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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Local Competition)
Provisions of the Telecommunications)
Act of 1996)
)
Joint Petition of BellSouth, SBC, and)
Verizon for Elimination of Mandatory)
Unbundling of High-Capacity Loops)
and Dedicated Transport)

CC Docket No. 96-98

H

COMMENTS OF AES COMMUNICATIONS, LLC

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EXECUTIVE SUMMARY

In the *UNE Remand Order*, the FCC determined it would review the national list of unbundled network elements (“UNEs”) every three years in order to provide certainty for new entrants deploying their business plans. AES is a prime example of the type of carrier that needs such certainty and the type of financially-stable, strong competitive entrant that the FCC seeks to encourage to enter the telecommunications market. By filing their Petition a mere 14 months after being required to make some of the new UNEs available, Petitioners have upset the certainty and stability the FCC sought to create by adopting the triennial UNE review rule. By even entertaining the Petition, the FCC has introduced uncertainty and additional costs into AES’ business planning process.

Over the past year, necessarily relying on the current regulatory framework, AES has invested substantial time and money in evaluating market opportunities, equipment vendors, pricing structures, and potential partners, in designing its network, and in taking the necessary and costly preliminary steps to implement its business plan. AES intends to rely heavily, at least initially, on incumbent local exchange carrier (“ILEC”) loops and enhanced extended loops (“EELs”). In order to reach ILEC loops, whether high capacity or plain-old two-wire copper, AES must collocate in the ILEC central office where the loops terminate or avail itself of EELs, where available. A grant of Petitioners’ requests would for all practical purposes eliminate availability of the EEL, just as it is finally becoming available in some locations. AES has already invested hundreds of thousands of dollars in collocation and intends to purchase unbundled dedicated transport from the

ILECs to connect its collocation arrangements to its switches. AES and other CLECs would be materially impaired without access to unbundled high capacity loops and dedicated transport. It is important to note that the real impact of Petitioners' request is to substantially raise prices of high capacity loops and dedicated transport that today are available at cost-based rates and in some instances could result in price increases of over 700%. If AES cannot gain access to loops and transport at cost-based rates, AES will be forced to reconsider or even forego its market entry strategy.

Petitioners have failed to heed the FCC's findings in the *UNE Remand Order* and repeat availability, ubiquity, cost, and timeliness arguments the FCC has already rejected. Although AES believes there are many flaws in the United States Telecom Association ("USTA") Report, it nevertheless shows that CLECs are investing in and deploying their own facilities notwithstanding the availability of ILEC high capacity loops and dedicated transport at cost-based rates. However, completely overbuilding ILEC networks is not possible as a practical or economic matter. Captive ratepayers paid for ILEC networks and ILECs still control the public switched telephone network and access to over 90% of local telephone subscribers. Removing competitor access to high capacity loops and dedicated transport needed to reach 90% of the nation's telephone subscribers will squash competition and deter further competitive investment.

The FCC must consider the consequences of prematurely determining that alternatives to ILEC high capacity loops and transport are ubiquitously available. If, as argued herein, alternatives are not ubiquitously available, competitors are faced with two equally unappealing options. First, competitors can purchase ILEC special access services to reach customers, thereby increasing their costs anywhere from approximately

150% to 750%. In the alternative, competitors can forego market entry in the metropolitan statistical areas, small towns, and suburbs where alternatives are not available. Neither option is consistent with the pro-competitive purposes of the Telecommunications Act of 1996. For the reasons specified herein, the FCC should promptly deny the Petition.

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COMMENTS OF AES COMMUNICATIONS, LLC

AES Communications, LLC (“AES”), pursuant to the Public Notice issued April 23, 2001,¹ files these comments in opposition to the Petition of BellSouth, SBC, and Verizon (together, “Petitioners”) for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport (“Petition”).

I. AES’ Interest in the Proceeding

AES is a wholly-owned subsidiary of AES Corporation, a publicly traded company. AES Corporation is a leading global power company comprised of competitive generation, distribution and retail supply businesses in the United States and throughout the world. AES Corporation currently holds in excess of \$35 billion in assets and is looking to expand its operations into the United States telecommunications market as a competitive provider of local and long distance services to small and medium enterprises (“SMEs”).² AES has received certification as a competitive local exchange

¹ *Common Carrier Bureau Grants Motion for Extension of Time for Filing Comments and Reply Comments on BOC Joint Motion Regarding Unbundled Network Elements*, CC Docket No. 96-98, DA 01-1041 (rel. April 23, 2001).

² AES is already operating in a number of telecommunications markets in Latin America, and plans to enter additional markets and/or expand its operations in markets in that region.

carrier (“CLEC”) in the District of Columbia, Maryland, and Virginia. AES intends to provide telecommunications services to customers using unbundled local loops, including high capacity loops, and dedicated interoffice transport purchased from incumbent local exchange carriers (“ILECs”). Thus, if the FCC were to remove dedicated transport and high capacity loops from the list of network elements that must be unbundled, AES could be materially impaired in its efforts to enter the telephone and broadband business and could be forced to abandon its market entry plans altogether. As such, AES has a substantial interest in this proceeding.

II. Background

In the *UNE Remand Order*,³ after defining and applying the “impair test,” the FCC determined that ILECs must provide, at cost-based rates, unbundled access to loops and dedicated transport, including high-capacity and dark fiber loops and transport.⁴ The FCC described the impair test in the *UNE Remand Order*:

We conclude that the failure to provide access to a network element would “impair” the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent’s network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier’s ability to provide the services it seeks to offer.⁵

In applying the impair test, the FCC considers the totality of circumstances and evaluates cost, timeliness, quality, ubiquity, and operational factors.⁶ Alternatives to ILEC-provided UNEs must be “actually available” (as opposed to “theoretically

³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) (“*UNE Remand Order*”).

⁴ *Id.* at ¶¶ 162-201, 322-68.

⁵ *Id.* at ¶ 51.

available”) whether through self-provisioning or third parties.⁷ The FCC also considers other factors, including how best to promote the rapid introduction of competition, facilities-based competition, investment, and innovation; how to reduce regulation where it is unnecessary; how to promote certainty in the market; and whether the rules it adopts are practical to administer.⁸ The FCC found that in order to provide certainty for competitors purchasing UNEs, building a business plan, and seeking capital for those plans, it would not revisit this determination for three years:

[T]he rules we adopt today seek 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.⁹

Although they disagree with the FCC’s interpretation of the “impair” test required by Section 251(d)(2),¹⁰ Petitioners evaluate the “factual” information presented in the United States Telecom Association (“USTA”) Report under the FCC’s test. This “factual” information, compiled by outside counsel for USTA, largely relies on third-party sources, including selected quotes from securities filings, press releases and court cases. Although this so-called “Fact Report” is riddled with analytical errors, AES does not attempt to expose those errors in its Comments.¹¹ Instead, AES shows why granting

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at ¶ 27.

⁹ *Id.* at ¶ 150 (footnotes omitted).

¹⁰ *See, e.g.*, Petition at 18 (“the UNE Remand Order appears to have been predicated on a fundamental misunderstanding of the ILEC’s networks”).

¹¹ Because they contain summary statistics and do not provide sufficient information concerning their conclusions, AES has not had a meaningful opportunity to examine and refute all of the “factual” references and conclusions of the Petition and USTA Report. *See, e.g., Petition of U S West*

the Petition would discourage further competitive investment in the local exchange market and why removing dedicated transport and high capacity loop elements from the UNE list would materially impair new market entrants' ability to provide service.

III. Granting the Petition Would Undermine the Stability and Certainty the FCC Sought to Promote in its UNE Remand Order

In the *UNE Remand Order*, the FCC determined it would review the national list of UNEs every three years.¹² By filing their Petition a mere 14 months after being required to make some of the new UNEs available,¹³ Petitioners have upset the certainty and stability the FCC sought to create by adopting the triennial UNE review rule.

The FCC explicitly considered the rapid changes that occur in communications technology, the fact that competition is continuously evolving, and the economic conditions of the telecommunications market in the *UNE Remand Order*.¹⁴ Nevertheless, it found that a period of regulatory stability was necessary. AES is a prime example of the type of carrier that needs such certainty. Moreover, AES is exactly the type of financially-stable, strong competitive entrant that the FCC seeks to encourage to enter the telecommunications market. Over the past year, AES has invested substantial time and money in evaluating market opportunities, equipment vendors, pricing structures, and potential partners, in designing its network, and in taking the necessary and costly

Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157 and consolidated cases, Memorandum Opinion and Order, FCC 99-365, ¶ 25 (rel. Nov. 22, 1999) (rejecting BOC petitions for special access pricing flexibility because the petitioners "failed to provide the Commission and interested parties a meaningful opportunity to examine the conclusions contained in the Quality Strategies' market reports."). AES understands that other parties intend to rebut Petitioners' so-called factual findings and reserves its right to address these issues in reply comments.

¹² *UNE Remand Order* at ¶ 150.

¹³ Although many of the rules adopted in the *UNE Remand Order* became effective on February 17, 2000, some, including dark fiber transport, did not become effective until May 18, 2000. *UNE Remand Order* at ¶ 526.

preliminary steps to implement its business plan. In performing its analysis and implementing the costly measures associated with designing its network and business plan, AES necessarily relied on the regulatory structure that is currently in place, including the FCC's unbundling rules and prices for UNEs and interconnection set by state commissions. AES intends to rely heavily, at least initially, on ILEC loops. In order to reach ILEC loops, whether high capacity or plain-old two-wire copper, AES must collocate in the ILEC central office where the loops terminate or avail itself of enhanced extended loops, where available. AES has already invested hundreds of thousands of dollars in conjunction with the collocation applications it has submitted to ILECs and has indicated its intent to purchase unbundled dedicated transport from the ILECs to connect its collocation arrangements to its switches. If AES cannot gain access to loops and transport at cost-based rates, AES will be forced to reconsider its market entry strategy. If AES is forced to purchase special access from the ILECs in lieu of high capacity loops and dedicated transport, it may forego market entry altogether. By even entertaining the Petition, the FCC has introduced uncertainty and additional costs into AES' business planning process. Were the FCC to grant the petition, it would alter the rules of the game to such an extent as to force AES to completely re-do its market entry analysis and business plan strategy, to re-evaluate the viability of market entry, and might in fact result in AES' decision to forego entry into the telecommunications market altogether.

If the FCC refuses to dismiss the Petition, as requested by NewSouth Communications on April 25, 2001, this will be the third time in six years that the FCC

¹⁴ *UNE Remand Order* at ¶ 148.

has considered what network elements are properly included in the national list of UNEs. Petitioners have exercised their rights to appeal the *UNE Remand Order* and may attempt to convince the Court of Appeals for the District of Columbia Circuit that dedicated transport and high capacity loops should not be unbundled. However, as the FCC stated in the *UNE Remand Order*, there is no reason to decide whether an element should be included in the national UNE list when the rule regarding that element is being reviewed by a Court of Appeals.¹⁵

The FCC should reject and refuse to entertain this Petition or any similar petitions to reduce elements subject to unbundling. The FCC should follow the triennial review rule it adopted in the *UNE Remand Order* in order to provide the certainty new entrants need to implement their business plans. In the alternative, if the FCC decides to consider the evidence presented in the Petition, it must assign the burden of proof to the Petitioners who are attempting to restrict prematurely the elements they must unbundle.

IV. Prematurely Removing ILEC Unbundling Obligations Would Necessarily Limit Competition to Large Business Customers and Large Metro Areas

The FCC must consider the consequences of prematurely determining that alternatives to ILEC high capacity loops and transport are ubiquitously available. Even if alternative high capacity loops are available to some customers that fit the ILEC special access profile, CLECs' targeted customers are not limited to ILEC special access customers. To the contrary, CLECs such as AES seek to provide advanced, bundled services to the SMEs that ILECs have largely ignored. Further, even if alternative transport is available to some ILEC central offices, CLECs' targeted customers include those served by plain old copper loops and such loops terminate in all ILEC central

¹⁵ *Id.* at ¶ 478.

offices, not just those that produce the majority of ILEC special access revenues. Thus, even if one accepts the Petitioners' argument that alternatives to ILEC high capacity loops and transport are available in the small number of central offices that represent the majority of ILEC special access revenue, it does not necessarily follow that alternatives are available ubiquitously.

If, as argued herein, alternatives are not ubiquitously available, competitors are faced with two equally unappealing options. First, competitors can purchase ILEC special access services to reach customers. In this connection, the fact that the Bell Operating Companies ("BOCs") do not significantly or at all price special access or transport services below the price cap ceilings shows that there is not significant competition for these services. In two of AES' initial target markets, purchasing special access instead of high capacity loops and transport could increase AES' costs anywhere from approximately 150% to 750%, as highlighted in Table 1, immediately below:

Table 1: UNE vs. Special Access

This chart represents the price increase to a CLEC for using Special Access compared to UNE cost-based prices. Details are included in the attached Exhibit 1.

	<u>Maryland</u>	<u>Virginia</u>
DS1 Loop	185% - 167%	189% - 141%
DS1 Transport	759%	743%
DS3 Transport	457%	393%

While the ILECs may benefit from the increased profit they gain from providing special access services,¹⁶ such price increases fundamentally change the economics of AES' determination to provide service to a particular customer or class of customers. Faced with such cost increases, the second option is that competitors such as AES likely

will be forced to forego market entry in the metropolitan statistical areas, small towns, and suburbs where alternatives to UNEs are not available.¹⁷ Thus prematurely ending ILECs' unbundling obligations would conflict with the purpose of the Telecommunications Act of 1996 ("1996 Act") to provide all Americans access to competitive telecommunications and advanced services.

V. CLECs Would Be Materially Impaired without Access to Unbundled High Capacity Loops

Petitioners have failed to heed the FCC's findings in the *UNE Remand Order* and repeat availability, ubiquity, cost, and timeliness arguments the FCC has already rejected. Because ILECs still control over 90% of local access lines¹⁸ and Petitioners' special access analogy is inapposite, the FCC should affirm ILECs' obligation to unbundle loops, including high capacity loops.

A. Availability and Ubiquity

The FCC expressly rejected ILEC arguments that because some CLECs "have successfully provisioned [high capacity] loops to certain large business customers," the FCC should refrain from unbundling such loops altogether.¹⁹ As the FCC explained:

Building out any loop is expensive and time-consuming, regardless of its capacity. That some competitive LECs, in certain instances, have found it economical to serve certain [large] customers using their own loops suggests to us only that carriers are unimpaired in their ability to serve those particular customers. This evidence tells us nothing about the customer the competitor would like to serve but cannot because the cost of

¹⁶ ILECs are permitted to recover "a reasonable profit" when providing UNEs to competitors. See 47 U.S.C. § 252(d)(1)(B).

¹⁷ Although AES is not currently providing service to customers, other CLECs are. If the FCC were to grant the Petition and alternatives were not available to reach existing customers, some CLECs may actually be forced to discontinue providing services to such customers.

¹⁸ Local Telephone Competition: Status As of December 31, 2000, Table 1 (May 2001) ("Local Telephone Competition").

¹⁹ *UNE Remand Order* at ¶ 184.

building a loop from the customer premises to the competitive LEC's switch is prohibitive.²⁰

Petitioners improperly limit their ubiquity analysis by making comparisons between high capacity loops and special access services in an attempt to limit the "addressable market." According to Petitioners, their special access revenues are a "useful surrogate" for the high-capacity market in general and their special access revenues are concentrated in approximately 20-25% of ILEC central offices.²¹ Petitioners' own description of the special access market²² points out at least one critical flaw in the comparison -- the largest purchasers of special access services are interexchange carriers, not the business customers CLECs seek to serve using high capacity loops and EELs. For instance, AES' business plan is to be a bundled service provider for SMEs, and it does not intend to use high capacity loops to provide service to IXCs. AES believes that it can provide SMEs with a bundled package of local, long distance, and broadband data services. AES intends to provide this package by using a high capacity loop or EEL purchased from the ILEC and consolidating all of the customers' traffic on that loop. Thus AES' high capacity loop customers will be very different from ILEC special access customers.

Petitioners also ignore the fact that CLECs may not, and often do not, target business customers with the same types of services ILECs provide. Rather, in order to win market share, CLECs must differentiate their service offerings by price, quality, and capacity, as AES intends to do by becoming the one-stop provider for SMEs. For instance, CLECs may use high capacity loops to provide service to a business customer

²⁰ *Id.* (footnotes omitted).

²¹ Petition at 11.

with fewer than 24 lines and may price their service substantially below the ILEC's in order to win market share. Or CLECs may take advantage of EELs, where available, to reach SMEs served by ILEC central offices where density does not justify the cost of collocation. Thus it is doubtful that CLEC revenue concentrations from services provided using high capacity loops would mirror ILEC special access revenue concentrations. However, even if Petitioners' special access analogy were accurate, it would not justify removing all high capacity loops from the UNE list, including those served by the remaining 75-80% of ILEC central offices. Nor would it justify removing new entrants' access to EELs,²³ which are also a cost-effective way to reach customers served by low density ILEC wire centers. As the FCC found in the *UNE Remand Order*, it is not appropriate to design unbundling obligations that result in patches of local competition, rather than the seamless competitive service of the fully competitive market envisioned in the 1996 Act.²⁴

Petitioners jump from a revenue comparison to a line comparison, arguing, without any statistical support, that business customers using high-capacity services make up a "relatively" small percentage of all business customers.²⁵ Although the FCC's local competition data shows that ILECs provided 5,269,000 UNE loops to CLECs as of December 2000, Petitioners (who should, as the suppliers of such loops, have access to such data) do not provide a measure or estimate what percentage of those loops are high

²² USTA Report at 2.

²³ Because the EEL is a loop and transport combination, removing access to unbundled transport effectively kills the EEL, whether it includes a high capacity loop or not.

²⁴ *UNE Remand Order* at ¶ 185.

²⁵ Petition at 12.

capacity.²⁶ Nor do Petitioners estimate the number of high capacity loops CLECs self-provision. Instead they cite two statistics USTA derived from manipulation of various third-party sources. First, Petitioners cite to the supposed existence of 218,000 miles of alternative local fiber²⁷ without explaining whether that figure includes only operational fiber or planned fiber.²⁸ Second Petitioners cite to the 175,000 buildings CLEC fiber “reaches.”²⁹ Because these figures do not provide an estimate of how much CLECs rely on ILEC high capacity loops to provide service to CLECs’ customer base, the FCC should reject this evidence as irrelevant to the impair test.

Moreover, these figures may be particularly misleading in light of the recent devastating downturn in the CLEC industry and the high number of CLECs who have substantially scaled back their plans for market entry, have filed for bankruptcy, or otherwise been forced to abandon their proposed operations altogether.³⁰ According to CLEC.com, in the past 12 months, numerous competitive telecommunications service providers have filed for Chapter 11 bankruptcy, been delisted from the Nasdaq, or closed down completely and had their assets auctioned to the highest bidder.³¹ Of the companies in bankruptcy, the Petition relies on two of them (Winstar and Teligent) as

²⁶ Local Telephone Competition, Table 4.

²⁷ Although the USTA Report cites Level 3, for instance, as having extensive local facilities, the Level 3 source cited in the footnote only includes miles for Level 3’s intercity, or long-haul network. USTA Report at 3, n.8.

²⁸ See, e.g., USTA Report at 18 (reporting that Fiber Technologies *plans* to build over 40 local metro networks which will total over 6400 route miles).

²⁹ Petition at 4.

³⁰ See, e.g., Petition at 15-16 (citing Winstar, a company now in bankruptcy, as an alternative provider of local loop facilities). See also David A. Wolcott, *An ALTS Analysis: Local Competition Policy & the New Economy*, 11 (Feb. 2, 2001) (citing Bear Stearns CLEC Index as showing that as of Dec. 22, 2000 stock prices of public CLECs were down 73.1% since the start of 2000 and some analyst predictions that half of CLECs will file for bankruptcy or face consolidation).

³¹ Mark H. Reddig, *Annus horribilis? However you say it, CLECs have had a bad year* (June 1, 2001).

part of its showing that alternatives are available to high capacity loops and Appendix B to the USTA Report cites four of them (ICG, e.spire, Advanced Radio Telecom, and North American Telecommunications) as alternative fiber network providers. This provides further evidence that the FCC must not take the statistics cited in the Petition and USTA Report at face value.

B. Cost and Timeliness

Building fiber to the customer premises is still the most capital intensive way of installing local broadband capacity. The *City Light Investor's Guide* estimates that fiber deployment costs \$100,000 to \$300,000 per mile for placing fiber underground, \$50,000 per mile for placing fiber on poles, and \$10,000 to \$60,000 per mile for placing fiber in pipelines.³² The high end of this range is clearly greater than the \$30,000 per mile cost cited in the Petition³³ and the \$46,680 per mile cost the FCC cited in the *UNE Remand Order* as a burden that would materially impair CLECs.³⁴

Moreover, CLECs that intend to lay their own fiber must also take into consideration the delays caused by the need to negotiate rights-of-way and franchise agreements and access to the buildings they intend to serve with their own fiber. As the FCC recently found:

there is also meaningful evidence that competitive LECs have in many instances encountered unreasonable demands and significant delay in their efforts to obtain access to buildings. Competitive LECs complain that they are being impeded by incumbent LECs and building owners. In some instances, competitive LECs state that they have been denied access to buildings completely, or have been charged exorbitant rates for access or been subjected to unreasonable conditions. And, in others, contract

³² Jonathan Atkin and David Coleman, *City Light: An Investor's Guide to Metropolitan Optical Services*, 24 (Dain Rauscher Wessels, March 22, 2001) ("*City Light Investors Guide*").

³³ Petition at 14.

³⁴ *UNE Remand Order* at ¶ 184, n.343.

negotiations have reportedly spanned upwards of eighteen months – a timeframe that is particularly problematic for a service provider in a competitive market.³⁵

This eighteen-month timeframe clearly meets the FCC’s material delay test, which requires only a six month to one year delay.³⁶

C. High Capacity Loops Still Meet the Impair Test

As shown above, high capacity loops still meet the impair test. Alternatives to ILEC unbundled high capacity loops are not actually available on a ubiquitous basis. Furthermore, both the cost of deploying high capacity loops and the time it takes to deploy them could materially impair a CLEC’s ability to provide service to end users. The FCC should therefore reject Petitioners’ request to relax ILEC unbundling obligations by removing high capacity loops from the UNE list.

VI. CLECs Would Be Materially Impaired without Access to Unbundled Dedicated Transport

A. Availability and Ubiquity

Petitioners claim that alternative transport need not connect each and every central office in order for it to be ubiquitously available.³⁷ The FCC rejected prior ILEC attempts to show that alternative dedicated transport was available absent data that focused on individual wire centers. In the *UNE Remand Order*, although the FCC acknowledged CLEC deployment of “interoffice transport facilities along selected point-to-point routes, primarily in dense market areas,” it found that “competitive transport facilities that currently exist do not interconnect *all* of an incumbent LEC’s central

³⁵ *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217 et al., First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, FCC 00-366, ¶ 17 (rel. Oct. 25, 2000) (citations omitted).

³⁶ *UNE Remand Order* at ¶ 89.

³⁷ Petition at 18.

offices,” thus *per se* failing the ubiquity requirement of the impairment test.³⁸ The FCC rejected the evidentiary *significance* of USTA’s 50,000-foot summary statistics, finding that “only at a granular, wire center-by-wire center level does the record show the presence of competitive alternatives to the incumbent’s interoffice transport.”³⁹ Petitioners present no new arguments to support reversal of the FCC’s finding. If AES wants to provide service using unbundled loops, it must somehow connect those loops to its switch. If ILECs deny AES access to unbundled dedicated transport, and alternative transport is not available in the central office where AES’ loops terminate, AES will have to purchase ILEC special access facilities or build its own. As the FCC found, tariffed services should be assigned little value as alternative facilities:

US West maintains that it need not unbundle local transport because requesting carriers can purchase its tariffed special access services. In light of the little weight we assign to the availability of resold services in our analysis, we reject US West’s argument. This argument would foreclose competitive LECs from taking advantage of the distinct opportunity Congress gave them, through section 251(c)(3) to use unbundled network elements.⁴⁰

This is especially true when purchasing special access facilities could increase AES’ costs by 150% to 750%.⁴¹

Despite findings by the FCC that such comparisons are inapposite under the impair test,⁴² Petitioners also continue to rely on special access comparisons. Petitioners

³⁸ *UNE Remand Order* at ¶ 341 (emphasis added).

³⁹ *Id.*

⁴⁰ *Id.* at ¶ 67 (footnotes omitted).

⁴¹ *See* Exhibit 1.

⁴² *See, e.g., UNE Remand Order* at ¶¶ 131-32 (“It is not appropriate to use these types of [access pricing flexibility] triggers to determine whether alternative sources of network elements are actually available as a practical, economic, and operational matter.”) and ¶ 341, n.673 (satisfying access pricing flexibility triggers does not mean an element fails the impair test).

allege that because 183 of 320 MSAs have at least one fiber-based collocator,⁴³ new entrants like AES can find alternative dedicated transport providers. Their argument still fails the ubiquity test. Evidence of at least one CLEC wire center collocation that relies on a third party transport provider does nothing to help AES if the third party transport provider has no spare capacity or is not located in the central offices where AES is collocated.⁴⁴ If AES must collocate in order to have access to plain old copper loops and third-party transport is not available, Petitioners would charge AES special access rates for the transport needed to bring AES' traffic back to its switch. Because these special access rates can be 1.5 to 7.5 times higher than cost-based dedicated transport rates,⁴⁵ granting the Petition would impose a material financial burden on new entrants, such as AES.

The fact that Petitioners have increased the number of collocation arrangements they provide to CLECs is of no significance. As a new entrant, AES must be collocated to access most ILEC loops and will face delays in turning up service until its collocation orders are filled. Even once AES completes its collocation arrangements, they will be worthless if AES cannot obtain the transport necessary to connect its collocation arrangements to its aggregation points and/or switches.

Finally, Petitioners recycle the "fiber nearby" argument. The FCC also previously rejected the significance of USTA evidence regarding the deployment of competitive fiber networks "nearby" incumbent LEC wire centers:

⁴³ Petition at 4-5.

⁴⁴ *UNE Remand Order* at ¶¶ 131-32.

⁴⁵ *See Exhibit 1.*

We note that the incumbents do not explain what is meant by fiber that is “nearby.” Nor do incumbents explain how having fiber “nearby” reflects the availability of ubiquitous transport alternatives.⁴⁶

The Coalition of Competitive Fiber Providers explain why having competitive fiber “nearby” an ILEC central office does not guarantee CLEC collocators alternative transport. As the Coalition’s Petition states, competitive fiber providers (“CFPs”):

need to access CLECs at their collocation space in ILEC central offices. CFPs need to access the ILEC central office for the purpose of extending fiber into the central office and connecting with CLECs collocated there. CFPs also need to install active electronics in CLEC collocation space and to place a distribution frame in the central office to facilitate further requests from CLECs for provision of fiber-based distribution services.⁴⁷

Yet, with the exception of the former Bell Atlantic companies, all ILECs deny CFPs the access to central offices that they need to provide their competitive fiber to collocated CLECs.⁴⁸ Petitioners’ claim that fiber “nearby” their central offices provides alternatives to dedicated transport is thus disingenuous. The FCC rejected such claims in the *UNE Remand Order* and it should reject them again here.

Since Petitioners still cannot address the FCC’s concerns about analyzing ubiquity on a wire-center-by-wire-center basis, they make a new argument that collocation hotels make the detailed analysis irrelevant. Specifically, Petitioners allege that collocation hotels, at least two per MSA in 49 of the top 50 MSAs, obviate the need for competitive transport alternatives at each ILEC wire center.⁴⁹ As an initial matter, even if collocation hotels made the detailed analysis irrelevant, BOCs could only meet the threshold in those

⁴⁶ *UNE Remand Order* at ¶ 342.

⁴⁷ *Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as Amended, to Central Office Facilities of Incumbent Local Exchange Carriers*, Petition for Declaratory Ruling by Coalition of Competitive Fiber Providers, CC Docket 01-77, 2 (filed March 15, 2001).

⁴⁸ *Id.* at 4.

⁴⁹ Petition at 5.

MSAs where collocation hotels are actually available. But Petitioners do not propose a transport exemption limited to the top 50 MSAs, they propose to remove unbundled access to transport throughout the United States. For this reason alone, the FCC should reject their analysis as patently unreasonable.

Even in the MSAs where collocation hotels exist, CLECs can only use them to bypass the ILEC and provide service directly to end users if the CLEC or an alternative provider has deployed local loop facilities that terminate in the collocation hotel. As of December 2000, ILECs still controlled 189,512,000 access lines.⁵⁰ Of the 16,397,000 access lines “provided” to end users by CLECs, at least 64.9% are effectively controlled by the ILECs because CLECs acquire those lines through resale or local loops purchased from the ILECs.⁵¹ In order to obtain access to those loops, CLECs must collocate at the ILEC central offices where the loops terminate. In order to connect those loops to their switches, CLECs must build or purchase interoffice transport to connect their collocation arrangements to their switches. Thus collocation hotels do not eliminate the need to establish connections between the ILEC wire center and the CLEC’s switch. Without the availability of alternative interoffice transport to *each* ILEC central office where CLECs provide service using unbundled local loops,⁵² CLECs will have no practical access to these loops, and thus will be unable to provide service to the vast majority of telephone customers in the United States.

⁵⁰ Local Telephone Competition, Table 4.

⁵¹ Local Telephone Competition, Table 3. Although this table shows that CLECs provide service to 35% of their end users over their own local loop facilities, the FCC questioned whether this data was accurate. See Local Telephone Competition at 1, n.2.

⁵² This is not to say that each ILEC wire center must be connect directly to a CLEC’s switch. CLECs typically aggregate their traffic at certain points just as ILECs have deployed the hub and spoke tandem and end office network architecture. However, the fact remains that the customer traffic carried over the local loop must still somehow be connected to the CLEC’s chosen aggregation point.

B. Cost and Timeliness

Petitioners cite no new specific cost or deployment figures to support their contention that the costs of deploying dedicated transport, and the time it takes to deploy it, have materially diminished since the FCC adopted the UNE Remand Order. As noted above in Section IV.B, Petitioners have underestimated the cost of deploying fiber and independent estimates of the cost of deployment still satisfy the FCC's impair standard. Furthermore, since transport will most likely cross more local permitting jurisdictions than local loops, the potential for significant rights-of-way delays still exist. For instance, City Signal alleges that certain cities in Ohio have failed to process its applications to attach its fiber optic cable on existing utility poles, some of which have been pending for more than one year.⁵³ Once again, such delays clearly meet the FCC's impair standard.

C. Dedicated Transport Still Meets the Impair Test

As shown above, Petitioners have failed to show that dedicated transport is actually available on a ubiquitous basis. Petitioners have also failed to provide evidence that the cost of deploying alternative transport and the time it takes to deploy alternative transport have diminished since the FCC adopted the *UNE Remand Order*. The FCC should therefore reject Petitioners' request to relax ILEC unbundling obligations by removing dedicated transport from the UNE list.

VII. Other Factors Do Not Justify Removing Dedicated Transport and High Capacity Loops from the UNE List

Petitioners' impair test argument shows the defect of their fallback argument. On the one hand, Petitioners argue that CLECs are not impaired without access to high capacity loops and dedicated transport. On the other hand, Petitioners argue that these

elements should not be unbundled because unbundling discourages facilities-based competition. While Petitioners' statistics are not reliable, it is clear that facilities-based competition is developing in local markets. As the USTA Report shows, CLECs are investing in and deploying their own facilities notwithstanding the availability of ILEC high capacity loops and dedicated transport at cost-based rates. However, completely overbuilding ILEC networks is uneconomical. Captive ratepayers paid for ILEC networks and ILECs still control the public switched telephone network and access to over 90% of local telephone subscribers. Removing competitor access to high capacity loops and dedicated transport needed to reach 90% of the nation's telephone subscribers will squash competition and deter further competitive investment.

Petitioners' second argument, that the unbundling obligations discourage them from deploying new broadband facilities, is equally unconvincing. ADSL technology was created in the 1980s and ILECs first began testing it in the mid 1990s. However, ILECs were slow to roll out DSL technology until providers like Covad entered the market.⁵⁴ As of December 31, 1998, approximately 39,000 customers purchased DSL service. By March 31, 2001, DSL subscribership had grown to approximately 2.9 million lines, with ILECs controlling 83% of the market.⁵⁵ Granting the Petition could squash the very competition that has spurred broadband deployment to date.⁵⁶ The FCC should

⁵³ See *City Signal v. Cleveland Heights*, CS Docket 00-253, Petition for Declaratory Ruling, at 2 (Oct. 18, 2000).

⁵⁴ Covad Communications Launches 1.5Mbps Access Service for Corporations to Connect to Work-at-Home Employees, Covad Press Release (Dec. 8, 1997) (http://www.covad.com/companyinfo/pressreleases/pr_1988/press_120897.shtml) (visited June 7, 2001).

⁵⁵ North American DSL Market Reaches 3.5 Million in First Quarter (<http://www.xdsl.com/content/tarticles/wp051101.asp>) (visited June 7, 2001).

⁵⁶ See *Id.* (quoting TeleChoice DSL Analyst Pat Hurley as saying "Potential customers may have reacted negatively to the fact that incumbents decided to raise [DSL] prices or end pricing promotions just as their competitors were going out of business.").

deny the Petition and instead step up its efforts to enforce ILEC compliance with their unbundling obligations.

VIII. Conclusion

For the reasons specified herein, the FCC should dismiss or deny the Petition and affirm its triennial UNE review rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Lipman', written over a horizontal line.

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June 11, 2001

Exhibit 1 to AES Communications, LLC Comments

UNE vs. Special Access Price Comparison
(Monthly Prices for Verizon)

	<u>Maryland</u>	<u>Virginia</u>	<u>Special Access</u>	<u>% Increase Special Access vs. Maryland UNE Prices</u>	<u>% Increase Special Access vs. Virginia UNE Prices</u>
UNE - DS1 Loop	\$113.03 - \$152.70	\$110.61 - \$181.29	\$209.11 - \$255.51	185% -167%	189% - 141%
UNE - DS1 Dedicated Transport	\$34.36	\$35.10	\$260.66	759%	743%
UNE - DS3 Dedicated Transport	\$519.24	\$604.53	\$2,375.30	457%	393%

Notes:

Maryland

- > UNE prices are from the MCI/metro/Bell Atlantic Interconnection Agreement dated February 2000, Attachment I
- > DS1 loop prices vary by rate group: rate group A1 is \$113.03 /loop/month; rate group B1 is \$152.70 /loop/month
- > Dedicated transport prices are for a 10 mile circuit
- > DS1 dedicated transport is calculated as follows: \$30.61 /facility/month + 10 miles x 0.375 facility/mile/month = \$34.36
- > DS3 dedicated transport is calculated as follows: \$414.74 /facility/month + 10 miles x \$10.45 /facility/mile/month = \$519.24

Virginia

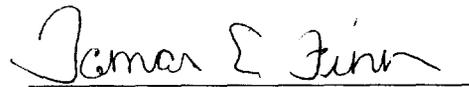
- > UNE prices are from the Bell Atlantic - Mpower Communications Interconnection Agreement dated May 2000, Exhibit A
- > DS1 loop prices vary by density cell: density cell 1 is \$110.61 /month; density cell 3 is \$181.29 /month
- > DS1 and DS3 dedicated transport prices are set forth directly in the Interconnection Agreement, Exhibit A

Special Access

- > Prices are from Verizon's FCC No. 1 Tariff
- > Channel termination prices are for 1.544 Mbps service found in Section 7.5.9 (A) (1) pg 7-250; zone 1 is \$209.11 /month; zone 3 is \$255.51 /month
- > Direct trunked transport prices for DS1 and DS3 are from Section 6.9.1 (C) page 6-330; 10 mile circuit was assumed
- > DS1 was calculated as follows: \$46.66 fixed/month + 10 miles x \$21.40 /mile/month = \$260.66
- > DS3 was calculated as follows: \$825.00 fixed/month + 10 miles x \$155.03 /mile/month = \$2,375.30

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of AES Communications, LLC have been served by Hand Delivery or First Class Postage Prepaid to the persons on the attached list.


Tamar E. Finn

Date: June 11, 2001

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