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October 31, 2002

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Memorandum of Ex Parte Presentation**
CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers;
CC Docket No. 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; and
CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Dortch:

On October 30, 2002, Jim Smith, Gary Phillips, and Christopher Heimann representing SBC Communications, Inc. (SBC), met with Jordan Goldstein, senior legal advisor to Commissioner Michael J. Copps.

The purpose of the meeting was to discuss the competitive deployment and usage of high cap loops and transport in the context of the Commission's Triennial Review. The attached material was discussed during the course of the meeting.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter and attachment are being electronically filed. I ask that this letter be recognized with the proceedings identified above.

Please call me should you have any questions.

Sincerely,

/s/ Brian J. Benison

Attachment

CC: Jordan Goldstein

Interoffice Transport and Local Loops

October 30, 2002

Overview

- The Commission must eliminate unbundling for loop and transport facilities where alternatives to UNEs are being used or reasonably could be deployed.

- The Commission should not permit CLECs to purchase high-capacity loops and/or loop-transport combinations as a substitute for special access, or to serve competitive markets — such as the long distance or wireless markets.

Guiding Legal Principles

- Elements that are properly unbundled are "bottleneck facilities" that are "very expensive to duplicate," as opposed to those which are "sensibly duplicable." *Verizon v. FCC*.
- "To rely on cost disparities that are universal as between new entrants and incumbents in *any* industry," rather than those "linked (in some degree) to natural monopoly," is to "invoke a concept too broad . . . to be reasonably linked to the purposes of the Act's unbundling provisions." *USTA v. FCC*.
- Nothing in the Act is "a license . . . to inflict on the economy" the costs of unbundling in competitive markets where there is "no reason to think doing so would bring on a significant enhancement of competition." *USTA v. FCC*.
- Unbundling "imposes costs" by "spreading the disincentive to invest" and "creating complex issues of managing shared facilities." *USTA v. FCC*.

Alternative Local Fiber is Widely Available

- All but nine of the top 100 MSAs are served by at least three CLEC fiber networks.
  - In *USTA*, the D.C. Circuit, noting that 47 of the top 50 areas had 3+ transport competitors, questioned how CLECs could be impaired where an element is "significantly deployed on a competitive basis." Slip Op. 13.
- 1,800 CLEC fiber networks in the 150 largest MSAs, which contain 70% of the US population.
- Competitive carriers have deployed at least 184,000 fiber route miles (much of which is local). ALTS claims the number is 339,000.

CLECs Can Extend Networks to Reach New Customers

- Because business customers are clustered in concentrated areas, CLECs readily can extend their networks incrementally to reach new customers by adding new spurs to existing fiber rings.
  - 80 percent of SBC's special access revenue comes from 25 percent of its wire centers.
- CLECS tout their ability to reach off-net customers (*e.g.*, Time Warner).
- Wholesale suppliers also offer to extend to off-net sites.
  - AFS, for example, offers to connect off-net buildings "at a convenient cost per linear foot" using a "complete turn-key solution" handling "every aspect of the process," including route development, right-of-way procurement, construction, monitoring and maintenance.

A Vibrant Wholesale Fiber Market Exists

- Wholesale suppliers provide a real alternative to ILEC fiber. For example:
  - FiberLoops.com, a fiber clearinghouse, lists competitive fiber for 175 cities, identifies fiber hotels, and has developed a directory identifying 2000 local fiber networks from over 100 different companies.
  - American Fiber Systems - offers a 'turnkey' fiber solution.
  - Utilities possess one-third of the nation's fiber infrastructure and rights-of-way, which they supply to carriers. Half of new metro networks are being built by utilities.
- These suppliers connect end users to fiber rings, IXC pops, and ILEC Central Offices.

AT&T's two stories on Competitive Fiber

- AT&T President David Dorman says:
  - AT&T has "built 18,000 route miles of fiber in 90 cities and . . . [has] about 7,000 buildings on net and that's growing every day."
  - "These 90 cities make up about 70 percent of the jurisdictional local intraLATA service marketplace. We've put this network where customers are and that's what we're focusing on, small to large."
  - "[O]ver 20 percent of our T1-equivalent services are on net and we're growing that every day with a real focus at a grass roots, granular level, building-by-building, address-by-address, of moving customers over."
- AT&T claims BOCs have market power for special access based largely on rate of return data derived from ARMIS reports
  - AT&T's data is based on archaic regulatory accounting and cost allocation requirements that do not accurately generate real world returns
  - The same reports show that SBC's return for switched access is 1.37%
  - Either the data provide a distorted (and therefore meaningless) picture of ILECs' rate of return or switched access rates are unreasonably low.

Financial Conditions Do Not Justify Unbundling

- A plethora of alternative facilities already exist — even if a carrier exits the market, its facilities will remain available, and at fire sale prices.
- Capital markets are tight, but not closed to CLECs with good business plans.
  - CLECs continued to receive funding in 2002: Level 3 — $500 million, Williams — $150 million, DSL.net — $35 million, Broadview Networks — $40 million, Yipes — $50 million, New Edge Networks — $15 million in cash and $131 million in converted debt, *etc*.
- Availability of UNEs would reduce capital flow to facilities-based carriers because the facilities they seek to build would have to compete with UNEs.

Competitive Triggers

- No unbundling of high-cap loops and transport at DS3 and above, including dark fiber.
- If the FCC elects not to remove all unbundling requirements for DS1s, a carveout should be developed, such as:
  - No unbundling of DS1 loops and transport at wire centers:
    - with 2 or more fiber-based collocators,
    - with at least 15,000 business lines, or
    - that generate $150,000 or more in monthly Special Access revenue.

Special Access is Highly Competitive

- Special access customers are highly concentrated.
  - 80% of SBC's special access revenues are derived from 25% of the wire centers in which it provides special access.
- The special access market has been subject to competition for the last 18 years, during which CLECs invested billions to deploy their own fiber.
- Competitive Special access providers have captured 28-39% of the market.

No Impairment Without Access to EELs

- No impairment without UNEs as a substitute for special access, or to provide long distance and wireless services.
  - Competition for special access is flourishing — CLEC market share is 28 percent to 39 percent.
  - Market characteristics (few customers with high volume in discrete areas) facilitate market entry.
  - Carriers successfully using special access to provide the services they seek to offer cannot be impaired without UNEs to provide such services.
- The FCC cannot, consistent with *USTA v. FCC* and *Comptel v. FCC*, allow UNEs to be used in competitive markets.
- At most, high-cap loops and transport should be unbundled only where used to provide a significant amount of local traffic.

Unlimited Conversion of Special Access to UNEs Conflicts with the Goals of the Act

- Undermines facilities-based competition where it is most advanced.
- Subjects special access to price regulation more onerous than when it was a monopoly service.
- Windfall for IXCs and large users at expense of basic consumers.
- Unbundling special access facilities in competitive markets (e.g., long distance and wireless) that have developed without UNEs cannot be squared with the D.C. Circuit's USTA and CompTel decisions.

Conclusions

- Competition is flourishing in the business-focused market of high cap loops and transport
- A myriad of alternatives exist to the ILEC facilities
- Forced access undercuts investment
- At a minimum, competitive indicators should be used to permit limited unbundling of DS1 loops and transport for the provision of local service.