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February 6, 2003

***EX PARTE* SUBMISSION VIA ELECTRONIC FILING**

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

Re: *Ex Parte* Submission in UNE Triennial Review;
CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

Today David Zesiger, Executive Director of the Independent Telephone & Telecommunications Alliance, Glenn Rabin of ALLTEL Corp., and I met with Commissioner Adelstein and Lisa Zaina, his Senior Legal Advisor, to discuss the above-referenced proceeding. The attached materials, which were distributed in the meeting, describe the substance of our presentation. Please direct any questions concerning this matter to me.

Respectfully submitted,

/s/ Karen Brinkmann
Karen Brinkmann

cc: Commissioner Jonathan Adelstein
Lisa Zaina
Marsha MacBride
Christopher Libertelli
Matthew Brill
Jordan Goldstein
Daniel Gonzalez
William Maher

UNE TRIENNIAL REVIEW

I. The Impairment Analysis Required By the D.C. Circuit Cannot Be Satisfied With Respect to the Switching UNE.

A. The Record Demonstrates An Abundance Of Affordable, Competitive Switching Capability From Multiple Suppliers.

1. Thousands of CLEC switches have been deployed in markets all over the country, many of them collocated with the ILECs' own switches.[1]

2. ILECs have also demonstrated their ability to enter each other's markets from neighboring service areas using their existing switching capabilities – without even requesting access to the incumbent's network in the market they seek to enter. The availability of switching from neighboring ILECs negates any possibility of "impairment" in switching.

B. The Record Contains No Evidence Of "Impairment" In Obtaining Or Deploying Switching Capability.

C. To De-List An Element, The Commission Need Not Find That CLECs Have Actually Deployed A UNE In Any Particular Market, But Only That The Network Element Be "*Available*" From Sources Other Than The ILEC Network.[2]

II. The Commission May Not Simply Conclude That CLECs Are "Impaired" In Smaller Markets Without Access to UNE Loops -- Section 251(d)(2) Requires the Commission To Conduct a More Granular Analysis Of "Impairment" To Take Into Account the Differing Characteristics of Independent ILEC Markets.

A. Smaller Markets Typically Have Fewer Customers Overall And Fewer Business Customers Than Larger Markets.

1. NECA recently reported that non-rural carriers serve over ten times as many customers per square mile on average than rural carriers (134 lines per square mile vs. 10.5 lines per square mile.)[3]

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[1] *See, e.g., ex parte* submission of United States Telecom Association in CC Dockets 01-338, 96-98 and 98-147 at 2 (Dec. 11, 2002) (citing the Association for Local Telecommunications Services Annual Report, *The State of Local Competition in 2002,* at 8 (April 2002), which reports 1,244 CLEC voice switches and 9,524 CLEC data switches as of September 30, 2001); *see also ex parte* submissions in these dockets by Verizon (January 10, 2003) and SBC (October 24, 2002).

[2] *See AT&T v. Iowa Utilities Board,* 535 U.S. 366, 389 (1999).

[3] NECA, "Trends in Telecommunications Cost Recovery: The Impact on Rural America" (October 2002) at 4-5.

2. A key measure of business customer concentration is given by interstate special access revenue as a percentage of total interstate revenue. NECA recently reported that special access accounts for only 18.9% of total interstate access revenues for rural carriers compared to 63.3% for non-rural carriers.[4]

B. Imposing Uniform Pre-Conditions To UNE Relief For All ILECs Would Contradict The D.C. Circuit's Mandate That The Commission's Rules Must Be Based Upon Market-Specific Analysis.

1. The Act requires that UNE obligations, as well as the conditions for relief from them, reflect market-specific analysis.

2. In considering any threshold criteria for unbundling relief, the FCC should avoid requirements that inappropriately assess competition in smaller markets, or fail to acknowledge such competition altogether.

III. <u>The Commission Should Acknowledge That "Impairment" Means Something Different In Smaller Markets, And Conduct The Appropriate Review In Those Markets.</u>

A. The Commission Should Not Assume A Minimum Size Wire Center Or Line Count As A Necessary Threshold For UNE Relief – To Do So Would Be An Impermissible Failure To Conduct The Impairment Analysis.

1. The size of the wire center is but one in a host of factors that determine what makes it profitable to serve an area.

2. The Act requires the Commission to make an "impairment" finding for every market, not just the most densely populated.

B. Setting Any Hard Threshold For Presumptive Relief Of the Switching or Loop UNE Obligation (Such As Central Offices Serving Less Than 5,000 Lines) Also Fails To Take Into Account Significant Evidence Of The Viability Of Facilities-Based Competition In Those Markets.

1. There are numerous examples of competitors entering markets with central offices serving fewer than 5,000 lines:

a. A rural co-op in Minnesota offers competitive service in communities of 550 lines, 809 lines, 1,000 lines, 2,200 lines, 3,700 lines, and 3,900 lines. Their collective market share in these communities is well above 50%.

b. In Iowa, rural co-ops and municipally operated local exchange carriers provide competition in small, rural communities of 252 lines, 323

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[4] *Id.* at 7-8.

lines, 361 lines, 446 lines and 439 lines. In each case, one facilities-based competitor in each market has gained significant market share.

c. Sprint Local Telecom Division has identified 20 exchanges with fewer than 17,000 lines in which they face switch-based competition, including the following examples with fewer than 5,000 access lines:[5]

(1)	Aulander, North Carolina	1,478
(2)	Austinville, Virginia	1,974
(3)	Bland, Virginia	1,846
(4)	Elida, Ohio	2,773
(5)	Mamie, North Carolina	2,122
(6)	Payne Springs, Texas	4,134
(7)	Robbins, North Carolina	2,501

2. Competitive wireless carriers have obtained statewide ETC status in a number of states (*e.g.,* US Cellular in Wisconsin, Cellular South in Alabama, RCC Holdings in Alabama), allowing them to provide competition in numerous smaller and rural communities.

3. Cable operators provide facilities-based competition in numerous smaller markets across the country.

4. In its recent report, "Scope of Competition in Telecommunications Markets of Texas,"[6] the Texas PUC reported that CLECs in Texas serve 16% of local customers in *rural and urban* areas, and CLECs serving rural areas favor facilities-based strategies far more than in urban areas.

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[5] Nor does Sprint represent that this is an exhaustive list. *Ex parte* submission of Sprint Corporation in CC Dockets 01-338, 96-98 and 98-147 (Oct. 16, 2002).

[6] Report to the 78th Texas Legislature, *Scope of Competition in Telecommunications Markets of Texas,* Public Utility Commission of Texas, January 2003 ("Texas PUC Report") at *xi*.

a. Between December 1999 and December 2001, Texas CLECs' market share has grown from less than 5% to more than 15% even as the overall number of access lines has declined over the last two years.[7]

b. In Texas, a number of CLECs target rural markets, and CLECs enjoy as much market share in rural markets as in urban markets --16%.[8]

c. In rural areas of the state, CLECs have a 23% share of the business customers.[9]

d. Facilities-based entry (rather than UNEs or resale) is the preferred method of Texas CLECs serving rural areas:

(1) As of June 2002, the percentage of customers in Texas served by CLECs using their own facilities was highest in rural areas *– fully 48% of the rural lines served by CLECs were receiving facilities-based service.*[10]

(2) For serving residential customers in rural markets, CLECs pursue facilities-based entry at a far greater rate (35%) than in non-rural markets.[11]

(3) Among non-residential customers, facilities-based CLECs have gained *three times* as many lines in rural areas of Texas as in urban markets.[12]

C. The FCC Should Not Impose A Multiple-Competitor Standard As A Pre-Condition To Granting Any UNE Relief, As Some Commenters Have Suggested.

1. Because smaller markets typically have fewer customers than larger markets they are unlikely to support the same number of competitors as larger markets. In fact, the great majority of independent markets may well be unlikely to be able to support more than one new entrant.

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[7] *Id.* at 20. This is consistent with national trends of CLEC market share growth, ILEC market share decline, and overall access line decline. *See id.* at 8 (citing FCC *Local Telephone Competition Reports* 2000-2002).

[8] *Id.* at 24.

[9] This compares remarkably to the CLECs' share of business customers in non-rural markets (12% in suburban areas and 17% in urban areas). *Id.* at 30.

[10] *Id.* at 25 (48% of rural CLEC customers were served by facilities-based CLECs, versus 16% of suburban CLEC customers and 9% of urban CLEC customers).

[11] *Id.* at 28 (35% of residential lines in rural markets served by a CLEC's own facilities, versus 21% in suburban markets and 8% urban markets).

[12] *Id.* at 29.

2. A single competitor can have a far more significant impact in a market served by independent ILECs, as in Anchorage and Fairbanks.[13] A single competitor can often provide powerfully effective competition in these smaller markets.

    a. In Anchorage, one switch-based competitor has 45% of the market, including both residential and business lines, and already has deployed a significant amount of its own distribution plant.[14]

    b. In McMinnville, TN, a single facilities-based competitor operated by a neighboring rural ILEC has captured more than 50% of the business lines from the independent ILEC serving the community.

    c. In Wisconsin, there are 8 active, facilities-based CLECs competing against the ILEC in 14 rural markets; in at least one of these markets, the ILEC has lost up to 46% of the lines.

    d. In the Champaign-Central Illinois area, a single competitor has captured over 50% of the business lines from the independent ILEC serving various rural communities.

    e. In San Marcos, Texas, a single facilities-based competitor has captured a significant percentage of lines from the independent ILEC serving the community *without* using UNEs.

    f. In St. Charles County, Missouri, a single facilities-based competitor has won approximately 12% of the market for residential and small business, and is capturing market share at a rate of 1% per month.

    g. In small, rural Texas communities such as Seymour, Knox City, and Munday, competition from a neighboring ILEC (a cooperative telephone company) using its own switch has garnered 12% of the subscriber lines.

3. Failure to de-list the switching UNE in such markets simply because there are not multiple competitors in the market would ignore the record evidence that CLECs simply are not "impaired" in such markets.

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[13] *See, e.g., ex parte* submission of Alaska Communications Systems Group, Inc. in CC Dockets 01-338, 96-98 and 98-147 (January 6, 2003).

[14] *See, e.g., ex parte* submission of Alaska Communications Systems Group, Inc. in CC Dockets 01-338, 96-98 and 98-147 dated January 6, 2003, and sources cited therein. *See also ex parte* submission of GCI in these dockets dated January 31, 2003 (CLEC has 45% market share in Anchorage, 21% in Fairbanks, 14% in Juneau).

D. The Commission Should Not Mandate National "Hot Cut" Provisioning Requirements That Would Effectively Require All ILECs To Implement Electronic Operations Support Systems ("OSS") Capabilities As A Pre-Condition To Obtaining Relief From The Switching UNE.

1. Independent ILECs serve markets that typically are not large enough to justify the cost of electronic OSS. Virtually no independents currently employ electronic OSS.

2. Competitors entering smaller markets served by independent ILECs have found it equally difficult to justify implementing electronic interfaces with ILECs because of the high costs associated with such systems is not justified by the number of potential customers in such markets.

   a. In Cincinnati, the ILEC was required to develop electronic OSS to facilitate the transition of customers to competitors' networks. However, no competitor ever made use of the electronic OSS, finding the more economical manual processes to be sufficient to meet their needs.

   b. In Fairbanks and Juneau, although the interconnection agreement provides for electronic OSS, neither the ILEC nor the CLEC has desired to incur the cost of implementing electronic OSS; the CLEC has significant market share notwithstanding.

   c. Requiring competitive carriers to interface with an ILEC via electronic OSS arguably places an unacceptable economic burden on the competitor, potentially violating the D.C. Circuit's mandate to analyze at an appropriately granular level the likelihood that a particular unbundling rule would actually stimulate competitive entry.[15]

E. New and Burdensome Performance Measures And Reporting Requirements Tailored To The Market Conditions That Prevail In BOC Markets Similarly Have Not Been Justified In Markets Served By Independent ILECs.[16]

1. For example, performance measures for minimum volumes and maximum timeframes for UNE loop conversions were designed for the BOCs and should not be imposed on independent ILECs; rather, the Commission should acknowledge that access to UNE loops has never been established as a barrier

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[15] For example, the court specifically criticized the Commission's failure to consider that in some markets, such as high-cost markets where rates are held below cost by regulation, any competitive entry that might be induced by unbundling would be "wholly artifical." *United States Telecom Association v. FCC*, *supra*, 290 F.3d at 422-23.

[16] See ITTA's Comments, filed January 22, 2002, and Reply Comments, filed February 12, 2002, in CC Dockets 01-318, *et al.*

to competitive entry in non-BOC markets, and therefore no "impairment" can be said to exist with respect to loop provisioning in these markets.

IV. Section 251(d)(2) Is Informed By the Larger Statutory Context, Including Section 251(f)

A. It Is Axiomatic That the Commission May Not Read Section 251(d)(2) In Isolation But Must Consider It In the Context of the Statutory Framework As a Whole.

B. Congress Evinced a Clear Intention to Afford Market-Appropriate Treatment to Rural and Midsize Carriers.

1. Section 251(f) Represents the Judgment of Congress That a One-Size-Fits-All Approach In Implementing Section 251 Is Inappropriate.

2. Section 251(f) Demonstrates a Congressional Preference For a More Granular Analysis of Market Conditions, Consistent With the D.C. Circuit's Interpretation of 251(d)(2).

C. Section 251 Codified the Presumption That Unbundling Obligations Are Inappropriate In Markets Served By Rural Carriers, Where Congress Deemed Local Circumstances Sufficiently Different From Other Markets To Warrant Different Unbundling Rules.

1. All rural carriers enjoy the exemption unless and until a requesting carrier proves that unbundling under Section 251(c) is "not unduly economically burdensome, is technically feasible, and is consistent with Section 254 of the Act..."[17]

2. In order to fully comply with the policy of market-specific regulation embodied in Section 251, the FCC should adopt appropriate burden-of-proof rules for markets served by rural carriers; this will guide the states in rural exemption termination cases and ensure the policies identified by the 8th Circuit are implemented uniformly nationwide.[18]

[17] 47 U.S.C. §251(f)(1).

[18] *See* Petition for Reconsideration of Action in Rulemaking Proceeding, FCC Public Notice Rep. No. 2508 (rel. Oct. 19, 2001), 66 Fed. Reg. 54009 (Oct. 25, 2001); *see also Iowa Util. Bd. v. FCC*, 219 F.3d 744, 762 (8th Cir. 2000) ("It is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission.... [T]he FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies.").

D. Section 251 Also Granted "Broad Protections" Under Sections 251(b) and (c) to Two Percent Carriers.[19] The Commission should instruct the states to consider whether unbundling obligations, and preconditions to relief of those obligations, have a disproportionate impact on two percent carriers, considering their "full economic burden" as instructed by the 8th Circuit.

[19] A state commission "*shall* grant" a two percent carrier's petition for suspension or modification of §251(b) or (c) requirements to the extent such suspension or modification "(A) is necessary – (i) to avoid a significant adverse economic impact on users of telecommunications services generally, (ii) to avoid imposing a requirement that is unduly economically burdensome, or (iii) to avoid imposing a requirement that is technically infeasible; and (B) is consistent with the public interest, convenience, and necessity." 47 U.S.C. §251(f)(2).