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October 25, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte*
CC Docket No. 96-98
CC Docket No. 01-138
CCB/CPD File No. 01-06

Dear Ms. Salas:

Pursuant to Sections 1.1206 of the Commission's rules, this will provide notice that on October 24, 2001, Jonathan Askin, Association for Local Telecommunications Services; John Spillman and Tom Whittaker, Broadslate Networks, Inc.; Pamela Arluk, Focal Communications; Trey Judy, Madison River Communications; Diane Sheehan, Network Plus, Inc., and the undersigned and Russell M. Blau of this firm met with: (1) Kyle Dixon, Office of the Chairman, and (2) Dorothy Attwood, Jeffrey Carlisle, Chris Libertelli, and Scott Bergmann, Common Carrier Bureau concerning issues in the above-captioned proceedings. David Fitts, Choice One Communications joined the meeting with Kyle Dixon via teleconference. We presented the views set forth in the attached document, which was provided at the meetings.

Sincerely,


Patrick J. Donovan

cc: Kyle Dixon
Dorothy Attwood
Jeffrey Carlisle
Chris Libertelli
Scott Bergmann
Michelle Carey
Brent Olsen
Kathy Farroba
Cathy Carpino

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ILEC “No Facilities” Policy

Verizon Policy

- In June/July, CLECs experienced greatly increased instances in which Verizon refused to provide DS-1 loop UNEs based on “no facilities” available.
- Impact:
 - Broadslate “no facilities” rejects went from 2 % to 50%.
 - Choice One went from negligible to 18% rejects for “no facilities.”
 - Madison River has pulled plans to enter new Verizon territory.
 - Network Plus rejects based on “no facilities” have gone from 3 % to 30 %.
 - RNK Telecom has 50% of orders in NH, and 15% of orders in MA (all since 7/24), rejected and has stopped ordering high cap UNEs due to increasing “no facilities.”
- Verizon now states that it did not change its “no facilities” policy, only that it started enforcing it.

A Key Aspect of the 1996 Act Remains Unimplemented

- The Commission has not yet addressed when, if ever, ILECs may decline to provide UNEs based on the fact they would need to provide something more than an “as is” facility.
- ILECs are defining for themselves the scope of their unbundling obligation.

Competitive Concerns

- ILECs may view “no facilities” as a wide ranging tool to deny meaningful access to UNEs.
- A cramped reading of unbundling obligations is part of the larger ILEC strategy to limit or eliminate unbundled access to advanced networks.
 - DS-1 loops can be used in conjunction with “next generation” technology to provide a host of high quality voice and data services at less than ILEC prices.
- ILECs are trying to establish UNEs as separate and inferior networks. “No facilities” is one aspect of this strategy.

- CLECs must purchase more expensive special access, and pay NRCs. NRCs can make special access economically infeasible for provision of some services, especially advanced data services.

Scope of Unbundling Obligations Is Not Limited To “As Is” Facilities.

- Illinois and Michigan have already determined – correctly – that ILECs must engage in construction activities in order to provide to CLECs as UNEs the same functionality that they provide to their own retail customers.
- The FCC has already required ILECs to “condition” loops in order to make them DSL capable. Whether ILECs are removing or adding equipment is not legally significant.
- In the *Local Competition Order*, the Commission ruled that ILECs are required to provide CLECs with UNEs that are equal in quality to the elements they provide themselves.
- Reliance on *Iowa Utilities Board* is unpersuasive. Adding electronics to an existing loop does not constitute construction of a “yet unbuilt superior network.”
- Section 251(c)(3) requires provision of UNEs on a nondiscriminatory basis and on reasonable terms and conditions.

Requested Relief

- Determine, pursuant to the Section 251(c)(3) nondiscrimination obligation, that ILECs must perform modifications and augmentations to network elements in order to provide to CLECs as UNEs the same network functionality that the ILEC uses in providing its own retail services.

Vehicle

- Include this issue in the *Provisioning NPRM*.
 - Metrics should be founded on clear rules governing when ILECs must provide UNEs.
 - “No facilities” metric: parity with ILEC retail services, performance reporting.
 - Language encouraging/authorizing interim relief should be included.
- Interim relief:
 - Chairman’s office/Bureau should seek informal resolution pending rulemaking.
 - “Rocket Docket” - ?
 - Pricing issues concerning modification/augmentation may be addressed in connection with the pending Mpower petition

Special Access

- *Provisioning NPRM* should include special access.
- Approach should be on provisioning for facilities and services regardless of legal characterization as UNEs or special access.