December 20, 2002

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written *ex parte* Presentation in CC Docket Nos. 01-338, 96-98 and 98-147

Dear Ms. Dortch:

On October 31, 2002, Broadview Networks, Inc., Eschelon Telecom, Inc., and Talk America, Inc., (hereinafter, the "UNE-P CLECs") were among a number of Competitive Local Exchange Carriers ("CLECs") that filed a proposed plan in the above-captioned dockets designed to (i) preserve the Unbundled Network Element Platform ("UNE-P") both as a legitimate market entry vehicle and for ongoing customer acquisition and ubiquity, while (ii) ensuring that CLECs providing UNE-P migrate to their own switching platforms as self-provided switching becomes technically and economically feasible.[1] As a result of recent meetings with the Commission and its staff to discuss this UNE-P to UNE-L Migration Plan, questions were raised whether the plan would require Incumbent Local Exchange Carriers ("ILECs") to provide Unbundled Local Switching ("ULS") at some level indefinitely or whether the plan would provide that, under certain conditions, an ILEC might be relieved of the obligation to provide ULS. In addition, at least one Commissioner has recently stated that in markets where enough alternative facilities-based providers exist so as to create a wholesale market for ULS and the impairment associated with unbundled loop provisioning problems is addressed, then ULS may not need to be provided.[2] This *ex parte* is submitted to address these issues and offer a solution.

UNE-P based competition has provided tremendous benefits to consumers, making it feasible for CLECs to provide meaningful competition for residential and small business customers (i.e. the so-called "mass market"). The UNE-P CLECs strongly believe that Sections 251-252 and 271 of the Communications Act of 1934, as amended, (the "Act") require, as a legal matter, that ULS and network combinations continue to be made available by the ILECs. The UNE-P CLECs are anxious to provide services using their own switching facilities, yet maintain that ULS, and especially UNE-P, must be available for the foreseeable future to facilitate entry and growth by new CLECs, and to allow CLECs to compete with ILEC offers made to multi-location customers where their facilities are not as ubiquitous as the ILECs'.

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1 Letter from Rebecca Sommi, Broadview Networks, Inc., *et al.* to Chairman Michael K. Powell, FCC, dated October 31, 2002 ("UNE-P to UNE-L Migration Plan").

2 See Remarks by Commission Kevin J. Martin, 20th Annual PLI/FCBA Telecom Conference, December 12, 2002, Washington DC, at 10-11.

Nonetheless, the UNE-P CLECs have offered the UNE-P to UNE-L Migration Plan in the event the Commission is determined to further restrict the availability of UNE-P.

In the same vein, after further analysis of the concerns raised in the recent meetings referenced above, the UNE-P CLECs have further refined their UNE-P to UNE-L Migration Plan to provide a procedure for ILECs to cease providing ULS on a central-office-by-central-office basis after certain conditions have been met, notice has been given to potentially affected carriers, and an appropriate transition period has expired (the "Central Office ULS Transition Plan"). Proposed regulations that would implement these procedures are attached and respectfully submitted herewith for the Commission's consideration. The attachment also contains streamlined and slightly revised rules for the UNE-P to UNE-L Migration Plan first submitted October 31, 2002. In "plain English," below are the major elements of the UNE-P CLECs' proposed Central Office ULS Transition Plan.

No Federal Preemption

Because the Commission's *Triennial Review* proceeding is undertaken solely to implement the Act, the proposed Central Office ULS Transition Plan, like the UNE-P to UNE-L Migration Plan, should be regarded as establishing minimum *federal* requirements. Adoption of such the Central Office ULS Transition Plan should not preclude State regulators from creating more stringent requirements on ILECs if necessary to implement *State* law.

State Implementation of the Central Office ULS Transition Plan

Just as a "granular" approach should be adopted to determining whether impairment exists, a "granular" approach should be used to ascertain whether an ILEC can refuse to provide all requesting carriers ULS in a given area. The Central Office ULS Transition Plan creates FCC-prescribed procedures and standards, but the detailed factual investigation and implementation is left to State regulators. This approach accounts for the very real geographic differences nationwide in topology, ILEC network configurations, ILEC costs, and the like, and the inevitable impact they have on the feasibility of self-provisioned local switching by CLECs and/or the development of a wholesale market for analog switch port products. Further, under the plan, ILECs would be permitted to stop providing ULS on a central office-by-central office basis, rather than region wide, because the adequate availability of wholesale analog switch products to justify the cessation of ULS will be limited to those central offices where the wholesale providers have an established presence. Moreover, other conditions necessary for a true alternative wholesale environment, such as adequate collocation space either from the ILEC or on a shared basis, is likely to differ from central office to central office. The States are well suited to oversee the implementation of this central-office level plan.

Local Equal Access and a Wholesale Market Are Prerequisites

Under the UNE-P to UNE-L Migration Plan, ULS must remain ubiquitously available until an ILEC can prove that it has deployed an improved UNE-L process that can effectively handle the migration of large volumes of lines by multiple CLECs in the same geographic area. The availability of such a local equal access system is just one prerequisite to an ILEC being able to cease providing ULS to all requesting carriers in a given central office under the UNE-P CLECs' Central Office ULS Transition Plan. Several additional conditions

must be satisfied to ensure that there is a wholesale market out of the central office in question, including:

- A State commission determination that the ILEC has implemented within the State the systems and processes necessary to support a wholesale market for DS0-level local switching that is combined with ILEC-provided unbundled voice grade loops and interoffice transport, including billing (e.g., allowing collocated carriers to accurately identify the unbundled loops ordered by wholesale customer telecommunications carriers), ordering and provisioning, and procedures to seamlessly move unbundled loops from the ILEC to other collocated CLECs and to move unbundled loops between two collocated CLECs, *i.e.,* CLEC-to-CLEC migration.
- State commission confirmation that at least five carriers unaffiliated with the ILEC that have undergone the initial migration under the UNE-P to UNE-L Migration Plan and have been collocated in the central office providing (for at least six months) voice grade, DS0 service using their own switching facilities. This requirement will ensure the stability of the collocation arrangements in the central office and the stability of the carriers whose presence will form the basis for the elimination of ULS in that central office. While not all of these carriers would have to be wholesale providers to allow for the ILEC to cease providing ULS in that central office (see next bullet), the presence of this many carriers is necessary to create an environment where sustained provision of wholesale DS0 voice grade products is likely and also to provide assurances that there is likely to be adequate collocation space and equipment capacity within the central office to support carriers migrating from UNE-P.
- At least two of the carriers collocated in the central office other than the ILEC must be providing a wholesale analog DS0 local switch port product to other telecommunications carriers on a common carrier basis. The presence of at least two qualified wholesale carriers is the absolute minimum required to ensure that reasonable market-based pricing of a wholesale local switching product will be available. If a single wholesale CLEC enable the ILEC to withdraw ULS, the Commission would simply be substituting an unregulated sole source supplier for a regulated sole source provider.
- There must be adequate collocation space, DS0-level terminations, and collocated equipment capacity in the central office to support the migration of qualifying lines served by CLECs and provisioned on the incumbent LEC's unbundled analog switch ports to the wholesale providers. If these conditions are not met in a central office, existing carriers would be unable to transition successfully without severe disruption to customers if ULS is terminated in that office.
- The incumbent LEC may not place restrictions on the ability of CLECs to order unbundled DS0 analog loops or interoffice transport into the collocated space of other CLECs or for a non-collocated carrier to move unbundled DS0 level loops or transport from the space of one collocated carrier to another. This ability to move such loops from one carrier to another with equipment in the central office is necessary if a truly competitive wholesale market in DS0 level switching capability is to develop.

Timing

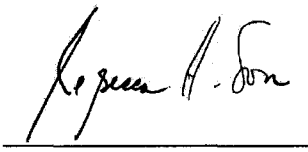
State regulators would be provided nine months after an ILEC request within which to determine whether the ILEC systems and processes necessary to support the wholesale provision of DS0 level analog switch ports are in place. Once a State commission makes a determination that the requisite systems and processes are in place and the other criteria of the Central Office ULS Transition Plan are satisfied in a central office in that State, an ILEC may notify all telecommunications carriers in the State that ULS will no longer be available after a date at least 12 months after the notice date, so as give CLECs the opportunity to secure and install their own collocated equipment or to make arrangements with other collocated carriers in the central office.

Reinstitution of ULS Requirements in a Central Office

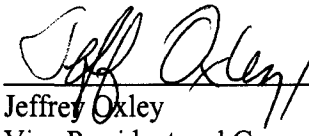
In the event, any time after an ILEC has given notice that it will cease to provide ULS within a given central office, the conditions for the Central Office ULS Transition Plan are no longer satisfied (e.g., there are no longer two wholesale providers of analog switch port products in addition to the ILEC), then the ILEC must again provide ULS in that central office, until the conditions are again met and the ILEC again provides at least twelve months' notice.

The UNE-P CLECs believe that our proposal accommodates the legitimate interests of all concerned. CLECs may continue to use ULS where self provisioned switching is not yet practical or a wholesale market has not yet developed, and will be given a reasonable amount of time to migrate when either condition is met. Yet, as with the UNE-P to UNE-L Migration Plan, ILECs are not required to provide ULS indefinitely without limitation. We hope that this refined proposal addresses the issues raised by the Commissioners and staff in our recent meetings and will prove helpful to the Commission as it nears a decision on the future treatment of ULS.

Respectfully submitted,



Rebecca Sommi
Vice President, Operations Support
Broadview Networks, Inc.



Jeffrey Oxley
Vice President and General Counsel
Eschelon Telecom, Inc.

George Vinall
Executive Vice President, Business Development
Talk America, Inc.

Attachment

cc: Chairman Michael K. Powell
Commissioner Kevin J. Martin
Commissioner Kathleen Abernathy
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Christopher Libertelli
Daniel Gonzalez
Matthew Brill
Jordan Goldstein
Lisa Zaina
William Maher
Richard Lerner
Scott Bergmann
Michelle Carey
Rob Tanner
Gina Spade
Jeremy Miller
Mike Engel
Aaron Goldberger
Dan Shiman

PART 51 – INTERCONNECTION

Subpart D – Additional Obligations of Incumbent Local Exchange Carriers

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§ 51.317 Standards for requiring the unbundling of network elements.

* * *

(b)(4) If an incumbent LEC is required to provide nondiscriminatory access to a network element in accordance with §51.311 and Section 251(c)(3) of the Act under §51.319 of this section or any applicable Commission Order, no State commission shall have authority to determine that such access is not required, except in accordance with §§ 51.319(c)(8), 51.319(c)(9), or 51.319(c)(10). A State commission must comply with the standards set forth in this §51.317 when considering whether to require the unbundling of additional network elements. With respect to any network element which a State commission has required to be unbundled under this §51.317, the State commission retains the authority to subsequently determine, in accordance with the requirements of this rule, that such network element need no longer be unbundled. This section shall not preclude the enforcement or establishment of any regulation, order, or policy of a State commission in accordance with Section 251(d)(3) of the Act.

* * *

§ 51.319 Specific unbundling requirements.

* * *

(c) *Switching capability.* An incumbent LEC shall provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to local circuit switching capability and local tandem switching capability on an unbundled basis, except as set forth in §§ 51.319(c)(8), 51.319(c)(9), and 51.319(c)(10), to any requesting telecommunications carrier for the provision of a telecommunications service.

* * *

(6) As a prerequisite to obtaining an order from a State commission pursuant to § 51.319(c)(7), an incumbent LEC must obtain an order from that State commission declaring that the incumbent LEC has implemented a process to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements within the operating territory of the incumbent LEC in that State. The State commission shall not issue such prerequisite order unless both:

(A) the incumbent LEC requesting the order proves to the State commission that the process which the incumbent LEC has implemented to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network element is capable of:

(i) migrating UNE-P lines to UNE-L lines for any requesting carrier in a manner that is timely, efficient, just, reasonable and nondiscriminatory, as well as nondisruptive and transparent to the requesting telecommunication carrier's end users;

(ii) migrating UNE-P lines to UNE-L lines on a single order for any requesting telecommunications carrier within three business days or within the interval previously established by the relevant state authority;

(iii) migrating all UNE-P lines to UNE-L lines at the monthly volumes experienced for UNE-P for any requesting telecommunications carrier within 30 calendar days or within the interval previously established by the relevant state authority;

(iv) processing migration orders with a maximum potential rate of error or trouble reported by the requesting telecommunications carrier equal to 0.99 percent or less; and

(v) migrating UNE-P lines to UNE-L lines at a cost-effective and cost-based rate;

AND

(B) an independent third-party selected by the State commission certifies after thorough examination and testing that the processes which the incumbent LEC has implemented to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements satisfies the criterion enumerated in § 51.319(c)(6)(A)(i):

(7) An incumbent LEC that has implemented processes to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements within its operating territory within a State, as confirmed by a final order issued in accordance with § 51.319(c)(6), may request the State commission to undertake the following analysis to determine the conditions pursuant to which the incumbent LEC may be relieved of its obligation to provide nondiscriminatory access to local circuit switching capability to any requesting telecommunications carrier for the provision of a telecommunications service, in accordance with §§ 51.311, 51.319(c)(8), 51.319(c)(9), and 51.319(c)(10), and section 251(c)(3) of the Act,:

(A) Determine the minimum number of qualifying lines that a requesting telecommunications carrier must serve:

(i) within an end office before it becomes economically efficient for the requesting telecommunications carrier to establish a collocation arrangement within that end office, which shall be designated the "Central Office Line Threshold" or "COLT;" AND

(ii) within a LATA, counting only those qualifying lines that exceed the COLT in the central offices where the COLT is exceeded, before it becomes economically efficient for the requesting telecommunications carrier to install its own switch to serve those qualifying lines, which shall be designated the "LATA Line Threshold" or "LLT."

A line shall be considered to be a "qualifying line" for the purposes of this section only if the line is a voice grade line supporting a nominal 300 to 3000 Hz signal that can be converted from UNE-P to UNE-L. In making the economic efficiency determinations required under this subsection, the State commission shall consider, at a minimum, whether the retail monthly rate that the incumbent LEC charges its end user customers exceeds the sum of the costs that a requesting telecommunications carrier would incur to self-provide the telecommunications service the requesting carrier intends to provide as evidenced by the costs charged by the incumbent LEC, including, but not limited to, the following costs to the extent applicable to the service:

(a) The TELRIC rate for local loop;

(b) The rate for interoffice facilities;

(c) The monthly recurring charges for collocation, including but not limited to terminations, rent, and power;

(d) Any other monthly recurring cost that a requesting telecommunications carrier might incur to self-provide the telecommunications service;

(e) The non-recurring costs for installing a switch to serve the affected loops;

(f) The non-recurring charges for establishing a collocation arrangement;

(g) The non-recurring charges for migration of UNE-P lines to UNE-L lines; and

(h) Any other non-recurring cost that a requesting telecommunications carrier would incur to self-provide the service.

(B) Determine whether a requesting telecommunications carrier would be impaired in its ability to provide the service it seeks to offer in a LATA where the LLT has been exceeded if the carrier lacked access to local circuit switching capability on an unbundled basis under § 51.311 and and section 251(c)(3) of the Act for the qualifying lines that exceed the COLT in the central offices which serve those qualifying lines.

(i) In undertaking the impair analysis in accordance with this section, the State commission shall conclude that the incumbent LEC's failure to provide access to local circuit switching capability on an unbundled basis for the qualifying lines that exceed the COLT in the central offices which serve those qualifying lines "impairs" a requesting carrier within the meaning of section 251(d)(2)(B) if, taking into consideration the

availability of alternative sources for network elements outside the incumbent's network, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer.

(ii) In order to evaluate whether there are alternatives sources for network elements actually available to the requesting telecommunications carrier as a practical, economic, and operational matter, the State commission shall look at the totality of the circumstances associated with using an alternative, considering:

(a) Cost, including all costs that requesting carriers may incur when using the alternative element to provide the services it seeks to offer;

(b) Timeliness, including the time associated with entering a market as well as the time to expand service to more customers;

(c) Quality;

(d) Ubiquity, including whether the alternatives are available ubiquitously; and

(e) Impact on network operations.

(8) *Initial Migration.* When the number of qualifying lines served by a requesting carrier in a LATA exceeds the LLT and the State commission has determined in accordance with § 51.319(c)(7) that the requesting carrier would not be impaired in its ability to provide the service it seeks to offer if the carrier lacks access to local circuit switching capability on an unbundled basis for qualifying lines that exceed the COLT in the central offices that serve those qualifying lines, the incumbent LEC may provide the requesting carrier with notice that the local circuit switching capability that the carrier is using will no longer be available on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act in the central offices where the number of qualifying lines the requesting carrier serves that exceeds the COLT for those qualifying lines that exceed the COLT.

(A) The notice permitted under this section must be provided to affected requesting telecommunications carriers at least 18 months before local circuit switching capability will no longer be available on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act for those qualifying lines that exceed the COLT.

(B) Incumbent LECs that elect to provide such notice shall process all initial migration orders placed by any requesting telecommunications carrier affected by such notice, at no charge to that carrier, in accordance with the rates terms and conditions upon which the State commission relied in issuing an order declaring that the incumbent LEC has implemented systems to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements in accordance with § 51.319(c)(6).

(C) In the event that the incumbent LEC violates any of the requirements of this section, the incumbent LEC must pay all affected requesting

telecommunications carriers liquidated damages of $1,000 per day for each affected line and for each day of continuing violations and waive all non-recurring charges associated with the affected lines. The incumbent LEC must pay liquidated damages in accordance with this section within 60 days of receipt of notice by the affected requesting telecommunications carrier.

(D) Within forty-five (45) days of receipt of notice from an incumbent LEC under this subsection that local circuit switching capability will no longer be available on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act, a requesting telecommunications carrier can request a waiver of the State commission's finding of non-impairment based on special circumstances. While the requesting telecommunication carrier's waiver request is pending, the incumbent LEC must continue to provide nondiscriminatory access to local circuit switching capability on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act.

(E) This subsection shall not relieve the incumbent LEC of its obligation to provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to UNE-P lines on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service for the qualifying lines that the carrier serves that do not exceed the COLT *or* for the qualifying lines that exceeds the COLT in a given central office if the central office is in a LATA where the qualifying lines that the carrier serves does not exceed the LLT.

(9) *Subsequent Migrations.* In a LATA where the local circuit switching capability is no longer ubiquitously available to a requesting telecommunications carrier on an unbundled basis in accordance with § 51.319(c)(8), the incumbent LEC may provide that requesting telecommunications carrier serving a number of qualifying lines within any central office where the number of qualifying lines exceeds the COLT with notice that the carrier must migrate all qualifying lines that exceed the COLT to a collocation arrangement for that central office.

(A) The notice permitted under this section must be provided to affected requesting telecommunications carriers at least six months before the qualifying lines that exceed the COLT must be migrated to a collocation arrangement for that central office.

(B) Incumbent LECs that elect to provide such notice shall process all migration orders placed by any requesting telecommunications carrier affected by such notice in accordance with the rates terms and conditions upon which the State commission relied in issuing an order declaring that the incumbent LEC has implemented systems to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements in accordance with § 51.319(c)(6). The charges for processing migration orders placed by any carrier in accordance with the requirements of this section shall not exceed the

incremental PIC charge, credited against any non-recurring charges that the carrier paid the incumbent LEC to establish the affected UNE-P lines.

(C) In the event that the incumbent LEC violates any of the requirements of this section, the incumbent LEC must pay all affected requesting telecommunications carriers liquidated damages of $1,000 per day for each affected line and for each day of continuing violations and waive all non-recurring charges associated with the affected lines. The incumbent LEC must pay liquidated damages in accordance with this section within 60 days of receipt of notice by the affected requesting telecommunications carrier.

(E) Within forty-five (45) days of receipt of notice from an incumbent LEC that qualifying lines which exceed the COLT must be migrated to a collocation arrangement for that central office, a requesting telecommunications carrier can request a waiver of the State commission's finding of non-impairment based on special circumstances. While the requesting telecommunication carrier's waiver request is pending, the incumbent LEC must continue to provide nondiscriminatory access to the affected UNE-P lines on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act.

(F) This section shall not relieve the incumbent LEC of its obligation to provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to UNE-P lines on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service for the qualifying lines that the carrier serves that do not exceed the COLT *or* for the qualifying lines that exceeds the COLT in a given central office if the central office is in a LATA where the qualifying lines that the carrier serves does not exceed the LLT.

(10) *Removal of Obligation to Provide Unbundled Switching in Individual Central Offices.* An incumbent LEC may cease providing unbundled local switching under § 51.311 and section 251(c)(3) of the Act in a central office in its operating territory to all requesting telecommunications carriers provided the following conditions are first met in that central office:

(A) The incumbent LEC has implemented processes to provide requesting telecommunications carriers with equal access to the incumbent LEC's network elements within its operating territory within the State in which the central office is located, as confirmed by a final order issued in accordance with § 51.319(c)(6); and

(B) (i) The incumbent LEC has implemented systems and competitively neutral processes with just, reasonable, and nondiscriminatory intervals, as confirmed by a State commission order upon application by the incumbent LEC, capable of supporting pursuant to just, reasonable, and nondiscriminatory charges the wholesale provision of analog switch port products by telecommunications carriers other than the incumbent LEC

within the incumbent LEC's central offices throughout its operating territory in the State in which the central office is located, including but not limited to billing systems, ordering and provisioning systems, and processes set forth in § 51.319(c)(10)(B)(ii).

(ii) In addition to the other requirements of § 51.319(c)(10)(B)(i), the systems and processes required under that subsection shall be capable of the following at cost-based and cost-effective rates:

(a) migrating UNE-P lines to UNE-L lines terminating at the collocated equipment of a telecommunications carrier other than the requesting carrier for any requesting carrier in a manner that is timely, efficient, just, reasonable and nondiscriminatory, as well as nondisruptive and transparent to the requesting telecommunication carrier's end users;

(b) migrating UNE-L lines terminating at the collocated equipment of a telecommunications carrier to the collocated equipment of a second telecommunications carrier other than the requesting carrier (i.e., CLEC to CLEC migrations) for any requesting carrier in a manner that is timely, efficient, just, reasonable and nondiscriminatory, as well as nondisruptive and transparent to the requesting telecommunication carrier's end users;

(c) migrating the lines of the types described in paragraphs (i)-(iii) of this subsection on a single order for any requesting telecommunications carrier within three business days or within the interval previously established by the relevant state authority; and

(d) processing migration orders with a maximum potential rate of error or trouble reported by the requesting telecommunications carrier equal to 0.99 percent or less.

(iii) The State commission shall not issue an order under § 51.319(c)(10)(B)(i) until an independent third-party selected by the State commission certifies, after thorough examination and testing that the systems and processes which the incumbent LEC has implemented to support the provision of wholesale analog switch port products by a telecommunications carrier other than the incumbent LEC meet the criteria of justness, reasonableness, nondiscrimination, and competitive neutrality required by §§ 51.319(c)(10)(B)(i) and (ii); and

(C) The State commission confirms that there are at least five (5) telecommunications carriers, each with no affiliation with any incumbent LEC operating in the LATA in which the central office is located, that (i) have completed the migration in the central office described in § 51.319(c)(8), (ii) are

using their own collocated equipment within that central office to actually provide DS0, voice grade services while also employing their own switching facilities for the qualifying lines served by that central office in a number equal to or greater than the COLT and (iii) have been providing such services in that central office using their collocated equipment for at least six (6) months;

(D) There are at least two (2) telecommunications carriers in addition to the incumbent LEC that are collocated in the central office and provide an analog DS0 level switch port product to other telecommunications carriers on a wholesale, common carrier basis; and

(E) Collocation space, DS0-level terminations, and collocated equipment capacity must be available in the central office to support the migration of all qualifying lines served by requesting carriers provisioned on the incumbent LEC's unbundled analog DS0 switch ports; and

(F) The incumbent LEC places no restrictions on the ability of non-collocated telecommunications carriers to order unbundled local loops and interoffice transport (whether provided by the incumbent LEC or a third party) into the collocation space of another collocated telecommunications carrier in the central office. Nor may the incumbent LEC place restrictions upon the ability of a non-collocated telecommunications carrier to move unbundled local loops or interoffice transport from one collocation space to another at the request of a non-collocated telecommunications carrier. The incumbent LEC may assess charges consistent with applicable regulatory and legal standards for such orders and moves as described in this paragraph; and

(G) The incumbent LEC, after the criteria in §§ 51.319(c)(10)(A)-(F) are satisfied, provides at least twelve (12) months' written notice to all telecommunications carriers certificated within the State in which the central office is located that pursuant to this section 51.319(c)(10) it will cease providing unbundled local switching to all telecommunications carriers within the central office.

Within forty-five (45) days of receipt of notice from an incumbent LEC under subsection § 51.319(c)(10)(G) that local circuit switching capability will no longer be available in a central office on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act, a requesting telecommunications carrier can request a waiver of the applicability of § 51.319(c)(10) to the central office based upon special circumstances. While the requesting telecommunication carrier's waiver request is pending, the incumbent LEC must continue to provide nondiscriminatory access to local circuit switching capability on an unbundled basis in that central office in accordance with § 51.311 and section 251(c)(3) of the Act.

(11) § 51.319(c)(10) shall not relieve the incumbent LEC of its obligation to provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to unbundled local switching or UNE-P lines on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service for the qualifying lines that the carrier serves in central offices that have not satisfied the criteria in § 51.319(c)(10), except to the extent provided for in §§ 51.319(c)(8) and (9). In the event that the incumbent LEC ceases to provide unbundled switching to a requesting telecommunications carrier in a manner not provided for in §§ 51.319(c)(8)-(10), the incumbent LEC must pay all such affected requesting telecommunications carriers liquidated damages of $1,000 per day for each affected line and for each day of continuing violations and waive all non-recurring charges associated with the affected lines. The incumbent LEC must pay liquidated damages in accordance with this section within 60 days of receipt of notice of the violation by the affected requesting telecommunications carrier.

(12) If, at any time following notice provided by an incumbent LEC pursuant to § 51.319(c)(10)(G), any of the criteria in §§ 51.319(c)(10)(A)-(B) and (D)-(F) are no longer satisfied in the central office, or the number of carriers satisfying the criteria in § 51.319(c)(10)(C) is three (3) or fewer in the central office, the incumbent LEC, upon receiving a request from a telecommunications carrier for unbundled local switching in the central office must provide unbundled local switching unless otherwise not obligated to pursuant to §§ 51.319(c)(8) or (9). If, at any subsequent time, the conditions in § 51.319(c)(10) are each again satisfied, including the existence of five (5) carriers in the central office that meet the requirements of § 51.319(c)(10)(C), then the incumbent LEC may again cease to provide unbundled local switching in that central office after having satisfied the notice requirements in §51.319(c)(10)(G).

(13) If a State commission cannot, based on the information available to it, determine the LLT and the COLT consistent with § 51.319(c)(7)(a), then the State commission may elect to establish an interim LLT of 60,000 lines and an interim COLT of 5,000 lines. A State commission that established an interim LLT and an interim COLT shall, within a reasonable period of time thereafter, establish an LLT and COLT on the basis of a determination consistent with § 51.319(c)(7)(A).

(14) A determination by a State commission in accordance with § 51.319(c)(7) that a requesting telecommunications carrier would not be impaired in its ability to provide the service it seeks to offer if the carrier lacked access to local circuit switching capability on an unbundled basis where the number of qualifying lines that the carrier serves in a LATA exceeds the LLT shall have no effect on network elements that a requesting telecommunications carrier is currently using, or subsequently requests, in accordance with § 51.311 and section 251(c)(3) of the Act, on an unbundled basis to serve its end user customers:

(A) from a central office where the requesting telecommunications carrier's total number of qualifying lines served by the requesting carrier is fewer than the COLT;

(B) for qualifying lines below the COLT within a central office where the requesting telecommunications carrier's total number of qualifying lines exceed the COLT;

(C) within a LATA where the requesting telecommunications carrier's total number of lines is fewer than the LLT; OR

(D) within a LATA in which the incumbent LEC has elected not to provide notice to the requesting telecommunications carrier in accordance with § 51.319(c)(8)-(9).

(15) This section shall not modify, limit or extend the authority of State commissions in accordance with § 51.317(b)(4).

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PART 51 – INTERCONNECTION

Subpart D – Additional Obligations of Incumbent Local Exchange Carriers

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§ 51.320 Commission action upon a State commission's failure to act under § 51.319(c).

(a) If a State commission fails to act to carry out its responsibility under § 51.319(c) in any proceeding or other matter under § 51.319(c), the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under § 51.319(c) with respect to the proceeding or matter and shall act for the State commission.

(b) For purposes of this part, a State commission fails to act if the State commission fails to respond, within 270 days, to a request by an incumbent LEC that the State commission issue an order in accordance with §§ 51.319(c)(6), 51.319(c)(7), or 51.319(c)(10) or to a request by a requesting telecommunications carrier for waiver in accordance with §§ 51.319(c)(8)-(10).

(c) Any party seeking preemption of a State commission's jurisdiction, based on the State commission's failure to act, shall notify the Commission in accordance with following procedures:

(1) Such party shall file with the Secretary of the Commission a petition, supported by an affidavit, that states with specificity the basis for the petition and any information that supports the claim that the State has failed to act, including, but not limited to, the

applicable provisions of the Act and the factual circumstances supporting a finding that the State commission has failed to act;

(2) Such party shall ensure that the State commission and the other parties to the proceeding or matter for which preemption is sought are served with the petition required in paragraph (c)(1) of this section on the same date that the petitioning party serves the petition on the Commission; and

(3) Within fifteen days from the date of service of the petition required in paragraph (c)(1) of this section, the applicable State commission and parties to the proceeding may file with the Commission a response to the petition.

(d) The party seeking preemption must prove that the State has failed to act to carry out its responsibilities under § 51.319(c).

(e) The Commission, pursuant to § 51.319(c), may take notice upon its own motion that a State commission has failed to act. In such a case, the Commission shall issue a public notice that the Commission has taken notice of a State commission's failure to act. The applicable State commission and the parties to a proceeding or matter in which the Commission has taken notice of the State commission's failure to act may file, within fifteen days of the issuance of the public notice, comments on whether the Commission is required to assume the responsibility of the State commission under § 51.319(c) with respect to the proceeding or matter.

(f) The Commission shall issue an order determining whether it is required to preempt the State commission's jurisdiction of a proceeding or matter within 90 days after being notified under paragraph (c) of this section or taking notice under paragraph (e) of this section of a State commission's failure to carry out its responsibilities under § 51.319(c).

(g) If the Commission assumes responsibility for a proceeding or matter pursuant to § 51.320, the Commission shall retain jurisdiction over such proceeding or matter.

(h) In making any determinations pursuant to § 51.319(c), the Commission shall ensure that such determinations meet the requirements applicable to State commissions under § 51.319(c).