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December 30, 2002

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VIA ELECTRONIC SUBMISSION

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 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:

One of the key issues for many competitive local exchange carriers (“CLECs”) in the Commission’s current *Triennial Review* proceeding in the above-referenced dockets is the continued availability of unbundled local switching (“ULS”) at rates based on total element long run incremental cost (“TELRIC”). Talk America, Inc. (“Talk America”) has been actively involved before the Commission in support of that outcome. Along with other CLECs who advocate the continued provision of ULS and the unbundled network element platform (“UNE-P”) at TELRIC-based rates, Talk America has nonetheless proposed a compromise plan setting forth conditions under which CLECs using UNE-P would be required to migrate certain levels of their customers to unbundled local loops supported by their own switching facilities or those of third-parties.¹ More recently, Talk America was one of three CLECs that modified that “UNE-P to UNE-L Migration Plan” proposal in response to staff concerns and comments at the Commission level to add procedures whereby an ILEC could obtain permission to cease providing ULS in qualifying central offices provided certain conditions were met.²

¹ See *ex parte* Letter from Rebecca Sommi, Vice President, Broadview Networks, Inc. *et al.* to Chairman Michael K. Powell, CC Docket Nos. 01-338, 96-98, and 98-147, dated October 31, 2002 (setting forth the proposed “UNE-P to UNE-L Migration Plan”).

² See *ex parte* Letter from Rebecca Sommi, Vice President, Broadview Networks, Inc. *et al.* to Secretary Marlene H. Dortch, CC Docket Nos. 01-338, 96-98, and 98-147, dated December 20, 2002 (setting forth the proposed “Central Office ULS Transition Plan”).

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Talk America has become aware that new questions have been raised at the Commission regarding the obligations of Regional Bell Operating Companies (“RBOCs”) that have been granted in-region interexchange authority under Section 271 of the Communications Act of 1934, as amended, (the “Act”) to continue to provide ULS under Section 271 to the extent they are not required to do so under whatever modified unbundling rules the Commission might adopt in the *Triennial Review* that are applicable to incumbent local exchange carriers (“ILECs”) generally. More specifically, in some States, RBOCs have been granted Section 271 authority in part on the ground that the RBOC has experienced the prerequisite “facilities-based” competition from CLECs as a result of the RBOC providing ULS under the cost-based pricing standards set forth in Section 252(d)(1) of the Act and the Commission’s Part 51 Rules, *i.e.*, under TELRIC.³ In these instances, the question is whether the RBOC must continue to provide ULS in that State at the same terms and conditions and at TELRIC-based rates in order to preserve its Section 271 interexchange service operating authority in the event the Commission otherwise determines pursuant to Section 251 that ULS need no longer be provided by that RBOC in that State, in whole or in part.

In a December 6, 2002 *ex parte* in the *Triennial Review* proceeding, counsel for Talk America explained that RBOCs receiving Section 271 authority *must continue* to provide ULS (and UNE-P) even where the absence of unbundled switching is found not to impair local competitors’ provision of services, *i.e.*, where unbundled switching and UNE-P is no longer required under Sections 251(c)(3) and 251(d)(2) of the Act.⁴ The principal, but not only, reason is that the Section 271 checklist requires that unbundled switching be made available independently of the requirement to do so under Section 251. *Compare* 47 U.S.C. § 271(c)(2)(B)(vi) with § 271(c)(2)(B)(ii). RBOCs *seeking* Section 271 authority would also still be required to make unbundled switching available under the Section 271 checklist. 47 U.S.C. § 271(c)(2)(B)(vi). While TELRIC would not strictly apply to the ULS rates for RBOCs, seeking Section 271 authority, ULS must still be available at parity (“substantially the same time and manner”) or in a manner that supports a “meaningful opportunity to compete” for an efficient competitor.⁵

As for RBOCs that have already received Section 271 authorization, the “anti-back-sliding” requirements of Section 271(d)(6) would actually obligate those RBOCs to provide ULS

³ See Commission orders cited in Attachment to *ex parte* Letter from Brad E. Mutschelknaus, Kelley, Drye & Warren, LLP, Counsel for Talk America, Inc., and Broadview Networks, Inc. to Secretary Marlene H. Dortch, CC Docket Nos. 01-338, 96-98, and 98-147, dated December 6, 2002 (responding to SBC’s \$26 “UNE-P equivalent” proposal) (“Mutschelknaus Letter”).

⁴ See *Mutschelknaus Letter, supra*, at 6-7.

⁵ *Id.* at 7. Under the Commission’s Section 271 decisions, the Commission has found that Section 271 checklist items generally – including the unbundled elements in checklist items 4-6 (loops, switching, and transport) – must be available at parity where there is a retail analogue and in a manner that supports a “meaningful opportunity to compete” for an efficient competitor where there is no analogue. See, e.g., *Application by SBC Communications, Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354, 18373-74, ¶ 44 (2000).

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(and UNE-P) at TELRIC-based rates where the existence of facilities-based competition in either residential or business markets — a pre-condition for seeking Section 271 Track A relief — was found, even if only in part, on the basis of UNE-P competition. The reason is that Section 271(d)(6) requires that all of the “conditions required for . . . approval” continue to be satisfied by an RBOC *after* such authorization is granted.⁶

If the availability of ULS (whether alone or as part of UNE-P) was a condition for Section 271 approval, then ULS (and UNE-P) must continue to be provided by that RBOC under Section 271(d)(6). For the reasons just cited, as an initial matter, the RBOC in that case should continue to provide ULS at TELRIC-based rates. However, in response to the recent questions described earlier, Talk America believes that an RBOC finding itself in this situation should be permitted to petition the Commission for a lessening of this requirement where and to the extent ULS (or UNE-P) is no longer required under Section 251(c)(3). To obtain that relief, the RBOC must make a clear and convincing showing that, *at the time it requests relief from the continued obligation to provide TELRIC-based ULS under Section 271(d)(6)*, the availability of ULS (or UNE-P) at TELRIC-based rates would *not* be required for the RBOC *currently* to satisfy the condition that facilities-based competition is present.⁷ Provided that that such a showing is made and accepted by the Commission, pursuant to a process whereby interested parties have the opportunity to comment on or oppose the RBOC request, then the RBOC should thenceforth only be obligated to provide unbundled local switching to the extent required by the checklist item 6. 47 U.S.C. § 271(c)(2)(B)(vi). As noted above, this means that the unbundled switching must be available at parity with the RBOC (*i.e.*, available at “substantially the same time and manner”) or at rates, terms, and conditions that support a “meaningful opportunity to compete” for an efficient competitor.

The procedure by which such a showing may be made and accepted by the Commission should be based upon the process set out in Section 271 for initial long-distance authority. Specifically, the procedures in Section 271(d) should be followed to make this showing, according to which the RBOC petitions the Commission, who after consultation with the State Commission, makes a determination whether or not the requirement to provide ULS at TELRIC-based rates may be lifted due to the presence of facilities-based competition from carriers that do not rely in any material part upon the availability of ULS (or UNE-P) at TELRIC-based rates.

Pursuant to Section 1.1206(b)(1) of the Commission’s rules, an original and one copy of this written *ex parte* presentation are being submitted to the office of the Secretary. Please associate this notification with the record in the proceedings indicated above.

⁶ See Attachment to Letter of Brad E. Mutschelknaus, *supra*, citing examples of the existence of UNE-P competition as the predicate for several Section 271 applications under Track A.

⁷ This has been Talk America’s position. See *ex parte* Letter from Brad E. Mutschelknaus, Kelley, Drye & Warren, LLP, Counsel for Talk America, Inc., and Broadview Networks, Inc. to Secretary Marlene H. Dortch, CC Docket Nos. 01-338, 96-98, and 98-147, dated December 6, 2002 (responding to the November 19, 2002, *ex parte* of Qwest, BellSouth, SBC, and Verizon regarding the States’ authority to participate in unbundling decisions) at 15, text accompanying note 28.

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Respectfully submitted,



Brad E. Mutschelknaus
Counsel for Talk America, Inc.

cc: Chris Libertelli (w/attachments)
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The Role of the FCC and The States In Determining the Availability of ULS

lines

Process

onstrated ability to migrate
any requesting carrier in
ner that is non-disruptive
ers.
e order must be migrated
established by state or, as
days.
NE-L lines can be
y volumes for UNE-P.
rates of 0.99% or less.
gration at no cost to
ions at cost-based rates.

Criteria

ographic scope of review
(CO, LATA).
um list of cost factors to
mining appropriate line
ate removal of
CLEC.
a for States to use when
ties deployment by

Requirement on a

ographic scope of State
(CO)
evidence of impairment
tes; proven hot cut
sale and other alternative
ching, availability of

Role of the States in Implementing Guidelines

A. Hot Cut Provisioning Process

- i. State to review ILEC-proposed and - filed performance plan, including migration costs, subject to federal criteria.
- ii. State to test and validate ILEC-filed performance plan subject to federal criteria.

B. Facilities Deployment Criteria

- i. State reviews relevant cost criteria and determines appropriate line densities necessary for switch and collocation deployment. (Criteria to be used are specified by the FCC, cost data to be based on previously conducted State ILEC cost studies)
- ii. State reviews relevant data on facilities deployment and determines migration schedule.

C. Removal of ILEC ULS Requirement on a Market Basis

- i. State assesses the presence of actual number of alternative DS0, VG switch providers (including at least 2 providing wholesale ULS) on a CO-by-CO basis.
- ii. State reviews ability of ILEC processes/procedures to accommodate CLEC-to-CLEC transfers and other requirements necessary for wholesale competition.
- iii. State determines if wholesale market is present and sustainable, justifying the lifting of the ULS requirement.

Timing

A. Hot Cut Provisioning Process*

State proceeding to determine the adequacy of plan and efficacy of actual process to be completed within 270 days of ILEC petition.

B. Facilities Deployment Criteria*

State proceeding to determine at what line densities CLECs to be required to deploy facilities to be completed within 270 days of ILEC petition.

CLECs to have 18 months to complete initial network buildout and migrate UNE-P lines that exceed the line density thresholds after conditions met and notice given.

C. Removal of ILEC ULS Requirement on a Market Basis

Alternative providers must have been using the ILEC migration process for movement between UNE-P and UNE-L for at least 6 months prior to ILEC petition (to test adequacy and sustainability of system).
State determination that ULS can be removed in given geographic area (CO) to be made within 270 days of ILEC petition.

CLECs to have 12 months to move to alternative vendors after conditions met and notice given.

*** Steps A and B could be accomplished concurrently.**



UL Conditions Necessary to Determine Removal of Impairment

Talk America
Broadview Networks
Eschelon Telecom
Ionex
AccessOne

AmeriMex Communications
eXpeTel
Midwest Telecom of America
Spectrotel
Vycera Communications



When Can ULS Be Eliminated as a UNE Priced at TELRIC?

- **Only the presence of a wholesale switching market can provide the evidence that the impairment has been eliminated**
- **Only a State can determine if an ILEC has implemented the systems and processes necessary to support a wholesale switching market**
- **Because the mass market requires geographic ubiquity, the availability of wholesale switching must be reviewed on a CO by CO basis.**

When Can ULS Be Eliminated as a UNE Priced at TELRIC?

- **ILEC success at eliminating hot cut impairment would be evidenced by presence in a given CO of multiple DS0, VG analog providers using their own switching**
 - CO should have at least 5 providers that have converted their UNE-P base to UNE-L and have continued to migrate customers from UNE-P to UNE-L for at least 6 months
 - At least 2 of those carriers should be providing a wholesale DS0, VG analog product to other carriers
 - CO must have adequate collocation space, DS0-level terminations and collocated equipment capacity
 - ILEC can have not restrictions on CLEC use of subaccounts or multiple carrier use of collocation space



When Can ULS Be Eliminated as a UNE Priced at TELRIC?

- **State would have 9 months after ILEC request to make determination that wholesale market was in place and ULS could be eliminated in given CO**
- **CLECs would have 12 months to find and transition to alternative ULS provider in CO**
- **If conditions which permitted State to eliminate ULS are not maintained, ULS could be reinstated at TELRIC**