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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
	)	

To the Commission:

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SUMMARY

The FCC's overriding objective in this proceeding should be to determine how best to promote local telecommunications competition. The Commission is being presented with two dramatically different sets of proposals for achieving that goal – one by the ILECs and another by state regulators, consumers and competitive new entrants. The FCC's task is to determine which proposal will actually promote local competition. This is an easy task. Consumers have benefited from greater choice in telecommunications services and providers where competition has flourished. Where local competition flourishes, however, the ILECs stand to lose market share. Short-term economic self-interest has led the ILECs to assert positions that, if accepted, would have the effect of killing local competition. That is exactly what they have done. If the Commission accepts the ILECs' proposals, it will do so with full knowledge that it is choosing a politically expedient path which will return us to monopoly rather than lead us to greater competition. If the FCC truly wants to promote local competition rather than merely paying lip service to the ideal, it will listen closely to the entities who must accept the considerable risks of entering the local market to compete against the incumbent monopolists. CompTel speaks for those entities, and is urging the Commission to take action in this proceeding to promote local competition through the robust UNE regime embodied in Sections 251(c)(3) and 252(d)(1) of the Communications Act.

Several statements in agency decisions and the speeches of Commissioners seem to reveal a prevailing sentiment within the FCC that restricting access to UNEs and raising barriers to entry somehow would stimulate facilities-based competition and/or further broadband deployment. This is a ridiculous falsehood propagated by the ILECs, and CompTel is frankly surprised that the Commission is taking it seriously. Congress adopted a strong UNE *statutory*

regime in 1996 because it knew that UNEs would promote local competition and long-term investment in alternative facilities by non-incumbent carriers. The Commission itself adopted a strong UNE *regulatory* regime in 1996 because it knew that this regime would play a critical role in promoting local competition. The ILECs have poured hundreds of millions of dollars into legislative lobbying, legal challenges, and regulatory efforts to tear down both regimes because they know that by doing so they would kill local competition and preserve their legacy local monopolies. The empirical and policy truth is this – new entrants need non-discriminatory access to the full range of UNEs at TELRIC-based rates so that they can establish the market presence (*e.g.*, brand name, customer base, revenue stream, back-office systems) necessary to implement a long-term entry strategy, including the development of facilities-based alternative networks.

Another critical empirical and policy truth is this – it is not the goal of every new entrant, nor should it be, to construct a ubiquitous, redundant local exchange network. For decades, the Commission has correctly recognized that the public interest is supported by many types of competitors, ranging from hybrid carriers who rely in part upon their own facilities, equipment and capabilities, to pure resellers who rely upon marketing prowess and efficient operations to offer consumers lower rates. The FCC claims to want to foster facilities-based competition, yet the questions in the *Notice* suggest that the Commission is considering proposals that would severely harm facilities-based competition. Ultimately, the Commission should leave it to the marketplace to sort out the optimum mix of competitive entry through self-provisioning, UNEs and resale. The Commission should not view its role as imposing an industrial policy on the country to promote the illusion that all or nothing facilities-based entry is feasible.

The capital markets have unequivocally repudiated the "field of dreams" model of network construction. Investors are no longer willing to let carriers build networks in anticipation that customers will fill them. Indeed, in today's world, each part of a network construction plan must be supported by identified revenues before further funding is available. These are all facts, however, of which the Commission is well aware. Yet, many questions in the *Notice* seem to reflect an implicit acceptance of the ILECs' false claim that the FCC is only a few UNE restrictions away from creating a new class of pure facilities, pure broadband competitor. This future, they claim, can only be achieved if the Commission eliminates or restricts UNEs despite clear language in the Act reflecting Congress' appreciation that competition can only develop where UNEs are available.

To the extent that the Commission conducts an inquiry into whether any particular network functionality satisfies the statutory "impair" test in Section 251(d)(2), the Commission must not employ assumptions contrary to the assumptions underlying the statute. Above all, the FCC cannot assume that restricting the availability of UNEs will facilitate competition. The language of Section 251(d)(2) also requires the Commission to apply the impair standard from the perspective of the *requesting carrier*, not the ILEC or end users. This requirement has a direct impact on the factors the Commission can consider in applying the impair standard, as well as the way in which the Commission can consider them. Specifically, the Commission can only consider factors that potentially affect the *requesting carrier's* ability to enter the market and "provide the services that it seeks to offer." For these reasons, CompTel has strong reservations about the FCC's so-called "granular" application of the impair standard. New entrants do not enter markets or provide services in a "granular" way. Certainly, their business

plans are not "granular," and there is a real danger that a "granular" approach would ignore the extent to which all the pieces of an entrant's business plan depend upon each other.

CompTel strongly opposes any application of the impair standard on a service-by-service basis. Such an approach is flatly contrary to the UNE regime in Section 251(c)(3) and Congress' careful definition of the term "network element." The FCC's task is narrowly limited to determining which "network elements" shall be made available "for purposes of subsection (c)(3)," and the statutory language neither authorizes nor is consistent with the service-by-service approach. The Supreme Court rejected the service-by-service approach in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and the Commission has never before used it as part of the impair analysis.

When analyzing the extent to which entrants may self-provision certain functionalities, the Commission must take into account the current state of capital markets and examine whether self-provisioning can be accomplished profitably. Capital markets have largely closed to competitive entrants in the last two years, the effect of which is that any FCC mandate requiring competitive carriers to replace UNEs with substantial investments in new facilities could be the last straw for competition. Hence, the Commission cannot take self-provisioning into account when applying the impair standard in this proceeding at this time.

CompTel urges the Commission to immediately bring its current rules and policies in line with the statutory requirements of the 1996 Act. In particular, the Commission must eliminate all restrictions on the use of the enhanced extended link (EEL) and eliminate the so-called switch carve-out that restricts the availability of the UNE Platform.

CompTel further reiterates its request that the Commission convene a Joint Conference and undertake other measures to obtain necessary input and participation by state

regulators in this proceeding. CompTel strongly opposes any "sunsets" or other phase-downs of UNE requirements as being anti-competitive and a deterrent to new investment and entry.

Finally, CompTel shares without reservation the FCC's stated goal of promoting facilities-based competition in the broadband market segment, as well as every other segment of the telecommunications market. However, the Act does not endorse, and CompTel does not support, policies that seek to promote investment for its own sake at the risk of competition, which brings with it the multiple benefits of efficient investment, rapid deployment, innovative service creation, and increased consumer welfare. Therefore, CompTel does not support policies that offer the false promise of immediate all-or-nothing facilities based competition while erecting barriers to viable, facilities-based competition. Such policies harm the interests of consumers by undermining competitive market forces, and unfortunately would result in less, not more, long-term investment in facilities by erecting enormous barriers to entry. The FCC claims to desire to promote broadband investment, yet it is actively considering ILEC-sponsored proposals that would yield precisely the opposite result.

The best way to promote broadband infrastructure investment is by adopting policies to implement the statutory regime to maximize new entry and competition in the telecommunications industry. Attempting to persuade the ILECs to increase their investment by sweeping away competitors and dominant carrier regulation would only free the ILECs to exploit their monopoly power by restricting output, charging higher rates and engaging in less investment, as they historically have done when given the opportunity.

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