

The argument is advanced that “any service-specific impairment analysis collides head-on with the plain meaning of section 251(c)(3) which empowers CLECs to use UNEs to provide any and all telecommunications services.”⁵⁶ The Commission has applied the impairment test to services:

The Commission rejected various CLEC arguments about “differences in cost and the amount of time required to implement services” regarding the use of operator services and directory assistance (“OS/DA”) provided by competitors and concluded that ILECs need not unbundle operator services and directory assistance, except under very limited conditions, because these services were competitively available.⁵⁷ Applying an impairment analysis, the Commission concluded: “Significantly, we find that the existence of multiple alternative providers of OS/DA service in the marketplace, coupled with evidence of competitors’ decreasing reliance on incumbent OS/DA services, demonstrates that requesting carriers’ ability to provide the services it seeks to offer is not materially diminished without access to the incumbent’s OS/DA service on an unbundled basis.”⁵⁸ Special access services are competitive, and CLECs are not impaired in their ability to compete if ILECs are not required to provide loop and transport combinations for CLECs to provision special access and toll services.⁵⁹

The Commission has been instructed by the Supreme Court to apply an impairment test to determine if ILEC unbundling is necessary and whether the absence of ILEC unbundling would constitute an impairment of a CLECs’ ability to compete. ILECs are only required to provide UNEs to requesting carriers when they would otherwise be impaired in their ability to provide competitive services for which the UNE

⁵⁶ *WorldCom Comments* at 6, CC Docket No. 96-98 April 5, 2001.

⁵⁷ *Third Report and Order and Fourth Notice of Proposed Rulemaking*, CC Docket No. 96-98, released November 5, 1999 (“UNE Remand Order”).

⁵⁸ *UNE Remand Order*, 15 FCC Rcd at 3895, ¶449.

⁵⁹ *USTA Comments* at 3-4, CC Docket No. 96-98 (April 5, 2001).

is sought.⁶⁰ The Supreme Court concluded that “the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act...”⁶¹

The market for special access services is competitive. The *Crandall Reply Declaration* provides data that competitive carriers serve a significant share of the market for special access services. The *Crandall Reply Declaration* demonstrates that CLEC facilities collocated in ILEC central offices or other facilities-based providers of special access services can reach such customers without ILEC loop and transport combinations.⁶² As the *Crandall Reply Declaration* concludes: “Because so many CLECs are contesting the market for special access services through their own facilities, one cannot conclude that CLECs would be impaired in the delivery of special access services if they lacked access to unbundled network elements.”⁶³

The competitive developments discussed in the *Crandall Reply Declaration* and the *Special Access Report* have occurred without the Commission resorting to mandatory unbundling to facilitate special access services by competitive carriers. Competitive carriers serve special access customers now through their own facilities-based networks and significant portions of potential customers are served by at least one facilities-based competitor interconnected through ILEC central offices or through competitive networks which bypass ILEC networks.

⁶⁰ *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

⁶¹ *Id.* at 388.

⁶² *Crandall Reply Declaration* at ¶26. Crandall concludes “[g]iven the availability of alternative supply, [competitive] carriers cannot be impaired if high capacity loops and transport are not unbundled.”

⁶³ *Crandall Reply Declaration* at ¶27.

The growth in fiber-based competitive carrier networks has occurred in all regions and markets throughout the country.⁶⁴ In addition, the market for wholesale suppliers of special access services has emerged and wholesalers are aggressively seeking to provide services to competitive carriers.⁶⁵

The data submitted by USTA establishes that “Mandatory ILEC unbundling of special access services would not promote facilities-based competition - - competition that is diverse and growing throughout the country.” Commission regulations that would require ILECs to provide loop and transport combinations to competitors providing special access services would impede the growth of market-driven facilities-based competition, while creating severe financial consequences for ILECs in general, and rural and smaller ILECs in particular.⁶⁶ Moreover, facilities-based competitive carriers like Time Warner Telecom will suffer competitive harm from lost special access revenues and stranded investment in facilities rendered useless with the conversion of special access to UNEs.

⁶⁴ *Crandall Reply Declaration* at ¶26; *Special Access Report* at 12.

⁶⁵ See Note 15.

⁶⁶ *USTA Comments* at 9-11; *TDS Comments* at 1, CC Docket No. 96-98 (April 5, 2001)(“Premature action here threatens to destroy the access charge regime ... and put pressure on customer rates in areas served by rural telephone companies under ROR regulation.”); *Joint Comments of NECA, NRTA, NTCA, OPASTCO, and Western Alliance Comments* at 4 (“This threat on the entire interstate access regime would be massive, putting in jeopardy the recovery of \$2.5 billion in costs assigned to the NECA common line and traffic sensitive pool alone.... [L]oss of this critical revenue stream could cause massive shifts in costs from the interstate to the state jurisdiction, with dramatic, adverse effects on local ratepayers.”).

CONCLUSION

The special access market is competitive, with many alternative providers, and the need for access by CLECs to ILEC UNEs in order to provide local exchange service is dramatically decreased. Specifically, ILEC high-capacity loops and dedicated transport facilities should no longer be required as UNEs on a mandatory basis. To find otherwise would be in contravention of Section 251(d)(2) of the 1996 Act and the Supreme Court's decision in *AT&T v. Iowa*.

The *Special Access Report* demonstrates that access by competitive carriers to unbundled ILEC high-capacity loops and dedicated transport does not meet the impairment test in Section 251(d)(2). Therefore, high-capacity loops and dedicated transport should be removed from the Commission's list of mandatory ILEC UNEs. USTA, however, supports a safety mechanism for CLECs to prove that the impairment standard is met for high capacity loops and/or dedicated transport in particular local exchange markets. After expedited Commission review of a CLEC's request and a finding that the impairment standard has been met in a particular local market for high-capacity loops and/or dedicated transport facilities, the ILEC would then be required to provide those facilities as UNEs in the particular local exchange market.

The *Crandall Reply Declaration* explains how the special access market is distinct and separate from the local exchange market and provides data that establish that competitive carriers are not impaired when providing special access services to existing high volume business customers, or meeting their needs by extending their fiber networks to serve new customers. The *Special Access Report* demonstrates that facilities-based

competitive carrier networks are deployed to bypass ILEC network facilities in markets across the country, including rural, urban and suburban markets.

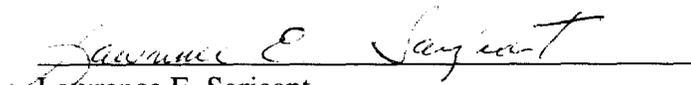
The market for special access is fully competitive as the Commission acknowledges. CLECs are not impaired when providing special access because of the availability of competitive alternatives to ILEC UNEs. Mandatory CLEC access to unbundled ILEC loop and transport combinations for special access is unnecessary in a market that is fully competitive and would be contrary to the Communications Act.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

June 11, 2001

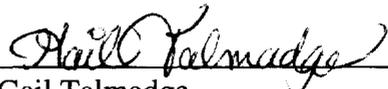
By:



Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Hunter
Julie E. Rones
1401 H Street, NW, Suite 600
Washington, DC 20005
(202) 326-7269

CERTIFICATE OF SERVICE

I, Gail Talmadge, do hereby certify that on June 11, 2001 a copy of *Comments of the United States Telecom Association* in CC Docket No. 96-98, was either hand-delivered or sent via U.S. Mail, first-class, postage prepaid, to the persons on the attached service list.


Gail Talmadge

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW - Eighth Floor
Washington, DC 20554

The Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445 12th Street, SW - Eighth Floor
Washington, DC 20554

The Honorable Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 12th Street, SW - Eighth Floor
Washington, DC 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, SW - Eighth Floor
Washington, DC 20554

Kyle Dixon
Federal Communications Commission
445 12th Street, SW - Eighth Floor
Washington, DC 20554

Jordan Goldstein
Federal Communications Commission
445 12th Street, SW - Eighth Floor
Washington, DC 20554

Janice M. Miles
Federal Communications Commission
445 12th Street, SW, Room 5-C327
Washington, DC 20554

Samuel Feder
Federal Communications Commission
445 12th Street, SW - Eighth Floor
Washington, DC 20554

William J. Friedman, IV
Federal Communications Commission
445 12th Street, SW - Eighth Floor
Washington, DC 20554

Deena Shetler
Federal Communications Commission
445 12th Street, SW - Eighth Floor
Washington, DC 20554

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

Jonathan B. Banks
Richard M. Sbaratta
BellSouth
1133 21st Street, NW - Suite 900
Washington, DC 20036

Michael E. Glover
Verizon
1320 North Court House Road - Eighth Floor
Arlington, VA 22201

Gary L. Phillips
SBC
1401 Eye Street, NW - Suite 1100
Washington, DC 20005

Brad E. Mutschelknaus
Robert J. Aamoth
Genevieve Morelli
Kelley Drye & Warren, LLP (e.spire Comms., KMC Telecom,
Intermedia Comms., Net2000, North County, Snip Link and Wireless World
1200 19th Street, NW - Fifth Floor
Washington, DC 20036

Jake E. Jennings
New South Center
Two N. Main Street
Greenville, SC 29061

Michael H. Pryor
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
(NewSouth Comms.)
700 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

Jonathan Askin
ALTS
888 17th Street, NW
Suite 900
Washington, DC 20006

Kathleen M. Marshall
Advanced TelCom Group, Inc.
200 S. Virginia Street
Suite 103
Reno, NV 89501

Patrick J. Donovan
Swidler, Berlin, Shereff & Friedman, LLP
(ALTS, Advanced TelCom)
3000 K Street, NW - Suite 300
Washington, DC 20007

Mark E. Brown
Michael J. Huebner
BroadRiver Comms.
13000 Deerfield Parkway - Suite 210
Alpharetta, GA 30004

Erik J. Cecil
Cole, Raywid & Braverman
(BroadRiver Comms. Co.)
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Rodney L. Joyce
J. Thomas Nolan
Shook, Hardy & Bacon
(Network Access Solutions, Inc.)
1850 K Street, NW
Washington, DC 20004

Joseph Kahl
RCN Telecom Services, Inc.
105 Carnegie Center
Second Floor
Princeton, NJ 08504

Steve Dubnik
CEO
Choice One Communications
100 Chestnut Street
Suite 700
Rochester, NY 14604

Tracy Mattson
Covad
2330 Central Expressway
Santa Clara, CA 95050

Brett Williams
New Edge Networks
3000 Columbia House Blvd.
Vancouver, WA 98668

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

ITS
445 12th Street, NW
Suite CY-B402
Washington, DC 20554