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

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	**CC Docket No. 01-338**
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	**CC Docket No. 98-147**
	)	

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MANY, many years ago lived an emperor, who thought so much of new clothes that he spent all his money in order to obtain them; his only ambition was to be always well dressed…One day two swindlers came to [his] city; they made people believe that they were weavers, and declared they could manufacture the finest cloth to be imagined. Their colours and patterns, they said, were not only exceptionally beautiful, but the clothes made of their material possessed the wonderful quality of being invisible to any man who was unfit for his office or unpardonably stupid…They asked for the finest silk and the most precious gold-cloth; all they got they did away with, and worked at the empty looms till late at night…

-- from Hans Christian Anderson's tale, The Emperor's New Suit, 1837.

I. Executive Summary

When the Federal Communications Commission ("FCC" or the "Commission") took its first steps in 1996 toward implementing the Telecommunications Act of 1996[1], it prefaced its actions by stating:

[1] Telecommunications Act of 1996, Pub. L. No. 104-104 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et. seq* (the "Act").

> The Telecommunications Act of 1996 fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress…State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, **the 1996 Act requires telephone companies to open their networks to competition**.[2]

Nearly six years later, the FCC is now examining the progress of its efforts to open the monopolists' networks through its implementation of the Act's unbundling obligations[3]. The outcome may be a change in the FCC's regulatory strategy, possibly a retraction or expansion of current unbundling requirements.

Talk America Inc. ("Talk America") is unique among competitive local exchange companies ("CLECs"), in that it provides competitive local voice services to residential customers. Unlike the vast majority of CLECs who have focused their competitive efforts on the business voice and data market segments, Talk America is one of the very few companies which has sought to fulfill the Act's promise of bringing competitive choice to residential telephone customers in urban, suburban, and rural areas of the country. Our

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[2] *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15505, ¶ 1 (1996) (**emphasis supplied**) ("*Local Competition Order"*).

[3] *See* 47 U.S.C. § 251, which imposes an obligation on incumbent Local Exchange Carriers ("LECs") "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory…"

customer base currently includes more than 180,000 local voice lines, 80% of which are provided to residential subscribers. The vast majority of these lines are provisioned using the UNE-Platform ("UNE-P) loop/switching combination. Although Talk America has proven that this entry strategy can be used successfully to bring competitive choice to the residential local voice service market, we respectfully submit that the barriers to local competition remain so high that carriers would be severely impaired in their ability to operate without access to the incumbent LECs' unbundled networks; therefore, the benefits envisioned by the Act are far from being achieved. Competition in all segments of the telecommunications market remains in a nascent and tenuous stage of development, heavily dependent upon continuing efforts by federal and state regulators to force the incumbent LECs to fully open their bottleneck monopoly networks to competition. Much work remains to be done to achieve the pro-competitive goals of the Act and the benefits that will ultimately inure to consumers once a truly stable competitive market is attained.

At this stage of the market's development, there can be no valid basis for a conclusion that any previously-defined unbundled network elements are either no longer necessary for the provision of competitive services, or that the failure of incumbent LECs to provide access to those elements would not impair the ability of CLECs to provide the services they seek to offer.

This proceeding provides an opportunity for the FCC to adjust its policies in ways that will more effectively use the tools that Congress gave it to tear down the barriers to local competition and achieve the goals and benefits of the Act. However, it also poses the serious risk that the FCC may instead alter its course in ways that will reinforce those

barriers and reverse the modest advances toward competition that have been achieved thus far. Talk America urges the FCC to pursue the former course by strengthening its commitment to open the bottleneck local exchange networks to competition. Following the alternative course would reverse the modest competitive gains that have been achieved to date, dealing a fatal blow to competition and to the ultimate achievement of the goals of the Act.

II. Introduction

In its Notice of Proposed Rulemaking ("NPRM")[4] released on December 20, 200,1 the Commission invited comment from interested parties in its comprehensive triennial review of unbundled network elements. At the outset of the *Triennial Review NPRM*, the FCC made its goals for this proceeding clear: "We seek to ensure that our regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the 1996 Act in light of our experience over the last two years, advances in technology, and other developments in the markets for telecommunications services."[5]

Although the provisions of the Act are intended to be pro-competitive and market opening, the Congressional intent of the Act was "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid

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[4] *In the Matter Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, and *Deployment of Wireline Services Offering Advanced Telecommunications Capability* CC Docket 98-147, Notice of Proposed Rulemaking, 15 FCC Rcd 22709 (rel. Dec. 20, 2001) ("*Triennial Review NPRM*" or "*UNE Triennial Review*").

[5] *Id.,* 15 FCC Rcd at 22710, ¶ 1.

deployment of new telecommunications technologies."[6] Congress recognized in passing the Act that the end game is not just competition, but rather the innumerable benefits that competition can achieve for consumers in the form of lower prices, improved service quality, improved customer service, expanded choice of services and providers, the imposition of market discipline upon the incumbent providers, and technological innovation and deployment.

The history of American business demonstrates that monopolistic and immature markets perform notoriously poorly in achieving these objectives, while fully competitive markets, if given the opportunity, usually perform quite well. By requiring the incumbent monopolists to unbundled their local networks for use by competitors and imposing other market-opening obligations, Congress sought to break the monopolists' century-old stranglehold on the bottleneck local exchange networks. These wireline networks continue to provide the only ubiquitous and widely affordable means of communication between all households and businesses within the United States. In passing the Act, Congress recognized that only by dismantling the incumbents' control over these bottleneck facilities would competition develop, ultimately producing the consumer benefits that are the end game they sought.

For competition and the resulting consumer benefits to be sustained over time, the market-opening provisions of the Act should eventually lead to a "network of networks," to eliminate the facilities bottleneck that provides the source of the incumbent LECs' monopoly power. As the FCC recognized in its 1999 *Competitive Networks Notice*:

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[6] Report on the Activity of the Committee on Commerce for the One Hundred Fourth Congress, Telecommunications Act of 1996, Public Law 104-104.

> We believe that, in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition, because only facilities-based competitors can break down the incumbent LECs' bottleneck control over local networks and provide services without having to rely on their rivals for critical components of their offerings…In order for competitive networks to develop, the incumbent LECs' bottleneck control over interconnection must dissipate. As the market matures and the carriers providing services in competition with the incumbent LECs' local exchange offerings grow, we believe these carriers may establish direct routing arrangements with one another, forming a network of networks around the current system.[7]

The only way to achieve a network of networks that will provide competitive choice to residential customers is to allow CLECs who have employed a UNE-P entry strategy to obtain a scale sufficient to provide them with the economic incentive to build their own local exchange networks. Talk America's strategic intention is to build such a local exchange network (the facilities of which are owned and operated by Talk America), but only when it is economically justifiable and financially feasible.

In this, the FCC's first triennial review of its implementation of the Act's crucial unbundling obligations, the pivotal question that must be asked and answered is: Six years after the Act's passage, has the FCC's implementation strategy been successful in creating a mature, competitive local service market? The incumbent LECs would have the FCC and state regulators believe that the answer is yes—that the unbundling requirements imposed on them thus far have shattered their ratepayer-funded 100-year old monopolies, leaving them powerless to control the supply, price, and quality of local

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[7] *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141, 14 FCC Rcd 12673, 12676, 12686, ¶¶ 4, 23 (1999).

telecommunications services. But is that vision of the current market, like the emperor's clothes, a meticulously woven illusion crafted by the evil merchants who seek to retain the riches for themselves? Talk America believes so.

The FCC should not be taken in by that illusion in considering possible modifications to the incumbent LECs' unbundling obligations in this proceeding. It must instead objectively evaluate whether the current regulatory model is moving the markets down the path envisioned by Congress and whether, in fact, the end game has been achieved. If, as the incumbent LECs claim, competition and all of its ensuing consumer benefits have arrived, the FCC might logically conclude that some or all of the incumbents' network elements need no longer be subject to unbundling obligations. That is the outcome the incumbent LECs clearly seek from this proceeding.

An objective review of the facts, however, will plainly reveal that the emperor truly has no clothes: competition remains in a nascent stage and is ultimately doomed to failure if the FCC moves to reduce or eliminate the unbundling obligations now imposed on the incumbents. Clearly, the network of networks that the FCC foresaw in 1999 remains a faint vision on the horizon, particularly with respect to the residential and small business market segments. Unless the FCC takes positive steps to expand and more stringently enforce the incumbent LECs' unbundling obligations, competition in the local exchange markets will not develop to a level that is ultimately sustainable over time without continued regulatory oversight.

Talk America hereby incorporates by reference the initial comments of the UNE Platform Coalition filed in this proceeding with respect to the specific evaluation of the issues raised in the *Triennial Review NPRM*, but we respectfully offer these independent

comments as well to provide focus and insight, based on our experience as a CLEC which has been operating in the competitive trenches since mid-2000. As one of less than a handful of CLECs that has chosen to focus its business on the residential service market, Talk America believes it can provide a unique perspective on the competitive state of the market, the daily experience of attempting to compete for mass market residential customers against the naturally hostile entities who control our underlying network facilities and access to operational support systems, and the persistent difficulties of attracting capital and achieving financial stability amidst both the known obstacles confronting CLECs, as well as the remaining uncertainties that are created by proceedings such as this—the outcome of which may threaten the very basis of CLECs' business models.

III. The State of Local Competition

The Act was intended to promote competition across the panoply of telecommunications services and market segments. Congress clearly did not intend to exclude the market for residential consumer services from the expected benefits of the Act. In fact, that segment of the telecommunications market—having started as the least competitive at the time the Act was passed—is where the greatest potential consumer benefits from competition exist, making the state of residential competition a critical factor in considering any changes to the incumbent LECs' unbundling obligations. As monopolists with nearly complete domination of the residential market, the incumbent LECs have had no incentive—other than that forced upon them by regulation—to reduce prices, improve customer service and service quality, or introduce innovative services and billing to residential customers. In comparison with regulatory constraints, the

pressures that could be imposed on the incumbent LECs by effective competition provide a far more effective and efficient means of attaining those benefits.

The evidence plainly demonstrates that competition in the residential local exchange market remains in its infancy, with only a few competitors like Talk America providing any choice for residential subscribers. While the FCC's public statistics on local competition do not include a residential-only market share analysis, they do show that as of June 30, 2001, 95% of the combined residential and small business access lines continued to be served at the retail level by incumbent LECs.[8] This figure alone leaves no room for doubt about the incumbent LECs' continued stranglehold on the residential/small business market, but it does not tell the entire story. While CLECs have managed to garner a 5% share of the residential and small business access lines, the overwhelming majority of even that small share of lines is owned by the incumbent LECs. Unfortunately, the FCC June 2001 Local Competition Report does not specifically show what portion of the CLEC-served residential/small business customers access lines are owned by the incumbent LECs, and either resold or leased as UNEs to CLECs. However, with the exception of some very limited voice service that may theoretically be provided over coaxial cable, Talk America is unaware of any CLECs who compete for residential or small business customers using their own loop facilities. Clearly, the vast majority of residential and small business access lines served by CLECs remain part of the incumbent LECs' networks.

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[8] *See* "Local Telephone Competition: Status as of June 30, 2001, FCC Industry Analysis Division Common Carrier Bureau" (rel. Feb. 27, 2002) ("June 2001 Local Competition Report").

Even when one considers market shares for all market segments, including residential, small business, and medium/large business, the FCC's own data show that CLECs now serve only 9% of the total access lines, leaving the incumbent LECs with a market share that remains above 90%, six years after passage of the Act. Any sound economic theory would label such a market a monopoly. Further, the limited CLEC competition that exists in the market is concentrated in a handful of the most populous states. The FCC's June 2001 Local Competition Report shows that as of June 2001, 40% of all CLEC residential and small business lines were in just two states, New York and Texas, while 69% of CLEC residential/small business lines were concentrated in only seven of the 50 states: California, Florida, Georgia, Illinois, New York, Pennsylvania, and Texas.

The miniscule inroads that competitors like Talk America have made in the incumbent LECs' residential/small business market shares have come predominantly through the deployment of a UNE-P entry strategy. For instance, in Georgia, nearly 50% of the total CLEC access lines (business and residential) as of September 2001 were provisioned via UNE-P, despite the fact that BellSouth only began making the UNE-P product available in Georgia in early 2000.[9] In Texas, where UNE-P has been available longer, it is estimated that CLEC access lines provisioned using UNE-P constituted 74% of the total CLEC lines acquired from Southwestern Bell Telephone Company as of June 2001.[10] Further, in Texas the number of CLEC access lines provisioned using UNE-P grew by 88% from January 2000 to June 2001, while the CLEC lines provisioned using

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[9] Reply Affidavit of Elizabeth Stockdale, CC Docket No. 01-277, November 13, 2001.

[10] Kim Sunderland, "The Good, The Bad and the UNE," *Phone Plus Magazine*, April 2002, www.phoneplusmag.com/articles/241RESELLER1.html.

stand-alone loops with CLEC-provided switching grew only 8%, and resale lines declined 5%.[11] The FCC's June 2001 Local Competition Report also noted the increasing importance of the UNE-P entry strategy: "UNE loops provided with ILEC switching (which includes the so-called UNE-Platform) have increased faster than UNE loops provided without switching."[12]

CLECs' growing reliance on the UNE-P entry strategy, particularly for competing in the markets for residential and small business customers, stems from the financial and operational imperatives to acquire a sizable customer base before deploying an alternative network of local switching facilities. As discussed more fully below, Talk America has recognized these imperatives in developing its business model and other CLECs are increasingly reaching the same conclusion. As a recent article in *Phone Plus* magazine noted: "A pure facilities-based strategy still is not self-sustaining, largely because of capital costs and current capital challenges, executives say…[A] carrier provisioning service via UNE-P acts much like a facility-based provider but without the necessary up-front capital."[13] Clearly, the elimination of switching as an available UNE would critically impair CLECs' ability to compete in the residential and small business markets. In fact, without the availability of incumbent LEC switching, the limited competition that has developed in those markets would be decimated.

This conclusion is not intended to over-dramatize the effect of reducing or eliminating the switching component from the list of required unbundled network

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[11] *Id*.

[12] June 2001 Local Competition Report at 2.

[13] Kim Sunderland, "The Good, The Bad and the UNE."

elements, but rather to focus the FCC's attention on the very real impact that its decisions in this proceeding will have on the ultimate success or failure of the goals with which both it and state regulators were entrusted under the Act. Talk America urges the FCC to proceed very cautiously in reaching its decisions in this proceeding, or risk reversing the modest gains that competitors have thus far achieved in the residential and small business markets.

IV. Talk America's Strategy in the Marketplace

Talk America's competitive strategy has been very different from the well-publicized paradigm of most CLECS. While others espoused the Field of Dreams strategy of "if you build it they will come," Talk America pursued a "customers first, facilities later" strategy. Talk America began its existence as a Tariff 12 company and, once it obtained a sufficient customer base, transitioned itself from a switchless reseller to a facilities-based long distance carrier by purchasing five Lucent 5AESS switches and transitioning to its own leased long distance network. It also designed and built its own billing platform and, through a relationship with America Online, was the first telecommunications carrier to employ online billing and real-time customer access to calling records. Further, while other CLECs focused on the business market were investing millions of dollars in switches that are now abandoned or grossly underutilized, Talk America invested in the first Hewlett Packard Superdome to provide the backoffice database capabilities needed to serve our growing customer base.

The fact is, the only economically efficient and financially viable way to ultimately build the "networks of networks" is for competitors to first acquire the base of customers that will use, and thus fund, those networks. That is the strategy that Talk

America has followed. To that end, in the year 2000, Talk America invested approximately $40 million to purchase the necessary equipment and develop and implement the backoffice systems required to enter the local residential market.

The Field of Dreams strategy, while perhaps appealing to investors during the 1990's venture capital and Wall Street heyday, has proven to be unsustainable, as evidenced by the a virtual wasteland of bankrupt and defunct facilities-based CLECs and DLECs that now litter the telecommunications landscape, along with countless abandoned or underutilized switches, collocation cages, and transmission facilities. For instance, in the past two years, nearly 30 CLECs and DLECs have filed for bankruptcy and/or restructured their debt, including the likes of such former industry stars as Teligent, Winstar, McLeod, e-spire, Covad, XO Communications, Rythms Net, and ICG. Still others are on the verge of bankruptcy or restructuring.

Unlike many of these previous Wall Street darlings, Talk America has not expended its limited capital resources on local switches, but rather on building its back office billing, provisioning, and customer service systems; implementing Electronic Data Interfaces ("EDI") in order to efficiently communicate with the Regional Bell Operating Companies for provisioning orders on a mass scale; developing and refining its marketing strategy; and building a customer base that includes over 180,000 local lines and approximately 700,000 long distance customers.

This approach was imperative, particularly given Talk America's focus on the residential market. In order to build a financially viable residential customer base, it is necessary to employ mass marketing techniques, such as direct mail, telemarketing, television advertising, and marketing through other retail channels. As a result of this

"shotgun" approach, Talk America's customers are not highly concentrated, but instead are widely disbursed across numerous exchanges in the 25 states where we provide local service. In fact, the 180,000 access lines Talk America currently serves reside in 4,499 separate wire centers and 15,387 individual NPA/NXX codes. It would be impossible to financially justify deployment of switches to serve such a disbursed customer base, or to attempt to serve these customers using competitive switching capacity, which, to the extent it is available at all, is concentrated in high-density exchanges with a predominance of business customers.

The UNE-P offering is the only economically viable means of attaining a critical mass of residential customers. Only after that critical mass is achieved, and only to the extent that there are significant clusters of customers in specific geographic areas, might it then be technically and economically feasible to migrate those customers to competitive switching alternatives, either deployed by Talk America or purchased from an alternative provider.

Talk America believes that its focus on obtaining and keeping customers, rather than on building facilities without customers to support them, is the only feasible one for a company initiating a long-term local exchange market strategy. An affirmation of that strategy is Talk America's EBITA positive results over the last two quarters, and positive net income in the fourth quarter of 2001. Such financial results are hard to find among CLECs. Assuming that the basis of our entry strategy, UNE-P, is not discontinued or significantly limited as a result of incumbent LEC-provided misinformation about the state of local competition, we anticipate continued improvements in our financial results in quarters to come.

V. Focus of the Triennial Review

The goal of the FCC in the triennial review should be to realistically and objectively assess the state of local competition and make regulatory adjustments that will enable the Congressional intent of the Act to be fulfilled. If competition is to move out of its nascent stage, the FCC must define and implement policies that provide stability in telecommunications regulation and stimulate long-term investment. Without that focus, any regulatory reforms purported to encourage competition will fail.

In order to properly evaluate the current state of competition and the prospects for further development, beyond market shares, the FCC should consider factors that have a real-world impact on competitors' ability to attract capital and achieve financial and operational stability in the local markets. Chief among those factors are: (1) the available gross margins in specific segments of the market; (2) the extent to which there is true parity in the incumbent LECs' provision of network elements, services, and operational support systems to CLECs, as required under the Act; and (3) the degree of market maturity. While Talk America cannot offer an exhaustive analysis of each of these factors, we can provide examples to illustrate the realities of the current market.

(1) Margin Analysis. For a competitor to survive in the telecommunications business, it is obviously critical to achieve gross profit margins that are sufficient to cover sales and marketing expenses, bad debt, general and administrative expenses, interest payments, taxes, depreciation and amortization, and, ultimately, generate a net profit. Thus, the starting point for determining financial viability is the gross margin, or the difference between the retail revenues that can be generated from the service and the wholesale costs incurred for the service. In the case of local services provisioned using

the UNE-P entry strategy, the wholesale cost is the cost of the underlying network elements.

As an example of the significant obstacles facing CLECs attempting to compete in the residential market, it is instructive to consider the gross margin opportunities in the New York market, one of the most competitively friendly in the country. Retail prices offered by Verizon to residential customers vary significantly there, depending upon the particular package selected by the customer. At the low end of the range of offerings, Verizon charges a rate of $6.11 for a residential line. The wholesale costs that would be incurred by a competitor using UNE-P to serve that same customer would be $10.27. If the CLEC offered the customer a comparable service at the same retail price as Verizon (thus, ignoring the fact that a competitor would actually need to offer a discount to attract the customer from Verizon), the CLEC could expect to generate approximately $11.11 per month for the line, combining the local service rate and the subscriber line charge. Thus, even if the CLEC charges the same retail price as Verizon, its gross margin would be just $.84 per month per line, or 8%, for that service offering. A CLEC could not hope to survive with gross margins at that level.

At the higher end of the spectrum, Verizon offers a premium local residential service package for $36.95 per month. The wholesale cost to offer the same service would total $30.73, and the total revenues that could be generated by the CLEC assuming it charges the same retail rate as Verizon would be $44.70 per month. In this instance, the CLEC could generate a gross margin of $13.97 per month per line, or 31%. While significantly better than the margin available for the low-usage customer with a basic

service package, this margin is still insufficient to allow for full recovery of all of a CLEC's internal operating costs, including generation of a reasonable profit.

The situation is far worse in other states, however. For instance, in California, Pacific Bell charges a retail rate of $10.69 for basic residential service. A CLEC offering the same service at the same retail rate could expect to generate $20.69 per line per month, but would pay wholesale costs of $27.90 for the UNE-P elements needed to provision the service. In this instance, the CLEC would generate a negative gross margin of $7.21 per line per month, or negative 35%. Clearly, no firm can survive for long if they are unable to cover even their wholesale costs.

Talk America has been able to achieve success in the residential market only by offering premium service bundles that include the basic service line, local and sometimes long distance usage, and features. This strategy allows the company to generate higher revenues per line and thereby achieve higher gross margins than could be achieved from the sale of a basic access line. Unfortunately, because of the high cost of UNEs relative to the subsidized retail rates offered by incumbent LECs, Talk America's ability to serve the entire spectrum of residential and small business customers, including those who only desire basic telephone service, is restricted. Interestingly, the incumbent former Regional Bell Holding Companies ("RBOCs) argue incessantly that they must be allowed into the long distance market in order to compete with CLECs who offer bundled local and long distance services. Yet, it is the RBOCs' excessive pricing of UNEs that essentially forces CLECs like Talk America to offer bundled products, and prevents them from offering stand-alone local exchange services using the UNE platform.

(2) Parity Analysis. In August 1996, when the FCC adopted its initial rules implementing the Act in the First Report and Order, it acknowledged the difficulties that would face prospective competitors in their efforts to compete against the incumbent LECs:

> [W]e believe that incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus, have little incentive to provision unbundled network elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and ability to engage in many kinds of discrimination. For example, incumbent LECs could potentially delay provisioning access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality.[14]

The FCC and state commissions have adopted a myriad of rules and performance standards in an effort to overcome the incumbent LECs' perverse incentives and capabilities to engage in discrimination in the provision of UNEs, interconnection, and access to operational support systems, and thereby thwart the pro-competitive purposes of the Act. While these measures have undoubtedly improved the situation beyond what it would be without them, the continued monopoly power of the incumbent LECs has enabled them to engage in persistent discriminatory behavior—some blatant and some subtle—in order to disadvantage competitors. Their incentives and ability to discriminate against competitors are so strong that they are exceedingly difficult to overcome through regulation, particularly when the penalties imposed on the incumbent LECs are not

[14] *Local Competition Order*, 11 FCC Rcd at15656, ¶ 307.

sufficient to deter the behavior and are, instead, viewed by the incumbents as a cost of doing business.

Among the discriminatory and anti-competitive strategies that Talk America and other CLECs continue to confront are:

- Inadequate and Incorrect Reporting of Line Loss by the incumbent LECs. Several RBOCs have persistently failed to accurately and consistently provide Talk America with timely notification of an end user's decision to change from Talk America's service back to the RBOC or to another CLEC. For instance, despite being ordered by the Michigan Public Service Commission in December 2001 to correct its severe line loss notification deficiencies and apologize to CLECs for the ensuing problems[15], Ameritech continues to this day to provide Talk America with either no or incorrect line loss information. In the 90 days following the Michigan PSC's Order, Ameritech-MI reported line loss on 34 lines 5-10 days after disconnection, 23 lines 10-30 days after disconnection, and 280 lines more than 30 days after disconnection. These delays cause Talk America to continue to bill customers who have returned to Ameritech or switched to another CLEC, generating customer confusion, anger, and complaints. And, despite the Michigan PSC's efforts to require Ameritech to fix the problem, Ameritech informed Talk America that it can expect to receive charges on a line for as long as two months after receiving line loss notification on a disconnected line.

- Incorrect Billing and Daily Usage Feeds. Talk America also confronts significant problems that result from the provision of inaccurate and/or incomplete billing and usage records from incumbent LECs. These issues impose particularly severe problems for CLECs attempting to compete in the residential market, where the sheer number of customer records that must be handled on a daily basis demands accurate electronic billing records from the incumbent LECs. Manual auditing and bill reconciliation is simply not an efficient or practical option. The persistent deficiencies in the billing records provided by some

[15] *See In the matter, on the Commission's own motion, to consider AMERITECH MICHIGAN's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996,* Order and Opinion, Case No. U-12320, (Dec. 20, 2001). As a result of this Order, Ameritech was required to issue a letter to Talk America which stated in part: "We would like to apologize for any inconvenience you may have experienced regarding non-generation of Line Loss Notifications (836s) which may have resulted in double billing of the CLEC's end user after the end user migrated local service to another Competitive Local Exchange Provider (CLEC) or to Ameritech-Michigan in a Winback situation." (Letter from Bob Healy, Ameritech Select Account Manager—Industry Markets, to Alan Kirk, Talk America Director of Product Development.)

incumbent LECs substantially impedes a CLEC's ability to compete, and imposes excessive and unnecessary costs on the CLEC and its customers.

- Antiquated and Undeveloped Ordering, Provisioning and Billing Systems. Talk America continues to face significant obstacles in its efforts to interface with the incumbent LECs in an efficient and cost-effective manner. Despite having six years to develop their operational support systems and their obligations under the Act to provide CLECs with parity ordering, provisioning, and billing services, many incumbent LECs have yet to do so, and continue to force CLECs to use manual and paper transactions that are both unnecessarily costly and inefficient. For instance, until just recently, Verizon-Virginia was unable to provide CLECs with electronic bills, which completely precluded Talk America from entering that market. For a CLEC serving residential customers, it is simply impossible to operate without accurate and timely electronic billing. Even more recently, Ameritech has informed Talk America that it must manually submit via facsimile any order that is rejected by Ameritech's ordering interface, even though the order rejections may be the fault of Ameritech. This procedure is virtually unworkable for a competitor attempting to process large volumes of residential service orders.

- Anti-Competitive Winback Efforts. The anti-competitive winback efforts undertaken by a number of incumbent LECs around the company also impede the ability of CLECs to compete on a level playing field, and violate the parity obligations imposed on the incumbents under the Act. Talk America believes that some incumbent LECs routinely use information obtained through their wholesale relationship with CLECs to engage in targeted campaigns to win back customers who have switched to a CLEC's service. While Talk America certainly does not expect to be insulated from competitive efforts by the incumbent LECs to retain or win back customers, those efforts become anti-competitive and unfair when the incumbent LECs use the proprietary information obtained from their provision of wholesale services to CLECs in order to target their retail winback efforts.

- Failure to Provide Parity Feature Functionality. The incumbent LECs also severely disadvantage CLECs who rely on UNE-P by refusing to provide CLECs with available features and functions that they offer to their own retail customers. As an example, Ameritech has refused to allow competitors who utilize UNE-P with access to the Advanced Intelligent Network triggers required to provide features such as privacy manager. Moreover, it has engaged in a strategy to win back customers from CLECs by offering privacy manager as a feature not available from the competitors. The inability of CLECs to use the full panoply of features and functions available in the switching facilities of an incumbent LEC limits their ability to compete on an equal footing, and reduces the choices available to consumers.

- Discriminatory Service. Talk America encounters on a daily basis a myriad of service problems that often suggest anti-competitive behavior or, at the very least, lack of parity on the part of the incumbent LEC. For instance, we have

experienced situations in which the incumbent LEC calls a customer who recently switched to Talk America in an effort to win back the customer; the incumbent LEC telemarketer has asked if the customer preferred Talk America's voice mail product to the incumbent LEC's product; shortly thereafter, the customer's Talk America voice mail discontinued working. In other instances, the customer loses dial tone when they switch to Talk America's service, despite the fact that no physical change is required under a UNE-P provisioning method to switch a customer. We have also experienced problems with incumbent LECs failing to meet repair deadlines for Talk America's retail customers, resulting in service disruptions for the customer and loss of goodwill for Talk America.

- Incumbent LEC Efforts to Disparage CLECs. Talk America and other CLECs face persistent attacks by incumbent LEC employees, who interface with the CLECs' retail end users when providing maintenance and repair services. There have been reported and unreported examples of incumbent LECs making disparaging remarks about the financial stability and service quality of competing carriers, which can be very damaging to the CLECs' reputations. These insidious anti-competitive strategies are inherently difficult to prove and prosecute, which is perhaps why they are so prevalent.

- Imposition of Excessive Deposit Requirements. Recently, as the first wave of interconnection agreements have expired and new ones are being negotiated, many incumbent LECs have sought to impose onerous deposit requirements on CLECs. While the deteriorating financial condition of some CLECs may seem to justify an increase in the deposit requirements, this issue very clearly demonstrates the rising obstacles that CLECs face as they attempt to compete with entities that control their access to critical network facilities. By raising the deposit requirements for CLECs who must have access to these facilities to compete during a period when the CLECs may already face financially tenuous circumstances, the incumbent LECs can inflict further financial damage on the CLECs and thereby impede their ability to compete. These onerous deposit requirements can thus be used by the incumbent LECs to raise the barriers to competitive entry.

Despite the various state and federal performance standards and penalty plans that have been implemented over the past few years, these problems and others that severely disrupt a CLEC's ability to compete against the incumbent LECs persist. Clearly, more effort is needed to enforce the existing parity performance requirements and to develop additional standards with sufficient penalties to deter this kind of anti-competitive behavior.

(3) Market Maturity. Relatively speaking, the new regulatory paradigm created by the 1996 Act is still in its infancy, and the competitive marketplace that it intended to create has not yet materialized, much less matured. The paradigm was designed to be technologically neutral, promoting parity rather than any particular method of market entry. The FCC recognized in its 1999 UNE Remand Order that "there will be a continuing need for all three of the arrangements Congress set forth in section 251 to different geographic areas."[16] It also recognized at that time that the continued availability of UNEs and UNE combinations was critical to achieving the ultimate vision of a "network of networks":

> We continue to believe that the ability of requesting carriers to use unbundled network elements, including various combinations of unbundled network elements, is integral to achieving Congress' objective of promoting rapid competition to all consumers in the local telecommunications market. Moreover, in some areas, we believe that the greatest benefits may be achieved through facilities-based competition, and that the ability of requesting carriers to use unbundled network elements, including various combinations of network elements, **is a necessary precondition to the subsequent deployment of self-provisioned network facilities**.[17]

Thus, the FCC has clearly acknowledged that the industry must mature, using resale, UNE and UNE-P entry strategies, before true facilities-based competition can be expected. CLECs have had only five years to attempt to attract investment and

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[16] *In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 15 FCC Rcd 3696, 3700, ¶ 5 (1999) ("*UNE Remand Order*"), *clarified In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 9587 (2000).

[17] *Id* (**emphasis supplied**).

customers, develop and refine their back office systems, and compete against incumbent LECs with 100 years of experience. Further, in many states, the UNE-P product has been available for only two years. During this limited period, companies like Talk America have had to educate the American public on the mere existence of local competition and have had to contend both in the retail and wholesale ends of the business with those 100 year old monopolists who have attempted to forestall competitive entry at every turn.

While competitive advances have certainly been made during the past five years, with at least 95% of the American public still receiving their local service from incumbent LECs, there clearly remains a great deal of work to be done. In light of the daunting financial, operational, regulatory and competitive obstacles already confronting CLECs in their efforts to growth their fledgling businesses, now is not the time to place in front of them what would be an insurmountable obstacle: further restrictions on the availability of UNEs and UNE combinations. Rather, now is the time to expand the available network elements in order to hasten the maturation of the market and the development of the network of networks that will ultimately bring true competition to the telecommunications market.

VI. Conclusion

Talk America urges the FCC look behind the rhetoric that will undoubtedly be offered by incumbent LECs in this proceeding to obscure the true state of competition in the local telecommunications market. The market is not, as they will claim, sufficiently competitive to justify restricting competitors' access to their network elements. To the contrary, competition, still in its infancy, is as invisible as the emperor's clothes. Until all of the threads that are needed to make the cloth—reasonable margins, regulatory

certainty, true parity, and market maturity—can be tightly woven to form a durable cloth of sustainable competition, any movement to unravel even a single pro-competitive thread of the present regulatory paradigm will place the goals of the Telecommunications Act in jeopardy.

The emperor marched in the procession under the beautiful canopy, and all who saw him in the street and out of the windows exclaimed: "Indeed, the emperor's new suit is incomparable! What a long train he has! How well it fits him!" Nobody wished to let others know he saw nothing, for then he would have been unfit for his office or too stupid. Never emperor's clothes were more admired.

"But he has nothing on at all," said a little child at last. "Good heavens! Listen to the voice of an innocent child," said the father, and one whispered to the other what the child had said. "But he has nothing on at all," cried at last the whole people. That made a deep impression upon the emperor, for it seemed to him that they were right…

-- from Hans Christian Anderson's tale, The Emperor's New Suit, 1837.

Respectfully submitted,

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