

**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
)	

**REPLY COMMENTS OF THE
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.**

The National Exchange Carrier Association, Inc. (NECA) submits this reply to comments filed in response to the Commission's *Notice of Proposed Rulemaking (FNPRM)* in the above-captioned proceeding.¹ NECA's reply is limited to the issue of whether the Commission's "safe harbor" restrictions, which constrain the ability of carriers to substitute unbundled network element (UNE) combinations for tariffed special access services, should be continued pending long-term reform of existing separations, access charge, and universal service mechanisms.

¹ 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, *Notice of Proposed Rulemaking*, 16 FCC Rcd 22781 (2001) (*NPRM*).

I. THE COMMISSION'S SAFE HARBOR RESTRICTIONS MUST BE MAINTAINED PENDING LONG-TERM REFORM OF ACCESS CHARGE, UNIVERSAL SERVICE AND SEPARATIONS RULES.

CompTel and WorldCom maintain that the Commission's "safe harbor" restrictions are unlawful and contravene section 251(c)(3)² of the Act by preventing a "requesting telecommunications carrier" from using UNE combinations to provide "a telecommunications service" of its choice.³ These commenters argue that as long as a competitor uses the leased UNE combinations to provide a telecommunications service, the FCC cannot place any further limits on the uses to which the carrier puts those elements.⁴

Comments submitted in this proceeding have explained that the lack of access to loop-transport combinations does not materially diminish a requesting carrier's ability to provide special access services.⁵ The fact that numerous entities are currently offering a wide variety of services using special access as inputs makes it evident that these entities

² 47 U.S.C. § 251(c)(3). This section provides that incumbent local exchange carriers (ILECs) have "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, non discriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."

³ See Competitive Telecommunications Association (CompTel) *Comments* at 91 (April 5, 2002), WorldCom *Comments* at 53-54 (April 5, 2002).

⁴ *Id.*

⁵ See Joint Comments of NECA, National Rural Telecom Association (NRTA), National Telephone Cooperative Association (NTCA), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and the Western Alliance in CC Docket No. 96-98 (filed Apr. 5, 2001). See also Joint Comments and Joint Reply of NECA, NRTA, NTCA, and OPASTCO in CC Docket No. 96-98 (filed Jan. 19, 2000 and Feb. 18, 2000 respectively).

are not impaired in providing the services they seek to offer.⁶ The *UNE Fact Report for 2002* warns that allowing the substitution of UNEs for special access services is “not only unnecessary to assure continued competition . . . but also likely to undermine the competitive supply of facilities that already has emerged for the local inputs in these markets.”⁷ Based on this record, the Commission may reasonably conclude that barring access to combinations of UNEs in lieu of special access would not materially diminish a requesting carrier’s ability to provide services it seeks to offer.

But even if this were not the case, existing restrictions should be left in place until the Commission fully addresses the complex jurisdictional cost recovery issues associated with the substitution of UNEs for interstate and intrastate access services. Failure to do so would undermine the Commission’s access charge plan, as well as state access charge regimes, and cause serious harm to LECs, telephone subscribers, and universal service in the process.⁸

CompTel seeks to respond to these concerns by claiming that an “efficient” facilities-based competitor should not fear being unfairly undercut by the availability of loop-transport UNE combinations at TELRIC rates and that “[t]he failure of inefficient firms is to be expected in a competitive market, not deplored as a sign that the market has failed.”⁹ This argument might make sense if access rates and UNE prices were

⁶ See *Verizon Comments* at 138.

⁷ See *BellSouth, SBC, Qwest and Verizon UNE Fact Report 2002* at V-18 (April 2002) (*UNE Fact Report 2002*).

⁸ See *Joint Comments* of NECA, NRTA, NTCA, OPASTCO and Western Alliance at 3-4 (April 5, 2001) (*NECA, et al. Joint Comments*).

⁹ See *CompTel Comments* at 94.

developed in a consistent manner. The fact is, however, that these rates are products of different regulatory regimes. As such, it makes no sense to assert that rates developed under one system are “inefficient” merely because they are higher, or different than, rates developed under another plan.

As NECA and other commenters have shown, loss of special access revenue streams would cause massive shifts in cost recovery from interstate access customers to state and local ratepayers, with dramatic adverse effects on local ratepayers. Lifting the existing use restrictions would effectively snuff out special access competition and undercut the market position of many facilities-based competitive access providers.¹⁰ In these circumstances, elimination of the safe harbor restrictions would not mean the triumph of more “efficient” competition but would merely allow one group of carriers to exploit a loophole in the rules at the expense of local telephone users.

Contrary to claims of AT&T, WorldCom, Comptel and others, the Commission is well within its authority under the 1996 Act to continue existing safe harbor restrictions pending reform of existing accounting, separations, universal service and access charge rules. In this regard, it must be kept in mind that the safe harbor restrictions were intended only as an interim measure, necessary to preserve the *status quo* pending consideration of how existing cost recovery mechanisms can be harmonized with the new competitive environment.¹¹ As such, these restrictions are necessary in order to comply

¹⁰ See *SBC Comments* at 107.

¹¹ The Commission noted that it “may, where necessary, establish a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goals of 1996 Act, including the full implementation of a competitively neutral system to fund universal service and a completed transition to cost-based access charges.” See

with the Act's mandate to preserve preexisting rules governing intercarrier compensation mechanisms, including the Commission's access charge plan, "until such restrictions and obligations are explicitly superceded by regulations prescribed by the Commission."¹²

The courts have unequivocally found that the Commission is entitled to substantial deference "when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated."¹³ In this case, permitting the free substitution of UNEs for interstate access services would mean wholesale *de facto* abandonment of existing cost recovery mechanisms, without any "considered action" taken by the Commission at all.¹⁴ Under the circumstances, maintaining the safe harbor restrictions on UNE combinations in order to preserve the status quo, while the Commission fully considers the legal and economic implications of allowing carriers to substitute UNE combinations for ILEC special access services, is not only permissible under the Act but the only reasonable alternative.

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Supplemental Order*, 15 FCC Rcd 1760 (1999) at ¶ 7, quoting from the *Local Competition First Report and Order*, 11 FCC Rcd at 15499 (1996).

¹² 47 U.S.C. § 251(g).

¹³ See, e.g., *ACS of Anchorage v. Federal Communications Commission*, 290 F3d. 403, 410 (DC Cir. 2002).

¹⁴ See *NECA, et al. Joint Comments* at 6.

II. CONCLUSION

The Commission has the requisite authority and public policy justification to continue the safe harbor restrictions pending reform of existing accounting, separations, universal service and access charge rules with the new competitive environment brought about by the 1996 Act. The record in this proceeding shows clearly that requesting carriers are not “impaired” by a lack of UNE combinations as substitutes for special access. The record also shows that allowing free substitution of UNE combinations for special access services would result in the *de facto* abandonment of the Commission’s access charge plan, in direct contravention of section 251(g) of the Act. The Commission should accordingly continue the existing interim “safe harbor” restrictions barring the free substitution of UNE combinations for access facilities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Comments was served this 17th day of July 2002, by electronic delivery and by first-class mail to the persons listed below.

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