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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of:	)	
	)	
Implementation of the	)	
Local Competition Provisions	)	CC Docket No. 96-98
Of the Telecommunications Act of 1996	)	
	)	
Joint Petition of BellSouth, SBC, and Verizon	)	
for Elimination of Mandatory Unbundling of	)	DA 01-911
High-Capacity Loops and Dedicated Transport	)	

COMMENTS OF MPOWER COMMUNICATIONS CORP.

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Mpower Communications Corp. ("Mpower"), by its undersigned counsel, hereby submits the following comments in response to the Petition of BellSouth, SBC and Verizon (the "Three RBOCs") for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport.

Before Mpower proceeds to respond to the Three RBOC Petition substantively, however, we would like to point out that this petition is premature at best. In the UNE Remand Order, released 11/5/99, the Commission adopted standards "designated to...respond to changes in the marketplace as alternatives to the incumbent LECs' network elements become available" and made a commitment to review the unbundling obligations in three years.[1] Barely 18 months have passed since that order was released and the Three RBOCs have come in not with a petition to review the unbundling obligations but basically, a demand that the FCC do away with major

1 UNE Remand Order, CC Docket 96-98, Released 11/5/99, para. 15.

unbundling obligations. Networks are not built in a day, or even a year, and it is far too early for that amount of change to have occurred. Indeed, as we discuss below, Mpower believes it has not occurred.

I. Introduction and Summary

A. Context

The local telecommunications network has been a monopoly for 100 years. The Telecommunications Act of 1996 (the "Act") was passed just over five years ago to make possible the gradual development of competition for local telecommunications services and the concomitant lessening or even elimination of regulation for these services. An incredible amount of work has been done during those five years and considerable progress has been made, however, the industry is not even close to being able to eliminate the regulatory "safety net" for the newly formed and struggling competitive local exchange carriers ("CLECs"), as requested by the petition of the Three RBOCs.

How does one eliminate monopoly and develop competition? As the Act requires, interconnection is crucial. CLECs continue to need access to the whole telecommunications network controlled by incumbent local exchange carriers ("ILECs"). Unbundled network elements ("UNEs") are important to the development of CLEC business but not in isolation from access to the entire network. CLECs cannot provide telecommunications services to major sectors of the marketplace and often cannot even reach their customers without access to the ILEC networks. In other words, CLECs need access to end-to-end loops regardless of the technology incorporated in them. Increasingly "advanced services" cannot be distinguished from "new technology," which is being used for all aspects of telecommunications services, voice and

data alike.

A century ago, there were two related reasons for the development of ILEC monopolies: i) Lack of interconnection between networks and ii) Replication without interconnection. The networks are now interconnected so one does not need two to three phones on each desk, along with information on which network the person to be called is using. Replication of network facilities, however, exists only in limited areas and one of the purposes of the Act was certainly to make competition possible with only limited replication of networks.[2] The ILECs own "the last mile" to customers and it is not economic to replicate the "distribution" portion of the network. To the extent that replication exists, as suggested by the Three RBOCs, it exists only for the largest companies and some of the biggest cities.[3] For all others, including medium to small businesses and residential customers, network replication, if any, is either very limited or non-existent and cannot substitute for access to ILEC facilities.

The Three RBOC Petition and the attached Kellogg, Huber, Hansen, Todd & Evans ("Kellogg-Huber") report, claim that the ILECs should be relieved from their obligation to unbundle high-capacity loops and transport facilities.[4] The conclusions in the Three RBOC

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2 We note that in the recent FCC Intercarrier Compensation Order, Docket 01-92, dated 4/27/01, Para. 114, the FCC expressed concern that various rules not force "competitive carrier[s] into an inefficient replication of the ILEC network." Mpower believes that is an appropriate concern and it is one that is shared by Mpower.

3 Special access customers "'are IXCs and large businesses.'" (p. 2 of Kellogg-Huber report, citing Commission Pricing Flexibility Order) "Special access customers also are highly concentrated." (p. 3 of Kellogg-Huber report) (Emphasis added.)

4 We note that in the recent FCC Intercarrier Compensation Order, Docket 01-92, dated 4/27/01, Para. 61, the FCC cites Patrick DeGraba, author of one of the recent major works on bill and keep, as believing that "at least until competition in transport develops further, it may be necessary to regulate the transport rates charged by ILECs," presumably to avoid "regulatory arbitrage," as described in fn 18. It is Mpower's position that there is insufficient competition for high capacity transport and loops, in general, to merit de-regulation. In fact, Mpower fails to see how there is any harm to ILECs from "not freeing" them from current regulations. TELRIC-based pricing is forward-looking pricing, intended to emulate the prices that would prevail in a competitive market, and is particularly appropriate in regard to fiber because fiber is mostly a recent investment, not subject to old booked costs. Thus, Mpower concludes that the very request for de-regulation at this time shows that the ILECs believe they can obtain higher than competitive prices. Certainly that attitude reflects an absence of competition.

Petition rest on two arguments: (1) high-capacity loop and transport facilities are available from alternative sources; and (2) competitors have sufficient resources to self-supply. Attached to these comments is a report (the "QSI Analysis") that shows that there is no factual basis for these claims.

The Tier 1 LECs own and operate over 18,000 switches that are connected with each other with by 2.5 billion route miles of inter-office facilities and serve approximately 175 million end-users. The data on capacity from alternative sources presented in the Three RBOC Petition are highly aggregated and fail to address the issue of ubiquity. It does not differentiate between local, interoffice, and intercity fiber networks, and it ignores that there is a significant amount of duplication of fiber networks in certain markets. In short, the aggregate data overstate the scope of fiber facilities available from alternative providers.

Further, given the general state of the competitive telecommunications industry and the tremendous uncertainty perceived by many over its long-term viability, the claim that competitors can self-provide is simply incorrect. For the interexchange carriers ("IXCs") and CLEC industry, the total decline in market capitalization from December 1999 through April 2001 is a staggering *$405 billion, or 64%.* The data for CLECs, excluding IXCs, are *$122 billion, or 69%.* By contrast, the RBOCs experienced declines in market capitalization over the same period of *$79 billion, or only 16%,* a percentage roughly comparable to the decline in the S&P 500 Index.

For the reasons discussed in these comments and the QSI Analysis, Mpower believes that the competitive telecommunications industry remains critically dependent on the availability of

affordable high-capacity facilities from the incumbent LECs in order to maintain and expand its customer base and urges the Commission to reject the Three RBOC Petition.

Mpower notes that in addition to the Kellogg-Huber Report analyzed above, the Three RBOCs have filed a Reply Declaration of Dr. Robert W. Crandall (the "Crandall Declaration"). Unlike the fact-based "impair" test or even the Kellogg-Huber Report, the Crandall Declaration doesn't try to present data for analysis. Instead, it presents a pyramid of theories and assumptions. Probably because the Kellogg-Huber Report failed to adequately address the crucial issue of ubiquity on a factual basis, Crandall tries to project its possibility by means of layer upon layer of assumptions. In effect, he argues that CLECs have a wonderful, profitable opportunity to self-provide facilities to numerous businesses which operate relatively near the fiber rings which have been built to serve very large customers. If one of his goals is to write a winning business plan for CLECs, it certainly doesn't seem to be a plan that CLEC themselves have found to be a viable alternative, as one after another, CLECs file for bankruptcy protection. His theories might make an interesting academic treatise but they are not well founded in fact and do not provide meaningful support for the Three RBOC Petition. The Petition should be rejected.

B. **Goals of the Act**

The Three RBOCs suggest, and we agree, that the 1996 Act had three major goals: i) Pro-competition, ii) Deployment of "advanced services" and iii) De-regulation. i) Pro-competitive aspects of the Act require interconnection to the public telephone network and the offer of UNEs and other means of access to the public telephone network. This is the CLEC "safety net." It allows CLECs to use a variety of business plans to serve customers and to use

needed components of ILEC networks to reach those customers. ii) New or "advanced services," however, need better definition. In fact, they do not really seem to be "services" at all but merely a part of new and evolving technology which increasingly consists of high speed, packetized transport of both voice and data. CLECs need network access to deploy this new technology – for both voice and data – to reach customers and to compete at all. iii) De-regulation. Mpower favors incremental de-regulation, as circumstances allow. In fact, Mpower has a plan for a "first step" which is based upon cooperation between ILECs and CLECs, a "win-win" solution. Mpower believes its plan for "FLEX Contracts" offers a means to move forward in a way which is better business, uses better processes and is better for utilities and consumers alike.[5]

C. Status of Competition

Competition is coming in a piecemeal fashion, at different levels and under different business plans. Mpower's business plan, for example, involves significant investment in switches and in hundreds of collocations at ILEC Central Offices ("COs"). Mpower is a facilities-based CLEC. It does not, however, attempt to build "the last mile" to the customer premises or to replicate interoffice or other transport. It buys the use of those facilities and it buys them predominantly from ILECs because that is where they mostly exist. Mpower cannot function without access to ILEC loops and transport because nobody else is providing what Mpower and other similarly situated CLECs need.

The Three RBOC petition refers almost exclusively to redundant network to serve very large businesses in very large cities. Very large businesses have always had more choices than others – even before the 1996 Act. Mpower's business plan, however, is to serve small and

5 Mpower filed its Petition for Forbearance and Rulemaking with the FCC, CC Doc. 01-117, on 5/25/01, outlining its request for approval of "FLEX Contracts."

middle-sized businesses in major metropolitan areas. There is no redundant network to serve these customers and it is not presently economical to construct such redundant facilities.

Further, the Three RBOC petition notes that there are 218,000 route miles of CLEC fiber. As discussed in the QSI Analysis, the data that the Three RBOC petition cite fails to distinguish between three different types of fiber networks: local, interoffice, and intercity. As a result, the 218,000 mile figure says little about how and where these fiber miles can be used to provide an alternative to the ILECs' high-capacity facilities.

The Three RBOC petition also suggests that CLECs can self provide the necessary high-capacity facilities. This argument ignores the financial collapse of the CLEC industry. The QSI Analysis calculates the change in market value of the CLEC industry over the period of December 31, 1999 through April 23, 2001, based on the value of the common shares held by investors. For the IXCs and the CLEC industry the total decline in market capitalization over this period is a staggering *$405 billion or 64%.* The data for CLECs, excluding IXCs, are *$122 billion or 69%.* By contrast, the RBOCs experienced declines in market capitalization over the same period of *$79 billion, or only 16%,* a percentage roughly comparable to the decline in the S&P 500 Index. It is clear that the financial community is increasingly skeptical about the prospects of the competitive industry and the regulators' ability to control the RBOCs' march back towards dominance.[6] In view of this, the Commission must reject the suggestion that, if worst came to worst, that CLECs could self-provide high-capacity facilities.

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6 See, Seth Schiesel, *Sitting Pretty: How Baby Bells May Conquer Their World.* The New York Times, Money&Business, Section 3, page 1. Sunday, April 22, 2001.

II. Two Types of Transport

A. "Collo." to the World/Interoffice facilities

Over a period of time, Mpower has made a concerted effort to identify sources of redundant fiber, dark fiber or otherwise, for transport and for network redundancy. At one point, Mpower had a team contacting possible sources throughout the country in an effort to identify the availability of desired routings and competitive pricing. Mpower also asked ILECs about the possibility of substantial "package deals" to obtain the desired redundant routing. The project was a failure. Mpower has concluded that there is no meaningful competition for such facilities and that often, one can't even buy one "leg" of a route from an alternative provider. In some instances, e.g. Las Vegas, NV, it was impossible even to piece together a desired route from any combination of providers. As a result of these efforts, Mpower also concluded that even if one could piece together the desired services, the result would be so fragmented that it would be totally unworkable and impossible to manage.

Further, the Three RBOCs would like to "have it both ways." On the one hand, they argue that special access and high capacity transport and loops, generally, are so competitive that they should be de-regulated. On the other hand, they clearly are trying to prevent IXCs from using EELs to avoid special access charges. If these markets were truly competitive, the RBOCs would just be trying to sell their products, not trying to protect their non-competitive rates and services from possible competition.

Impact/"Impair" Analysis. The standard for whether network elements must be unbundled is contained in 47 U.S.C. 251(d)(2)(A) & (B). The Commission is to consider "at a minimum, whether –

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

In the UNE Remand Order, the FCC explicitly stated the difference it saw between the two standards: "This 'necessary' standard differs from the 'impair' standard we adopt below because a 'necessary' element would, if withheld, *prevent* a carrier from offering service, while an element subject to the 'impair' standard would, if withheld, merely limit a carrier's ability to provide the services it seeks to offer."[7] The FCC further clarified that "withholding access to the element would prevent a competitor from providing the service it seeks to offer...because no practical, economic, and operational alternative is available, either by self-provisioning or from other sources"[8] whereas, under the "impair" standard, "failure of the incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer."[9]

For almost no services for which the FCC required unbundling did the ILECs claim proprietary elements (advanced intelligent network, "AIN," was an exception)[10] so the "impair" rather then the "necessary" standard generally applies. Nevertheless, it is clear from Mpower's experience that even the higher "necessary" standard would be met. Competition just has not provided the redundancy the ILECs argue for. Their analysis only applies to very large businesses in certain very large cities. As the QSI Analysis shows, the Tier 1 LECs operate over

7 UNE Remand Order, para. 46.
8 Id. at para. 44.
9 Id. at para. 48.
10 Id. at para. 32 & 41.

18,000 switches that are connected with each other by over 2.5 billion route miles of inter-office facilities and serve approximately 175 million end-users. Companies like Mpower could not provide the services they seek to offer without access to this vast ILEC network of interoffice transport.

Further, granting the Three RBOC petition would eliminate the rights of CLECs to use enhanced extended links ("EELs") – a step forward which should not be undone - and would block CLEC access to fiber of all kinds, e.g. dark fiber, lit fiber and access from the CO to the remote terminal ("RT"). Thus, this petition seeks to make an "end run" around the UNE Remand Order and the line sharing order.

B. "Collo." to Customer Premises/Local Channel Facilities

At this point in time, Mpower is a significant provider of xDSL services. Consequently, Mpower currently leases many copper loops. Mpower has, however, been evaluating various new products and technologies which would require the use of high capacity fiber loops for provisioning. Perhaps even more significant is that the technology being used and/or developed for transport of both voice and data is undergoing a "sea change."[11] Technology currently in use and/or being evaluated for use in the near future uses the same general methods for transporting both voice and data. That is, both voice and data are broken up into small segments or "packetized" for transport. There are, of course, differences in the necessary Quality of Service standards for voice and data, which affect the specific types of packets used, however, the new processes are substantially the same. Thus, in the very near future, companies like Mpower will

11 According to the International Telecommunication Union, World Telecommunication Policy Forum 2001 Final Report, dated 1/31/01, 2.1: "A fundamental paradigm shift has been underway in the telecommunications industry – a shift that has arguably brought about as dramatic a change in personal communications as the telephone did compared to the telegram. That change is a shift from traditional PSTN circuit-switched voice networks to packet-

be unable to reach their customers or even to compete at all without the availability of end-to-end loops, as UNEs, regardless of the technology in the loop.

Impact/"Impair" Analysis. The Three RBOC Petition[12] points to information indicating that approximately one in four commercial buildings is served by CLEC fiber. Obviously, even taken at face value, this means that at least 75% of all commercial buildings are not reached by fiber from a competitive carrier. Further, as the QSI Analysis points out[13], nearly 75% of all commercial buildings served by an alternative provider are served by one cable company, which offers local telephone service in a very limited number of its markets, i.e. 6-7 of the largest cities in the country. The second largest alternative provider of fiber to commercial buildings serves only approximately 12% of those buildings.[14]

The FCC standards for the impairment analysis, at 47 CFR 51.317(b), used to determine whether a non-proprietary network element must be made available to CLECs set out five criteria for determining whether lack of the element "materially diminishes" a CLEC's ability to provide services. Those criteria are:

(i) Cost

(ii) Timeliness

(iii) Quality

(iv) Ubiquity of alternatives

(v) Impact on network operations.

It is quite clear to Mpower that with such limited availability of fiber from alternative

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switched data networks, using Internet Protocol (IP) technology."
12 Three RBOC Petition at p. 4.
13 QSI Analysis at p. 4.
14 Id.

providers, competitive availability of access to commercial buildings is more "scattered" than "ubiquitous," at least for the small to medium-sized businesses Mpower seeks to serve. Also, this lack of ubiquity would have a tremendous impact on operations. Lack of ubiquity would put the "timeliness" and "costs" completely beyond the time frames and costs necessary for the operations of a company like Mpower. Mpower buys and installs its own switches and collocates in ILEC central offices but leases transport and local loops in order to serve its customers and meet its business plan. Without ready access to transport and loops, Mpower simply cannot serve its customers.

When read together, the Three RBOC petition, the Kellogg-Huber report and the Crandall Declaration suggest that despite the language of the petition, the RBOC's real interest is in special access, not DSL or other loops. Note, however, that the very definitions of high capacity transport and loops include "circuits at a level of DS-1 or higher."[15] A T-1/DS-1 circuit has a capacity of 1.54 Mbps. xDSL services all meet or exceed this capacity. The three major types of xDSL, i.e., SDSL, ADSL and RADSL, each have a range between 160 Kbps and more than 7 Mbps, depending upon the electronics at either end and the quality of the line. If special access is, in fact, the real interest of the Three RBOCs, then this must somehow be clarified very specifically.

III. Access Charge Model Analysis

The Three RBOC analysis of facilities that might be available to CLECs is based entirely on special access data. Special access is only a small portion of telecommunications services and those facilities are not indicative of alternative facilities that are available for possible use in

15 Three RBOC Petition at p. 1, fn 1.

providing local services. In fact, the Kellogg-Huber report attached to the Three RBOC petition is premised upon the position that these are two separate markets and distinct sets of end-users.

In the first pages, the Kellogg-Huber report explicitly states: "*First*, this report demonstrates that the market for special access service is distinct from the market for basic local exchange services from both a demand and supply perspective,"[16] and "*First,* the end users of special access service are different from those of basic local exchange service."[17] [Emphasis added.] The Kellogg-Huber report then goes on to adopt the Commission findings that "the customers for special access 'are IXCs and large businesses, not residential or small business end users.'"[18] [Emphasis added.]

Second, in defining the special access market, the Kellogg-Huber report makes three main points, each of which differentiates special access from basic local exchange service and makes clear that the report is not relevant to an analysis of basic local exchange service: 1) The "end users of special access service are different from those of basic local exchange service."[19] 2) The "suppliers of special access service are different from the suppliers of basic local exchange service."[20] and 3) "[S]pecial access service is provisioned and operated differently from basic local exchange service."21

Further, the Three RBOCs argue that the grant of pricing flexibility in diverse markets should be sufficient to show that carriers are not impaired in entering those markets. Not only does this argument ignore the fact that special access and local service exist in separate markets,

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16 Kellogg-Huber Report, p. 1.
17 Id. at p. 2.
18 Id.
19 Id.
20 Id. at p. 3.
21 Id. at p. 4.

it also generalizes far too broadly from the process of obtaining pricing flexibility. In fact, the FCC's decision to offer pricing flexibility for access services, based upon the amount of collocation, was appealed and ultimately, decided by the U.S. Court of Appeals for the District of Columbia in WorldCom v. FCC, 238 F.3d 449 (2001). The Court laid out the facts and rules fairly carefully. It pointed out, for example, that for Phase I relief, the ILEC had to show collocation in only 15% of wire centers within a MSA[22] and that "at least one competitor... rel[ies] on transport facilities provided by a non-incumbent LEC in each wire center relied on."[23] [Emphasis added.] These are fairly minimal standards even for special access. To argue that they are sufficient for the separate market for basic local exchange services is just not credible.

In addition, Phase I pricing relief hardly represents an uncontrolled or free market, as proposed by the Three RBOCs. With Phase I pricing relief, ILECs "may offer contract tariffs and volume and term discounts, while remaining subject to some price cap rules and tariff requirements."[24] Also, the Phase I relief at issue, based on the percent of collocation, applied only to dedicated transport services.[25] Other and much higher criteria apply to channel terminations or common line and traffic-sensitive services.[26]

Also, as shown by the QSI Analysis, the Three RBOC data have not been broken down into components that can properly be compared. The data are highly aggregated and do not separately account for inter-city, interoffice and local fiber miles. Further, the data do not account for the fact that CLECs tended to build their networks to serve larger customers in

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22 In the alternative, an ILEC could use wire centers accounting for at least 30% of revenues, which in this highly concentrated market could be even less than 15% of the wire centers.
23 WorldCom v. FCC, 238 F.3d 449, 455-56 (2001)
24 Id. at 455.
25 Id.
26 Id. at 456.

relatively limited locations or the fact that several CLECs have filed for bankruptcy in the last six months. Consequently, the Three RBOC Petition provides little, if any, support for the proposition that there is competitive availability for high capacity loops and transport, in general.

IV. Incremental De-Regulation – FLEX Contracts

A. Introduction

The 1996 Act is the context of our current discussions. Like all legislation, it is not perfect. It was, however, a thoughtful compromise, a "deal" which balanced important interests. De-regulation of long distance – a far less complicated process – has had more than fifteen years to develop the current level of competition. Local competition under the 1996 Act has had just barely five years. A lot of time, energy, thought and money have been invested in the re-structuring of local services, based upon the "deal" agreed upon and reflected in the 1996 Act. It is important to give it time to work.

B. Three RBOC Plan

The proposal outlined in the Three RBOC petition – which is also being sought in Congress by means of the Tauzin bill – would suddenly eliminate "advanced services"/"new technology" UNEs now.[27] In doing so, it would initiate a sudden leap from limited, partial and guided de-regulation to the chaos of an attempt at total de-regulation, without the incremental building process which, hopefully, will develop true competition over time. Such a plan would, among other things, open a Pandora's Box and lead to regulatory shock.

Again, there has been a failure to distinguish among different elements of the market. From a "big picture" standpoint, the telecommunications market is divided into three large

27 It is somewhat puzzling to Mpower that the Three RBOCs are pushing for an elimination of advanced services UNEs at the very time that several RBOC annual reports indicate that the RBOC wholesale business with CLECs is

pieces. At one end is residential services, urban and rural alike; at the other end is service to the country's largest businesses in the largest cities. In the vast middle ground is service to small and medium-sized businesses.

For residential services, replication of the distribution system is unlikely to take place in the foreseeable future. Prices are still capped and subsidized. For the biggest businesses in the largest cities, as demonstrated by the Three RBOC petition, more choices exist.

In the middle ground occupied by small and medium-sized businesses, there are no price caps and no subsidized pricing. There is, however, no replication of the distribution system either. Basically, there is little or no choice.

The Three RBOC petition would sweep away the last five years of regulatory efforts under the 1996 Act and replace measured de-regulation with an attempt to skip from monopoly network to a presumptive free market. Advocating such an extreme stance, of course, leads to questions about the range of possible alternatives. Among the possible long-term options are 1) UNEs alone; 2) structural separation of the various ILECs in order to provide more incentives for monopoly network providers to serve their wholesale customers appropriately; 3) UNEs as a "safety net," along with FLEX contracts as a step forward, as Mpower recently proposed to the FCC. (See fn 5) Further, over time, there will likely be meaningful ways of circumventing the ILEC monopoly distribution system, including fixed wireless, satellite, mobile wireless and/or cable solutions. Despite ILEC concern, however, these "solutions" are not generally available to substitute for the ILEC telecommunications distribution system for residential, small and medium-sized businesses.

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among the fastest growing sectors of their business.

Mpower believes the Three RBOC proposal is most imprudent at this critical juncture. The Three RBOC petition would eliminate the CLEC "safety net" just as competition has begun to build. It would circumvent the UNE remand order and the processes established in the line sharing and advanced services portions of this docket. If granted, this plan is bound to fail, if the idea is to develop competition, as opposed to returning to ILEC monopoly.

C. Reasonable Approach

If, or as, competition grows, staged de-regulation may be desirable and appropriate. Only minimal de-regulation may someday be possible. We are not yet at that point.

The Three RBOCs complain that current rules could discourage them from building facilities. One reasonable approach, which Mpower advocates, is to allow the ILECs the choice of technology, rate of deployment, etc. regarding networks as long as CLECs have access to those networks.[28] Another reasonable approach which Mpower advocates is to pull back on the idea of collocation in remote terminals ("RTs"), which is unlikely to be economically viable, but require end-to-end UNEs regardless of the technology in the loop.

The idea of end-to-end UNEs, regardless of the technology in the loop, is not just reasonable, it is critical to the future of CLECs. Further, SBC, in its Project Pronto, voluntarily offers such end-to-end access and has stated that this access is being offered at TELRIC prices. Thus, it not only can be done, it is being done. Mpower's only concern is that CLECs should not have to rely upon the "voluntary" commitments of ILECs for such vital network components. In order for CLECs to make long-term, rational business decisions, ILECs must be required to provide such end-to-end access as UNEs, at TELRIC prices.[29]

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28 Mpower Reply Comments in FCC Line Sharing Docket, pp. 4, 3.

29 One can speculate on how long this "voluntary" commitment by SBC to provide end-to-end access at purported

A third reasonable approach - and these approaches are by no means mutually exclusive – is for the FCC to allow what Mpower calls "FLEX Contracts." Briefly, FLEX Contracts would allow ILECs and CLECs to negotiate for volume and term discounts and a broad range of business terms that make sense to the parties. They would be subject to non-discriminatory "opt-in" by other parties but would not be subject to "pick and choose." They would offer wholesale business-to-business solutions and they should result in "win-win" agreements that could be useful to any similarly situated parties.

Interestingly, after Mpower began to work on the idea of FLEX contracts, it encountered information on the Phase I and Phase II special access contract tariffs.[30] It certainly appears that Mpower's FLEX contracts have at least a partial role model in the FCC's regulations for allowing ILECs more flexible pricing mechanisms. [Discussed briefly in Section III, above.]

D. Critical Juncture

Mpower believes that we are at a critical juncture in the telecommunications industry today and that thoughtful, creative and business-oriented solutions are needed. Two things are happening. ILECs are concerned about the impact of other technologies such as satellite, fixed wireless, cable and IP. At the same time, the wholesale market for telecommunications services is building rapidly.

ILECs have asked for "parity" of regulation with cable and other technologies. This could mean regulating other types of providers of "high tech" products or it could mean more rapid de-regulation of the telecommunications industry. In our opinion, neither makes much sense at this time. Of course, Mpower, as a CLEC, would be happy to have more options, e.g.

TELRIC prices will last if this petition is granted.

30 See, e.g., WorldCom v. FCC, 238 F.3d 449, 455 (U.S. Ct. App., D.C. Cir., 2001)

required cable open access, if that is what the ILECs succeed in accomplishing.

The most immediate issue, however, is how to develop effective competition in the telecommunications industry. Mpower believes that the most sensible answer is to emphasize wholesale markets for telecommunications services. These markets are already developing rapidly.[31] Encouraging CLECs to roll out vibrant products promptly could help to fill the ILEC network "pipes" and provide other technologies with the effective challenge the ILECs desire.

Mpower has suggested a phrase to characterize such an emphasis on wholesale: "Retail, wholesale or no sale." In essence, the ILEC has three alternatives in providing telecommunications services to the public. It can provide retail services; it can provide wholesale services; or it can lose out on one or both of those sources of revenue. Certainly, the most effective approach is to continue to emphasize retail sales while beginning to emphasize wholesale services as well.[32]

In this context, FLEX contracts could operate as one form of incentive for ILECs and CLECs to make long-term commitments to benefit both parties and the consumer. In emphasizing wholesale services, it is also possible to reduce the risk of deploying new networks. For example, forecasting and coordination of network planning both allow the ILEC to tailor its network to anticipated demand. Such an approach would benefit all parties. Such an approach would also represent a phased process which could develop more direct competition, as opposed to niche competition or niche monopolies.

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31 According to various sources, including BellSouth and other ILEC annual reports.

32 We understand that several RBOCs are now commissioning their sales forces to sell to CLECs – a tacit recognition that the RBOC perception of the wholesale market is shifting from a regulatory obligation to a business opportunity.

E. Industry Solutions

In light of Mpower's analysis, above, Mpower believes that now is the time to stop using the regulatory process for "war" and to develop the tools to forge partnerships and compromises. The on-going regulatory "war" is increasingly bad for consumers and wastes incredible amounts of resources for CLECs, ILECs and regulators.

Who should lead the way toward industry-wide solutions? Mpower notes that the USTA recently decided to expand its membership to include CLECs. It made this decision with the determination to encourage more dialogue and consensus, to try to take an industry-wide view and to spearhead industry-wide solutions where possible. Surely this is a key to a model whose time has come. Technology is moving too fast for a truly effective regulatory process in the traditional sense. Despite regulators' best efforts, existing processes are cumbersome because they grow out of the old rate-of-return regulatory process. Further, government-imposed structures, by definition, must exist where markets and market-based solutions do not. Mpower believes we are at a juncture where industry-fostered solutions are needed and where industry trade associations could and should lead.

V. Conclusion

Mpower has shown that the Three RBOC data do not support the requested relief. The data deal exclusively with special access, which according to their own Kellogg-Huber report, is a separate market from high capacity loops and transport. Mpower has also shown that, in fact, there is not ubiquitous competitive access for small and medium-sized commercial customers. These are precisely the customers served by companies such as Mpower. Consequently, companies such as Mpower would not only be "impaired" without access to high capacity ILEC

loops and transport but absolutely could not serve their customers. The petition of the Three RBOCs should be denied.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of the	)	
Local Competition Provisions	)	CC Docket No. 96-98
Of the Telecommunications Act of 1996	)	
	)	
Joint Petition of BellSouth, SBC, and Verizon	)	
for Elimination of Mandatory Unbundling of	)	DA 01-911
High-Capacity Loops and Dedicated Transport	)	

DECLARATION OF AUGUST H. ANKUM
ON BEHALF OF
MPOWER COMMUNICATIONS CORP.

PURPOSE AND SUMMARY OF ANALYSIS

The Three RBOC Petition by BellSouth, SBC and Verizon ("the Three RBOC Petition"), and the attached Kellogg-Huber Report as well as the Declaration of Robert W. Crandall ("Crandall Declaration"), assert that the ILECs should be relieved from their obligation to unbundle high-capacity loops and transport facilities. The conclusions in the Three RBOC Petition rest on two arguments: (1) high-capacity loop and transport facilities are available from alternative sources; and (2) competitors have sufficient resources to self-supply. This analysis demonstrates that both arguments are incorrect.

The first section of this analysis presents data to show how vast and ubiquitous the scope of the ILECs' networks is compared to CLEC networks. The Tier 1 LECs operate over 18,000 switches that are connected with each other by more than 2.5 billion route miles of inter-office facilities and serve approximately 175 million end-users. The data on capacity from alternative sources presented in the Three RBOC Petition is highly aggregated: it fails to address the issue of ubiquity; does not differentiate between local, interoffice, and intercity fiber networks; and ignores that there is a significant amount of duplication of fiber networks in certain markets so that the data overstate the scope of fiber facilities from alternative providers.

The second section of this analysis addresses the assertion that competitors can self-provide the necessary high-capacity facilities. Given the general financial state of the competitive telecommunications industry and the tremendous uncertainty over its long-term viability, this claim is simply wrong. For the interexchange carrier ("IXC") and competitive local exchange carrier ("CLEC") industries,[1] the total decline in market capitalization from December 1999 through April 2001 is a staggering *$405 billion, or 64%.* The decline for just CLECs, excluding IXCs, is *$122 billion, or 69%.* By contrast, the four RBOCs experienced declines in market capitalization over the same period of $79 billion, *or only 16%,* a percentage roughly comparable to the decline in the S&P 500 Index.

[1] Tables 2.1 through 2.3 in Section 2 list the CLECs, IXCs, and RBOCs for which changes in market capitalization were calculated.