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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 14, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Notice of Ex Parte Presentation
Commission Consideration of Application Under the Cable Landing License Act, IB 00-106

International Settlement Policy Modification Request for a Change in the Accounting Rate for International Message Telephone Service with Mexico ARC-MOD-20010530-00123

Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC 96-98

Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC 98-147

Promotion of Competitive Networks in Local Telecommunications Markets, WT 99-217

Dear Ms. Salas;

Yesterday, the attached was submitted to Chairman Michael Powell, Commissioner Gloria Tristani, Commissioner Kathleen Abernathy, Commissioner Michael Copps, Commissioner Kevin Martin, Matthew Brill, Kyle Dixon, Sam Feder, Jordan Goldstein, Adam Krinsky, Lauren Maxim Van Wazer, Deena Shetler, Bryan Tramont, Peter Tenhula, and Monica Shah Desai.

Sincerely,

Jodi S. Sirotnak

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The Federal Communications Commission

Issues, Opportunities and Challenges

AT&T

THE FEDERAL COMMUNICATIONS COMMISSION

Issues, Opportunities and Challenges

This is a critical period for the Commission. Although it has been five years since passage of the Telecommunications Act of 1996 ("Act"), the principal goal of the Act – bringing competition to all local markets – remains largely unrealized. At the same time, some traditionally regulated markets have become intensely competitive but regulatory reform has yet to follow. These events create significant challenges and opportunities for the Commission to ensure that the goals of the Act – particularly competition in local telephone markets and rapid, cost-effective, and wide deployment of advanced services – are fulfilled for the benefit of consumers and the economy. Below, AT&T outlines the most pressing and important issues facing the Commission, and recommends the substantive rules and policies the Commission should adopt in those areas to promote competition and advance the public interest. Separately, AT&T provides a detailed discussion of each of the issues discussed below, along with references and citations to key precedents, briefs and orders.

I. The Commission must exercise its full authority to ensure that local markets are open – and remain open -- to competition.

In the Telecommunications Act of 1996 (the "Act"), Congress recognized, at least in the near term, that it was impossible for new entrant competitive local providers ("CLECs") to duplicate the ubiquitous local networks of the incumbent local telephone companies ("ILECs"). Thus, in § 251 of the Act, Congress mandated that ILECs lease the piece-parts of their networks -- "unbundled network elements" or "UNEs" -- to CLECs at efficient, cost-based rates and on non-discriminatory terms and conditions. In this way, CLECs would be able to use ILEC facilities to provide retail competition to the ILECs not only for traditional voice services but also for broadband services. This is an essential first step toward sustainable facilities-based competition, and it is also essential if ILECs are ever going to enter local markets outside their historically franchised territories to compete against each other. Congress further held out a carrot to the Bell Operating Companies ("BOCs") that complied with the Act's mandates and the Commission's rules. Pursuant to § 271 of the Act, BOCs that irreversibly open their local markets to competition are permitted to enter the long distance market.

But little local competition has emerged to date. The BOCs have found the competitive and low-margin long distance market an insufficient incentive to surrender their lucrative local monopolies, and instead have engaged in a campaign of non-cooperation and litigation. Most critically, the BOCs have been successful in getting state regulatory Commissions to set rates for unbundled network elements that are well above cost, making it economically impossible for new entrants to compete. Many state commissions have also permitted the BOCs to impose unreasonable limitations on CLECs' ability to access and use network elements, particularly limitations designed to impede competition for advanced services. And even where network element rates are set at efficient levels and no unreasonable use restrictions have been imposed, the BOCs have avoided competition by refusing to provision network elements on a reasonable basis or by degrading the quality of the access CLECs receive. Moreover, the BOCs have not entered other ILEC territories to provide competitive services to customers, despite the fact that Act removed any impediments they may have had to providing out-of-region telecommunications services.

As a result, five years after Congress passed the Act and after unprecedented investments by CLECs, the incumbents maintain bottleneck control over nearly a hundred million captive local phone customers, and their persistent monopoly power shows no sign of weakening. To the contrary, as the Commission's own studies confirm, the rate of competitive gains is slowing and there is mounting evidence that the incumbents are on the verge of remonopolizing all telecommunications services in their franchised local territories. While some cable companies like AT&T have begun the arduous and expensive process of upgrading and enhancing their cable networks to make them capable of providing two-way telephony and other services, the slow development of packet-voice technology means that, for consumers, a broad-based telephony offer remains on the horizon rather than having become reality. And while some consumers have eschewed wireline telephones for wireless products in their entirety, service quality, expense and availability issues mean that wireless technology as replacement for wireline remains a hope for the future rather than the present. The only set of competitors poised then to offer broad-based competition to the incumbents today is the CLEC community, which is rapidly shrinking as the capital and financial markets are abandoning them, while the incumbents, especially the merged BOC monoliths, are extending their dominance in the local phone market to advanced services and Internet access, with their monopoly lines of business providing the muscle and fiscal health that the CLEC industry lacks.

All of these facts demonstrate that market forces are not yet sufficient to replace the role of regulation in the marketplace. While "de-regulation" may be the theme du jour, policies that result in a less competitive environment, which requires more regulation later, are not in fact de-regulatory. Congress gave the Commission ultimate authority and responsibility to implement the Act's local competition provisions and to assure that its implementing rules are effective and enforced. The Commission's broad authority extends not only to rules for the efficient pricing of network elements, but also to critical issues governing when and how those network elements must be provisioned to CLECs. Adherence to Congress' mandates in the Act requires the Commission to take an active and direct role in ensuring that local markets are in fact fully opened to meaningful competition.

To ensure that local markets are in fact opened and remain open for competition from CLECs and from ILECs in each other's service territories, the Commission must, at a minimum:

<u>Eliminate Restrictions on Access to, and Use of, UNEs</u>

- Ensure CLECs have necessary access to all network elements by modifying rules that limit the availability of unbundled local switching to customers with 3 or fewer lines. Failure to do so will significantly hamper CLECs' ability to provide competitive service to small business customers;

- Remove all restrictions on the use of combinations of the loop and transport network elements. Under the Commission's current interim rules, CLECs are prohibited from obtaining a combination of unbundled loops and unbundled transport (a combination known as an enhanced extended link, or "EEL") unless they can demonstrate to the ILEC that they have "won" a certain percentage of the end user access lines and the customer is making a substantial amount of local "voice" telephone calls (as the ILEC defines that term) over those lines. These interim restrictions (i) are flatly contrary to the Act, (ii) are inconsistent with the Commission's own prior findings, (iii) thwart competitive entry, (iv) generate excessive monopoly profits for the incumbents and (v) lead to higher consumer prices;

- Ensure that states have properly implemented the Commission's forward-looking pricing methodology for both recurring and non-recurring network elements which permit competitors to enter local markets and provide competitive services to all customers; and

- Ensure that new entrants have the ability to obtain nondiscriminatory access to next generation digital loop carrier technology as unbundled network elements at cost-based rates. Absent practicable, cost-based access to this technology, competition for advanced services will be seriously impaired.

<u>Ensure Pro-Competitive Performance Metrics and Performance Plans</u>

- Ensure the establishment of clear performance metrics to encourage the timely, effective and nondiscriminatory provisioning of network elements that are of appropriate quality and are provided in a manner that permits CLECs to compete. Equally as important, the Commission must ensure that the BOCs adopt and adhere to clearly-defined and stringent performance plans that generate substantial and immediate consequences for discriminatory performance. Very few states have acted to date to implement such plans, yet competitors desperately need such plans everywhere they are providing competitive alternatives.

- Ensure the establishment of clear performance metrics to encourage the timely, effective and nondiscriminatory provisioning of special access facilities as well. Special access circuits have been, and continue to be, used by CLECs for both interconnection and in place of network elements as a means to permit competitors to provide services to customers. Even in the few states which have established performance plans for network elements, these facilities fall outside the scope of those because the circuits are inter, rather then intrastate. Also as important, the Commission must ensure that the BOCs adopt and adhere to clearly-defined and stringent performance plans that generate substantial and immediate consequences for discriminatory performance

<u>Require Nondiscriminatory Building Access</u>

- Ensure that new entrants can obtain nondiscriminatory access to multi-tenant environments (MTEs) so the tenants of such buildings, which include approximately 24% of residential telephony subscribers [and over 750,000 office buildings] nationwide, can enjoy the benefits of competitive local exchange services.

<u>Protect Collocation Rights</u>

- Protect CLECs' collocation rights by ensuring that CLECs can: (1) collocate modern multifunctional equipment, including equipment that supports advanced services; and (2) cross-connect their collocated equipment and facilities to the collocated equipment and facilities of other LECs in the same central office.

Exercise Its Enforcement and Section 271 Authority

- Commit to strict and expeditious enforcement of the Act and Commission rules through complaint and other enforcement proceedings and demonstrate its willingness to impose meaningful penalties and to issue cease and desist orders for any violations of the local competition requirements.

- Ensure full compliance with its existing market-opening rules before granting an application for Section 271 relief, particularly the critically important rules that govern the prices ILECs charge for network elements and ensure competitive access to DSL-related network elements.

Moreover, the Commission must act quickly. Many new entrants are on the verge of bankruptcy. Not all CLECs can be expected to succeed, but if market forces are to replace regulation in telecommunications markets as the Act intended, the marketplace must provide an environment in which conditions permit a significant number of competitors to have the ability to survive and prosper. Without doubt, the BOCs' consistent ability to frustrate efforts to enforce the Act's commandments has played a significant role in the CLECs' failure and the capital markets' loss of confidence in the CLECs' ability to prosper. Every potential competitor needs some form of local network access and technical support from the BOCs, who have impeded new competitors through high wholesale prices and by slow-rolling the delivery of access to the vital network elements and connections competitors need. Predictably, this has discouraged new investment in the slumping telecom sector and driven smaller competitors out of business -- including scores of high-speed DSL Internet service providers in the last few months alone.

At the same time, the BOCs are strengthening their hand through merger and consolidation. The eight largest incumbents have become four BOCs, controlling more than 93% of the nation's voice-grade equivalent lines in their regions, and they are extending that dominance into the provision of DSL service. BOCs now account for over 80% of all DSL lines deployed. In the residential arena, the numbers are even more startling, with the incumbents providing a full 90% of DSL services.

It is clear that the competitive local market is not mature enough to police ILEC conduct. In the absence of market forces controlling behavior, the Commission must exert regulatory pressure to ensure that markets become and stay open. Acting now is the appropriate "de-regulatory" response because failure to act swiftly and decisively now will only result in the need for much more extensive regulation later. The BOCs continue to control the pipeline into businesses and homes, protected by the endless legal, procedural and technical roadblocks that encumber CLECs' ability to interconnect with their existing networks and use their network elements. These problems can only be resolved through continued oversight of monopoly markets and vigilant enforcement of the market-opening provisions of the Act.

II. The Commission should economically rationalize its inter-carrier compensation and universal service subsidy rules.

Competition in telecommunications markets depends on the existence of an economically rational and competitively neutral system of inter-carrier compensation and universal service subsidy payments. For this reason, the Act mandates cost-based interconnection and the elimination of implicit subsidies. In today's "network of networks," this is critical because much of the cost of providing telecommunications and related services involves direct and indirect payments to other carriers. In this environment, economically rational and competitively neutral payment rules are a critical precondition to sustainable competition.

The Commission has taken several steps in its attempts to rationalize the various inter-carrier compensation schemes within its jurisdiction, including "reciprocal compensation" for the delivery of local traffic, interstate "access charges" paid by long distance carriers to large (price cap-regulated) ILECs and to CLECs, and the "settlements" payments that occur with respect to some international calls. For non-rural LECs, the Commission has implemented a new Universal Service Fund ("USF") designed to promote universal telephone service by providing explicit subsidies to carriers that serve rural and other high-cost customers (the "high cost fund"). Although this system is sound, the Commission will need to better explain it based on a recent remand from the United States Court of Appeals for the Eleventh Circuit. In addition, the Commission has established a mechanism to provide support to schools and libraries (the "e-rate" program).

But there is much significant and urgent work left to be done. First, the Commission needs to complete its reform of the access and universal service systems for rural ILECs. In May 2001, the Commission took initial steps toward reform by increasing the level of universal service support for these companies, but it failed to require complementary reductions in these companies' access charges. These reforms are needed because, in their absence, they create unsustainable market pressure on interexchange carriers who have concomitant rate averaging requirements and they distort the introduction of competition into local markets. In addition, in May 2001, the Fifth Circuit Court of Appeals made clear that the Act requires the elimination of all implicit subsidies that remain embedded in access charges. Therefore, there can be no further delay in resolving this matter.

Fortunately, the Commission has before it a framework to complete these reforms that was developed by a task force created under the auspices of a Federal-State Joint Board and comprised of representatives from the Commission, State commissions, consumer groups, ILECs, and interexchange carriers. Implementation of the principles established by this Rural Task Force ("RTF") will result in the removal of all existing subsidies from access rates, by making a number of significant changes to rural ILECs' access charges that parallel the changes adopted under the Commission-approved "CALLS" Plan for non-rural ILECs. Conversely, the Multi-Association Group ("MAG") Plan on access reform would retain significant subsidy embedded in the MAG proposed rates. The RTF access reforms should be addressed promptly, in advance of the broader proposals in the MAG plan, which would also seek to establish a system of incentive regulation for the rural ILECs.

Second, the Commission should complete its reform of USF contribution mechanisms. Earlier this year, the Commission took interim steps to reduce distortions created by the mechanism that required interstate carriers to make contributions based on their reported interstate revenues from the *prior* year. The interim solution was to reduce this lag to 6 months. Though a welcome and significant improvement, the 6-month "lag" continues to disadvantage carriers whose interstate revenue base is declining, because they must collect their contributions from a smaller customer revenue base than the one upon which the fund contribution was based. The only way to do so is to charge their end users higher line-item rates. Conversely, carriers with an increasing interstate revenue base are able to recover their contributions by charging their customers a *lower* line-item rate. This is particularly insidious in the competitive long distance market as the BOCs begin to offer interLATA service and have no obligation to make any contributions on the additional interLATA revenue at all for 6 months after gaining entry to long distance markets. The net result is that traditional interexchange carriers and their customers are required to bear artificially higher costs.

Coincident with reducing the lag period to 6 months, the Commission initiated a proceeding to reform entirely the manner in which carrier contributions are assessed. In order to establish a competitively neutral support system by the end of this year, the Commission should eliminate the remainder of the lag by replacing carrier USF funding with a current line-based assessment and pass-through to the end-user of the assessed surcharge amount.

A properly crafted surcharge should, moreover, establish an appropriately broad base for USF funding. In its original *Universal Service Order,* the Commission provided that the contribution base for the e-rate program was to be total telecommunications revenues. In other words, all telecommunications carriers providing interstate telecommunications services were required to contribute a percentage of their *total* telecommunications revenues (interstate and intrastate) annually to the portion of the USF that funds the e-rate program. The United States Court of Appeals for the Fifth Circuit struck down this aspect of the *Universal Service Order* in 1999, on the grounds that the inclusion of intrastate revenues in the contribution base was beyond the Commission's statutory authority. The net effect of this ruling was to shift almost a billion dollars of annual funding onto carriers that provide predominantly interstate services (*i.e.*, the long-distance carriers). In addition, the Commission improperly exempted carriers whose revenues are derived primarily from international calls from responsibility for contributing to the USF fund.

This has created a situation that is neither competitively neutral nor stable. Under this system, one set of carriers is bearing almost the entire burden of paying for the multi-billion dollar universal service program. This, in turn, greatly hampers their ability to compete with telecommunications carriers that provide predominantly intrastate or international services. Moreover, this system is inherently unstable, because distinguishing interstate revenues is increasingly impossible in the Internet age. Indeed, competition is increasingly spurring carriers to offer bundles of services at a single price, which makes identifying discrete interstate revenues inherently arbitrary and invites abuses. Moreover, the differing impact of universal service contributions on carriers has created an undesirable variation in carriers' line-item recovery amounts which creates confusion among consumers about their telecommunications bills. To address these developments, the Commission should replace the existing system with a flat per-line USF funding mechanism based on current data, prescribe a pass-through to the end user of the assessed surcharge amount, and absolve individual carriers of the risk of non-recovery of their USF obligations. Requiring all carriers to pass through a prescribed universal service contribution amount and relieving individual carriers of the risk of non-recovery by spreading that risk evenly through the industry promotes transparency, predictability and competitive neutrality.

Third, the Commission should be increasingly vigilant in monitoring and addressing the ILECs' deteriorating performance in the provisioning of access services, especially special access. ILEC provisioning performance has declined markedly in recent years, resulting in competitive harms, a decrease in economic efficiency, and increasing customer dissatisfaction and complaints. In that regard, contrary to proposals in the Commission's 2000 Biennial Review proceeding, the Commission should maintain existing carrier reporting requirements relating to provisioning performance, and consider steps to stem the decline in the quality of monopoly access services, including implementing a national set of performance benchmarks to which all ILECs must adhere and adoption of clearly-defined and stringent performance plans that generate substantial and immediate consequences for discriminatory performance. Moreover, the Commission should promptly respond the recent invitation from the New York Pubic Service Commission to establish a workable federal/state partnership to assure that ILECs provision special access services in a commercially reasonable and nondiscriminatory manner.

III. The Commission should reduce or tailor its regulations so they do not impede competition, slow broadband deployment, or distort competitive markets.

At the same time that Congress dictated in the Act that the Commission use a broad array of regulatory tools to pry open monopoly-controlled local telecommunications markets and to protect consumers from ILEC anticompetitive abuses, it also directed the Commission to eliminate unnecessary and counterproductive regulations in competitive markets. Thus, it is equally important that the Commission refrain from imposing new regulations on nascent or robustly competitive markets.

Long Distance. Contrary to the pro-competitive regime Congress had in mind when it passed the Act, the Commission continues to retain outdated regulations in the vigorously competitive long distance market. For example, the Commission continues to require rigid conformance to the Act's rate averaging requirements by long distance carriers without taking into account important competitive considerations. The Commission's current regulations prevent nationwide long distance carriers, which must average their rates based on nationwide costs, from competing effectively with the ILECs that are entering the long distance market in geographically limited areas based on their local costs. The Commission should exercise its broad forbearance authority to permit nationwide long distance carriers to deaverage their rates at least in those markets in which an ILEC is providing long distance service.

IV. International Issues.

Three key international issues pending before the Commission are: (1) the Worldcom request to approve excessively high settlement rates with Telmex, Mexico's dominant carrier; (2) enforcement of the Commission's benchmark settlement rate order; and (3) the pending NPRM on submarine cable licensing.

Mexico is by far the largest recipient of US settlement outpayments, and has historically been very slow to offer reduced accounting rates to US carriers. Recently, Worldcom and Telmex filed a new accounting rate agreement that offers only minimal reductions over a three year period, and provides no assurances that cost-based rates will be achieved in 2004 and beyond. This deal only locks in the subsidy flow to Telmex at the expense of US businesses and consumers, and should be rejected.

The Commission's benchmark order has been a key catalyst for lowering settlement rates, producing lower costs for US carriers and lower prices for US consumers. The Commission should build on this momentum by continuing to enforce benchmarks. Furthermore, the Commission should act quickly against recalcitrant countries that retaliate against or "whipsaw" US carriers seeking to negotiate lower settlement rates. The Commission should also "truncate" a recent deal signed by the US carriers with India to insure it is benchmark complaint.

The Commission's NPRM on submarine cables proposes mechanisms under which a submarine cable applicant could qualify for streamlined processing. As reflected in the near-unanimous industry comments, these broad proposals would in fact only add regulatory burdens. Today's submarine cable marketplace is growing rapidly, and, despite claims to the contrary, "closed" or private investment cables have not been foreclosed from the market. In fact, in 2002, 100% of new cable capacity is projected to be on private cables. While these broad mechanisms are unnecessary and should not be required, it is appropriate that the Commission apply the current Section 214 process to its approval of submarine cable applications.

THE FEDERAL COMMUNICATIONS COMMISSION
Issues, Opportunities and Challenges

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III. Regulation and Competitive Markets

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A. International Settlement Rates

B. Submarine Cable Notice of Proposed Rulemaking

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Local Competition Issues

A. Local Competition

Access to incumbent LEC local switching as an unbundled network element is critical to support competition for both residential and small-to-medium sized business customers. Unbundled local switching is the heart of the "UNE-Platform," which has proven to be the most viable short-term entry strategy, even for competitors who are building their own networks. Unfortunately, the 3-line limit established in the *UNE Remand Order* for access to local switching as an unbundled network element (and at cost-based pricing) is clearly insufficient to accomplish the statutory goal of full and effective competition for residential and small/medium sized business customers. In resolving the Petitions for Reconsideration in this proceeding, the Commission should ensure that UNE-P is available to all customers with fewer than 20 lines access lines.

AT&T is one of the largest competitive local exchange carriers, having invested many billions of dollars to develop its own local service infrastructure to serve residential and business customers. But AT&T has found that access to unbundled local switching is crucial to its ability to serve residential and small/medium sized business customers for two reasons. First, despite AT&T's significant investment in local switches, it cannot afford to deploy sufficient numbers of switches to approach nationwide coverage and reach its existing customer base (an issue small CLECs without an existing customer base do not face). Therefore, UNE-P provides a vehicle that allows AT&T to reach its customers with a local service offer in advance of being able to deploy equipment or facilities and to grow that base until it is economically feasible to place a new switch. Second, the ad hoc "hot cut" process that is typically required to move a customer's loop from an incumbent LEC's switch to a competitor's switch is still poorly developed and has led to an inordinate number of provisioning errors and/or service problems (as high as 40%), particularly for the higher volumes of loop orders that AT&T would typically expect to place. All customers, but especially business customers, are sensitive to these potential problems and often shy away from using a competitor if they fear any possibility of service problems when they change their local carrier. Thus, AT&T's plans include using UNE-P as a transition vehicle to enter a market where it has its own switch until it accumulates enough customers in a central office to permit the use of a managed cutover process that minimizes the problems associated with hot cuts.

Although a handful of small CLECs have claimed that they do not need access to unbundled local switching to achieve their entry goals to serve small business customers, the vast majority of CLECs, large and small, seeking to serve that customer segment have demonstrated that unbundled local switching remains a key component of carrier entry strategies.[1] In addition to the points raised by AT&T above, these carriers note that they

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1 See PACE Coalition, Birch Telecom, McLeodUSA, CompTel, New South Communications, ASCENT, AT&T and Worldcom *ex parte* letter from Genevieve Morelli to Magalie Roman Salas in CC Docket 96-98, dated June 22, 2001; PACE Coalition *ex parte* letters from Genevieve Morelli to Magalie Roman Salas in CC Docket No. 96-98, dated June 29, 2001 and May 1, 2001; PACE Coalition, InfoHighway Communications Corporation and Z-Tel Network Services *ex parte* letter from Genevieve Morelli to Magalie Roman Salas in CC Docket No. 96-98, dated April 16, 2001; PACE Coalition, Coprecomm *ex parte* letter from Genevieve Morelli to Magalie Roman Salas in CC Docket No. 96-98,

B. **Loop-Transport Combinations Must Not be Subject to Use Restrictions.**

It is critical that the Commission act promptly to remove the existing temporary limitations that (1) prevent competitors from using combinations of the loop and transport network elements (together with any associated multiplexing) to provide special access service and (2) prohibit the "co-mingling" of local and access services on the same network elements. Continuation of these restrictions is inconsistent with the Commission's rules and Section 251 of the Act and has the effect of taxing customers and competitors billions of dollars each year, *i.e.*, the amount of monopoly profits that incumbents are able to extract in their non-cost-based special access rates. Moreover, permitting incumbent LECs to refuse to provide CLECs with UNEs based on an ILEC's interpretation of what services the CLEC will provide erects a practically insurmountable barrier to entry that will be impossible for CLECs to overcome.

In its November 1999 *UNE Remand Order*, the Commission correctly found that new entrants are impaired in their ability to offer service if they do not have the ability to obtain access to incumbent LEC loops and transport, regardless of the capacity of the facilities used to provide those functionalities.[3] Thus, the Commission properly held that loops and transport of any capacity are required to be made available as unbundled network elements. In addition, Commission Rule 51.307(c) requires incumbent LECs to provide requesting carriers with access to all of the features, functions and capabilities of an unbundled network element "in a manner that allows the requesting carrier to provide any telecommunications service that can be offered by means of that network element." (*See also* Act, § 251(c)(3)).

Despite those rulings, the Commission's *UNE Remand Order* and its companion *Supplemental Order* held on an interim basis that competitors could not use *combinations* of those same loop and transport elements to provide special access services until the Commission had the opportunity to examine the impact of such a policy. The incumbent LECs supporting that restriction had argued, among other things, that losing special access revenues on such a large scale would have a significant negative impact on their business. This is an important competitive issue, because incumbents' rates for special access services are far above (up to double) their costs, and they generate a multi-billion dollar subsidy for the incumbents each year.[4] The Commission did provide an exception

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3 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 99-238, released November 5, 1999 ("UNE Remand Order"), ¶¶ 184-187 (loops), 323-24 (transport). Loops provide connectivity between customer premises and LEC central offices. Transport (interoffice transmission facilities) provide connectivity between carriers' wire centers or switches. 51 C.F.R. § 319(a)&(d).

4 It should also be noted that even though the incumbents have been given pricing flexibility for special access services in many areas, their prices have remained essentially unchanged, further demonstrating their market power. In addition, forcing competitors to purchase special access services rather than network elements typically subjects them to poor provisioning treatment by the incumbents. For example, the New York Public Service Commission has found "based on the record, that Verizon's provisioning performance for special services is significantly below Commission targets; that Verizon treats other carriers less favorably than its end users; and that Verizon remains the dominant provider of

to that restriction if the CLEC was able to satisfy the incumbent LEC that it was providing a significant amount of local service to a particular customer. However, the requirements for meeting the exception standard make it nearly impossible for CLECs to comply, even when they are in fact providing a significant amount of local service over the affected circuits.

The Commission initially stated that it would resolve this issue by June 2000. However, instead of doing so at that time, it issued a clarification order maintaining the *status quo* and providing additional detail on what constitutes a "significant" amount of local exchange service, creating "safe harbors" for qualifying under the exception it carved out in 1999. In addition, CLECs were supposed to be able to self-certify to the ILEC that they qualified for one of those safe harbors. Notably, in that Order, the Commission also restricted carriers from "co-mingling" local and access services on the same incumbent LEC facilities, even though there is no technical basis for such a limitation, and even though the incumbents have always been able to use any of their facilities to provide any service they choose. The effect of that prohibition is that carriers who have a pre-existing special access base, such as AT&T and WorldCom, must create a separate network in order to avail themselves of UNE rates for those facilities. As a practical result, those facilities are unavailable to AT&T at UNE rates, even when it is using them to provide a "significant amount of local exchange service."

The record clearly shows that there is no basis in law or fact supporting the interim limitations. The Commission's individual findings of impairment regarding loops and transport in the *UNE Remand Order* are clearly correct. Following the analytical path laid out by the Supreme Court, the Commission properly found that competitors in general cannot find, deploy, or use comparable alternatives to either of these elements. Moreover, it is also undisputed that the loop and transport elements used to provide local service are *exactly the same facilities* used to provide special access services, which are clearly "telecommunications services." Thus, whether these elements are looked at individually or in combination, the answer to the "impairment' inquiry under § 251(d)(2) must be the same. The Act requires that CLECs obtain unbundled, cost-based access to those facilities in order to compete with incumbents in the provision of all telecommunications services. In order for consumers to see the benefits of competition, the Commission must enforce the cost-based access to network elements required by the law.

Incumbents have recently tried to muddy the waters in the use restriction proceeding by submitting a Joint Petition seeking removal of high capacity loop and transport facilities from the list of available unbundled network elements. Moreover, in an attempt to bolster their position in both dockets, the incumbents placed on the record an unsworn "fact report" prepared by one of their lead attorneys that purports to show that competitors have access to alternative facilities. However, each of the key conclusions in that report has been directly refuted by sworn evidence from AT&T (and

facilities for special services." Transcript of Proceedings, New York State Public Service Commission, May 23, 2001, pp. 22, 29.

additional data from others) showing that: (1) the data relied on by the incumbents is misleading at best and often flat wrong; and (2) real-world practical considerations (including, for example, problems in obtaining access to rights of way and building access) preclude even large carriers such as AT&T from constructing or otherwise obtaining alternatives to incumbent LEC facilities, regardless of the capacity of such facilities.[5] Indeed, a critical fact that even the incumbents ultimately admit is that the percentage of competitive facilities in the real world is virtually unchanged from the time that the Commission made its initial determination in the *UNE Remand Order*.

Apparently recognizing the frailty of their fact "evidence," the incumbents belatedly submitted on April 30, 2001 a theoretical "study" prepared by an economist that purports to show the theoretical likelihood that a competitor could build its own high capacity facilities to serve some high use customers. AT&T's June 11, 2001 response to this "study" shows that it is based on a series of undocumented models and, more important, that the assumptions underlying these models ignore the real-world problems that CLECs face, including an ever-dwindling source of capital for construction and totally untenable assumptions regarding CLECs' ability to win and retain customers. Thus, the study produces unverifiable and unreliable conclusions. In contrast, the sworn testimony of CLECs demonstrates that the study's conclusions are contrary to fact, and reinforces the Commission's earlier conclusions that new entrants are impaired without access to all types of loop and transport facilities.

Accordingly, the Commission should act promptly to end this unwarranted multi-billion-dollar subsidy to the incumbents and eliminate the use restrictions and co-mingling prohibitions on loop-transport combinations. It should also reject the Joint Petition.

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5 *See* AT&T Comments dated June 11, 2001 and Reply dated June 25, 2001 in CC Docket No. 96-98 (Attachments E-F).

C. Access to Next Generation Loops is Critical to the Development of Competition.

Incumbent LECs are rapidly planning for and deploying next generation digital loop carrier ("NGDLC") technology in their local networks.[6] This architecture has two principal advantages over the incumbents' older copper loop facilities. First, it reduces the amount of copper loop plant that needs to be serviced, thus reducing the incumbents' costs to serve customers.[7] Second, NGDLC technology upgrades an incumbent's existing loop plant to permit the exchange of high bandwidth transmissions between a retail customer and an advanced data service network (which is what makes the technology "next generation"). However, the incumbents argue that these loops need not be unbundled, a position that, if adopted, would effectively mean that only the incumbents themselves (or their affiliates) could efficiently provide high revenue advanced services and voice/advanced service bundles. In addition, the Commission needs to clarify and enforce the incumbents' section 251(c)(4) obligation to make available for resale advanced services provided by their advanced service affiliates, as required by a recent decision of the D.C. Circuit Court of Appeals.

The Commission has repeatedly found that the incumbents' loop plant is the quintessential bottleneck facility, regardless of the age or nature of the technology employed, because it is simply too difficult and expensive to build or find alternatives.[8] Moreover, it is elementary that all service providers need a means to connect retail customers to their networks. Thus, it is clear that most Americans will be unable to receive the Act's expected benefits of (i) advanced services and (ii) choice among a variety of advanced service providers, unless NDGLC loops are available as unbundled network elements pursuant to section 251(c)(3).

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6 NGDLC deployment involves the installation of upgraded electronics in remote terminals that are already located relatively close to customers' premises. Frequently, these remote terminals are already connected to the incumbents' central offices with a fiber feeder facility but if they are not, the obsolete copper feeder is replaced by less costly and higher capacity fiber.

7 In fact, applications of the Commission's TELRIC pricing methodology employ the general assumption that incumbents will deploy increasing amounts of fiber loop facilities. In some states' application of TELRIC (such as New York), they have assumed that the incumbent's *entire* network would be comprised of fiber loops, because they are (overall) the least-cost facilities to provide this functionality. Because of these twin benefits, the incumbents' implicit (and sometimes explicit) threats to stop building NGDLC facilities cannot be taken seriously. For example, SBC's threat to "halt indefinitely" deployment of DSL facilities is simply a form of regulatory blackmail designed to punish those states that determine that SBC's unbundling obligations extend to its Project Pronto facilities. But SBC has also boasted to investors that "[t]he network efficiency improvements alone pay for the [Project Pronto] initiative . . . " SBC Investor Briefing, *SBC Announces Sweeping Broadband Initiative*, at 2 (Oct. 18, 1999) Attachment G.

8 *E.g.*, *UNE Remand Order* at ¶¶ 181-183. The factual support showing that CLECs continue to be impaired in the absence of even high capacity loops is summarized in AT&T's June 11 and June 25, 2001 comments on the RBOC's Joint Petition to remove high capacity facilities from the unbundling requirements of section 251(c)(3).

Predictably, incumbents have vociferously argued that they should be entitled to reserve the use of NGDLC facilities exclusively to themselves and to avoid any obligation to unbundle them as network elements (*i.e.*, at cost-based pricing). This is a transparent attempt to control the pace at which competitors may introduce or expand their own advanced service networks and their ability to serve customers.

The incumbents' position is based on the false premise that their decision to deploy fiber facilities and transmission electronics in their loop plant changes the fundamental functionality of the loop element -- connectivity between retail customers and their serving incumbent LEC central office (*see* FCC Rule 51.319(a)). This is flatly wrong. Nevertheless, the incumbents recognize that if they are able to deny new entrants cost-based access to NGDLC loops, virtually all competitors will lack a cost-effective means to connect customers to their advanced services networks, and their incentives to invest will be destroyed. As a result, competition for advanced services will effectively be eliminated. But the effects will not stop there, because customers who want to buy bundles of both voice and advanced services will only be able to get them from the incumbent. Indeed, if the Commission does not make clear that incumbents must unbundle NGDLC loops in all types of serving arrangements, the few competitors who may seek to compete will face the prospect of buying "market priced" advanced service loops, with both the market and the prices determined solely by the incumbents. Thus, it is imperative that the Commission promptly establish competitors' right to access NGDLC loop facilities as unbundled network elements and explicitly rule that they are entitled in all cases to access incumbents' "entire" loop functionality, *i.e.*, all of the incumbent's facilities connecting a customer and the incumbent's central office, whether or not the incumbent employs fiber in the loop, at cost-based rates.[9]

Competitors are not seeking anything new in this regard. The Commission recently came to this very conclusion in its *Line Sharing Reconsideration Order* (at ¶ 11), holding that competitive LECs that participate in line sharing "must have the option to access [a fiber-fed] loop at either [the remote terminal or the central office], not the one that the incumbent chooses as a result of network upgrades entirely under its own control." Critically, the Commission (at ¶ 13) held that "it would be inconsistent with the intent of the *Line Sharing Order* and the statutory goals behind sections 706 and 251 of the 1996 Act to permit increased deployment of fiber-based networks by incumbent LECs to unduly inhibit the provision of xDSL services." AT&T and other new entrants seek the same rights when they engage in line splitting.[10]

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9 A full description of AT&T's position on this issue is found in its October 12, 2000 and February 27, 2001 comments and November 27, 2000 and March 13, 2001 replies in CC Docket Nos. 98-147 and 96-98, Attachments H-K.

10 The Commission has used "line sharing" to refer to an arrangement in which the incumbent provides voice services using the low frequency signals carried on a loop and the incumbent or another carrier provides advanced services using the high frequency signals on the same loop. "Line splitting" refers to a similar service arrangement in which the voice service is provided by a carrier other than the incumbent. When a competitor provides voice service using either the unbundled network element platform ("UNE-P") or resale, the technical configuration used to provide line sharing and line splitting are identical.

Despite claims from some incumbents, access to an "entire loop" will *not* allow new entrants to access the incumbents' "packet switching" functionality. The transmission facilities in question connect only two points – the retail customer's premises and the incumbent LEC's serving central office (the point where CLECs have been struggling for the past five years to establish collocations) so they can access loops connecting to retail customers. Thus, new entrants only seek the same access to retail customers that the incumbents already have – the ability to access all of their customers' transmission signals at the incumbent's central office. Thus, the issue is *not* whether "packet switching" would be unbundled or whether competitors would have unbundled access to an incumbent's "advanced services network." Unbundling the loop functionality – which is all that AT&T seeks here -- is not the same as unbundling an incumbent's advanced service network, regardless of any technological smoke screen the incumbents may raise. The real issue is whether all competitors who deploy their *own* packet elements or advanced service capabilities will have the nondiscriminatory ability to use the incumbents' *loops* to add customers to their networks.

There is no question that the physical arrangements competitors seek in connection with line splitting are technically feasible, because they are the same ones that must be used to implement the Commission's *Line Sharing Reconsideration Order.* Indeed, the incumbents make no such argument.[11] Moreover, the Commission has already found that the incumbents' economies of scale, scope and density make loop facilities the most difficult to duplicate, regardless of the nature of the underlying technology or the bandwidth of the facility.[12] Thus, there is also no question that the inability to obtain access to NGDLC loops impairs new entrants' ability to compete.

It is critical to note that the lack of cost-effective access to connections to retail customers relegates potential competitors to extremely narrow niche markets. Thus, if competitors are not able to obtain cost-based access to NGDLC loops, they would have little, if any, incentive to build their own packet switching or advanced services networks or to develop innovative capabilities for end users. As a result, consumers' choices for advanced services would largely be limited to the incumbent, and these limitations would spill over into traditional voice service offerings as well.[13]

It is important to note that, other than the duty to provide services for resale discussed below, competitors are not requesting regulation of the incumbents' advanced

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11 The technical feasibility of such arrangements is also validated by the fact that incumbent LECs are willing to provide the same capability as a "wholesale service" rather than as an unbundled network element. Thus the issue is whether the incumbents will be allowed to avoid their unbundling obligations in order to manipulate their competitors' costs and effectively wipe out their profitability.

12 *E.g., UNE Remand Order* at ¶¶ 181-183.

13 As noted above, consumers who want bundled packages of voice and advanced services will be simply unavailable to carriers that are only able to provide voice services, because they cannot obtain cost-effective access to the incumbents' NGDLC loops.

services. All that they are seeking is what the statute requires: the same ability to use unbundled network capabilities that only the incumbents can broadly and cost-effectively deploy to enable them to connect retail customers to their networks. Without assurance of such access, competitors will not be able to provide services that are comparable to those of the incumbent.[14] Thus, lack of unbundled access to NGDLC loops will not provide competitors any incentives to deploy their own advanced services network facilities; rather, it will discourage them from deploying advanced services networks at all. The incumbents, of course, recognize this and have patiently used the lack of affirmative Commission rulings to achieve a near-monopoly position in the provision of DSL services. Neither the Act nor the policies underlying it support such a result.

Finally, on January 9, 2001, the D. C. Circuit Court of Appeals vacated the Commission's ruling in the *SBC/Ameritech Merger Order* that allowed SBC to avoid the obligations of section 251(c) by establishing a separate subsidiary to provide advanced services. *Association of Communications Enterprises v. FCC*, No. 99-1441. In particular, the Court held that SBC could not avoid its resale obligation under section 251(c)(4) merely because it had established a separate subsidiary to provide advanced services. Moreover, the Court recognized that its decision in this case was one of general application. Despite the Court's clear ruling, the BOCs that have established advanced services affiliates have offered a series of meritless arguments in an effort to avoid the effects of the Court's decision. In addition, the BOCs have resisted competitors' attempts to cover the obligations of their advanced services subsidiaries in interconnection agreements. The Commission has begun dealing with these meritless claims in the context of its recent *Connecticut 271 Order*.[15] It should move promptly to reject all remaining BOC claims in this area, especially those that would preclude CLECs from reselling an incumbent's DSL service when they provide voice service using UNE-P or UNE loops.

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[14] The bandwidth that can be provided over a copper facility decreases as a function of its length. Thus, "all copper" loops – which have substantially longer copper segments than NGDLC loops – can never provide competitors with the same level of quality as NGDLC loops.

[15] *Application of Verizon New York, Inc, et al, for Authorization to Provide In-region, InterLATA Services in Connecticut*, CC Docket No. 01-100, released July 20, 2001.

D. <u>The Commission Must Ensure that New Entrants Have Access to the Services and Processes Essential to Facilities-Based Entry.</u>

Over the last five years, AT&T has committed tens of billions of dollars in order to offer competitive local exchange services using all of the entry vehicles contemplated by the 1996 Act. To this end, AT&T has sought to provide such service over its own facilities, whether via fixed wireless, cable facilities, or its own fiber facilities. Yet, even as a facilities-based provider, AT&T cannot provide competitive local exchange services without obtaining essential inputs from the incumbent LECs and other parties. AT&T must (i) be able to interconnect with the ILEC networks without being forced to duplicate the ILEC network; (ii) gain prompt, nondiscriminatory access to public rights-of-way to install its facilities without imposition of local regulation or unlawful fees; (iii) have prompt, cost-based access to utility poles, ducts, conduits and rights-of-way to get its facilities to customers' neighborhoods; (iv) obtain prompt, nondiscriminatory access to multi-tenant buildings to reach the millions of customers who live and work there; and (v) obtain nondiscriminatory and competitively neutral porting of telephone numbers from ILECs. The Commission has taken the lead in establishing rules that seek to provide new carriers the ability to provide facilities-based competition. But rules alone are not enough. Without prompt, effective enforcement of the Commission's rules, the roll-out of effective facilities-based competition will be significantly delayed, and millions of consumers will continue to be deprived of the competitive benefits promised by the 1996 Act.

<u>Interconnection at a Single Point within a LATA; Adequate Network Capacity</u>

To offer potential customers the ability to place local calls to all persons located within the local calling area, CLECs must interconnect with the ILECs, which still control over 94% of local residential subscribers. In order to do so, CLECs and ILECs must deploy Interconnection Facilities between the switches serving the CLEC's customers and the end office switches serving the ILEC's customers and the subtending ILEC tandem switches.[16] The parties must then establish trunking between these switches for the efficient routing of interconnection traffic.

To effectively compete for local exchange customers, AT&T has designed and deployed a network architecture that is substantially different than the embedded ILEC network. Due to the very high initial cost of switching platforms as compared to the lower incremental cost of high-capacity facilities, AT&T has chosen to deploy fewer switches and more transport on the end-user side of the switch. (Even where AT&T has determined the need for multiple switches within a LATA, they are often collocated within the same building.) The distinction between the two networks is that while the ILEC deploys tandems first and then grows into high use dedicated trunking between

[16] Interconnection Facilities are the physical transmission channels that transport traffic between the AT&T and ILEC switches that are used for local and intraLATA toll traffic. Facilities should be differentiated from trunks or trunk groups, which are the logical connections between two switches permitting traffic to be routed in an efficient manner. Trunks are established over working facilities.

offices, AT&T deploys a single switch combined with long transport on the end-user side of the switch, because that combination is incrementally less costly than adding a new switch in each part of a market. This means that some calls from ILEC customers to AT&T customers must be transported beyond the ILEC local calling areas to be delivered to the AT&T switch serving the terminating AT&T customers. Where AT&T has chosen not to deploy a switch within a LATA, the point of interconnection (or "POI") will be treated as if it were an AT&T switch (*i.e.*, AT&T has virtually extended its switching functionality into the LATA to the POI). The AT&T architecture, therefore, provides a switch (or switching presence) in every ILEC LATA.

Some ILECs, however, insist that CLECs be required to have a POI in every local calling area, or in the absence of such a POI, that the CLEC pay for the cost of carrying both the ILEC's and the CLEC's traffic between the POI and the local calling area, or in some cases that the CLEC even pay access charges to the ILEC for such traffic. Not only would such a requirement violate existing Commission rules, but it would adversely affect consumers in two ways. First, they would lose the benefits of the efficient network architectures deployed by AT&T and other CLECs, producing higher network costs. Second, it would shift to CLECs the transport costs that ILECs are required to bear under the Act. The higher costs that CLECs (and their customers) would be forced to bear would make those markets that would have been marginally profitable using AT&T's network architecture, uneconomic to serve. Moreover, using the ILEC's local calling areas as the basis of network interconnection substantially reduces the network efficiencies of the alternative network architectures deployed by AT&T, forcing AT&T into an inefficient ILEC look-alike interconnection arrangement, and forcing CLEC customers to bear the burden of those inefficiencies.

Fortunately, the Act requires ILECs to allow interconnection by a CLEC at any technically feasible point. As the Commission explained in its *Local Competition Order*, the interconnection obligation of section 251(c)(2) "allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination of traffic."[17] The Commission reaffirmed the Act's requirement most recently in its *SBC-Texas 271* decision in which it made clear that section 251, and the Commission's implementing rules, give CLECs "the option to interconnect at only one technically feasible point in each LATA."[18]

In its Notice of Proposed Rulemaking Inquiry on Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, the Commission has asked

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17 *Local Competition Order* at ¶ 172. *See also* Memorandum of the FCC as Amicus Curiae at 20-21, *US West Communications Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, No. CV 97-1575-JE (D. Or. 1998) (a requirement of multiple POIs within a single LATA "could be so costly to new entrants that it would thwart the Act's fundamental goal of opening local markets to competition").

18 *Application of SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Report and Order, ¶ 78 (June 30, 2000).

whether it should change its rule permitting CLECs to establish a single POI in a LATA or shift to CLECs the cost of transporting ILEC-originated local calls to that POI. AT&T urges the Commission to refrain from making such a change. Doing so would only force new carriers to adopt an inefficient ILEC network architecture that would increase the cost of competitive entry and delay the realization of competitive benefits by consumers.

AT&T has also experienced a significant traffic-blocking problem with ILECs, known as "behind the tandem blocking." For example AT&T Broadband currently exchanges most traffic with the ILECs at tandem switches via trunking between the parties (both for access and local traffic). As Broadband's customer counts have increased (Chicago now has over 120,000 customers, from a standing start about 18 months ago), traffic between the parties has also increased. AT&T is experiencing two problems. For outgoing calls, Broadband monitors its network traffic and growth, and orders trunks from the ILECs. Some of the ILECs, however, are slow to process trunk orders, and if outgoing Broadband traffic reaches critical levels, AT&T's end user customers have difficulty making calls. For incoming calls, the ILECs are supposed to monitor their traffic levels and order trunks from AT&T to accommodate traffic growth. If those trunks reach critical capacity levels, Broadband customers will have difficulty receiving incoming calls from ILEC customers. AT&T has been receiving complaints from its customers about both inbound and outbound call blocking, and has had to escalate this issue (i.e., as an exception from the normal process) to expedite the ILEC provisioning process. AT&T cannot continue to provide a competitive cable telephony offer unless the ILECs process trunking orders expeditiously to ensure adequate network capacity, without requiring high level escalations on a regular basis. In addition, the ILECs need to monitor their traffic patterns to CLECs, to anticipate trunking needs, and to order trunks proactively before inbound CLEC blocking rises to critical levels.

Public Rights-of-Way/Municipal Franchises

Facilities-based competitors need to be able to install their facilities along public streets in order to bring their networks to the neighborhoods in which potential customers live and work. Recognizing the critical role that access to public rights-of-way would have in the roll-out of competitive telecommunications, the 1996 Act strictly limits the role of local governments. Section 253 limits municipalities to their traditional role of overseeing the use of public rights-of-way. Unfortunately, an increasing number of local governments have adopted ordinances that seek to subject providers of telecommunications services to a third layer of regulation in addition to that imposed by the Commission and state public utility commissions. Although many of these proposals are characterized as rights-of-way management, they address matters such as interconnection and universal service that far exceed the cities' legitimate authority. And, most of these ordinances make it a criminal penalty to offer service without compliance with the ordinance. Such ordinances impose substantial impediments to competition and usurp the Commission's and the states' traditional regulatory authority over telecommunications.

Moreover, although the Act permits cities to receive "fair and reasonable" compensation for "use" of public rights-of-way, many cities are imposing excessive fees that bear little, if any, relationship to the burdens imposed on rights-of-way by providers of telecommunications services. These fees appear to be gauged to promote the greatest revenue to the city, e.g., through percentages of gross revenues, or substantial one-time application fees, rather than any meaningful attempt to recover the actual costs incurred by the city related to its right-of-way management.

Even where cities engage in permissible rights-of-way management and collection of fees, Section 253(c) mandates that cities do so on a "competitively neutral and nondiscriminatory" basis. This language prohibits the differential treatment of incumbents and new entrants with respect to rights-of-way fees or other requirements, which can exacerbate the advantages incumbent LECs already enjoy. Yet, despite the plain language of the Act, some cities have imposed franchise obligations exclusively upon new entrants and not on the incumbent LEC. For example, the City of White Plains, New York, sought to impose a franchise requirement and a five percent of gross revenues fee on new entrants, despite the fact that the City did not require Verizon to obtain any franchise nor pay any franchise fee. A federal district court held that this clear favoritism toward Verizon did not violate the strictures of the Act, despite specific Commission precedent that "[l]ocal requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory."[19] The Commission has filed an amicus brief in the *White Plains* appeal stressing that White Plains' blanket exemption of Verizon based only on its position as an incumbent "is precisely the kind of barrier to competitive entry that Congress intended section 253 to remove."

AT&T urges the Commission to continue its vigorous enforcement of section 253. The Commission should act promptly on preemption petitions and use other opportunities to make clear to municipalities that their authority is limited by the Act to those activities directly linked to use of the public rights-of-way, such as regulation of the time, manner and place of excavations, and that they are not permitted to erect a third level of telecommunications regulation. Further, fair and reasonable compensation for use of the rights-of-way must be related to the direct costs incurred by cities in their regulation of the rights-of-way, and, in all events, city requirements and fees must be imposed in a nondiscriminatory and competitively neutral manner.

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19 *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21443 (¶ 108) (1997), 13 FCC Rcd 16400 (1998) (denying petition for reconsideration). *See also Silver Star Telephone Company, Inc.*, 12 FCC Rcd 15639, 15638 (¶ 42) ("disparity in the treatment of classes of providers violates the requirement of competitive neutrality"), 13 FCC Rcd 16356, 16360-61 (¶¶ 9-10) (denying petition for reconsideration), *aff'd*, *RT Communications*, 201 F.3d at 1268-69.

Utility Poles, Ducts, Conduit, and Rights-of-Way

Virtually the only practical physical medium available for facilities-based CLECs to reach individual subscribers is the poles, ducts, conduits, and rights-of-way owned or controlled by local utilities. *See FCC* v. *Florida Power Corp.*, 480 U.S. 245, 247 (1987). Accordingly, access to these facilities on reasonable terms is crucial to CLECs' very existence. Because CLECs must rely upon their actual and potential competitors for reasonable access to such necessary facilities, Congress acted in 1996 to ensure that CLECs have access to these bottleneck facilities on reasonable and nondiscriminatory "rates, terms, and conditions." In doing so, Congress recognized that federal regulatory oversight is necessary to ensure that utilities that own and control these facilities do not engage in anti-competitive conduct that would deny such access and thereby hinder the development of a competitive local telecommunications market.

The 1996 Act amended section 224 to expand the rights to use utility poles, ducts, conduits, and rights-of-way to include providers of telecommunications service as well as cable television systems. These protections, however, were not extended to incumbent local exchange carriers, since they already own or control the poles, ducts, and conduits for which others require access. 47 U.S.C. § 224(a)(5). The Commission thereupon acted to implement the new provisions of section 224. However, in April 2000, the 11th Circuit held that the provision of Internet service over cable facilities was not the provision of a cable service or telecommunications service under the Act, and that the cable system attachment was therefore not entitled to the protections of section 224.[20] Although the court stayed its decision pending decision by the Supreme Court, utilities, especially power companies, have taken advantage of the regulatory confusion created by the 11th Circuit's decision to attempt to extract exorbitant attachment fees. For example, Alabama Power Company sought to increase its pole attachment rate from $7.47 to $38.81 per month.

The Commission has taken appropriate steps to ensure that section 224 is implemented as Congress intended. For example, the Commission ruled that Alabama Power could not implement its unlawful rate. In addition, the Commission successfully sought to have the *Gulf Power II* decision reviewed by the Supreme Court. Yet, the utilities have not ceased their efforts to extract monopoly rents from cable companies and CLECs, and notwithstanding clear Commission rulings, the utilities have engaged in a continuing war of attrition to extract unlawful rates from new entrants. For example, Alabama Power's affiliate, Georgia Power, sought to impose unilaterally a rate of $53.35 on AT&T's affiliate, TCG, in the state of Georgia, even though the lawful rate would be no greater than approximately $6. TCG brought a pole attachment complaint (which is still pending) before the Commission in late 2000, but the average competitor is out of the market for a period of 6-12 months while pole attachment complaints are considered by the Commission, and there is virtually no downside for the utilities in forcing these competitors (or at least the ones who can afford to fund the litigation expense and be out

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20 *Gulf Power Co. v. FCC*, 208 F.3d 1263, *rehearing denied*, 226 F.3d 1220 (11th Cir. 2000) (per curiam), *cert. granted, NCTA v. Gulf Power Co.*, No. 00-832.

of the market for that long) to pursue FCC complaints in order to gain access to poles on lawful terms. In order to help staunch these anticompetitive efforts, the Commission must act promptly to resolve pole attachment complaints, and should consider imposing sanctions and other enforcement remedies and procedures against the utilities to ensure prompt compliance by the utilities with their lawful obligations without requiring new entrants to spend valuable time and resources litigating pole attachment complaints.

<u>*Access to Multi-Tenant Buildings*</u>

Approximately 24% of residential telephone subscribers nationwide live in multi-dwelling units. In some areas, such as New York City, the percentage exceeds 70%. Further, a significant portion of business customers operate out of multi-tenant buildings. Although MTEs are ideal targets for early facility-based market entry, access to tenants within these properties is too often blocked by the building owners or incumbent LECs that own or control the telephone wiring within the building. Nondiscriminatory access to these multi-tenant environments (MTEs) must be enforced to jump start local competition.

The Commission has made efforts to reduce the barriers incumbent LECs and building owners have erected to facilities-based telecommunications competition in MTEs. The *UNE Remand Order's* treatment of intra-premises wiring was a first step, and the second step occurred in November 2000, when the Commission issued its *First Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 99-217. In the *FRO,* the Commission, among other things, prohibited carriers from entering into exclusive access arrangements regarding commercial MTEs, facilitated building owners' ability to take control of their inside wiring, and held that § 224 applied to conduits or rights-of-way owned or controlled by a utility within MTEs. However, as the Commission recognized, the barriers to full and effective MTE competition imposed by ILECs and building owners remain substantial. *FNPRM,* ¶¶ 17-19.

The *FNPRM* comments confirm that both incumbent LECs and building owners are impeding competitors' efforts to serve tenants in MTEs on a nondiscriminatory basis. Indeed, MTE owners acknowledge that incumbent LECs receive favored treatment because of their substantial market power and that competitive LECs, in contrast, are subjected to discriminatory rates, terms, and conditions governing their access to MTEs. In order to break through these barriers, the Commission must focus its efforts in two critical areas: (1) assuring that the pre-existing relationships between building owners and incumbent LECs do not limit competitors' access to customers in MTEs; and (2) assuring that the terms and conditions that incumbents apply to unbundling of intra-premise wiring promptly and fully reflect the pro-competitive intent of the *UNE Remand Order.*

As a matter of policy, the Commission should extend nondiscriminatory access obligations to residential as well as to commercial buildings.[21] Facility-based

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[21] Such provisions should include (1) a prohibition on exclusive contracts regardless of the type of premises involved – the market power of the incumbent and building owners is the same everywhere; (2) current exclusive access agreements should be nullified, because they simply prevent the development of

competition, consumer choice and innovation are all encouraged if end users in MTEs have the unfettered choice of the telecommunications carriers that best meet their specific needs.[22] Further, there is no basis to foreclose customer choice because an MTE owner has entered into an agreement with a building LEC (BLEC),[23] and the Commission should provide such a clarification of its policy. The only instance in which a nondiscriminatory access requirement should be waived is where there is a convergence of MTE owner and the MTE's tenants, such as in government buildings (in which the tenants are governmental bodies), hotels, hospitals, and universities.

With respect to implementation, the Commission should rely upon its substantial experience implementing the nondiscriminatory access requirement of the Pole Attachment Act, 47 U.S.C. § 224(f)(1) to resolve any building access disputes in an expeditious and cost-conscious manner. Further, full disclosure of access terms need to be available to all competitors, just as would occur in a competitive market. At a minimum, where an incumbent LEC serves an MTE, it should be required to make available the rates, terms, and conditions that govern its access to a particular MTE upon the request of a competitor that is considering whether to serve the MTE. Moreover, with respect to application of section 224, the Commission should decline incumbents' and building owners' attempts to narrow the existing definition of "right-of-way".[24]

Finally, the Commission should assure that the incumbents do not circumvent the pro-competitive requirements of the *UNE Remand Order* relating to intra-premises wiring during the interconnection agreement process. It is already apparent that the incumbents will take every opportunity to create ambiguity out of otherwise straightforward Commission language and will refuse to meet competitors' market entry needs unless the Commission expressly and unambiguously requires compliance within a

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facility-based competition; and (3) incumbent LECs should not be permitted to enforce or enter into new preferential marketing agreements until a fully competitive market exists.

22 To that end, a potential competitor should not be required to wait until a tenant requests service before a nondiscriminatory access requirement is invoked. Competitors must be ready to serve customers in the same time frame as the incumbent. Frivolous requests for building access need not be a concern, because no competitor would remain in business long if it conditioned space for building access without the prospect of serving customers located there.

23 Specifically, where a BLEC has been certified as a local exchange carrier, it should be subject to the same nondiscriminatory access obligations imposed on other LECs. Where the BLEC has not been certified, it should be treated as an agent that stands in the shoes of the building owner, thus triggering the nondiscrimination complaint process if it refuses to provide nondiscriminatory access.

24 Although the categorical definition of "right-of-way" already adopted by the Commission ("at a minimum," "a defined pathway that a utility is actually using or has specifically identified and obtained the right to use in connection with its transmission and distribution network") may be adequate to address the needs of competitive LECs in a majority of cases, the Commission should leave open, for case-by-case adjudication, whether Congress' broad "right-of-way" mandate demands additional access in particular circumstances.

specific time.[25] Therefore, the Commission must make clear that it will vigorously enforce its orders relating to MTE access, and will not tolerate delays in implementation. At a minimum, terms, conditions and pricing applicable to MTE access should be a specific area probed in review of any newly filed section 271 application.

Number Portability

In order to compete against entrenched incumbents, new entrants attempting to offer competitive facilities-based local exchange service must be able to offer prospective customers the ability to keep their existing telephone numbers. For this reason, the Commission has required that incumbent LECs provide number portability so that consumers can retain their existing telephone numbers "without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another". 47 C.F.R. § 52.21(k). Nonetheless, as part of its roll-out of cable telephony, AT&T has experienced significant difficulty in offering number portability to its customers.

First, many ILECs consistently miss the scheduled time to port the customer's number following installation of the cable telephony equipment. When the ILEC ports the number too early, the impact on the customer is particularly severe – the customer has no dial tone and is totally out of service. Troubling consequences also occur when the ILEC ports the number much later than scheduled. In that event, the customer has dial tone, and can make outgoing calls, but cannot receive incoming calls. These issues arise for a number of reasons, including insufficient ILEC process automation (with attendant electronic fall-out and manual processing). In order to avoid serious injury to CLECs' competitive efforts, ILECs must adhere strictly to number portability DMOQs, and have adequate electronic processes in place to port numbers in a timely and accurate manner.

Second, the ILECs generally will not support week-end number porting. Week-end number porting (Saturday and Sunday) is crucial to the ability of a new facilities-based entrant to market to new residential customers on a major scale because the customer must be at home in order to facilitate cutover of the new loop and porting of the customer's existing number to the new line. Because of the many items that can affect a number porting at the last minute, new entrants need to have ILEC technicians available on weekends to handle number porting issues. For example, many ILECs pre-set a number porting for a particular time. But, if the customer is not at the premises, or wants to change or cancel the service ordered, AT&T needs real-time access to an ILEC technician to stop or re-schedule the port.[26]

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[25] For example, in Washington, Qwest refused to permit AT&T to access intra-building wiring that Qwest purportedly owned until such time as the Washington Utilities and Transportation Commission could define the terms and conditions applicable to such access. As a result of Qwest's actions, AT&T's local customers were denied service -- and indeed lost service. AT&T was thus forced to file a complaint with the WUTC in order to get Qwest to permit access to this wiring.

[26] The ILECs are just starting to support the Saturday ports with real-time technical assistance; they have refused to support Sunday ports (with the exception of BellSouth).

Finally, at least one ILEC has refused to accept new orders (and has halted work on existing orders) for a period of time while upgrading a switch. Thus, this ILEC merely told AT&T that it was entering a black-out period while it upgraded certain switches. It did not provide any procedures to be used during the "black-out," but simply issued rejections for any orders sent. To make matters worse, when the black-out period ended, the ILEC immediately processed the number portability orders that were pending prior to the black-out period (and that it had suspended indefinitely) without any notice to AT&T. As a result, AT&T's customers were left with no service because of the unannounced ports. The ILECs must have reasonable written and properly communicated procedures for switch upgrades, which include notification to competitive carriers for scheduled downtimes and re-scheduled port dates associated with switch upgrades.

E. Collocation of Advanced and Efficient Equipment and Cross-Connects Between Collocating CLECs Are Necessary to Effective Local Competition and the Rapid Deployment of Competitive Advanced Services Capabilities.

This Commission has long sought to promote efficient facilities-based competition. For this goal to be realized, collocation must be readily available and not so constrained that competitors are hobbled in their efforts to deploy networks that even begin to approach the economies and scale of the existing incumbent LEC networks. Unfortunately, legal maneuvering and restrictive practices of the incumbent LECs, particularly as they relate to collocation, hamper facility-based competition. The incumbents' current positions and practices, if sustained, would (i) prevent competitors from deploying multi-functional equipment that is essential to achieve reasonable economies of scale, (ii) hinder the development of competitive interoffice transport by denying CLEC-to-CLEC cross-connections, (iii) limit alternatives for access to advanced service providers by foreclosing partnerships between DLECs and CLECs to provide competitive bundles of voice and advanced services, and (iv) foreclose the deployment of efficient packet switching networks by denying CLECs the right to collocate packet switching functionality. None of these constraints are supported by any consideration of technical feasibility nor are they supported by a reasoned interpretation of the Act or by public policy. Rather, the incumbents LECs are simply seeking, through every means possible, to slow or stop the development of competition.

Congress recognized in the 1996 Act that the ability to collocate is critical to the development of competition and required in § 251(c)(6) that incumbent LECs provide physical collocation of necessary equipment on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The ILECs were excused from this obligation only if collocation is not technically feasible or because of space limitations. In its *Local Competition First Report and Order,* the Commission established general rules governing the collocation of equipment, and, in particular, the Commission required incumbent LECs to install cross-connects between the equipment of collocating CLECs.

In order to promote the deployment of advanced services capabilities, the Commission clarified in March 1999 that its existing rules permitted collocation of all equipment necessary for interconnection or access to UNEs, "regardless of whether such equipment includes a switching functionality, provides enhanced services capabilities, or offers other functionalities." *First Report and Order*, CC 98-147, ¶ 28. The Commission also permitted collocating CLECs to install their own cross-connects to other collocating CLECs. On March 17, 2000, the D.C. Circuit affirmed the Commission's order in most respects. However, the court held that the Commission's definition of "necessary" was impermissibly broad, and that any application of a collocation obligation to multi-function equipment or cross-connects required "a better explanation from the FCC." On remand, the Commission initiated a *Second Further Notice of Proposed Rulemaking* in CC Docket 98-147 requesting comment on the proper scope of its collocation rules. During this period, however, competitors have been denied much of the practical usefulness of collocation. As a result, facilities based competition has suffered.

The Commission previously has recognized that national collocation rules are essential to the development of effective competitive and the prompt deployment of advanced services. In addition, on July 12, 2001, the Commission adopted rules setting forth new collocation rules. In its press release concerning its recent decision on remand from the D.C. Circuit Court of Appeals, the Commission stated that its Collocation Order will:

- adopt a standard for equipment "necessary for interconnection or access to unbundled network elements" that parallels AT&T proposed definition -- equipment is "necessary" if the inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to UNEs;

- conclude that multi-functioning equipment is "necessary" if the primary purpose of the equipment meets the necessary test and does not significantly increase the burden on the ILEC property;

- find that switching equipment (excluding traditional circuit switches) and routing equipment typically meet the "necessary" standard for collocation; and

- require that ILECs provide CLEC-to-CLEC cross-connects upon reasonable request.

Commission enforcement of its new rules will be essential to ensure that incumbent LECs permit collocation of equipment that performs transmission (whether time division multiplexed or packet based transmission such as ATM), switching (whether packet switching or circuit switching, including but not limited to "soft switches), and network monitoring functionalities, (including, but not limited to telemetry networks, router and hubs).

F. Pending Appeals of Key Competitive Issues

U.S. Supreme Court

Petitions for certiorari granted on:

- The 8th Circuit's partial invalidation of Commission's TELRIC pricing rules. Briefing currently in process, oral argument scheduled for October 2001.

- The 8th Circuit's invalidation of Commission rules that require incumbents to combine network elements on request. Briefing currently in process, oral argument scheduled for October 2001.

- The 11th Circuit's invalidation of certain Commission pole attachment rules. Briefing complete, oral argument scheduled for August 28, 2001.

  AT&T supports the Commission's positions in these matters

D.C. Circuit Court of Appeals

UNE Remand Order - defines the unbundled network elements that incumbents must provide to competitors. Briefing substantially complete, oral argument scheduled for March 7, 2002.

Line Sharing Order – requires incumbents to provide the high frequency spectrum of the loop as an unbundled network element (consolidated with appeal of the *UNE Remand Order*). Briefing not yet begun, oral argument scheduled for March 2002.

Line Sharing Reconsideration Order –requires incumbents to provide line sharing when incumbents deploy fiber facilities in loops; requires incumbents to support line splitting; rejects requests for reconsideration of various aspects of the *Line Sharing Order* (also consolidated with the above appeals). Briefing not yet begun, oral argument scheduled for March 2002.

AT&T has intervened in and expects to support the Commission's positions in the above cases

Reciprocal Compensation Order – establishes a federal compensation scheme for ISP-bound traffic, including a 3:1 traffic ratio rebuttable presumption, declining compensation rates over three years, and growth caps. Appeals filed, briefing/oral argument not yet scheduled.

CLEC Access Charge Order –requires IXCs to purchase access from all CLECs that tariff rates within a "safe harbor" level on a sliding scale that decreases from 2.5 cents/MOU to ILEC levels after three years, and precludes challenges to the prescribed rates. Appeals filed, CLEC stay motion denied, briefing/oral argument not yet scheduled.

Kansas/Oklahoma 271 Order- granted 271 applications for Kansas and Oklahoma. Briefing complete, oral argument scheduled for September 17, 2001.

Massachusetts 271 Order – granted 271 application for Massachusetts. Appeals filed, stay motion denied, briefing/oral argument not yet scheduled.

CLEC Rate Reasonableness Complaints (AT&T v. BTI, et al.) - finds that for periods prior to May 2001, CLEC access charges as high as 3.8 cents per minute were just and reasonable. Appeals filed, briefing/oral argument not yet scheduled.

<u>Fifth Circuit Court of Appeals</u>

CALLS Order – adopted the CALLS Plan, which provides substantial access charge reductions for price cap carriers. The case was argued on May 7, 2001.

AT&T supported the Commission's position in this matter

<u>Second Circuit Court of Appeals</u>

TCG v. City of White Plains – appeals district court decision holding that a municipality's imposition of a 5% of gross revenues franchise fee on an AT&T subsidiary and no franchise fee on the incumbent did not violate the Act's requirement that any compensation for use of public rights-of-way must be competitively neutral and nondiscriminatory. Briefing in progress, to be completed by the end of August 2001, oral argument scheduled for no earlier than October 26, 2001.