

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-98
Local Competition Provisions of the)	
Telecommunications Act of 1996)	
)	

PETITION

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SUMMARY

The Commission should immediately issue an order to establish pro-competitive procedures and standards for conducting the three-year review of the national list of unbundled network elements (“UNEs”) established in the *UNE Remand Order*. Particularly given the perilous state of local competition today, and the ongoing onslaught by the incumbent local exchange carriers (“ILECs”) against the UNE regime, competitive carriers need the certainty of knowing when and how the Commission plans to conduct the three-year review.

CompTel proposes that the Commission convene a Federal-State Joint Conference on UNEs pursuant to Section 410(b) of the Communications Act. Given the critical role played by State regulators in implementing the statutory UNE regime, as well as the intensive data- and State-specific nature of the three-year review, the Commission should establish a formal mechanism to secure the State participation necessary for an informed application of the statutory “impair” standard.

Further, the Commission should establish a specific date upon which ILECs may file petitions seeking to remove or scale back mandatory UNEs. Petitions filed earlier than the specified date should not be considered. CompTel proposes a filing date of May 18, 2003 for such petitions because it is the three-year anniversary of the latest effective date of the rules and policies adopted in the *UNE Remand Order*. Also, such a filing date will give the Joint Conference and State regulators sufficient time to conduct a thorough investigation and prepare recommendations.

In addition, the Commission should make clear that the three-year review is not a *de novo* inquiry into all national UNEs. This is a three-year *review*, not a three-year *sunset*. Any party seeking to remove or scale back a UNE bears the burden of proof to show, by a

preponderance of record evidence, that the requested relief is justified. Further, the Commission should make clear that parties cannot use the three-year review proceeding as a pretext for filing untimely reconsideration petitions regarding the *UNE Remand Order*. While parties should be encouraged to present all legal and factual issues that are relevant to the three-year review proceeding, they should not be able to re-litigate issues that the Commission addressed and resolved in the *UNE Remand Order*.

Lastly, the Commission should announce that it will not consider removing or scaling back a UNE if the requesting ILEC has not fully complied with its obligation to provide the UNE for a commercially reasonable period of time. This rule will remove the current incentive for the ILECs to avoid complying with the statutory and regulatory UNE regime in hopes that the Commission will curtail that regime during the three-year review. This rule also will help to ensure that the record evidence of market behavior during the three-year period is truly relevant to the Commission's application of the "impair" standard.

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To: The Commission

PETITION

The Competitive Telecommunications Association (“CompTel”), by its attorneys, hereby petitions the Commission to establish pro-competitive procedures and standards for conducting the three-year review of the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) (“*UNE Remand Order*”). CompTel is the premier industry association representing competitive telecommunications providers and their suppliers. CompTel’s members provide local, long distance, international, Internet and enhanced services throughout the nation. It is CompTel’s fundamental policy mandate to promote open markets, both today and in the future. As a result, CompTel has a direct interest in the ability of its members to obtain full and non-discriminatory access to unbundled network elements (“UNEs”), both alone and in combinations, as required by Congress in Section 251(c)(3) of the Communications Act of 1934.

After years of destructive litigation initiated by incumbent local exchange carriers (“ILECs”) upon passage of the Telecommunications Act of 1996, the Commission’s *UNE Remand Order* laid the necessary regulatory foundation in 1999 for the development of local competition in the United States. In response to the U.S. Supreme Court’s nearly total rejection

of the ILECs' objections to the 1996 Act and the FCC's implementing rules, *see AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), the *UNE Remand Order* compiled a list of UNEs that ILECs are required to offer to requesting carriers nationwide at cost-based rates under Sections 251(c)(3) and 252(d)(1). The statutory UNE regime is the heart and soul of the 1996 Act – this regime embodies Congress' understanding that requesting carriers should be permitted to use the existing ILEC infrastructure, rather than build a redundant network at the outset, to provide competitive telecommunications services at lower prices to U.S. consumers.

In reliance upon the 1996 Act and *UNE Remand Order*, numerous competitive carriers invested billions of dollars in the U.S. telecommunications market sector. While pursuing myriad market entry strategies, virtually all competitive carriers depended in one way, shape or form upon the proper functioning and enforcement of the statutory UNE regime to bring the benefits of local competition for the first time to American citizens and businesses. The availability of UNEs at cost-based rates enabled competitive carriers to enter the local market to earn customers and revenues, while making massive longer-term investments in competing and complementary infrastructure, equipment, software and other telecommunications capabilities.

During the last 18 months, the development of local competition has faltered badly. Many competitive carriers have gone into bankruptcy, while surviving competitive carriers have experienced financial challenges, declining share prices, and a drying-up of capital investment. Few if any competitive carriers have been able to sustain operations for a significant period on a cash-flow positive basis. Certainly, the general economic downturn in the high-technology and telecommunications sectors contributed to the stalling of local competition. However, in CompTel's view, by far the most important cause has been the ILECs' persistent and widespread refusals to implement the UNE provisions in the 1996 Act and the FCC's

implementing rules. The ILECs have done the following – refused to provide mandatory UNEs; engaged in delayed, inept and error-riddled UNE provisioning; developed critical OSS functionalities that are expensive, unwieldy, and error-prone; discriminated overtly and repeatedly in favor of their affiliated enterprises; charged UNE prices that exceed the statutory TELRIC standard in many states; refused to provide UNE combinations; and sabotaged competitive carriers’ offerings in violation of FCC rules through unlawful and anti-competitive “winback” efforts. Of course, the ILECs then paid millions of dollars to consultants, lawyers and lobbyists to “spin” the resultant demise of local competition as the inevitable result of a flawed statutory scheme that imposed too many burdens on the incumbent monopolies.

The FCC’s response to the ILECs’ misconduct has been disappointing. Rather than step-up efforts to enforce the Act and its rules against ILEC misconduct, the FCC’s enforcement process has been ineffective.¹ Formal complaints rarely yield swift decisions, and we question whether they continue to yield prompt and useful settlement agreements with the ILECs. The FCC’s principal enforcement action today is the periodic imposition of modest fines which the ILECs are more than willing to pay as the price for killing local competition. Further, several critical rulemaking issues for promoting local competition (*e.g.*, EELs and the UNE Platform) have been lost for years in a never-ending cycle of *ex parte* meetings and ILEC delay tactics.² The FCC’s inaction has been particularly harmful for the enhanced extended link

¹ For example, there have been 23 requests this year (through September 12, 2001) that the FCC grant accelerated treatment of disputes. The FCC has not granted any of those requests. Fifteen are still pending, while six have been denied, one settled, and one withdrawn.

² As regards the pro-competitive enhanced extended link (“EEL”), the FCC established “interim” restrictions in November, 1999 and promised competitive carriers that it would issue a final order by June, 2000. The FCC did not keep its promise – no such order was issued, and the matter remains pending to this day. As for the UNE Platform, CompTel and others filed petitions for reconsideration in February, 2000 to remove or ameliorate restrictions on its availability. Those petitions also remain pending.

(“EEL”), which, if made broadly available at cost-based rates, could significantly stimulate long-delayed local competition. Instead, the Commission has agreed to ILEC demands to impose severe restrictions on EELs -- contrary to the express terms of the 1996 Act and the FCC’s prior UNE decisions -- to protect the ILECs’ monopoly interstate access revenue streams.

This is the backdrop against which the FCC will conduct its promised three-year review to determine whether the list of mandatory UNEs should be modified. In the *UNE Remand Order*, the FCC stated that “[w]e expect to reexamine our national list of network elements that are subject to the unbundling obligations of the Act every three years.”³ The FCC chose a three-year period because it was the minimum time period necessary to give competitive carriers “reasonable certainty” about the status of UNEs for entering the local market. The FCC stated: “Revisiting our rules in three years should provide sufficient certainty to the carriers and capital markets and should provide carriers with sufficient time to implement their plans.”⁴ The FCC expressly prohibited the ILECs from seeking to remove UNEs from the mandatory list prior to the three-year review. The FCC reasoned that *ad hoc* consideration of petitions to remove UNEs from the list would “threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers.”⁵ The FCC also reasoned that entertaining such *ad hoc* petitions would undermine the overriding goal of implementing and administering its UNE rules.⁶

Unfortunately, the *UNE Remand Order* did not specify any procedures, schedules or standards for moving forward with the three-year review. Although we are only half-way

³ *UNE Remand Order* at ¶ 151.

⁴ *Id.*

⁵ *Id.* at ¶ 150.

⁶ *Id.*

through the three-year period, certain ILECs already have filed a petition to remove selected UNEs from the mandatory list, in open defiance of the Commission's decision that it will not consider such petitions.⁷ Rather than reject that petition summarily, the FCC sought comments from interested parties, thereby undermining the goal of regulatory certainty which the FCC sought to promote in the *UNE Remand Order*.

CompTel believes it is imperative that the Commission establish in advance the procedures and standards that will govern its three-year UNE review. Particularly given the current perilous state of local competition, as well as the ongoing ILEC efforts to prematurely denude the mandatory UNE list, competitive carriers need the certainty of knowing when and how the FCC plans to conduct the three-year UNE review. The resources available to competitive carriers for participating in this process are more limited than ever before, and it is critical that the FCC avoid an ill-defined and drawn-out process that forces competitive carriers to respond to a never-ending series of ILEC petitions and *ex parte* submissions on the record in this proceeding. The public interest is promoted if parties are told in advance when to file and what issues to address. In furtherance of that goal, CompTel proposes in this petition certain procedures and standards that the FCC should use to conduct the three-year UNE review in a way that promotes Congress' objective of delivering the benefits of local competition to American consumers.

⁷ See Joint Petition, filed by BellSouth Corporation and BellSouth Telecommunications, Inc., SBC Communications, Inc., and Verizon Telephone Companies, CC Docket No. 96-98, filed April 5, 2001 (requesting removal of high-capacity loops and dedicated transport from mandatory UNE list).

I. THE COMMISSION SHOULD CONVENE A JOINT CONFERENCE AND ESTABLISH A SPECIFIC FILING DATE FOR UNE REMOVAL PETITIONS

A. The Commission Should Convene a Federal-State Joint Conference on UNEs Pursuant to Section 410(b) of the Communications Act

The Commission should convene a Federal-State Joint Conference on UNEs to facilitate, inform and coordinate its implementation of the three-year UNE review. Section 410(b) of the Communications Act authorizes the Commission to “confer with any State commission having regulatory jurisdiction with respect to carriers regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission.”⁸ This grant of authority plainly covers the UNE regime and the forthcoming three-year UNE review. The Commission has convened such conferences in the past, most recently in 1999 with the establishment of a Joint Conference on Advanced Telecommunications Services.⁹

A Joint Conference in connection with the three-year UNE review will promote the public interest. The three-year review will depend critically upon comprehensive empirical information and the industry’s experience with the current UNE regime, both of which will vary, sometimes significantly, from state to state and region to region. As a result, the hands-on participation by State regulators in the three-year UNE review through a Joint Conference is both appropriate and necessary. Moreover, State regulators play a critical role in the implementation

⁸ 47 U.S.C. § 410(b).

⁹ *See Federal-State Joint Conference on Advanced Telecommunications Services*, 14 FCC Rcd 17622 (1999); *see also* 47 C.F.R. Part 1, Appendix A.

of the UNE regime, with functions ranging from arbitrating the UNE provisions in interconnection agreements and establishing UNE prices, on the one hand, to the formal and informal adjudication of UNE disputes between ILECs and competitive carriers, on the other hand. The State regulators' experiences and perspectives on the UNE regime will be invaluable to any effort to determine which UNEs satisfy the "impair" standard in Section 251(d)(2) of the Act.

The data-intensive nature of the three-year review underscores the need for a Joint Conference on UNEs. The Commission has successfully used the Joint Conference vehicle to obtain and exchange information regarding advanced telecommunications services. A similar vehicle, including field hearings, is needed for the three-year UNE review. Particularly given the Act's purpose to ensure that the UNE regime will promote competition for *local telecommunications services*, the direct involvement of State regulators with jurisdiction over such local services would seem to be an indispensable component of any meaningful three-year UNE review. Convening a Joint Conference will permit the Commission and State regulators to act in a coordinated and cooperative fashion without unduly delaying the completion of the three-year UNE review. Given the intensively fact- and State-specific nature of the issues that will be addressed in the three-year UNE review, CompTel submits that it would be useful for the Joint Conference to prepare its own recommendations and to facilitate the independent submission by State regulators of written statements to the FCC on these critical issues.

B. The Commission Should Establish A Specific Filing Date For Parties To Request The Removal or Scaling Back of UNEs

The normal procedure for modifying the Commission's UNE rules would be for the Commission to issue a *Notice of Proposed Rulemaking*, after which interested parties would file comments and reply comments. CompTel submits that this procedure is not suitable for the

three-year UNE review. The Commission itself is not yet in a position to make any data-backed proposals on whether the UNE list should be modified, and competitive carriers should not be placed in the position of having to file comments based on speculation or supposition about which UNEs the ILECs might challenge, the geographic scope of such challenges, and/or the evidence they will present to support their requests. Rather, the Commission should establish a date certain upon which parties seeking modifications to the mandatory UNE list should file a petition with the Commission specifying the desired relief and providing evidentiary support. At a minimum, the Commission should require any such petition to specify the UNEs that the petitioner desires to have removed or scaled back, the State or region in which such relief is sought, and the evidence supporting the requested relief. The Commission should then place those petitions on Public Notice and permit parties to file comments and reply comments at reasonable intervals. Such a procedure will ensure that all parties have a meaningful opportunity to participate in this proceeding, and will avoid wasting resources by enabling parties to focus their comments and reply comments upon specific proposals and evidence.

In its order, the Commission should establish May 18, 2003 as the earliest date upon which any party may file a petition to have a UNE removed from the mandatory list. That date is three years after the latest date – May 18, 2000 – upon which all new rules and policies adopted in the *UNE Remand Order* became effective.¹⁰ The FCC should not establish an earlier

¹⁰ The *UNE Remand Order* was published in the Federal Register on January 18, 2000. See *Revision of the Commission's Rules Specifying the Portions of the Nation's Local Telephone Networks That Incumbent Local Telephone Companies Must Make Available to Competitors*, 65 FR 2542 (2000). While certain rules and policies became effective within 30 days on February 17, 2000, other rules and policies became effective within 120 days on May 18, 2000. In the interests of administrative efficiency, rather than conducting separate three-year review proceedings for specific UNEs based on when they became effective, the Commission should conduct a single three-year review of all UNEs on the mandatory list based on the latest effective date for any UNEs pursuant to the *UNE Remand Order*.

filing date so that competitive carriers may benefit from regulatory certainty for the full three-year period as promised in the *UNE Remand Order*. From CompTel's perspective, the May 18, 2003 date is conservative given that the ILECs have yet to provide UNEs as required by law and as contemplated by the FCC in the *UNE Remand Order*. The Commission wanted competitive carriers to have three full years of experience with UNEs as the basis upon which to begin evaluating whether the mandatory UNE list should be modified. The ILECs have subverted that policy by failing to provision UNEs promptly, and in some cases by failing to provision UNEs and UNE combinations at all, in the period since the FCC adopted the *UNE Remand Order*. As a result, even the May 18, 2003 filing date may not give the industry and the Commission three years' worth of experience upon which to evaluate UNE removal requests.

In addition, establishing a single date for the filing of petitions to remove or scale back UNEs would give the Federal-State Joint Conference on UNEs, as proposed above, a meaningful opportunity to generate useful data necessary to apply the "impair" standard. Rather than force competitive carriers to expend their limited resources to both participate in the Joint Conference proceedings and to respond to a series of ILEC petitions and *ex parte* submissions on UNEs, the Commission should enable the Joint Conference to take the lead by gathering data and sharing experiences, followed by the submission of petitions to remove or scale back UNEs should any party believe that the data justify such a result.¹¹

It is critical that the Commission announce and then adhere to a policy of refusing to consider petitions that are filed prior to the specified filing date. Premature petitions inevitably will be based upon partial, incomplete and in some cases outdated information which

¹¹ Such a procedure is consistent with the Commission's statement in the *UNE Remand Order* that it would consider taking the first steps to conduct the three-year review at the two-year mark. *UNE Remand Order* at ¶ 151 n.269.

is not fully representative of current market conditions. As a result, such petitions are unlikely to provide the Commission with sufficient information to determine whether any change to the mandatory UNE list is warranted. Premature petitions also will undermine competition by siphoning off the dwindling resources available to competitive carriers to participate in the three-year UNE review proceeding. Rather than permit the ILECs to bleed the competitive carriers by engaging in extensive guerrilla warfare during the months leading up to a final agency decision, the Commission should establish a date certain for such filings and announce a policy that it will not consider any petitions filed before that date.

Lastly, the Commission should make clear that parties may file petitions to add UNEs to the mandatory list at any time. The three-year monitoring period was established solely for petitions seeking to remove UNEs from the mandatory list. It would not interfere in any way with the business and regulatory certainty needed by competitive carriers to implement their market entry plans to permit parties to file petitions to add UNEs to the mandatory list. Hence, parties should be free at any time to file petitions to add UNEs to the mandatory list, and the Commission should not delay consideration of those requests.

C. The Commission Should Establish Prompt But Reasonable Deadlines for Comment and Reply Comments.

Once the Commission establishes a specific filing date for UNE removal petitions, it is important for the Commission to permit parties to have enough time to address the issues while continuing to ensure a prompt resolution of all petitions. The Commission should declare that it will promptly place all such petitions on public notice, and that it will establish a 90-day period for comments followed by a 45-day period for reply comments. Particularly if the Commission has worked cooperatively with a Federal-State Joint Conference on UNEs in advance of these petitions, such a pleading cycle should be sufficient to give all parties the time

they may need to respond to the studies or other empirical data provided in the petitions seeking to remove UNEs from the mandatory list. CompTel submits that this pleading cycle balances the parties' need for sufficient time to respond with all parties' desire to resolve the petitions as quickly as possible. The Commission should announce that once the pleading cycle closes, it will move forward to consider and resolve the petitions as expeditiously as possible consistent with the requirements of the Administrative Procedure Act.

II. THE REVIEW PROCEDURE MERELY PROVIDES OPPORTUNITY FOR ILECS TO PRESENT FACTS THAT SPECIFIC UNES NO LONGER MEET THE STATUTORY STANDARD

A. The Three-Year Review Is Not A Reconsideration Proceeding

The deadline for filing petitions for reconsideration of the impair standard expired on February 17, 2000. Therefore, the FCC should state that parties may not use the three-year review petitions as vehicles for challenging the rules and policies (*e.g.*, the proper application and scope of the “impair” standard) established in the *UNE Remand Order*. The Commission should make clear that the sole purpose of a three-year petition is to give parties an opportunity to propose the removal or scaling back of UNEs based on record evidence. As regards the petitions for reconsideration of the *UNE Remand Order* which were timely filed by CompTel and other parties, CompTel urges the Commission to resolve all of those petitions promptly. In particular, CompTel filed a petition for reconsideration in early 2000 regarding the local switching UNE, and CompTel submits that the Commission should grant that petition without further delay.

In no event should the Commission use a pending reconsideration petition as a pretext for bypassing the three-year UNE review procedures for removing or scaling back a UNE. In particular, if any party seeks to use post-1999 evidence as evidence that the

Commission should remove or scale back a mandatory UNE, the Commission should consolidate that petition with the three-year review petitions and require the filing party to supplement the petition with relevant data from the three-year monitoring period. This is consistent with recent Commission practice to require parties to supplement or abandon petitions for reconsideration where the record has grown stale since the petitions were originally submitted to the FCC.¹²

At the same time, the Commission should not prohibit parties who participate in the three-year review proceeding from raising legal and policy issues which supplement rather than contradict the Commission's previous holdings in the *UNE Remand Order*. Based on industry developments and new data since the *UNE Remand Order*, it is possible that the parties may be able to suggest additional factors or clarifications that the Commission should take into account when implementing the UNE provisions in the statute, including the "impair" standard in Section 251(d)(2)(B). Parties should have a full opportunity to present all legal and policy arguments which are relevant to any party's request to remove or scale back a UNE and which do not constitute an improper reconsideration of the *UNE Remand Order*.

In the event a party desires for the Commission to modify or eliminate a rule or policy it adopted in the *UNE Remand Order*, that party should file a petition for rulemaking. The Commission should then adhere to its standard procedure of issuing a Public Notice to request comments on the proposed change, followed by a *Notice of Proposed Rulemaking* should

¹² E.g., Public Notice, 16 FCC Rcd 13871 (2001) (asking parties to refresh the record in CC Docket No. 96-98 regarding 1996 reconsideration petitions).

the Commission believe that the proposal may have merit. Without this limitation, the three-year UNE review proceeding would quickly become unwieldy, a result which would fatally subvert the strong public interest in maximizing business and regulatory certainty regarding the statutory UNE regime.

B. The Party Proposing Removal of a UNE Bears the Burden of Proof

The three-year UNE review proceeding is one where parties will have the opportunity to present evidence that they believe justifies the removal or scaling back of UNEs on the FCC's mandatory list. Because those parties would be seeking to modify existing rules and policies, the FCC must make clear that they bear the burden of proof to show by a preponderance of the record evidence that the requested relief is justified. In the absence of such evidence, the FCC's current rules and policies, including the mandatory UNE list, must be retained.¹³ The Commission should make clear that it will not regard evidence as sufficient to remove or scale back a UNE which does not accurately reflect the industry's experience with that UNE during the three-year monitoring period. For example, if a party seeks removal of a UNE based on outdated or incomplete evidence, the Commission must reject the petition for relying on stale evidence that does not fairly reflect the industry's experience with the UNE.¹⁴

¹³ Put in other words, the FCC should not conduct a *de novo* examination of each UNE and require parties supporting particular UNEs to put evidence in the record justifying the retention of those UNEs. The *UNE Remand Order* established a three-year review, not a three-year sunset.

¹⁴ CompTel recognizes that any party filing a petition on May 18, 2003 inevitably must rely upon evidence that pertains to less than the entire three-year monitoring period. While the Commission cannot reasonably insist in those circumstances that such a party must produce evidence up to and including the filing date of the petition, the Commission can and should insist that the petition rely upon the most recent available data that reflect as much of the three-year period as possible. In any event, if the only data available do not provide a representative view of industry experience with the UNE during the three-year period, then the petition must fail for lack of evidence.

C. UNEs Should Not Be Removed Prior To Full Compliance

The Commission should state that it will not consider removing a UNE from the mandatory list if the requesting ILEC has not fully complied with its obligation to provide the UNE for a commercially reasonable period of time. It is important to announce this rule in advance so that any party filing a petition on May 18, 2003 will know to include information regarding its statutory compliance as part of the petition.

This rule is important for several reasons. First, it provides the ILECs with an incentive to perform their statutory obligations during the three-year review period. Unfortunately, many ILECs have decided to avoid providing UNEs in compliance with the statute and the FCC's rules in the hopes that the UNEs will be removed at the three-year review. The Commission must eliminate this invidious practice by holding that an ILEC is not qualified to seek removal of a UNE – nor may it benefit from another party's request to remove a UNE – unless that ILEC has fully complied with the statute and the FCC's UNE regulations for a commercially reasonable period of time. Second, the industry experience with a UNE during the three-year period is distorted if the UNE is not made available as required by law. In particular, some competitive carriers may be forced by the ILECs' non-compliance to obtain the necessary functionality through alternative means (or to dispense with the functionality) even when it is not economic to do so. To prevent the ILECs from relying upon this non-economic behavior as evidence that the "impair" standard is not satisfied, the Commission should insist that ILECs show they have complied with the *UNE Remand Order* before seeking removal of a UNE.

CONCLUSION

For the foregoing reasons, the Commission should promptly issue an order convening a Federal-State Joint Conference on UNEs, and establishing the procedures and standards for the three-year UNE review proceeding.

Respectfully submitted,

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