October 24, 2002

**VIA ELECTRONIC FILING**

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

**Re: *Ex Parte* Presentation in CC Docket No. 01-338; CC Docket No. 96-98; and CC Docket No. 98-147**

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, the signatories of this letter[1] hereby submit this written *ex parte* presentation in the above-captioned docketed proceedings. The purpose of this presentation is to respond to recent RBOC *ex parte* presentations in the above referenced dockets urging the Commission to preempt state commission determinations regarding the unbundling of network elements by incumbent local exchange carriers ("ILECs").[2]

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[1] Access Integrated Networks, AT&T, Broadview Networks, Competitive Telecommunications Association, El Paso Global Networks, Eschelon Telecom, Ionex Telecommunications, Inc., KMC Telecom, New Edge Networks, PACE Coalition, Talk America, WorldCom, Z-Tel Communications, Inc.

[2] *See SBC Telecommunications, Inc., Memorandum of Ex Parte Presentation*, CC Docket No. 01-338; CC Docket No. 96-98; CC Docket No. 98-147 (filed Oct. 10, 2002); *See BellSouth Ex Parte Notification*, CC Docket No. 01-338 at 19 (filed Oct. 15, 2002) ("Allowing the states to decide the issue [of ULS availability] in the first instance or to reach contrary 'impairment' determinations, is inconsistent with the FCC's statutory jurisdiction, and would result in 50 states' worth of litigation, lack of regulatory concisistency, and uncertainty for investment; the FCC should sunset switching UNEs."); *See Verizon Ex Parte Notification*, CC Docket No. 01-338; CC Docket No. 96-98; CC Docket No. 98-147, at 17 (filed Oct. 9, 2002) ("FCC has sufficient authority to implement a transition plan to address practical concerns with discontinuing residential UNE-P."); *See Verizon Ex Parte Notification*, CC Docket No. 01-338; CC Docket No. 96-98; CC Docket No. 98-147, at p. 10 (filed Oct. 16, 2002).

In the early 1990s, a number of state legislatures, including Illinois, New York, Texas, and Georgia, embarked on the bold experiment of local telecommunications competition. The state legislatures generally authorized their regulatory bodies to adopt regulations that support the development of competition in the local telecommunications markets, including authorizing them to adopt rules requiring ILECs to provide unbundled access to UNEs.[3] State commissions built on one another's innovations and added important contributions of their own to a growing understanding of the actions that would be needed to bring competition to this critical marketplace. Congress, in recognition of the valuable experiences of state commissions in developing local competition, accorded them a key role in the Telecommunications Act of 1996.[4]

In the 1996 Act, Congress envisioned a strong ongoing role for state commissions. Indeed, in Section 251(d)(3) of the Act, Congress provides state regulators with the authority to establish additional unbundling obligations, so long as those obligations comply with subsections 251(d)(3)(B) and (C).[5] Section 251(d)(3) states:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that –
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> (A) establishes access and interconnection obligation of local exchange carriers;
> (B) is consistent with the requirements of this section; and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

The Commission in the *UNE Remand Order*,[6] held that section 251(d)(3) grants state regulators the authority to impose obligations upon ILECs beyond those imposed by the national UNE list adopted by the Commission in that order, so long as the additional state-imposed obligations "meet the requirements of Section 251 and the national policy framework

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[3] *See e.g.*, *Texas Public Utility Regulatory Act ("PURA")*, Chapter 60, Subchapter B.

[4] Telecommunications Act of 1996, Pub. L. No. 104—104, 110 Stat. 56, codified at 47 U.S.C. §§ 251 *et seq* (*"1996 Act"*).

[5] In addition, many states have independent authority to order unbundling.

[6] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 3696 (1999)

instituted in [that] Order."[7] That conclusion was compelled by the Eighth Circuit Court of Appeals decision in *Iowa* that subsection 251(d)(3) "does not require all state commission orders to be consistent with all of the FCC's regulations promulgated under section 251."[8]

In the *Triennial Review NPRM* the Commission must, consistent with the decision in *USTA v. FCC*,[9] conduct pursuant to section 251(d)(2) a refined and fact-specific analysis of factors[10] previously identified by the Commission as essential to an impairment analysis. Most, if not all of these factors are highly fact-specific and may vary from geographic region to geographic region, and accordingly, state commissions are, no doubt, best situated to conduct these analyses.[11] As a result, the state commissions should be enlisted to assist the Commission in implementing section 251(d)(2) of the Act. Indeed, in the *Triennial Review NPRM*, the Commission itself "recognize[s] that state commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdictions, and that entry strategies may be more sophisticated in recognizing regional differences."[12] The signatories of this letter agree with the Commission's observation in this respect. Clearly, the state commissions are best situated to ascertain local competitive conditions in applying federal unbundling criteria. States not only have the local experience and expertise necessary to make such determinations, they also routinely utilize the processes and procedures – including

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7 *UNE Remand Order*, 15 FCC Rcd at 3767, para. 154.

8 *Iowa Utilities Board v. FCC,* 120 F.3d 753, 806 (8th Cir. 1997), not at issue in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). While states are preempted from removing unbundling obligations imposed by the FCC, they remain free to add additional obligations necessary to promote intrastate competition. *See* 47 U.S.C. §§251(d)(3) and 261(c); *see also, e.g. Commission Investigation and Generic Proceeding of Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes,* Order, Cause No. 40611-S1, Phase II (Indiana Util. Reg. Commission, June, 2002) (rejecting argument by Ameritech Indiana that the Court of Appeals' decision in *USTA v. FCC* diminishes states' authority to order unbundling, including authority to impose additional unbundling requirements.)

9 *See United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA v. FCC*").

10 The Commission seeks comment on applying the unbundling analysis to (1) specific services; (2) specific geographic locations; (3) differing facilities; (4) specific customer types; and (5) requesting carrier type. *Triennial Review NPRM* at para 35. In seeking comment on applying the unbundling analysis to specific services, the Commission solicits input on how to factor in the level of competition for a particular service. *Triennial Review NPRM.* at para. 38. More generally, it strongly encourages parties to submit evidence of actual marketplace conditions, indicating that evidence of that type "will be considered more probative than other kinds of evidence."

11 State commissions agree. *See e.g. Oct. 17, 2002 Letter of Lila A. Jaber, Chairman of Florida Public Service Commission to Michael Powell, Chairman of the Federal Communications Commission*. ("…the FPSC believes state commissions are best positioned to develop regulatory policy at the state level that can promote facilities-based competition as envisioned by the 1996 Telecommunications Act.")

12 *Id.* at para 75.

discovery, sworn testimony and cross-examination on the record – that are essential to reasoned fact-finding. Accordingly, the signatories of this letter submit that the Commission should adopt the framework outlined below in the *UNE Triennial Review Proceeding*.

This framework is very similar to the framework proposed by the Michigan Public Service Commission ("MI PSC") in its *Triennial Review Proceeding* comments.[13] The MI PSC suggested that the Commission should continue to maintain a national list of UNEs, but should also "establish a process by which state regulatory commissions can take the lead in determining when alternatives in their states are sufficiently available to warrant the de-listing of a UNE."[14] Numerous other state commissions made similar proposals in their *Triennial Review Proceeding* comments and reply comments.[15]

**The State Role in Unbundling Determinations**

- **State Law Authority Preserved**. Pursuant to section 251(d)(3), the states have broad discretion to adopt, implement, and enforce rules requiring access to UNEs and the FCC has only limited authority to preclude state actions requiring incumbent LECs to provide access to UNEs based upon independently granted state authority;
- **The FCC May Conclusively Find Impairment Exists on a Nationwide Basis for a Particular UNE**. For each currently available UNE, the detailed factual record in the *Triennial Review Proceeding* does not support a general Commission finding of "non-impairment" under section 251(d)(2) of the 1996 Act. Thus, the Commission should not "delist" any current UNE under federal law, *i.e.*, decline to require that ILECs provide requesting carriers with access to such elements at TELRIC-based rates;
- **If the FCC Determines there is Insufficient Evidence to Presume Impairment on a Nationwide Basis, it shall turn to the States to Conduct Detailed Fact Finding and Issue a Decision** . Local competition can be expected to develop at different speeds in different geographic areas. Thus, even though the record in the *Triennial Review Proceeding* supports a general finding of impairment for all current UNEs, there may be limited instances in which Commission may determine that the evidence of impairment for a particular UNE may not support a

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13 Comments of the Michigan Public Service Commission, CC Docket No. 01-338, et al. (filed April 5, 2002), pp. 4-6.

14 *Id*. at 5.

15 *See e.g.* Comments of the Florida Public Service Commission, CC Docket No. 01-338, et al., (filed April 4, 2002), pp. 5-6; Comments of the Public Utilities Commission of Ohio, CC Docket No. 01-338, et al. (filed April 5, 2002), pp. 7-10.

finding of impairment on a national basis. In such instances, the Commission should set forth appropriate criteria for states to apply (under federal law) to determine whether impairment exists within that specific state. Either upon its own motion or upon a petition from an incumbent LEC making a *prima facie* showing that CLECs may not be impaired without access to a particular UNE in a specified area, a state may conduct an analysis of – and reach a decision as to -- whether impairment exists for the particular UNE in any specific geographic area. States should be permitted to consider additional criteria in conducting any such analysis under section 251(d)(2) and should apply their local expertise to determine the appropriate weight to be given to each factor[16].

- **Frequency of Petitions by Incumbent LECs**. To provide greater market certainty, ensure state resources are not overtaxed or exhausted, and prevent unceasing litigation, an incumbent LEC should be permitted to file a petition with a state commission seeking delisting of UNEs in a given geographic area no earlier than two years after the state commission issues its final decision on the incumbent LEC's previous request;
- **Non-Action by States.** The Commission shall establish a process similar to that in 47 CFR 51.803 to address those instances where a state does not initiate action in response to a petition from an incumbent LEC making the required *prima facie* showing within a reasonable time.

The FCC retains sufficient legal authority to review state actions taken pursuant to section 251.

The signatories of this letter submit that whether the public will view local competition as successful will largely depend upon whether the public itself benefits. Limited competition for some larger businesses, or for only some businesses and residents in limited

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[16] If a state orders the delisting of a UNE, it should adopt an appropriate transition period to ensure a continuity of service for customers. A state may, of course, "relist" a UNE if it later finds pursuant to FCC and state criteria that impairment exists. In addition, a state may add UNEs pursuant to criteria set forth by the FCC or pursuant to any independent authority. In these instances, states should act upon a petition by a CLEC or upon their own motion. In addition, failing any state action, a CLEC should be able to petition the FCC if the "relisting" is pursuant to federal law.

geographic areas, is not what consumers and most businesses expected from the 1996 Act. Accordingly, we urge the Commission to adopt the proposal described herein.

Respectfully submitted,

Access Integrated Networks
AT&T
Broadview Networks
Competitive Telecommunications Association
El Paso Global Networks
Eschelon Telecom
Ionex Telecommunications, Inc.
KMC Telecom
New Edge Networks
PACE Coalition
Talk America
WorldCom
Z-Tel Communications, Inc.

cc: Chairman Powell
Commissioner Abernathy
Commissioner Copps
Commissioner Martin
C. Libertelli
M. Brill
D. Gonzalez
J. Goldstein
W. Maher
M. Carey
R. Tanner
J. Miller
T. Navin