonable interchangeability of use*. This is a standard taken from antitrust case law.¹⁵ For purposes of understanding market dynamics and the nature and extent of competition, either one of these characteristics -- functional equivalence or reasonable interchangeability of use -- may constitute substitutability; it is not necessary that two services exhibit *both* of these characteristics for those two services to be substitutes. Substitutability is first and foremost a characteristic of demand, and of customer perception. It is the thing that causes competitive pressure to exist across services, even services that are not functionally equivalent. In competitive markets, it operates as a controlling factor on prices.

¹⁵ U.S. Supreme Court, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

In the case of the exchange access market, *reasonable interchangeability of use* is the appropriate measure since it encompasses all degrees of substitutability. Specifically, it acknowledges that quality differences can exist between substitutes, and that two goods or services that are not identical or functionally equivalent can still exert competitive pressure on each other. Returning to the definition of a “market,” the overall demand for any of the services in the exchange access market is affected by the presence of comparable, alternative services offering “reasonable interchangeability of use.” To know that this is true, one need only envision a small company opting to purchase a special access line rather than switched access facilities to economize on long-distance calling expenses. One clearly serves as a replacement (substitute) for the other, and the price of one (special access) affects the reduction in demand for the other (switched access).

There are many examples of products and services that are not perfect substitutes, that exhibit price differences and quality differences, and yet have been found by the courts to operate in the same market and exert competitive pressure on each other.¹⁶ The key issue from an economic standpoint, and consistent with legal findings, is whether two services have the ability -- actual or potential -- to take significant amounts of business away from each other.¹⁷ If the answer is yes, they are in the same market. Clearly, switched and special access service have the ability -- potential and actual -- to do just that.

Furthermore, it is not necessary for all customers of all services, or even all customers of one service, to acknowledge this reasonable interchangeability of use in order for the services to operate in the same market. The fact that one service cannot or does not take away *all* customers

¹⁶ See ABA Section of Antitrust Law, *Antitrust Law Developments* (4th Ed. 1997), pp. 500-508.

¹⁷ *SmithKline Corp. v. Eli Lilly & Co.*, 575 F. 2d 1056, 1063, (3rd Cir.) *cert. denied*, 439 U.S. 838 (1987).

from another service does not mean that the two are not substitutable services. All that is necessary is that an adequate number of customers might be willing to move between services so as to result in competitive pressure -- *actual or potential* -- between services. In the context of exchange access, it is not necessary that every switched access customer view that service as comparable to special access in order for the two services to be substitutes -- that is, to exhibit reasonable interchangeability of use and to exert competitive pressure on each other.

The existence and availability of substitutes have historically been a key determinant in the Commission's approach to defining a market. In the Bell Atlantic-NYNEX merger proceeding, the Commission made specific reference to service substitutability, and concluded that markets were distinct in situations where one bundle of services did not serve as an "acceptable substitute" for another.¹⁸ In the SBC-Ameritech merger order, the Commission found that one market was distinguishable from another because one set of services was not considered an "adequate or feasible substitute" for another.¹⁹ It is clear that the Commission's use of substitutability as a criterion, and its subsequent conclusions, are consistent with the definition of the exchange access market above. In other words, consistent with Sprint's position and the Commission's position, the Crandall Affidavit errs by considering only the special access portion of the exchange access market, and comparing that limited segment to the local exchange market. As shown below, had the Crandall Affidavit examined the entire exchange access market and compared that to the local exchange market, the results would tell a significantly different story.

¹⁸ *NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, 20016 (para. 53) (1997).

¹⁹ *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, 14 FCC Rcd 14712, 14746 (1999).

B. The Criteria Used in the Crandall Affidavit Are Biased And Skew The Resulting Conclusions.

The Crandall Affidavit uses two criteria to show that the “special access market” is distinct from the local exchange market: 1) the existence of a specific customer profile for special access, and 2) geographic clustering of special access customers (Crandall Affidavit, pp. 4 and 5). If these two criteria are applied to the correct market (the exchange access market), it is clear that Dr. Crandall’s conclusions are no longer valid.

The Crandall Affidavit considers only “high-capacity” customers, stating that “special access customers are very large businesses that spend a lot of money on telecommunications services” (p. 4). While that description certainly applies to some purchasers of special access services, it does not describe all special access customers, and certainly does not apply to all purchasers in the exchange access market. Sprint’s data show that in February 2001, over 43% of Sprint’s incumbent local division special access customers were purchasing services with a capacity below DS-1, and over 33% of Sprint’s local division special access customers had monthly bills of less than \$150. Far from being very large businesses, these special access customers included such diverse enterprises as feed yards, paint stores, auto parts stores, and even many individual subscribers.

Furthermore, it is incorrect to suggest that customers in the exchange access market (as opposed to the special access segment of the exchange access market) exhibit any unique customer profile: most purchasers of local exchange service also purchase switched access service. So with regard to the first criterion, the Crandall Affidavit is mistaken on two levels: there is clearly no unique customer profile when we examine the correct market (the exchange access market) and there is also no unique customer profile even if we examine the wrong market (the special access market).

The second criterion in the Crandall Affidavit is that the “special access market” is clustered geographically. As with the first criterion, this claim is wrong both when applied to the correct market (the exchange access market) and the incorrect market (the special access market). Regarding the exchange access market, because most customers participate in this market through use of switched access, there is clearly no more or less clustering than across the population in its entirety. As to Dr. Crandall’s focus on high-capacity special access customers, Sprint does not doubt that special access customers, as a subset of the exchange access market, might in some cases be more geographically clustered than the exchange access market as a whole. But this is not a characteristic of the special access market; rather, it is a characteristic of the *business* market, in which the majority of special access customers operate.

For example, the Crandall Affidavit states that in Qwest’s territory, more than 60 percent of special access revenues are generated from only 11 percent of Qwest’s total wire centers (p. 14). Although Sprint does not have access to Qwest’s revenue data, an examination of estimated line counts using the FCC’s data supports this fact: over 60% of Qwest’s special access lines are found in 11% of Qwest’s wire centers. However, further examination reveals that over 60% of Qwest’s business lines (apart from special access lines) are also contained in only 11% of Qwest’s wire centers.

An examination of SBC (pre-Ameritech) line counts reveals the same fact: over 80% of SBC’s special access lines are concentrated in just 21% of its wire centers. But the same concentration holds for business lines: over 80% of SBC’s business lines (apart from special access) are concentrated in just 22% of SBC’s wire centers. Finally, the Crandall Affidavit claims that 91% of BellSouth’s special access revenues are generated from 20% of its wire centers. A line count analysis is generally consistent with this claim, showing that 91% of

BellSouth's special access lines are concentrated in 32% of BellSouth's wire centers. However, the same analysis shows that 91% of BellSouth's business lines (apart from special access) are equally concentrated in 34% of BellSouth's wire centers.

A brief examination of Sprint's Local Telecom Division revenues casts additional doubt on the conclusions contained in the Crandall Affidavit. Using data from May 2001, we find that monthly recurring local exchange revenues are *at least* as concentrated as the special access revenue discussed in the Crandall Affidavit, and as the business lines mentioned above. For May 2001, over 80% of Sprint's Local Division monthly recurring local exchange revenue was generated from only 21% of Sprint's total wire centers.

The conclusion that must be drawn from these facts is that the geographic clustering criterion used in the Crandall Affidavit is not evidence of a separate market. If the special access market is distinct from the local exchange market because it is geographically clustered, then so too is the business market distinct from the local exchange market, a statement that is clearly nonsensical. The fact that Sprint local division's geographic distribution of special access customers is almost identical to the geographic distribution of local exchange revenues (80% of special access customers clustered in 18% of wire centers, compared to 80% of local exchange revenues generated from 21% of wire centers) directly contradicts the claims made in the Crandall Affidavit, and lends further support for the proper conclusion, as stated in Sprint's comments and reply comments, that the exchange access market and the local exchange market are indeed not separate and not distinct, but intertwined.

C. The Econometric Analysis Used In The Crandall Affidavit Improperly Self-Selects A Portion Of The Exchange Access Market In Order To Produce The Desired Result.

In the Crandall Affidavit, a Probit model is used to estimate the probability that a business customer would subscribe to high-capacity special access service. These probabilities

are then used to determine “potential” high-cap special access customers, their location, and their proximity to alternate providers. The analysis continues with an estimation of the number of these high-cap special access customers that CLECs could potentially (as opposed to actually) serve profitably, based on specific assumptions contained in a commercial cost model. Based on these assumptions, the Crandall Affidavit concludes that the “large majority of potential special access customers...are addressable by existing CLEC facilities” (p. 35).

As was the case with the customer profiles and geographic clustering characteristics discussed above, the econometric analysis used in the Crandall Affidavit explicitly and purposely self-selects the segment of the exchange access market that will produce the desired result. By limiting the analysis to high-capacity businesses, the Crandall Affidavit shows, not surprisingly, that much of this subset of the special access market tends to be clustered, and that CLECs have targeted those clustered areas with fiber build-outs. As Sprint stated in its initial comments, there is no logical or factual basis for differentiating the exchange access market in terms of the types of end user customers served in that market. On the issue of separating high-capacity customers, the Commission explicitly rejected the argument that high-capacity loops need not be unbundled simply because it is easier to self-provision loops to customers requiring high capacity.²⁰ The analysis contained in the Crandall Affidavit does nothing except identify one of the reasons why it is easier to self-provision those high-capacity loops: many high-capacity customers are located near each other. The analysis does not demonstrate that either an overwhelming majority of the special access market (correctly specified to include all special access customers) or the exchange access market overall is “addressable by existing CLEC facilities.”

²⁰ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3780-82 (1999) (“*UNE Remand Order*”).

* * * * *

While it might serve a particular purpose to dissect the exchange access market and separate out one specific subset of that market (the high-capacity special access large-business customer), the economic fact is that the exchange access market is composed of multiple services (switched access, special access, high-capacity, lower capacity) and multiple customer types (residential, small business, large business). The market forces operating within the exchange access market operate across services and across customer types. It is also a fact that the exchange access market and the local exchange market are neither technically nor economically distinct from one another. As Sprint has previously explained, from a technical standpoint, incumbent carriers use the very same plant and network to provide both local exchange and exchange access service.²¹ From an economic standpoint, switched access cannot be separated from special access and at the same time switched access cannot be separated from local exchange service in the form of basic service since basic service includes access to inter-exchange service, or switched access. For the overwhelming majority of customers, it is impossible to distinguish the supply of (and demand for) basic exchange service from the supply of (and demand for) switched access because one includes the other. The Crandall Affidavit's attempts to show otherwise, by ignoring a significant portion of the exchange access market, must be dismissed by the Commission.

²¹ See Sprint Comments in CC Docket No. 96-98 filed April 5, 2001, p.3, and Reply Comments filed April 30, 2001, p. 6.

IV. THE JOINT PETITION IS PREMATURE AND SHOULD NOT BE CONSIDERED DURING THE 3-YEAR QUIET PERIOD PRESCRIBED BY THE COMMISSION.

In the *UNE Remand Order*, the Commission identified “certainty in the market” as one of the critical factors to be considered in analyzing what network elements must be unbundled. The Commission stated that:

...we find that the unbundling requirements we adopt should typically provide the uniformity and predictability new entrants and fledgling competitors need to develop and implement national and regional business plans. In addition, uniform and predictable unbundling rules will provide financial markets with reasonable certainty so that competitive LECs can attract the investment capital they need to execute their business plans. Specifically, uniform and predictable unbundling rules reduce substantially competitive LECs’ risk of underutilized investment or cash flow drain by providing financial markets with some certainty that the competitors will be able to execute their business plans.

UNE Remand Order, para. 114.

After careful consideration, the Commission adopted a national list of unbundled network elements that included high capacity loops and dedicated transport. It explicitly stated (*id.*, para. 151) that it would “reexamine [the] national list of network elements that are subject to the unbundling obligations of the Act every three years.” The Commission emphasized (*id.*, para. 150, footnotes omitted) that this three-year quiet period was necessary:

...to provide a measure of certainty to ensure that new entrants and fledgling competitors can design networks, attract investment capital, and have sufficient time to attempt to implement their business plans. Entertaining, on an ad hoc basis, numerous petitions to remove elements from the list, either generally or in particular circumstances, would threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers ... [and] would undermine the goal of implementing unbundling rules that are administratively practical to apply.

Ignoring the Commission’s unambiguous statement that it would consider changes to the national UNE list only after a 3-year period, the Petitioners request, scarcely 18 months after adoption of the *UNE Remand Order* and less than 14 months after the effective date of that

order, major deletions from the UNE list. The Joint Petition is the very type of ad hoc filing which the Commission sought to avoid in order to prevent unnecessary roiling of the market and the costly expenditure of limited resources by interested parties (resources which might be better devoted to the execution of business plans) to counter such premature petitions.

Even if the Joint Petition were not premature, it should be rejected because it is procedurally deficient. Petitioners have requested deletion of those portions of Section 51.319 of the Commission's Rules which require the unbundling of high-capacity loops and dedicated transport. Administratively, the Joint Petition may be viewed as a petition for reconsideration of these rules; a petition for waiver of the rules; or a request for rulemaking to revise the rules. A petition for reconsideration is clearly inadmissible, as the time for making such a request is well past. The Joint Petition does not appear to be a petition for waiver, as it purports to demonstrate that the UNE list should be revised for all ILECs in all markets, not just for the three Petitioners in limited circumstances. And, the Joint Petition does not request that the Commission institute a rulemaking proceeding. Rather, as NewSouth Communications has correctly pointed out, the Petitioners "inappropriately seek to collapse into a single step – the adoption of an order – a process that requires two steps – the release of a notice of proposed rulemaking and then an order."²² Should the Petitioners choose to amend their submission to comply with the rules governing the filing of a request for a rulemaking, they would have to address four-square why such a request should be entertained prior to expiration of the 3-year quiet period prescribed by the Commission.

²² "Motion to Dismiss Joint Petition" filed by NewSouth Communications on April 25, 2001, p. 5. See also NewSouth's follow-up letter to the Chief of the Common Carrier Bureau dated May 21, 2001, p. 3 (Petitioners' argument "boils down to a claim that they have met the requirements for filing a petition to initiate a rulemaking – not dispensing with it").

V. CONCLUSION.

The USTA study used to support the Joint Petition is riddled with factual and theoretical errors and fails to demonstrate that requesting carriers will not be impaired by removal of high-capacity loops and dedicated transport from the national UNE list. The Crandall Affidavit also is theoretically deficient, and does not support a finding that no impairment will result from the removal of these elements from the UNE list. Finally, the Joint Petition itself is premature and procedurally defective. For these reasons, the Commission should reject the Joint Petition and retain both the loop and transport elements on the UNE list.

Respectfully submitted,

SPRINT CORPORATION



Norina T. Moy
Brian Staihr
Richard Juhnke
Jay Keithley
401 9th St., N.W., Suite 400
Washington, D.C. 20004
(202) 585-1915

June 11, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing COMMENTS OF SPRINT CORPORATION was sent by United States first-class mail, postage prepaid, on this date to the parties on the attached pages.



Sharon Kirby

June 11, 2001

Carol Ann Bischoff, Esq.
Jonathan D. Lee, Esq.
Competitive Telecommunications
Association
1900 M St., NW, Ste. 800
Washington, DC 20036

Robert J. Aamoth, Esq.
Todd D. Daubert, Esq.
Kelley Drye & Warren LLP, Ste. 500
Washington, DC 20036

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

Peter D. Keisler, Esq.
James P. Young, Esq.
C. Frederick Beckner III, Esq.
Counsel for AT&T Corp.
Sidley & Austin
1722 I Street, NW
Washington, DC 20006

Chuck Goldfarb, Esq.
Henry G. Hultquist, Esq.
Alan Buzacott, Esq.
Worldcom, Inc.
1133 19th Street, NW
Washington, DC 20036

Gary L. Phillips, Esq.
Riger K. Toppins, Esq.
Paul K. Mancini, Esq.
SBC Communications, Inc.
1401 Eye Street, NW, Ste. 1100
Washington, DC 20005

Jeffrey S. Linder, Esq.
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Michael E. Glover, Esq.
Edward Shakin, Esq.
Verizon Telephone Companies
1320 North Court House Road, 8th Floor
Arlington, VA 22201

Sharon J. Devine, Esq.
Robert B. McKenna, Esq.
Counsel for Qwest Corporation
Suite 700
1020 19th Street, NW
Washington, DC 20036

M. Robert Sutherland, Esq.
Jonathan B. Banks, Esq.
BellSouth Telecommunications
675 West Peachtree Street, Ste. 4300
Atlanta, GA 30375-0001

Richard A. Askoff, Esq.
Colin Sandy, Esq.
Counsel for National Exchange Carrier
Association, Inc.
80 South Jefferson Road
Whippany, NJ 07981

Richard A. Askoff
Colin Sandy, Esq.
National Exchange Carriers Association, Inc.
2120 L Street, NW, Ste. 650
Washington, DC 20037

L. Marie Guillory, Esq.
Daniel Mitchell, Esq.
Counsel for National Telephone Cooperative
Association
4121 Wilson Blvd., 10th Floor
Arlington, VA 22203

Lawrence G. Malone, Esq.
Brian P. Osias, Esq.
Public Service Commission Of The State Of
New York
Three Empire State Plaza
Albany, NY 12223-1350

Thomas Jones, Esq.
A. Renee Calahan, Esq.
Christi Shewman, Esq.
Willkie Farr & Gallagher
Counsel for Time Warner Telecom
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036

Lawrence R. Freedman, Esq.
Fleischman & Walsh, L.L.P.
Counsel for Norlight Telecommunications, Inc.
1400 16th St., NW, 6th Floor
Washington, DC 20006

Michael J. Shortley, III, Esq.
John S. Morabito, Esq.
Counsel for Global Crossing
180 South Clinton Avenue
Rochester, NY 14646

Richard Metzger, Esq.
Pamela Arluk, Esq.
Focal Communications Corporation
7799 Leesburg Pike, Suite 850 North
Falls Church, VA 22043

Russell M. Blau, Esq.
Joshua M. Bobeck, Esq.
Swidler Berlin Shefeff Friedman, LLP
Counsel for El Paso Networks, LLC
3000 K Street, NW, Ste. 300
Washington, DC 20007-5116

Jonathan Askin, Esq.
Kimberly M. Kirby, Esq.
Association for Local Telecommunications
Services
888 17th Street, NW
Washington, DC 20006

Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications
Commission
445 12th Street, SW
Washington, DC 20554

Brad E. Mutschelknaus, Esq.
Jonathan E. Canis, Esq.
Ross A. Buntrock, Esq.
Counsel for the Joint Commenters
Kelley Drye & Warren LLP
1200 19th Street, NW
Washington, DC 20036

International Transcription
Service
445 12th Street, SW
Washington, DC 20554

Mark E. Brown, Esq.
Michael J. Huebner, Esq.
BroadRiver Communications
Corporation
13000 Deerfield Parkway, Ste. 210
Alpharetta, GA 30004

Alexis Rosen, President
Epana Networks, Inc.
15 West 18th Street, 15th Floor
New York, NY 10011

Devin W. Brown, Vice President
Quantum Telecommunications, Inc.
4080 Water Tank Road
Manchester, MD 21102

Erik J. Cecil, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., NW, Ste. 200
Washington, DC 20006

Margot Smiley Humphrey, Esq.
Holland & Knight LLP
Counsel for TDS &
National Rural Telecom Association
2099 Pennsylvania Ave, NW, Ste. 100
Washington, DC 20006

Stuart Polikoff
Director, Government Relations
Organization for the Promotion and
Advancement of Small Telecommunications
Companies
21 Dupont Circle, NW, Ste. 700
Washington, DC 20036

Gerard J. Duffy, Esq.
Blooston, Mordkofsky, Dickens, Duff
& Prendergast
Counsel for Western Alliance
2120 L Street, NW, Ste. 300
Washington, DC 20037

Lawrence E. Sarjeant, Esq.
Linda L. Kent, Esq.
Keith Townsend, Esq.
John W. Hunder, Esq.
Julie E. Rones, Esq.
United States Telecom Association
1401 H Street, HW, Ste. 600
Washington, DC 20005-2164