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EX PARTE

William F. Maher, Chief, Wireline Competition Bureau
Federal Communications Commission
The Portals, 445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: CC Docket No. 01-338, 96-98, 98-147
Local Use Restrictions on UNEs and UNE Combinations

Dear Mr. Maher:

BellSouth is filing this letter in response to a flurry of recent filings concerning the conditions under which carriers may use UNEs and enhanced extended loops (EELs) to deliver special access type services. As discussed below, those conditions were the product of a collaborative industry process. That process produced an agreement among four CLECs, the Bell companies and GTE. The Commission adopted the conditions jointly suggested by those companies after carefully considering and rejecting a number of the same arguments that have been made against the conditions in recent filings in this docket. The industry has operated under these conditions since 2000. That the conditions were well-chosen is clear from the record – competition, particularly facilities-based competition, to serve business customers has continuously increased since the conditions were adopted, and CLECs now serve over 30% of the business lines in BellSouth's region. In addition, the conditions have been soundly endorsed by the D.C. Circuit. The certainty provided by the operating experience that has been gained with the conditions and the clear legal support provided for them by the courts provides further important support for keeping the current conditions. There is little to be gained for competition or for industry certainty by rewriting the current conditions.

At a minimum, BellSouth strongly urges the Commission not to upset the settled status of these restrictions lightly or without a through opportunity to consider the implications of any alternatives. The record is, at best, incomplete concerning alternatives proposed by Cbeyond and others. The Commission should not make a significant change in the existing process until the

consequences are fully known. Details of alternative proposals are vague, procedures and system modifications have not begun, financial effects are unknown, vulnerability to gaming is untested, and the legalities of the alternatives are not established. By contrast, the current restrictions are now well understood and processes and procedures have been developed by both ILECs and CLECs to ensure compliance. That this understanding has taken some time is not surprising because these issues are not simple. Accordingly, while the goal of simplifying the restrictions may be a worthy one, such an effort also raises the very serious risk of returning the industry back to the unsettled position that existed prior to the issuance of the *Supplemental Order Clarification*,¹ (or “Order”). Without an adequate opportunity for the industry to comment on specific proposals being considered by the Commission, it is likely that – as with the previous orders – any modification will have unintended consequences.

BACKGROUND: THE PURPOSE OF THE *ORDER* AND THE NEED FOR LOCAL USE RESTRICTIONS.

A. *The Order and the CompTel Decision.* In its *UNE Remand Order* the Commission recognized that allowing requesting carriers to use unbundled loop-transport combinations solely to provide exchange access service to customers without providing local exchange service could have significant policy ramifications because TELRIC-priced unbundled network elements are typically priced substantially lower than tariffed special access services.² In its *Supplemental Order Clarification*, the Commission extended the constraints on carrier attempts to substitute UNEs for special access services so as not to cause, among other things, substantial market dislocations.³

The Commission was rightly concerned that immediate provision of special access as UNEs “could undercut the market position of many facilities-based competitive access providers.”⁴ The Commission recognized that the exchange access market (of which the special access market is a subset) occupies a different legal category from the market for telephone exchange services, and that Congress itself drew an explicit distinction between the two markets.⁵ The Commission concluded that the Act does not compel the Commission, once it determines that any network element meets the “impair” standard for one market, to grant competitors automatic access to that same network element solely or primarily for use in a different market.⁶

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587, 9598-9600, ¶¶ 21-22 (2000) (“*Supplemental Order Clarification*” or “*Order*”).

² *Order* at 9588, ¶ 2. The Commission agreed to further explore these issues “because of concerns that universal service could be harmed if [the Commission] were to allow interexchange carriers (IXCs) to use the incumbent’s network without paying their assigned share of the incumbent’s costs normally recovered through access charges.” *Id.*

³ *Id.* at 9591-92, ¶ 7.

⁴ *Id.* at 9597, ¶ 18.

⁵ *Id.* at 9593, 9594, ¶¶ 10, 14.

⁶ *Id.* at 9595, ¶ 15.

The result was that, pending the outcome of the various proceedings that are folded into this triennial review, the Commission defined more precisely the “significant amount of local exchange service” that requesting carriers must provide in order to obtain EELs in the form of three safe harbor local usage options. When CompTel contested these restrictions, stating that there was no statutory basis for use or service-by-service restrictions, the United States Court of Appeals unequivocally rejected the legal challenge and affirmed both the Commission’s legal authority and its reasoning. The Court explained that under CompTel’s theory, once a Commission found a single purpose as to which an “element” met the impairment standard, no matter how limited, it would be forced to mandate provision of the element for all, no matter how little potential impairment was involved in the remainder of the telecommunications field.⁷ Rejecting this theory, the Court observed, “CompTel never explains what logic could have persuaded Congress to lock the Commission into such a scheme.”⁸

The Court further upheld the Commission’s reasoning with respect to its determination not to disrupt its access reform policies,⁹ its effort to protect facilities-based competitors,¹⁰ the ability of companies to comply with the information demands of the safe harbor local usage options,¹¹ and the Commission’s concern that its commingling restrictions are the only way to prevent carriers from gaming the system by using UNEs to bypass special access services.¹² Specifically, with respect to the claim that current safe harbor provisions are “too demanding” on carriers, the Court found that “it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors.”¹³ Indeed, from 2000-2002, CLECs have certified and BellSouth has converted 13,034 circuits to EELs and provisioned another 10,389 circuits as new EELs.

B. *The Need for Local Use Restrictions for Stand-Alone UNEs.* The *Order*, of course deals with EELs. But explicit in the reasoning of the *Order*, and in the provisions of the statute and in the federal court opinions, is the notion that, as a fundamental matter, the Commission’s original impairment determinations were made in the context of other carriers’ ability to compete against ILECs for the provision of local exchange service. Thus, UNEs, whether stand-alone or in combination, are only available to those carriers who seek to provide local exchange service in competition with ILECs (as specifically defined in section 251(h)) and who can demonstrate impairment. Indeed, the very same considerations that the *CompTel* Court recognized as leading the Commission to seek to “channel CLECs’ use of EELs toward local service”¹⁴ similarly counsel the use of stand-alone UNEs toward local service.

⁷ *CompTel*, 309 F.3d at 13.

⁸ *Id.*

⁹ *Id.* at 14-16.

¹⁰ *Id.* at 16 (observing that the Supreme Court’s discussion of the incentive effects of *TELRIC in Verizon Communs. Inc. v. FCC* would be “meaningless” if “the Court had not understood the Act to manifest a preference for facilities-based competition).

¹¹ *Id.* at 16-17.

¹² *Id.* at 17-18 (identifying “complex reasons why gaming might occur” in the absence of the Commission’s commingling restrictions).

¹³ *Id.* at 17.

¹⁴ *Id.* at 11.

It is clear that the Commission must take this opportunity, once and for all, to clarify that its impairment determinations are specific to carriers that seek to compete head-to-head against ILECs in the provision of wireline local exchange voice service. The D.C. Circuit in *CompTel* expressed a clear concern over the opportunities for gamesmanship of a service-indifferent regulatory approach to impairment, including the fact that the lack of explicit use restrictions on unbundled loops, in the absence of current commingling restrictions, could allow the entire base of the loop (or “channel termination” portion of special access) to be converted into unbundled loops.¹⁵ Current commingling restrictions and safe harbors are at best a regulatory bandaid arguably made necessary by the lack of an explicit and conclusive affirmation by the Commission that its impairment determination is service-specific.

C. *Wireless Service.* The need for a service-specific impairment test is underscored by recent CMRS carrier efforts to get access to UNEs for provision of wireless service. Despite enormous growth in recent years (in large part the result of minimal regulation of the industry) CMRS carriers argue that they are somehow impaired in their efforts to compete with ILECs. A simple review of the growth in wireless customers makes such a conclusion impossible, irrespective of the convoluted arguments under which wireless carriers’ seek to fit their network architectures within current definitions of network elements. Nonetheless, the CMRS carriers conclude that because they are “carriers” they are entitled to unfettered access to all UNEs for which the Commission has made an impairment determination – the precise logic underlying *CompTel*’s appeal of the *Order* which has been soundly rejected by the Court of Appeals.¹⁶ Of course, were the Commission to find that CMRS carriers were providing a competitive local service—a precondition to their entitlement to UNEs—it would also be legally obligated to include CMRS carriers in evaluating the availability of competitive alternatives for impairment purposes. This would mean, for example, that the Commission would necessarily find that at least 5 competitive providers of residential local loop service were present in every MSA in the country.

D. *CompTel Requires a Service-Specific Impairment Analysis.* BellSouth has twice recently demonstrated that the Commission may not lawfully permit the use of UNEs or UNE combinations for uses unrelated to the provision of local telephone exchange service.¹⁷ Section

¹⁵ *Id.* at 17-18.

¹⁶ More recently, other carriers that do not provide local exchange service, including carriers that provide transport facilities alone to other carriers, have begun to demand UNE loops under the Act from BellSouth merely because of their status as a “telecommunications carrier” and without regard to serving wireline local exchange customers.

¹⁷ Letter from Herschel L. Abbot, Jr., BellSouth, to Hon. Michael Powell, FCC, (Dec. 19, 2002), pp. 2-4 (under cover of letter from Jonathan Banks, BellSouth to Marlene Dortch, FCC, CC Docket No. 01-338 (Dec. 19, 2002); Letter from W.W. Jordan, BellSouth to Marlene H. Dortch, FCC, CC Docket No. 01-338 (Nov.27, 2002), pp. 2-6. *See also* BellSouth Comments at 5-6, 28-29 (Apr. 8, 2002) and BellSouth Reply Comments at 62 (July 17, 2002) (demonstrating

251(d)(2), as written and as interpreted by the appellate courts, requires the Commission to undertake a service-specific impairment analysis. The Commission may not impose unbundling requirements “detached from any specific markets or market categories.”¹⁸ The Supreme Court has admonished the Commission to “apply some limiting standard, rationally related to the goals of the Act” in determining which elements should be unbundled.¹⁹ The Commission is further compelled by the D.C. Circuit to employ a more granular, market-specific approach in determining impairment under the Act.²⁰ As the *CompTel* Court recognized, “[t]he Commission [was] clearly correct that *Iowa Utilities Board* required it to limit its former all-encompassing interpretation of the necessary and impair language” of the statute.²¹

Critically, the *CompTel* Court also observed that the FCC’s authority to make distinctions that were based on customer markets, which it earlier found in its *USTA* decision, demonstrated that the Act allowed “restrictions keyed to a specific ‘service’ of the requesting carriers.”²² Because unbundling “imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities,”²³ unbundling beyond the impairment standard established by the Act is unauthorized and contrary to the public interest. Thus, the *CompTel* decision lays to rest any doubt that section 251(d)(2) requires the Commission to undertake a service-specific impairment analysis before mandating the unbundling of a network element for use in the provision of the particular service a requesting carrier “seeks to offer,”²⁴ and even notes that the Act “seems to invite an inquiry that is specific to particular carriers and services.”²⁵

In light of this, without a clear demonstration of impairment with respect to the particular service, there can be no possible claim for unbundling special access services as UNEs simply to grant any requesting carrier – whether a CLEC, IXC, CAP or CMRS provider – a discount on the purchase of those facilities.²⁶ Where competition is thriving without the use of UNEs, there can be no impairment consistent with the Act, whether for stand-alone UNEs or combinations of UNEs. Thus, the Commission must clarify once and for all that its impairment determinations are specific to carriers that seek to compete head-to-head against section 251(h) ILECs in the provision of wireline local exchange voice service.

statutory basis for limiting impairment determination to carriers competing head-to-head with section 251(h) ILECs in the provision of wireline local exchange service).

¹⁸ *United States Telecomm. Ass’n v. FCC*, 290 F.3d 415, 426 (D. C. Cir. 2002) (“*USTA*”).

¹⁹ *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

²⁰ *USTA*, 290 F.3d at 426.

²¹ *CompTel*, 309 F.3d at 13.

²² *Id.* at 12-13, citing *Supplemental Order Clarification*, ¶15.

²³ *USTA*, 290 F.3d at 427.

²⁴ *CompTel*, 309 F.3d 8 (upholding FCC restrictions on the use of Enhanced Extended Links for the provision of local service only).

²⁵ *Id.* at 13.

²⁶ *See Iowa Utils. Bd.*, 525 U.S. at 390.

NECESSARY ENHANCEMENTS TO CBeyond PROPOSAL

To the extent the Commission feels obligated to modify the existing restrictions in order to make them less complex or cumbersome, BellSouth believes that Qwest has offered a proposal that, with some modification, might work as a streamlined alternative. Additionally, Cbeyond has recently filed a proposal that seeks to define what it means to be offering a "primary local service." While Cbeyond's proposal has some useful suggestions, it will not serve its intended purpose without several clarifications and additional requirements that are essential to ensure that competitive carriers are truly offering a predominantly local service. These additional requirements are also necessary to prevent the type of gaming prohibited by the restrictions set forth in the *Supplemental Order Clarification*.

1. Local Exchange Service Clarifications

Cbeyond suggests, "Primary local exchange service would include the provision of local exchange lines and local number assignment and porting capability, that the service offering includes emergency services capability and that service permits both originating and terminating local voice service capability." This proposal is unclear and would not prevent gaming. Therefore, BellSouth suggests additional clarification:

- At least half of the traffic carried on each loop must consist of local voice traffic. This obligation is consistent with Qwest's proposal and is a very conservative measuring stick of what it means to be a predominantly local service provider. BellSouth's separations records show that over 80% of telephone calls made over local exchange lines are local calls.
- The originating and terminating local voice traffic should include the ability to make originating local voice telephone calls without a toll charge and without dialing special digits not normally required for a local call.
- The local exchange line should be connected to a Class 5 switch (a local switch) registered as a Class 5 switch capable of local exchange service. With software modification, carriers can convert all or part of their Class 4 interexchange switches to Class 5 switches.
- The service must be marketed, advertised and sold as a local exchange service, not toll or data service. If the end user customers do not believe that their services are local exchange services, it is unreasonable to expect ILECs to accept the services as local.

2. EELs Must Terminate into Collocation

Cbeyond states that, "[t]he EEL circuit terminates into a physical collocation pursuant to Section 251 Interconnection Agreements." BellSouth agrees with the condition, except the Commission should clarify that physical collocation is more than just a requirement. As is true today, collocation should be included as part of the definition of an EEL. EELs were developed to allow collocating CLECs to reach loops in central offices where they have not yet built collocation. EELs are not intended as substitutes for point-to-point private lines.

3. Critical Clarifications Omitted From Cbeyond Letter

The Cbeyond letter could be interpreted to allow interexchange facilities to be converted to UNEs if one small portion of a large service had the ability to complete local calls, for instance, one voice grade channel in a DS-3 special access service. The following clarifications would be necessary, at a minimum, to foreclose this type of gaming:

- ILECs are not required to provide or convert to an EEL any circuit that does not meet the local exchange service requirement.
- ILECs are not required to provide or convert any facility to an EEL unless all the loops connecting to the interoffice facility meet the local exchange service requirement.
- As with the current constraints, ILECs are not required to connect UNEs/EELs with tariffed services.

4. Audit Rights

Audit rights should be more balanced than those proposed by Cbeyond²⁷. Cbeyond suggests that CLECs should be allowed to attest to compliance and receive EELs. If CLECs are given such latitude, then ILECs should be allowed to determine criteria for conducting audits, up to and including random audits. Under no circumstances should the ILEC be required to prove the CLEC has misclassifications before it is allowed to conduct the audit to gather the data needed to determine if there are misclassifications. To ensure that misclassification is not risk free, and consistent with the current requirements, the ILEC should bear the cost of the audit unless the audit reveals noncompliance, in which case the CLEC should reimburse the ILEC for the cost of the audit.

²⁷To this point, ILECs have been frustrated in attempts to exercise even the limited rights that already exist. However to the extent changes need to be made to clarify, enforce, and strengthen audit rights, the Commission has an open proceeding related exclusively to EELs audits. Petition for Declaratory Ruling of NuVox, Inc., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, DA 02-1302, Public Notice (rel. June 3, 2002).

CONCLUSION

BellSouth again urges the Commission not to modify the existing restrictions without careful and thorough consideration. The criteria in the *Supplemental Order Clarification* are reasonable, they work as intended, and they encourage local competition while limiting significant replacement of competitive interexchange access services with UNEs. To the extent the FCC decides to consider the Cbeyond proposal, it needs to be modified with the foregoing clarifications.

Sincerely,



Glenn Reynolds

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