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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

DA 01-911

COMMENTS OF THE CLEC COUNCIL  
OF THE  
UNITED STATES TELECOM ASSOCIATION

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**COMMENTS OF THE CLEC COUNCIL OF THE UNITED STATES TELECOM  
ASSOCIATION**

The USTA CLEC Council ("CLEC Council"), by its undersigned Chairman, hereby submits the following comments in response to the above-captioned Petition of BellSouth, SBC and Verizon (collectively, "the Petitioners") for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport ("Petition" or "Joint Petition").

These are the first comments the CLEC Council has filed at the Federal Communications Commission ("Commission"). The United States Telecom Association ("USTA" or "the Association") formed the CLEC Council in 2001 to provide a forum for competitive local exchange carriers ("CLECs") of all types and sizes to share information among themselves and with other USTA members concerning technical and policy issues confronting the telecommunications industry. In creating the CLEC Council, USTA intended to create an atmosphere in which its CLEC members could meet to discuss such issues in a frank and open manner, with the goal of reaching consensus with the other

industry segments that USTA represents. In its short history, the CLEC Council has tackled a number of tough policy issues with its ILEC members and the dialogue alone has helped to foster a better understanding of how the industry can work together to make competition work for consumers and the national economy. However, as the USTA Board anticipated when it created its expanded membership structure and a process for allowing different councils to share their unique perspective, there are issues where differences cannot be completely bridged, notwithstanding the good intentions of all parties. Thus, these comments are being submitted on behalf of only the CLEC Council and its members and do not necessarily represent the position of the entire Association or members of the Association that are not part of the CLEC Council.

### ***Introduction***

The CLEC Council urges the Commission to deny the Petition for the following four reasons:

*First*, The Petition is untimely. It has been only 18 months since the Commission issued the *UNE Remand Order*.<sup>1</sup> The Petitioners already are asking the Commission to accelerate its re-evaluation of the conclusions it reached in that order, a full year before the Commission had determined it would be necessary to do so.

*Second*, The solution the Petitioners propose would seriously damage competition in the local exchange services market by irreparably harming an industry that is currently struggling to survive.

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<sup>1</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

*Third*, The rule change the Petitions seek is far too precipitous. Any deregulation of unbundling obligations that affects the CLECs' ability to compete must be a measured response that is implemented gradually, as circumstances require.

*Fourth*, Petitioners fail to demonstrate that the Section 251(d)(2) "necessary" and "impair" standards have been met for either high-capacity loops or dedicated transport elements.

**1. *The Petition Is Untimely.***

The CLEC Council believes that the Petition represents an attempt by Petitioners to effect an untimely reconsideration of the Commission's *UNE Remand Order*. It was only in November 1999 that the Commission undertook an extensive analysis of the competitive marketplace and carefully determined which network elements it would require incumbent local exchange carriers ("ILECs") to unbundle. At that time, the Commission recognized that the competitive environment likely would change and resolved to re-examine these unbundling obligations in three years.<sup>2</sup>

On the basis of what they consider to be compelling new evidence of alternatives to ILEC high-capacity loops and dedicated transport elements, the Petitioners now ask the Commission to review the analysis all over again, well over a year ahead of schedule. As discussed below, the CLEC Council does not believe that the evidence the Petitioners present merits Commission review in advance of the established schedule.

**2. *Granting the Petition Would Cause Irreparable Harm to CLECs.***

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<sup>2</sup> *UNE Remand Order* at 3704.

Even casual financial market observers are well aware of the setbacks the CLEC segment of the telecommunications industry has experienced recently. Almost every day there is news of additional cutbacks, layoffs, reorganizations, and bankruptcies.

Although the various members of the CLEC Council have diverse business plans and individualized market strategies, we *all* agree that *all* competitive telecommunications providers must have access to affordable high-capacity facilities from ILECs in order to survive this critical time.

The CLEC Council takes strong issue with the Petitioners' arguments that unbundling of high-capacity loops and dedicated transport deters investment and innovation and, ultimately, competition.<sup>3</sup> To the contrary, availability of these unbundled network elements ("UNEs") is precisely what fosters investment and viable competition as CLECs build out their networks and enter markets in competition with the long-established and well-entrenched incumbents.

Although a number of CLEC Council members have invested significantly in switches and collocations in ILEC central offices, it is not practical for all of them to replicate either the "last mile" of facilities to the customer premise or interoffice or other transport facilities. In the vast majority of cases – and for some time to come – the ILEC is and will be the only source for these critical network elements. Thus, it is obvious that UNEs are absolutely essential for the survival of many CLECs, as they simply would not be able to offer service without them.

Other CLEC Council members are engaged in building their own fiber networks. Generally, these networks are limited to routes serving specific areas and customers. Such facilities do not pass every ILEC central office where the CLEC wishes to compete,

and most of the time there is no alternative to the ILEC to obtain this coverage. These CLECs simply cannot function in the market without access to unbundled ILEC high-capacity loops and transport. Even where a CLEC intends to build fiber facilities within reasonable proximity of a customer, it may need short- or medium-term use of a high-capacity loop or dedicated transport to provide service until the network build is complete. If no alternative facility is available, as is often the case, the CLEC would be substantially disadvantaged and impaired without access to ILEC UNEs.

***3. Petitioners Seek a Rule Change that Is Far too Precipitous.***

The CLEC Council firmly believes that, if and when deregulation of UNEs is warranted (which we do not believe to be the case here), it must occur only as gradually and deliberately as circumstances merit. Sudden and precipitous deregulation – as Petitioners now request – will have a devastating effect on CLECs’ ability to offer competitive choices to consumers. Even assuming, *arguendo*, that there is some merit to Petitioners’ representations that alternatives exist in the form of competitive or self-provisioned network facilities, the Commission should target relief in a manner that ensures that alternatives to the eliminated UNEs actually do exist and are reasonably and readily available to all CLECs.

To further illustrate the need for only gradual deregulation, we note that the Petition refers almost exclusively to redundant networks that serve very large businesses in metropolitan areas. Very large businesses have always had more choices than others – even before the pro-competitive provisions of the 1996 Telecommunications Act became effective, companies such as MFN and Teleport entered the market as “competitive

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<sup>3</sup> Petition, p. 23.

access providers,” thereby offering large users a reduction in access charges. Despite the claims of the “Crandall Declaration,”<sup>4</sup> there is essentially no redundant network available to serve small and middle-sized businesses in major metropolitan areas, much less in smaller urban or rural areas. Nor is it presently economical for many CLECs to construct such redundant facilities. The limited evidence the Petitions offer of redundant networks for serving large businesses does not in and of itself justify across-the-board relief from the ILECs’ unbundling obligations. Such relief may well pull the rug out from under CLECs that target small and mid-size businesses, even in large cities, thereby depriving customers of the benefits of competition. Granting the Petition at this time is not in the public interest.

***4. Petitioners Have not Demonstrated that High-Capacity Loops and Dedicated Transport Merit Deregulation under the Impairment Test.***

In evaluating this Petition, the Commission will have to determine whether Petitioners have presented sufficient evidence of alternative availability of high-capacity loops and dedicated transport facilities to warrant overturning the careful analysis the Commission undertook less than two years ago. As part of that analysis, the Commission considered and rejected arguments virtually identical to those the Petitioners now proffer to exclude high-capacity loops and dedicated transport from the unbundling requirements.

With regard to high-capacity loops, the Commission ruled as follows:

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<sup>4</sup> See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Reply Comments of the United States Telecom Association (April 30, 2001), Attachment, Reply Declaration of Robert W. Crandall (“Reply Declaration”).

*We disagree with incumbents' assertions that we should not unbundle high-capacity loops because competitive LECs have successfully self-provisioned loops to certain large business customers. According to these commenters, the call concentration and revenue potential of "high-capacity" lines (DS-1 and higher) make self provisioning high capacity lines an economically viable alternative to the incumbent LECs' unbundled high-capacity loops. 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 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 building a loop from the customer premises to the competitive LECs' switch is prohibitive.<sup>5</sup>*

With regard to dedicated transport, the Commission ruled as follows:

*We find that requesting carriers are impaired without access to unbundled dedicated and shared transport network. In particular, self-provisioning ubiquitous interoffice transmission facilities, or acquiring these facilities from non-incumbent LEC sources, materially increases a requesting carrier's costs of entering a market or of expanding the scope of its service, delays broad-based entry, and materially limits the scope and quality of a requesting carrier's service offerings. Although the record indicates that competitive LECs have deployed transport facilities along certain point-to-point routes, the record also demonstrates that self-provisioned transport, or transport from non-incumbent LEC sources, is not sufficiently available as a practical, economic, and operational matter to warrant exclusion of interoffice transport from an incumbent LEC's unbundling obligations at this time. Accordingly, we conclude that incumbent LECs must offer unbundled access to their interoffice transmission facilities nationwide.<sup>6</sup>*

The CLEC Council does not agree that the evidence the Petitioners offer supports their arguments that the marketplace for network alternatives (including self-provisioned elements) has changed significantly since the above analysis was completed less than two years ago.

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<sup>5</sup> *UNE Remand Order*, at 3780.

<sup>6</sup> *Id.* at 3841.

Simply put, the proffered evidence does not provide the “marketplace information”<sup>7</sup> on which the Commission previously decided the impair test should be based. The Commission requires that the impair analysis consider the totality of circumstances associated with using an alternative, including, at a minimum, cost, timeliness, quality, and impact on network operation.<sup>8</sup> The Commission requires that any alternative must actually be available to the requesting carrier as a practical, economic, and operational matter. *Significant with respect to the instant Petition, the Commission also explicitly stated that it would not base its decisions on impairment on cost models or the theoretical availability of alternatives from other sources, which the CLEC Council avers, is exactly what the Petitioners offer in the Crandall Declaration and the “Fact Report”*<sup>9</sup>

Because the supporting documentation provided by Petitioners does not satisfy the Commission’s criteria outlined above, the Petition should be denied. The Crandall Declaration relies on just the sort of cost models and theoretical availability of network alternatives that the Commission explicitly rejects as a basis for making impairment decisions. Furthermore, Mr. Crandall’s models are flawed. First, he assumes CLECs have the funds necessary to self-provision facilities. This certainly is not true in light of the present state of the competitive industry and the severe and documented shortage of capital. Second, even if CLECs had funding to self-provision network facilities, Mr. Crandall’s assumptions grossly overestimate the revenue a CLEC could expect from such investment. Mr. Crandall’s model assumes that if a CLEC builds facilities up to a

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<sup>7</sup> *Id.* at 3731.

<sup>8</sup> *UNE Remand Order* at 3731.

<sup>9</sup> *See* Petition, Attachment B, Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport (“Fact Report”).

building, that it will receive all of the telecommunications revenue generated by every tenant in that building – an assumption that is clearly not supported with “marketplace information.”<sup>10</sup> As a final matter, the Commission must keep in mind that Mr. Crandall’s conclusions are based on survey data from only six metropolitan areas, and it should hesitate before basing a nationwide decision on such limited and unrepresentative data. The members of the CLEC Council can attest to the fact Mr. Crandall’s business modeling does not accurately reflect the real world they confront every day.

Nor does the highly aggregated Kellogg-Huber Fact Report adequately address the issue of ubiquity of network facilities. It does not differentiate between local, interoffice, and intercity fiber networks and, therefore, ignores a significant amount of duplication of networks in certain markets. The failure to make this critical distinction tends to grossly overstate the availability of alternative facilities, and thereby, render the Report’s conclusions unuseful.

We also urge the Commission to scrutinize the underlying data presented in the Fact Report. While the Petition asks for immediate relief based on arguments that alternative high capacity networks exist today, the cited Fact Report includes information on networks that are planned but not built. Thus, this fiber is not actually available to the requesting carrier as a practical, economic, and operational matter. For example, in Pittsburgh, the fiber providers cited in the Report do not actually provide fiber today. Yipes is a telecommunications service provider that owns no fiber presently and American Fiber Services has not yet built into the market.

Finally, Petitioners admit that, even if the evidence proffered is as compelling as they claim, it cannot justify the relief requested unless the Commission also redefines the

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<sup>10</sup> Reply Declaration, paragraphs 38, 39, 57 and footnote 43.

word “ubiquitous” to account for the specific context of high-capacity services. In doing so, they are asking for an untimely reconsideration of the UNE Remand Order.<sup>11</sup> We do not argue with Petitioners’ uncontroversial premise that businesses using high capacity services generally are more geographically concentrated than local exchange customers. However, Petitioners do not offer a workable alternative definition of “ubiquitous” that is more suitable in this context or a well-reasoned argument as to how one gets from this uncontroversial premise to a conclusion that there is indeed ubiquity with respect to alternatives for all of the elements for which relief is requested. The Petition falls far short of fully addressing the Commission’s impairment standard and demonstrating that the alternatives are actually available to requesting carriers as a practical, economic, and operational matter.

For instance, Petitioners seek to demonstrate ubiquity of high capacity loops by a single study showing “that CLEC fiber today already serves at least 175,000 commercial office buildings” and then explaining why this figure alone demonstrates ubiquity based on a series of assumptions, a recitation of anecdotal evidence of competitive carriers’ network plans, and a reminder that “wireless high capacity loops are a real competitive presence in their own right.”<sup>12</sup> This certainly is not a serious-minded analysis based on the Commission’s stated impairment test and it further demonstrates that the Petition is weak and premature.

### ***Conclusion***

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<sup>11</sup> “What the Commission failed to recognize [in the UNE Remand Order] is that ‘ubiquity,’ for services provided using high-capacity loops to business customers, means something very different than it does in the mass market for local exchange customers.” Petition, page 10.

<sup>12</sup> Petition pp. 11-13.

The supporting data the Petitioners provide are inadequate, the assumptions they use to analyze them are incorrect, and the conclusions they draw are wrong. The actions they propose the Commission implement based on these conclusions, however, could be highly damaging to CLECs. The CLEC Council supports the Commission's commitment to review the ILECs' unbundling obligations it promulgated in the UNE Remand Order in eighteen months as planned. The Petition offers the Commission no conclusive evidence in support of revisiting the issue so far ahead of its previously stated schedule.

For the foregoing reasons, the USTA CLEC Council respectfully requests that the Commission deny the Petition.

**Respectfully submitted,**

United States Telecom Association  
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June 11, 2001

## **CERTIFICATE OF SERVICE**

I, Francis Coleman, do hereby certify that I have caused 1) the foregoing **COMMENTS OF THE CLEC COUNCIL of the UNITED STATES TELECOM ASSOCIATION** to be filed electronically with the FCC by using its Electronic Comment Filing System, and 2) a hard copy of the **COMMENTS** to be served, via hand delivery, upon the person/entity listed below.

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**June 11, 2001**