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February 5, 2003

VIA ELECTRONIC FILING

The Honorable Michael K. Powell, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *UNE Triennial Review*, WB Docket Nos. 01-338 *et al.*, Competitive Need for Unrestricted Dedicated Transport and Loops -- ***Ex Parte Presentation***

Dear Chairman Powell:

KMC Telecom Holdings, Inc. ("KMC"), by and through its attorneys, submits this letter in the above-captioned proceeding, urging the Commission to reject the perpetuation of existing, or the adoption of new, use restrictions on unbundled network elements ("UNEs"). Specifically, KMC asks that the Commission affirmatively hold in its forthcoming *Triennial Review* order that competitive local exchange carriers ("CLECs") may use unbundled transport and loop facilities to compete with the incumbent LECs ("ILECs") in the provision of telecommunications services to other carriers, including CLECs, interexchange carriers ("IXCs"), data carriers and wireless carriers.

KMC is a facilities-based carrier that has made significant investments in numerous markets in fiber, switches, and other transmission network equipment. KMC seeks to use unbundled transport and/or loop network elements in combination with KMC's own facilities to provide a competitive wholesale alternative to ILEC transport and transmission services to telecommunications carriers. Without access to such network elements for this purpose, KMC, despite its substantial capital investment in its own transmission network facilities, will be handicapped in its ability to bring wholesale competition to the ILECs. The Commission should reject the requests of ILECs, such as that in the recent *ex parte* submission of BellSouth, asking the Commission to retain *and expand* existing so-called "safe harbors" that restrict the use of UNEs by requesting carriers, so as to not stamp out facilities-based wholesale-carrier initiatives

of KMC and other firms.[1] Such initiatives are exactly what the Commission should be promoting so as to advance the development of wholesale and, thus, retail competition.

Restricting or prohibiting CLECs' use of loops and transport generally to provide service to other carriers as described above would be an expansion of narrow existing use restrictions and would be discriminatory, unjust, and unreasonable in contravention of Sections 201, 202, and 251(c)(3) of the Communications Act, of 1934, as amended.[2] *First*, wholesale telecommunications provided on a common-carrier basis clearly qualify as "telecommunications services," and thus may be supported by UNEs. *Second*, it would be patently discriminatory for ILECs to prohibit CLECs from using UNEs to provide precisely the same "carrier's carrier" wholesale services that they themselves provide as local exchange carriers. *Third,* it is unjust to deprive customers a competitive choice of transmission providers based on unsubstantiated claims that local competition threatens the access charge regime, as some ILECs contend.[3] *Fourth*, it would be unreasonable for ILECs to limit use of UNEs based on labels such as "special access" culled from the monopoly environment existing before the passage of the Telecommunications Act of 1996; such labels have no meaning in the competitive marketplace that Congress envisioned and should be phased out, not reinvigorated.[4] *Finally*, the ILECs' own capital expenditure ("capex") figures demonstrate their level of network investment is directly proportional to the strength of the competitive industry, the growth of which would be hampered by the restrictions the ILECs advocate.

As an initial matter, under the 1996 Act, UNEs may be used to provide *wholesale* telecommunications services. Section 251(c)(3) of the Act mandates, without qualification, that UNEs may be used by requesting carriers for the "provision of a telecommunications service."[5] No distinction is made between retail and wholesale services. Wholesale transmission services for the use of other telecommunications carriers clearly meet the definitions of both "telecommunications" and "telecommunications services," provided such transport is between or among points selected by the carrier customer, is without change in the information transmitted, and is offered for a fee generally to all prospective carrier customers.[6] The Commission has determined that telecommunications offered on a common-carrier basis to other carriers qualifies as "telecommunications services."[7]

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1 WC Docket 01-338, Letter from Margaret H. Greene, President, Regulatory and External Affairs, BellSouth, to Chairman Michael Powell *et al.*, FCC (Jan. 31, 2003) ("BellSouth Letter").

2 47 U.S.C. § 201(b) (prohibition against unjust and unreasonable charges practices, classifications, and regulations), § 202(a) (prohibition against unjust and unreasonable discrimination in charges practices, classifications, regulations, *facilities*, and service), and § 251(c)(3) (UNEs must be provided pursuant to just, reasonable, and non-discriminatory terms and conditions).

3 *See* BellSouth Letter at 3.

4 *See* 47 U.S.C. §§ 251 ff.

5 47 U.S.C. § 251(c)(3).

6 47 U.S.C. §§ 153(43) and (46).

7 *Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776, ¶¶ 785-86 (1997); *see also Virgin Islands Telephone Corporation v. FCC*, 198 F. 3d 921 (D.C. Cir. 1999).

Moreover, any ILEC prohibition against CLECs providing wholesale service to IXCs, data carriers, and wireless carriers would be a discriminatory practice that violates Sections 202(a) and 251(c)(3) of the Act.[8] For example, it is a core function of the ILECs as local exchange carriers to provide Commercial Mobile Radio Service ("CMRS") carriers with transmission circuits, including connections between their central offices and the CMRS providers' Mobile Telecommunications Switching Offices ("MTSOs"), and also between MTSOs and cell sites or base stations. Today, there is essentially no wholesale competition for these components of wireless carrier networks, and the overwhelmingly predominant source is ILEC facilities. For ILECs now to advocate that CLECs may not use unbundled loops or transport for the purpose of providing wholesale services competitive with ILEC transmission services to wireless and other carriers is to champion blatant discrimination, as well as to deprive retail carriers the benefits of wholesale competition.[9] In such a context, imposition of use restrictions can no longer a matter be a matter of impairment analysis but would be an example of outright violation of Sections 202(a) and 251(c)(3). For this reason alone, the Commission should reject any ILEC position favoring restrictions on the use of UNEs to provide competitive wholesale services to carriers. The Commission would thereby promote the development of both competitive wholesale as well as retail marketplaces, advancing what Congress itself characterized as one of the fundamental objectives of the 1996 Act: to "open[] all telecommunications markets to competition."[10]

Any argument that competitive use of dedicated transmission facilities to provide high-bandwidth services will "disrupt [the Commission's] access reform policies"[11] is without merit. As an initial matter, nothing in the 1996 Act or in the Commission Rules indicates that consideration of the access regime is appropriate in an unbundling analysis. Conversely, the Commission has recently issued a series of "access reform" orders that limit access charge

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[8] 47 U.S.C. §§ 202(a) and 251(c)(3).

[9] Facilities between ILEC central offices and MTSOs clearly meet the network element definition of transport. *See* 47 C.F.R. § 51.319(d)(1)(i) (transport includes dedicated transport between ILEC and/or another carrier's wire centers *or* between switches owned by the ILEC or the other carrier). ILEC transmission facilities between MTSOs and wireless carrier base station locations also qualify as network elements, either as loops or transport. As a general matter, these facilities are clearly used to provide telecommunications services. 47 U.S.C. § 153(29). More specifically, these facilities meet the definition of loop since they function as the "last mile" of the CMRS provider customer's wireline network (*see* 47 C.F.R. § 319(a)(1)), but they also meet the definition of transport since they are ILEC facilities between another carrier's wire centers and/or switches. Consequently, facilities between MTSOs and cell sites must be available as some form of UNE to competitive wholesale carriers, whether categorized as loop or transport. In this regard, KMC supports the positions taken by El Paso Networks, LLC ("EPN"), in this proceeding. *See ex parte* Letter of Patrick J. Donovan, *et al.*, Swidler Berlin Shereff Friedman, LLP, Counsel for EPN, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 (dated Dec. 20, 2002) at 3-7.

[10] Deployment of Wireline Services Offering Advanced Telecommunications Capability, 16 FCC Rcd 15435 ¶ 67 (2001) (granting collocated CLECs the ability to cross-connect with other collocated CLECs at an ILEC premise in order to provide wholesale transport services), *quoting* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) at 1.

[11] See BellSouth Letter at 3.

levels, for CLECs as well as ILECs,[12] while placing the bulk of charges on end users, rather than IXCs.[13] Consequently, these orders guarantee the security and stability of ILEC *and* CLEC access charges, and hence universal service, regardless of which facilities a LEC uses to serve another carrier as the LEC's customer. Therefore, it would be unjust for the use of UNEs to be constricted to deprive LEC customers competitive local transport services made possible by unbundling on the faulty premise that the access charge regime will somehow be adversely affected.

Similarly, the ILECs' constant references to competitive transport services as being "special access" and therefore deserving of isolation from other competitive telecommunications services for purposes of unbundling analysis are also baseless. Although KMC recognizes that the Commission has concluded that certain services, such as Digital Subscriber Line ("DSL") services, are provisioned through a special access-type network configuration, that same holding and subsequent orders are silent as to whether a CLEC would be impaired without access to the same unbundled loops that support DSL or whether the customers served over such a loop should be limited to receiving a particular class of services.[14] Resort to such monopoly-era labels as "special access" turns unbundling analysis on its head and run counter to the 1996 Act as a whole: the 1996 Act requires the Commission and State regulators to focus on the ILEC provision of network elements to competitors and not on particular finished products that a requesting carrier might provide over them. BellSouth and other ILECs in this proceeding are coaxing the Commission into viewing the network through service-sensitive filters as it did in the 1980's, rather than in an unbundled, service- and technology-neutral state as Congress envisioned in the 1996 Act. Remaining vestiges of such backward thinking should have been discredited long before this *Triennial Review* proceeding, and certainly cannot serve as a basis for maintaining or expanding UNE restrictions.

Finally, the "disincentive-to-new-investment" theory advanced by BellSouth[15] and other ILECs is equally unsupportable. The figures released by the ILECs themselves undermine this theory, and demonstrate that the imposition of use restrictions on high-capacity transmission circuits offered as UNEs and the struggles of competitors, in fact, have been accompanied by disincentives. ILEC capital expenditures have decreased since the CLEC industry has lost so many key players and competitive pressures have eased. Where the ILECs

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[12] *Multi-Association Group (MAG) Plan for Regulation of the Interstate Services of Non-Price Caps Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, FCC 01-304 ¶ 3 (rel. Nov. 8, 2001).

[13] *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, FCC 00-193, 15 FCC Rcd. 12962, 12965 ¶ 3 (2000) ("*CALLS Order*").

[14] *GTE Telephone Operating Cos., Tariff Transmittal No. 1148*, CC Docket No. 98-79 (Oct. 20, 1998), *recon.* FCC 99-41 (Feb. 20, 1999); *Bell Atlantic Telephone Operating Cos., Bell Atlantic Tariff No. 1, Bell Atlantic Transmittal No. 1076*, CC Docket Nos. 98-168 *et al.*, FCC 98-317 (Nov. 30, 1998) (approving Bell Atlantic, BellSouth, GTE and Pacific Bell DSL tariffs).

[15] BellSouth Letter at 2.

had increased their "capex" by 22 percent in the period from 1997 to 2000[16], they have since curtailed their capital expenditures significantly. For example, Verizon's capital expenditure budget for 2002 was at least $1.4 billion less than its 2001 budget,[17] which itself represented a decrease from 2000 expenditures.[18] The decrease projected for 2003 is even greater, with current "guidance" projected by Verizon at $12.5 to 13.5 billion for this year.[19] SBC invested 39% less in 2002 than it spent in 2001, and anticipates spending even less in 2003.[20] BellSouth's annual capital expenditures over the period 2000-2002 decreased from $7.0 billion, to $6.0 billion, to $3.8 billion.[21] This trend cannot be attributed to unbundling requirements -- quite the opposite. Decreased expenditures tellingly followed the imposition of the use restrictions that the ILECs now ask the Commission to preserve in order to, so the ILECs say, create incentives for investment. The trend cannot be attributed to unbundling: first, ILEC capex was at its peak around 2000, the year after the Commission had released its most comprehensive unbundling rules, notably the *UNE Remand Order*[22] and line sharing requirement for DSL;[23] and, secondly, it was only in mid-2000 that the Commission fully imposed the existing safe harbor rules for enhanced extended links ("EELs").[24]

Separate and apart from being violative of Sections 201(b), 202(a) and 251(c)(3) of the Act for all ILECs, there is no basis at all for Regional Bell operating Companies ("RBOCs") possessing or seeking Section 271 in-region interLATA authority to impose use restrictions on transport or loop UNEs. To the extent that there is any basis at all for unbundled use restrictions for any ILECs, it arguably is to be found in Sections 251(d)(2) or 251(c)(3).[25]

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16 *See* Federal Communications Commission, *Telecommunications @ the Millennium*, Figure 10 (Feb. 8, 2000) (BOCs invested $82 billion from 1992 to 1995 and $100 from 1997 to 2000).

17 *Verizon Communications Reports Solid Results for Fourth Quarter, Provides Outlook for 2002*, Verizon News Release (Jan. 31, 2002) (capital expenditures reported or budgeted at $17.4 and 16.0 billion for 2001 and 2002, respectively).

18 *Verizon Communications Posts Strong Results For Fourth Quarter and 2000,* Verizon New Release (Feb. 1, 2001) (capital expenditures for 2000 at $17.6 billion.)

19 *See* Verizon Financial Performance at http://investor.verizon.com/financial/index.html (posted as of Feb. 4, 2003).

20 *SBC Reports Fourth-Quarter Earnings Per Diluted Share of $0.71, $0.62 Before Special Items and Expensing Stock Options,* SBC News Release (Jan. 28, 2003) (reporting or projecting capital expenditures of $11.2 billion in 2001, $6.8 billion in 2003, and $5-6 billion in 2003)..

21 *See* BellSouth Corporation Consolidated Statement of Income, 4Q00, (Jan. 22, 2001) at 2, posted at; http://bellsouth.com/investor/pdf/4q00p.pdf; BellSouth Corporation Consolidated Statement of Income, 4Q02, (Jan 23, 2003) at 5, posted at http://bellsouth.com/investor/pdf/4q02p.pdf.

22 *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) *remanded United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

23 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Fourth Report and Order, 15 FCC Rcd 3696 (Dec. 9, 1999), *vacated United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

24 *See Implementation of the Local Competition provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999), *clarified* FCC 00-183 (rel. June 2, 2000); *aff'd. Competitive Telecommunications Association v FCC,* 309 F. 3d 8 (2002). .

25 *See CompTel, supra,* 309 F. 3d at 12-13.

However, RBOCs with or seeking Section 271 authority have an independent obligation to provide unbundled loops and transport distinct from any obligation ILECs generally have under Section 251(c)(3).[26] Unlike Sections 251(c)(3) and 251(d)(2), the Section 271 separate checklist unbundling obligations do not provide language that supports any use restrictions. Further, by virtue of Section 271(d)(6), the Commission may not, "by rule or otherwise, limit or extend" the checklist obligations to provide unbundled loops or transport, which in itself precludes use restrictions on these UNEs for RBOCs with or seeking Section 271 authority.[27]

Pursuant to Section 1.1206(b)(1) of the Commission's rules, this written *ex parte* presentation is being submitted to the office of the Secretary electronically. Please associate this letter with the record in the proceedings indicated above.

Respectfully submitted,

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[26] *Compare* 47 U.S.C. §§ 271(c)(2)(B)(iv)-(v) (loop and transport unbundling obligations not dependent on 251(c)(3) or 251(d)(2)) *with id.* § 271(c)(2)(B)(ii) (unbundling obligation based on 251(c)(3) and 251(d)(2))

[27] 47 U.S.C. §§ 271(d)(4).

Lisa Zaina, Chief Legal Advisor to Commissioner Adelstein
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