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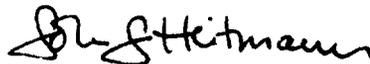
**Re: *Ex Parte*; Implementation of the Local Competition Provisions in the  
 Telecommunications Act of 1996 – CC Docket No. 96-98**

Dear Ms. Salas:

Enclosed please find an original and one copy of a Letter addressed to Dorothy Attwood, Chief of the Common Carrier Bureau, which should be included in the above-referenced proceeding.

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the envelope provided. Please direct all questions regarding this filing to Brad E. Mutschelknaus at (202) 955-9765 or John J. Heitmann at (202) 955-9888.

Respectfully submitted,



Brad E. Mutschelknaus  
 John J. Heitmann

Enclosures (as noted)

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**BY HAND DELIVERY**

Ms. Dorothy Attwood  
Chief, Common Carrier Bureau  
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445 12th Street, S.W. Room 5-C450  
Washington, D.C. 20554

***Ex Parte:* Implementation of the Local Competition Provisions in the  
Telecommunications Act of 1996 – CC Docket No. 96-98**

Dear Ms. Attwood:

Thank you for meeting with representatives from the competitive local exchange carrier (“CLEC”) industry last week to discuss some of the difficulties these companies have experienced in attempting to obtain access to Enhanced Extended Links (“EELs”).<sup>1</sup> At the close of the meeting, you requested that we provide you and your staff with a further explanation of how CLECs believe the Commission’s Orders regarding EELs apply to activities in the marketplace. Per your request, the following discussion provides further insight into these activities and why the Commission must provide the entire industry with a clarification stating that Channelized Facilities Usage, whereby UNE DS1s and special access DS1s traverse the same DS3 transport facility is not co-mingling and that ILECs must process associated conversion requests without delay.

<sup>1</sup> See *Ex parte* Letter of Teresa K. Gaugler, Association of Local Telecommunications Services, *et al.* to Magalie R. Salas, Secretary, Federal Communications Commission (August 9, 2001) (*August 9, 2001 ALTS Ex Parte*). Each of the entities represented at that meeting, Net2000, e.spire, Focal and ALTS are signatories to this letter. To demonstrate that the positions expressed herein have broad support across the CLEC industry, CompTel was invited and it agreed to sign-on to this letter as well.

In response to your questions raised during our discussion, we have focused on three particular issues to supplement our prior explanation of Channelized Facility Usage.<sup>2</sup>

**(1)     *Application of the Temporary Local Use Restrictions  
          Must Focus on Circuits Used to Serve Particular End Users***

Consistent with the plain language and most straight-forward reading of the Commission's *Supplemental Order Clarification*, application of the temporary local usage restrictions must be subject to an analysis focused on the end user. In other words, the significant local use tests must be applied to *each* DS1 used to serve an end user and selected by a CLEC for conversion. There is nothing in the FCC's orders to support incumbent local exchange carriers' ("ILECs") contentions that *every* DS1 carried over multiplexed/channelized transport (often a DS3) must qualify for conversion before *any* DS1s can be converted to EELs. In short, the fact that a DS1 EEL circuit traverses a DS3 transport facility *does not* require an "all or nothing" conversion of the DS3. For the following reasons, this "all or nothing" proposition is an incorrect reading of the Commission's temporary local use restrictions.

Most importantly, the actual language of the Commission's local use tests does not support the ILECs' contention that *every* DS1 must be eligible/all or nothing position. Rather, that language indicates clearly that those tests apply on an *end user DS1* by *end user DS1* basis. Indeed, the *Supplemental Order Clarification*'s language in "safe harbor options #2 and #3" provides that "[w]hen a loop-transport combination involves multiplexing (*e.g.*, DS1 multiplexed to a DS3 level), *each of the individual DS1 circuits* must meet this criteria."<sup>3</sup> Notably, the Commission used the word "each" (as in "each of the individual DS1 circuits") and not "every" (as in all DS1 circuits).

Moreover, in the language that precedes the language just quoted, the Commission casts its local use requirements with respect to a particular "end user customer",<sup>4</sup> the "loop portion of

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<sup>2</sup> On August 1, 2001, the signatories joined in an *ex parte* presentation provided to the Common Carrier Bureau concerning many of the same issues related to difficulties CLECs have experienced in attempting to obtain access to EELs. See *Ex parte* Letter of Brad E. Mutschelknaus, Kelley, Drye & Warren LLP, *et al.* to Dorothy Attwood, Chief Common Carrier Bureau, Federal Communications Commission (August 1, 2001) (*August 1, 2001 Ex Parte*). The instant submission provides further guidance regarding these issues.

<sup>3</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9597-9600, ¶22 (footnote omitted) (emphasis added) (*Supplemental Order Clarification*).

<sup>4</sup> In safe harbor option # 1, the Commission states that "the requesting carrier certifies that it is the exclusive provider of an *end user's* local exchange service". Option #2 asks whether the "requesting carrier certifies that it provides local exchange and exchange access services to an *end user* customer's premises and handles at least one third of the *end user* customer's local traffic as a percent of the *end user* customer local dialtone lines". Option # 3 addresses whether a requesting carrier provides some local service to an "*end user*" local service. *Supplemental Order Clarification*, 15 FCC Rcd at 9597-98, ¶22.

the loop-transport combination”, and the “loop facility”. Obviously, loops (or special access tails) are dedicated to particular end users. In linking its local use requirements to specific end user circuits, the Commission assured that the circuits identified for conversion would be used to carry a significant amount of the CLEC-served end user’s local traffic. To the contrary, it makes no sense to tie the local use requirements to *every* DS1 circuit (both those designated for conversion and those that are not) multiplexed onto DS3 transport or entrance facilities (as the ILECs contend) since such facilities typically are used to aggregate circuits serving *multiple end users*.<sup>5</sup> Moreover, the FCC’s orders provide no support for such an interpretation.<sup>6</sup>

Thus, the conversion to UNEs of DS1 circuits that traverse DS3 transport segments that also are used to carry other DS1s that may not be identified (or “eligible”) for conversion is not co-mingling and is not in any other way barred by the Commission’s safe harbor restrictions. The Commission’s “each of the individual DS1 circuits” language properly is interpreted to mean each individual DS1 circuit identified by a CLEC and eligible for conversion based on the local service provided over that circuit to a particular end user.<sup>7</sup> The fact that other DS1 circuits may ride the DS3 transport or entrance facility alongside those eligible circuits selected for conversion does not alter the Commission’s tests and certainly does not compromise the goal the Commission sought to achieve by adopting its temporary use restrictions. Those other DS1s (that will remain tariffed special access) have nothing to do with the end user served by the DS1 circuit selected for conversion and, accordingly, the Commission, consistent with its transitional use restrictions as they currently exist, need not assure that a significant amount of local traffic is being carried over them. Again, those *other* DS1 circuits will remain – and will be paid for as – special access. Thus, ILEC concerns regarding “bootstrapping” ineligible circuits are unfounded.<sup>8</sup> Moreover, this result comports with the Commission’s stated interim goal of avoiding pure access bypass by providers of exclusively interexchange services.

**(2) *The Commission Need Not Conduct an Additional Impairment Analysis with Respect to Channelized Facilities***

In a recent effort to divert the Commission’s attention away from the issue of EEL conversion delays, ILECs have asserted that the Commission must conduct a new “impairment” analysis to determine whether channelized facilities must be unbundled. This is obstructionist

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<sup>5</sup> Notably, if the DS3 is itself a “derived” facility, other DS3s may riding alongside that DS3 and those DS3s may be used to serve multiple end users of other carriers.

<sup>6</sup> Furthermore, as indicated in the *August 1, 2001 Ex Parte*, such an interpretation would have wasteful economic and bizarre practical consequences by forcing CLECs to re-groom their networks into parallel UNE and special access networks. *August 1, 2001 Ex Parte* at 4.

<sup>7</sup> That is unless, of course, an entire DS3 is designated to a particular end user and a CLEC seeks to convert the entire DS3.

<sup>8</sup> Indeed, the more significant concern requiring the Commission’s prompt attention is the well documented problem of ILECs refusing to convert “eligible” circuits, as required by the Commission’s orders.

nonsense. There is in fact no need for the Commission to conduct a new and additional impairment analysis with respect to any EEL or what more accurately should be described as a “derived” element provided over a channelized facility that may comprise part of a loop-transport combination. Indeed, the Commission already has determined that high capacity loops, including DS1 loops, meet the impairment test and must be made available as UNEs.<sup>9</sup> The Commission also has concluded that high capacity transport, including DS1 and DS3 transport, meets the impairment test and properly is classified as a UNE. As both DS1 and DS3 UNE loops, as well as DS1 and DS3 UNE transport, often are provided over (“derived” from) facilities that may be different from or have greater capacity than the specified UNE, it is quite clear that there is no merit to the ILECs’ latest tack to delay and deny CLECs access to EELs.<sup>10</sup>

Moreover, in its *UNE Remand Order*, the Commission affirmed its *Local Competition Order* conclusion that UNEs are defined by the *functional* -- rather than the *physical* -- aspects of network elements.<sup>11</sup> For example, the Commission’s definition of the loop network element includes all *features, functions, and capabilities of the transmission facilities* owned by the incumbent LEC, between an incumbent LEC’s central office and the loop demarcation point at the customer premises.<sup>12</sup> Whether the loop consists of home run copper or is partially comprised of fiber facilities running from the central office to a remote terminal, as is the case when integrated digital loop carrier (“DLC”) technology is deployed, the changes in the physical characteristics of the equipment (including the use of such multiplexing/channelization equipment) does not remove the loop from the definition of a UNE.<sup>13</sup> Moreover, the presence of

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<sup>9</sup> See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3772, 3777, 3781-82, ¶¶ 165, 176, 187 (1999) (“*UNE Remand Order*,” issued in response to *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)).

<sup>10</sup> For example, DS3 transport is at times provided over higher capacity OCn circuits. Similarly, DS1 loops can be provided over higher capacity circuits or parts thereof (DS1 subloop distribution elements can be aggregated onto higher capacity subloop feeder elements).

<sup>11</sup> See *UNE Remand Order*, 15 FCC Rcd at 3765, 3772, ¶ 167 (“Our intention is to ensure that the loop definition will apply to new as well as current technologies. . .”).

<sup>12</sup> *Id.* at ¶ 167 (emphasis added); see also 47 U.S.C. § 3(29).

<sup>13</sup> The Commission has affirmed that ILECs are under an independent obligation to provide unbundled access to subloops wherever technically feasible – even when DLC technology is deployed. *UNE Remand Order*, 15 FCC Rcd at 3776-77, ¶ 175 (“Because excluding such equipment [DLC multiplexing equipment] from the definition of the loop would limit the functionality of the loop, we include the attached electronics, with the exception of the DSLAMs) within the loop definition.”); *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 16 FCC Rcd 2101, ¶ 8 (“We concluded that incumbent LECs are required to unbundle the high frequency portion of the local loop even when the incumbent LEC’s local customer is served by DLC facilities (“*Reconsideration Order and Sixth NPRM*”), citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order, Fourth Report and*

other loops derived from the same channelized fiber facility has no impact whatsoever on whether any one of them must be unbundled by the ILEC. The fact is that the ILEC must unbundle individual loops and may not deny unbundling requests because a CLEC has not requested unbundling of *every* loop carried over the same fiber facility.

Similarly, the Commission determined that “requesting carriers are impaired without access to unbundled dedicated and shared transport network”<sup>14</sup> and, therefore found that ILECs must provide unbundled access to “all technically feasible capacity-related services such as DS1-DS3 and OC3-OC96 dedicated transport services.”<sup>15</sup> It is technically feasible to derive DS1s from DS3s, DS3s from OC3s, etc. Thus, the Commission’s current rules require unbundling of DS1 and DS3 transport, regardless of the fact that such elements may be derived from higher capacity facilities. Again, ILECs may not deny a request for unbundled DS1 interoffice transport simply because the ILECs’ network employs a DS3 on the requested route and the CLEC has not requested that the ILEC unbundle all DS1s carried over the DS3.

Thus, the ILECs’ latest ploy to delay and deny CLECs access to EELs has no legal foundation. The Commission already has conducted the required impairment tests and its current unbundling obligations extend to elements derived from channelized facilities.

**(3) *Conversions of Derived DS1 Special Access Circuits to EELs Will Not Result in an Unlawful or Unanticipated Reduction of ILEC Special Access Revenues***

The conversion to EELs of DS1 special access circuits carried over channelized DS3 facilities is required by law, regardless of the effect such conversions may have on ILEC special access revenues.<sup>16</sup> Nevertheless, such conversions will not cause any reduction in special access revenues (*to the extent such reductions are not offset by increases in UNE revenues*) that has not already been anticipated (and apparently deemed tolerable) by the FCC and the ILECs (many of them signed onto the letter that essentially has become the core of the Commission’s requirements for conversion eligibility).<sup>17</sup>

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Order, 14 FCC Rcd 20912, 20955, ¶ 89 (*Line Sharing Order*) and *UNE Remand Order*, 15 FCC Rcd at 3789-90, ¶ 206.

<sup>14</sup> *UNE Remand Order*, ¶ 321.

<sup>15</sup> *Id.*, ¶ 322.

<sup>16</sup> In opening local markets up to competition and in requiring that the ILECs unbundle network elements at cost-based pricing (TELRIC), Congress certainly anticipated that ILECs would face declining revenues in core businesses, including special access. Congress also made new revenue opportunities available to the ILECs (UNEs, interLATA interexchange service), but the ILECs generally have been slow to take advantage of those opportunities.

<sup>17</sup> See Letter from Gordon R. Evans, Vice-President Federal Regulatory, Bell Atlantic, et al. to Chairman Kennard and Commissioners, Federal Communications Commission, CC Docket No 96-98, filed February 29, 2000 (“*February 29, 2000 Joint Letter*”).

As demonstrated above, such conversions are contemplated by and do not fall outside of the Commission's three interim safe harbors that govern such conversions to this day. Moreover, adherence to the Commission's significant local usage tests with respect to each of the individual DS1s will ensure that the Commission prevents access bypass by interexchange carriers.<sup>18</sup> As discussed above, Channelized Facilities Usage provides CLECs with the ability to convert qualified DS1 special access circuits to EELs in those cases where the amount of local exchange traffic on a particular circuit meets or exceeds the Commission's temporary local use restrictions. By the same token, this network configuration will continue to provide ILECs with special access revenues generated by those DS1 circuits on the DS3 facility which are not designated for conversion to EELs and remain priced at tariffed special access rates.

Of course, Channelized Facilities Usage anticipates that a DS1 EEL circuit carried over a DS3 segment would be priced at UNE rates, while any non-converted DS1s carried over the DS3 would be charged at the appropriate tariffed special access rates for those services. The signatories emphasize that adoption of a pro-rated pricing mechanism similar to ratcheting for transport segments that contain both special access and EEL circuits will ensure that ILECs, consistent with the Commission's current EELs rules and the goals they are designed to serve, do not incur additional and unanticipated losses of special access revenues.<sup>19</sup>

More importantly, the adoption of such a pricing mechanism will insure that no circuit identified for conversion to a TELRIC-priced EEL is left stranded and that no competitor or end user is forced to bear unwarranted ILEC special access costs. Notably, many of those special access circuits which the signatories are seeking to or will seek to convert should have been provisioned as TELRIC-priced UNEs in the first place. Frequently, UNE provisioning problems – in the form of quality and timely and predictable delivery, and artificial, unauthorized ILEC restrictions on the availability of UNEs (Verizon, for example, will provide interoffice transport only between some offices and refuses to provide it between others) – have forced CLECs to order special access to meet end user needs and thereby have artificially inflated ILEC special access revenues and CLEC costs. Thus, the ILECs have received a huge windfall over the past five years and it is high time that CLECs – and their end users – received the benefit of TELRIC pricing on those circuits, as required by law.

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<sup>18</sup> This statement is not intended to suggest that the signatories support continued application of the significant local use restriction which is currently under review at the DC Circuit. Rather, it merely acknowledges that the means selected by the Commission should accomplish its goal. Similarly, the signatories do not accept that protection of ILEC special access revenues is either lawful or a legitimate policy goal as, in this context, it necessarily equates with keeping competitors' costs artificially high and impedes the development of competition. Instead, the signatories simply recognize that the significant local use test is the governing law until the Commission of the DC Circuit finds otherwise.

<sup>19</sup> We emphasize, further, that because ILECs will continue to enjoy special access revenue from these transport facilities, there is no basis to impose termination liabilities on a CLEC when a CLEC seeks to convert from special access to UNEs derived DS1 circuits carried over DS3 transport.

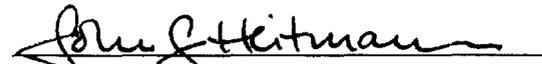
Ms. Dorothy Attwood  
Chief, Common Carrier Bureau  
August 20, 2001  
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KELLEY DRYE & WARREN LLP

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We hope that you find this further explanation to be responsive and that it provides you with further insight as to why the signatories urge the Commission to provide the entire industry with a clarification stating that Channelized Facilities Usage, whereby UNE DS1s and special access DS1s traverse the same DS3 transport facility, is not co-mingling and that ILECs must process associated conversion requests without delay. As always, we are available to answer any questions or concerns you may have regarding this submission.

Respectfully submitted,



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