

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7643
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL. (212) 973-0111
FAX (212) 891-9598

February 4, 2003

VIA ELECTRONIC FILING

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

***Re: CC Docket Nos. 01-338, 96-98, 98-147, Review of the Section 251
Unbundling Obligations of Incumbent Local Exchange Carriers -- Ex
Parte Filing***

Dear Ms. Dortch:

As pointed out in El Paso Networks, LLC (“EPN’s”), December 20, 2002 letter to the Commission in these dockets (a copy of which is attached hereto), the Commission (1) should not determine that CMRS providers are not eligible to purchase UNEs and (2) should not preclude CLECs from purchasing UNEs to provide wholesale telecommunications services to CMRS providers. EPN also suggested that the Commission clarify that the definitions of UNE loops and transport explicitly include service to cell sites and other carrier locations.

EPN stresses in the strongest possible terms that even if the Commission determines that CMRS providers are not eligible to purchase UNEs, which it should not for all of the reasons stated in EPN’s December 20, 2002 letter, that determination has no bearing on whether CLECs would be impaired without access to UNEs to provide telecommunications services to CMRS providers. The 1996 Act requires ILECs to provide unbundled access to “any requesting telecommunications carrier for the provision of a telecommunications service.”¹ This requirement clearly encompasses a CLEC’s provision of telecommunications service to a CMRS provider. There is no legal or policy basis under the Act for determining that CLECs are unimpaired in their ability to provide telecommunications service to CMRS providers without access to UNE loops or transport to provide. As the US Court of Appeals for the District of Columbia suggested, the 1996 Act “require[s] a more nuanced concept of impairment than is reflected in findings such as the Commission’s – detached from any specific markets or market

¹ 47 U.S.C. § 251(c)(3).

categories.”² Thus, regardless of the outcome in the Commission’s consideration of CMRS carrier access to UNEs, the Commission must *independently* evaluate whether the removal of such network elements will impair the ability of *CLECs* that seek to offer telecommunications services to CMRS providers to provide those services.³ Any determination by the Commission regarding the availability of network elements to *requesting carriers* that serve CMRS providers that does not include an appropriate evaluation of “impairment” under the 1996 Act would be unreasonable and arbitrary and capricious.

Rather than excluding facilities that serve CMRS providers from the ILECs’ unbundling obligations, the Commission should clarify the definitions of UNE loops and transport to explicitly encompass such service. Specifically, the Commission should clarify its definition of UNE loops to uncontrovertibly include cell sites and other wholesale customer (*i.e.*, carrier) locations; specifically identify wireless carrier cell sites as possible loop termination points; and remove the term “end user” from the definition of local loop entirely. In the alternative, the Commission should clarify its definition of interoffice transport UNEs to provide that interoffice transport may be between switches or wire centers owned by ILECs and other telecommunications carriers including CMRS carrier Mobile Telecommunications Switching Offices in addition to carrier locations where traffic is aggregated and/or routed, such as cell sites. By adding these express clarifications to its UNE definitions, the Commission would advance the pro-competitive goals of the Act by ensuring that ILECs cannot impede *CLECs* ability to provide wholesale telecommunications services to CMRS and other carrier customers.

² *US Telecom Ass’n v. FCC*, 290 F.3d 415, 426 (D.C. Cir. 2002).

³ Any impairment analysis that focuses on the provision of service to CMRS carriers must analyze the alternatives available in that market and whether self provisioning is economically efficient and will not lead to investment in wasteful and duplicative facilities. *US Telecom Ass’n v. FCC*, 290 F.3d at 427. In considering alternatives the Commission must reiterate its long standing belief that the availability of ILEC special access services are not considered alternatives for purposes of the impairment analysis. See *Local Competition Order*, 11 FCC Rcd 15644, ¶ 287; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 369, ¶ 354 (1999). If the Commission were to consider the availability of special access sufficient to warrant a finding of non-impairment it would seem that unbundling would cease to be an option in any market for any service because the ILEC’s service is almost always available.

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Respectfully submitted,

/s/

Russell M. Blau
Patrick J. Donovan
Joshua M. Bobeck

cc: Chairman Powell
Commissioner Abernathy
Commissioner Martin
Commissioner Copps
Commissioner Adelstein
Christopher Libertelli
Matthew Brill
Daniel Gonzalez
Jordan Goldstein
Lisa Zaina
William Maher
Jeffrey Carlisle
Scott Bergmann
Jessica Rosenworcel
Carol Matthey
Jane Jackson
Richard Lerner
Michelle Carey
Brent Olson
Tom Navin
Jeremy Miller
Robert Tanner
Ian Dillner
James Schlichting
Jenny Vaughn