BellSouth Corporation
Legal Department
Suite 900
1133-21st Street, NW
Washington, DC 20036-3351

jonathan.banks@bellsouth.com

Jonathan Banks
General Attorney

202 463 4182
Fax 202 463 4195

February 13, 2003

EX PARTE

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

RE: *Ex Parte Presentation,* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338

Dear Ms. Dortch:

On February 13, 2003, Herschel Abbott sent the attached letter to Chairman Michael Powell. This letter describes a recent joint proposal on safe harbors for EELs.

I am filing this notice in the docket identified above, as required by Section 1.1206(b)(2) of the Commission's rules, and request that you associate this notice with the record of those proceedings.

Sincerely,

Jon Banks

BellSouth Corporation
Suite 900
1133-21st Street, N.W.
Washington, DC 20036-3351

herschel.abbott@bellsouth.com

Herschel L. Abbott, Jr.
Vice President -
Governmental Affairs

202 463 4101
Fax 202 463 4141

Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW Portals II Building
Washington, DC 20554

Re: Ex Parte Notice
Triennial Review Proceeding – Docket No. 01-338

Dear Chairman Powell:

The Joint Compromise Proposal recently submitted by NuVox, Cbeyond, SniP LiNK and SBC represents a significant step and merits further study.[1] It illustrates again that incumbent and facility-based competitors can engage in constructive industry dialogue that results in solutions that distinguish local from special access-type services. The parties to that agreement are to be particularly commended for building their solution on the same "significant local use" requirement established by the Commission in its *Supplemental Order Clarification* and firmly upheld by the D.C. Circuit.[2] The parties also recognize the legal necessity of the local requirement by quoting the D.C. Circuit's admonition that "it is far from obvious to us that the FCC has the power, without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such [nonlocal] services on an unbundled basis."[3] The value of the legal certainty provided by retaining the "significant local use" requirement cannot be overestimated.

BellSouth believes that further industry dialogue in a less rushed atmosphere is likely to result in an improved and more focused proposal. Other proposals have put forward a variety of different solutions, and those should be carefully evaluated on a stand-alone basis and in combination with others.[4] BellSouth recently proposed a purely architectural solution (attached) that looks to a number of factors that show that a carrier is likely to be using UNEs for local purposes. Incorporating elements of that proposal into the Joint Compromise could yield a legally and operationally sound solution.

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[1] Letter from Ed Cadieux (NuVox), John Heitmann (Kelly, Drye and Warren), Julia Strow (Cbeyond Communications), Patrick Donovan (Swidler Berlin Shereff Friedman), James Smith and Gary Phillips (SBC Telecommunications) to Marlene Dortch (FCC), Docket No. 01-338 (filed February 7, 2003).
[2] The court upheld the local use requirement and firmly endorsed each and every rationale put forward by the Commission supporting that requirement. *CompTel Telecommunications Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir.2002)(*CompTel*).
[3] *CompTel*, 309 F.3d at 14.
[4] *See, e.g.,* Letter from Cronan O'Connell (Qwest) to Marlene Dortch (FCC), Docket No. 01-338 (filed Feb. 6, 2003).

Earlier collaborative efforts between competitors seeking to use their own facilities to compete and incumbents yielded the current safe harbors.[5] The current safe harbors require that a carrier seeking to use EELs must be either the exclusive local provider or deliver enough local traffic over the facilities to meet certain minimal usage thresholds. Although it has been argued that measuring traffic may impose certain burdens on smaller CLECs seeking to use UNEs to provide integrated broadband offerings, BellSouth continues to believe that, for the great majority of service offerings, the traffic measurements required by the current safe harbors are not burdensome. Rather than throw out the current safe harbors, which have been upheld in court, the issues raised by these new offerings should be dealt with on their own terms, and any new safe harbors should specifically address and be limited to those new offerings.[6]

To truly achieve their goal, the Joint Compromise safe harbors must be improved in a number of areas. First, the proposal does not achieve its purpose of requiring "significant local use." The proposal relies principally on a required ratio of interconnection trunks to EEL circuits to establish local use. However, the proposal contains no actual requirement that significant local traffic be delivered over those trunks. Interconnection trunks can be ordered from incumbents or provided by CLECs at very little cost,[7] so the fact that trunks are in place does not demonstrate that they (or associated EELs) are being used to deliver significant amounts of local traffic. Establishing a minimum requirement for minutes delivered over the interconnection trunks would be one way to show that the trunks (and associated EELs) were actually being used to provide real local service.[8]

Second, for smaller carriers the proposal must either include the current prohibition on commingling or extend to individual UNEs. BellSouth's recently submitted proposal extends the local use requirement to UNEs.

Third, the requirement that disputes over compliance by smaller CLECs be brought to the Commission as enforcement actions may create substantial burdens on the Commission and all the parties. Further industry discussion over other avenues to handle disputes by involving state commissions or using arbitration may prove very worthwhile.

Fourth, by expressly allowing smaller carriers to wholesale EELs the Joint Compromise proposal invites opportunities for evasion of the core policy reasons underlying the safe harbors. A thorough review of the reasons for wholesaling UNE circuits to large carriers with substantial long-distance businesses is likely to suggest that there would be little to be gained from safe harbors that endorse wholesaling, while the disincentives to deploying facilities created by wholesaling are likely to be significant. In addition, the wholesaling provisions are likely to become lightening rods for enforcement actions and attract substantial resources to monitoring and enforcement that would be more effectively invested elsewhere.

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[5] Letter from Suzanne Guyer, Bell Atlantic, to Magalie Roman Salas, Federal Communications Commission, Docket No. 96-98 (filed Feb. 29, 2000) transmitting letter signed by BellAtlantic, Intermedia Communications, BellSouth, SBC, Focal Communications, Time Warner Telecom, GTE, U.S. West and WinStar Communications.

[6] Technically, the current safe harbors were designed for channelized facilities, for example, DS1s that are divided into individual voice-grade channels. The new packet-switched based offerings that create traffic measurement difficulty are provided over unchannelized facilities. Different types of data, Internet access and local traffic is mixed on the facility and sorted out by a packet switch, rather than being separated on different channels.

[7] The average non-recurring cost for an interconnection trunk in BellSouth's region is about $330 for the first trunk on an order and only $60 for additional trunks on an order.

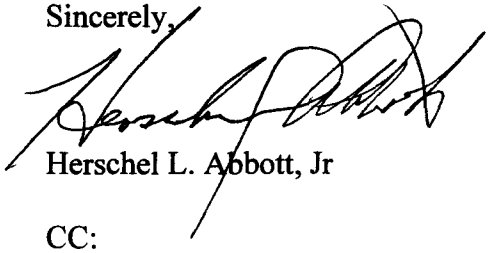
[8] Standard traffic engineering principles could be used to establish minimum thresholds. Traffic could be measured by the incumbent's switch if it is too burdensome for the CLEC to measure using its own switch.

Fifth, further study of the feasibility and costs of traffic measurement on channelized and unchannelized facilities would aid in drawing the lines contemplated by the Joint Compromise proposal. Similarly, a more detailed understanding of the proposed revenue thresholds may suggest that any appropriate lines drawn between carriers be drawn differently.

Finally, although UNEs should certainly be available to CLECs seeking to use them to deliver "innovative new local services for their end users,"[9] the Act establishes legal limits to that availability. To the extent that those services include, or are composed primarily of, nonlocal services such as broadband Internet access, the Commission cannot legally require incumbents to provide UNEs for those services without the service-specific impairment finding required by *CompTel*.[10]

The Joint Compromise shows again that industry dialogue on this issue can produce useful results. Further dialogue that addresses the issues above can result in a set of local use safe harbors that will provide a solid, legal, foundation for sustainable local competition. Consistent with prior precedent and the *CompTel* decision, clear Commission directives on the outlines of an industry solution to showing significant local use would aid in a speedy, collaborative resolution.

Sincerely,



Herschel L. Abbott, Jr

CC:
Honorable Commissioner Kathleen Q. Abernathy
Honorable Commissioner Michael J. Copps
Honorable Commissioner Kevin J. Martin
Honorable Commissioner Jonathan S. Adelstein
Christopher Libertelli
Mathew Brill
Jordan Goldstein
Daniel Gonzalez
Lisa Zaina
John Rogovin
William Maher
Jeffrey Carlisle
Michelle Carey
Tom Navin

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[9] Joint Compromise at 1.
[10] *CompTel* at 14. *See also* BellSouth White Paper (attached).

BellSouth Corporation
Legal Department
Suite 900
1133-21st Street, NW
Washington, DC 20036-3351

jonathan.banks@bellsouth.com

Jonathan Banks
General Attorney

202 463 4182
Fax 202 463 4195

January 31, 2003

EX PARTE

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

RE: *Ex Parte Presentation* CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On January 31, 2003, Margaret Greene sent the attached letter to Chairman Michael Powell, Commissioner Kathleen Abernathy, Commissioner Michael Copps, Commissioner Jonathan Adelstein, and Commissioner Kevin Martin. This letter provides a short white paper that explains the law and the facts that require the Commission to draw a real line between telephone exchange (local) and access services and discusses special safe harbors.

I am filing this notice in the dockets identified above, as required by Section 1.1206(b)(2) of the Commission's rules, and request that you associate this notice with the record of those proceedings.

Sincerely,

Jonathan Banks

Attachment

Cc: Christopher Libertelli
Matt Brill
Jordan Goldstein
Lisa Zaina
Rich Lerner
Bill Maher
Jeffrey Carlisle
Scott Bergman
Michelle Carey
Tom Navin
Jeremy Miller

BELLSOUTH

BellSouth Corporation
Suite 4503
675 W Peachtree St
Atlanta, GA 30375

Margaret H. Greene
President Regulatory and
External Affairs

January 31, 2003

Chairman Michael Powell
Commissioner Kevin Martin
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Jonathan Adelstein
445 12th Street, SW Portals II Building
Washington, DC 20554

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

Dear Chairman Powell:

This letter provides a short white paper that explains the law and the facts that require the Commission to draw a real line between telephone exchange (local) and access services. It also proposes a set of safe harbor criteria that the Commission could use to determine if UNEs and UNE combinations such as EELs are being used to provide local service. These proposed safe harbors could replace the current safe harbors contained in the *Supplemental Order Clarification*. BellSouth's proposed safe harbors are "architectural" and do not contain specific local traffic requirements. BellSouth believes that a local traffic requirement is the most direct, accurate and simplest way to determine that UNEs are in fact being used for local service, but proposes this architectural solution because a number of CLECs have proposed similar approaches and the Commission may be exploring such an approach.

Substituting a completely new and untried approach for the current safe harbors that were developed by a group of CLECs and ILECs and put formally in place in 2000 is likely to have profound anti-consumer effects.[1] Special access services are subject to real facilities-based competition throughout the country today. That facilities-based competition has grown up without UNE regulation. This competitive environment provides real benefits for the larger businesses that pay for these services, and creates a climate that favors investment in facilities, creates jobs and leads to innovation.

[1] Letter from Suzanne Guyer, Bell Atlantic, to Magalie Roman Salas, Federal Communications Commission, Docket No. 96-98 (filed Feb. 29, 2000) transmitting letter signed by BellAtlantic, Intermedia Communications, BellSouth, SBC, Focal Communications, Time Warner Telecom, GTE, U.S. West and WinStar Communications.

New rules that may have the effect of forcing TELRIC pricing on this business will devalue the huge investments in facilities that carriers have made and create a huge disincentive to new investment with the consequent loss in competition, jobs and innovation. The loss of over 500,00 jobs and 2 trillion dollars of market capitalization in this industry over the past three years highlights the dangers of adopting the wrong regulatory policies. In particular, as carriers consider facilities investments to expand the reach of broadband offerings for businesses, and to create wholly new broadband services, they must know that TELRIC pricing will not become the pricing standard for business broadband.[2]

As background, competitive access providers entered the special access business in 1984, when Teleport began constructing a fiber-optic network in Manhattan. In 1986, the Commission formally preempted "any *de facto* or *de jure* barrier to entry" into the provision of exchange access services.[3] In 1992, the Commission recognized the already extensive build out of alternative local fiber networks, finding that DS1 and DS3 special access services were subject to competition.[4] Later that year, the Commission found that access "competition is already developing relatively rapidly in the urban markets and will only accelerate with the implementation of expanded interconnection."[5] The Commission recognized at the time that basic economics separated access services from the provision of local exchange service because "[t]raffic density is greater, and costs lower, in most central city areas where large concentrations of high volume customers are located."[6] Certainly these basic, long-recognized facts of providing access service to the larger business customers that buy them would prohibit any finding that the access and local services markets are "inextricable intertwined."[7]

The facts show that the Commission's deregulatory path to competition in special access services has generally worked. CLECs now have over 1,800 local fiber networks for the delivery of special access type services. There are over 40 of these networks in Atlanta alone. In 45 of the top 50 MSAs, there are at least two, and most often three, companies that provide DS-1 service that is typically used to provide special access services on a wholesale basis. CLECs provide more voice-grade equivalent lines over these facilities

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[2] Certain CLECs are petitioning the Commission for a requirement that incumbent carriers provide broadband UNEs for the delivery of integrated voice, data and Internet access services to medium and larger businesses. *See* Letter from John Heitmann, on behalf of NuVox, to Marlene H. Dortch, Federal Communications Commission, Docket No. 01-338 (filed Dec. 19, 2002) at 6 (typical broadband customer has 12 to 16 access lines). The Commission fixed the line between small and medium businesses at 4 access lines in the *UNE Remand Order*.

[3] *Cox Cable Communications, Inc.*, Memorandum Opinion, 102 FCC 2d 110 (1985), *vacated as moot*, 61 Rad. Reg. 967 (1986).

[4] *See, In the Matter of Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket Nos. 91-141 and 92-222, *Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369, 7451-55 and n. 412(1992) (*Special Access Order*); *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 (*Transport Phase I*), *Second Report and Order and Third Notice of Proposed Rulemaking*, 8 FCC Rcd 7374, 7423-25 (1993) (*Switched Transport Order*).

[5] *Special Access Order* at ¶¶ 7451, 7452.

[6] *Special Access Order* at ¶ 175.

[7] *Supplemental Order Clarification*

than the Bell companies serve over their own facilities.[8] CLECs report over $10 billion in special access revenues accounting for more than 33% of special access revenues. Investment in special access facilities – fiber rings and connections to buildings – has consistently increased both before and after the 1996 Act because UNEs and TELRIC pricing have not been injected into the provision of special access services.[9]

By requiring real evidence of use for local services, the Commission's current safe harbors provide some guarantee that UNEs are actually used to provide local service and not to substitute for competitive special access type services. Those safe harbors have been in place since 2000, and the market evidence of strong growth in competitive revenues and facilities shows that the current approach is working.

As discussed in the attached white paper, the D.C. Circuit upheld the current use restrictions. The Court specifically agreed with the Commission's reasoning that the safe harbors were necessary to the Commission's efforts to avoid disrupting its access reform policies[10] and to its efforts to protect and encourage facilities-based competitors.[11] The court also specifically upheld the Commission's concern that its commingling restrictions were necessary 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]

BellSouth takes strong exception to suggestions that the current approach is not being properly implemented. For example, the FCC and the Georgia and Louisiana state commissions found that BellSouth was in compliance with its obligations to offer UNE combinations including EELS.[14] BellSouth offers efficient processes for ordering new UNE combinations such as EELS and for converting existing special access services to UNEs.[15] BellSouth began the process of auditing special access circuits that have been converted to UNEs in 2002, two years after the safe harbors were put in place and CLECs began converting circuits. BellSouth has complied with its obligation to convert circuits based simply on an unverified CLEC statement that circuits qualify under a safe harbor, and is well within the Commission's rules to audit compliance after the conversion.

The architectural replacement for the current safe harbors that is attached to this letter has been carefully crafted to impose the minimum requirements consistent with maintaining a

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[8] Attached White Paper at p. 4-5.
[9] See discussion of CLEC facilities and revenues in attached White Paper at 4-5.
[10] *Id.* at 14-16,
[11] *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).
[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] Georgia/Louisiana 271 Order at ¶¶ 199-200. Georgia Commission GALA I Comments at 134-36l; Louisiana Commission GALA I Comments at 51-54.
[15] Georgia/Louisiana 271 Order at ¶ 200.

line between local and special access services. The essential point of the proposal is to ensure that UNEs are actually being used to provide local service, not just that the CLEC that has ordered them is capable of providing local service. The necessary line between local and special access services can only be maintained by a showing that the UNE circuit is actually used to provide significant local service. Under CLEC proposals, carriers qualify if they possess a few indicia that they do, or merely have some capability to, provide local service to some customer in the general area. For example, by providing local service to a few customers, a carrier would qualify to convert thousands of purely special access circuits to UNEs. These proposals draw no real line between local and special access services and would result in wholesale arbitrage that would undermine the current competitive structure of special access services.

BellSouth's proposal builds on CLEC proposals. It applies to UNE circuits and requires real indicia that local service will be provided. Thus, BellSouth's proposal requires that UNE circuits have local number assignments,[16] 911 capabilities[17] and be able to originate and terminate local traffic.[18] In addition, on high capacity facilities that provide the equivalent of many individual circuits, at least half the circuits (or channels) would have to meet these local requirements.[19] Should UNEs be required to be available for broadband services, which would require a separate impairment finding, UNEs that are being used as part of a packet-switched, variable bandwidth service, must be connected to a switch that performs the functions of a local switch[20] and there must be a sufficient number of telephone numbers associated with the circuit to demonstrate that the circuit is being used to provide a significant amount of local service to the end user.

The legal and policy ramifications of injecting UNE regulation into special access services are broad, deep and counter to the Commission's competition goals. Special access services are provisioned and sold in a radically different environment from that of local exchange services. Exporting the Commission's broad UNE policies designed to create competition for local exchange services to special access would undo years of successful Commission efforts to create a regulatory environment favoring access competition. It would also undo nearly twenty years worth of competitive provider investment in bringing about the very facilities-based competition that the Commission sought to favor.

The Commission should not alter the current safe harbors, which have been upheld by the D.C. Circuit, and that have fostered the continuation of real facilities-based competition for special access customers. The legal and market risks of adopting a new approach that

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[16] *See* Letter from Chris McKee, XO Communications, to Magalie Roman Salas, Docket No. 01-338 (filed January 27, 2003) (XO Ex Parte) at p.8, Letter from Patrick Donovan, on behalf of El Paso Networks, to Marlene H. Dortch, Federal Communications Commission, Docket No. 01-338 (filed January 24, 2003)(El Paso Ex Parte) at 3; Letter from Julia Strow, Cbeyond Communications, to Marlene H. Dortch, Federal Communications Commission, Docket No. 01-338 (filed Jauary 6, 2003)(Cbeyond ex Parte) at 2.
[17] Cbeyond Ex Parte at 2.
[18] Cbeyond Ex Parte at 2.
[19] XO Ex Parte at 8.
[20] Cbeyond Ex Parte at 2.

The Commission should not alter the current safe harbors, which have been upheld by the D.C. Circuit, and that have fostered the continuation of real facilities-based competition for special access customers. The legal and market risks of adopting a new approach that would discourage investment, innovation and competition should preclude experimentation. However, if the Commission chooses to adopt a new approach, any test must establish a clear and enforceable requirement that UNE circuits are actually providing substantially local services. Without that requirement, UNE arbitrage based on TELRIC pricing will replace facilities-based competition with the predictable ill effects on consumer welfare, jobs and innovation.

Sincerely,

Margaret H. Greene

THE COMMISSION MAY NOT PERMIT HIGH-CAPACITY UNES TO BE USED FOR SPECIAL ACCESS WITHOUT AN IMPAIRMENT FINDING AS TO THAT DISTINCT SERVICE

This paper expresses BellSouth's urgent concern that the Commission is considering taking action in this proceeding that would be contrary to the Commission's own prior, pro-competitive decisions and, moreover, would be flatly unlawful under the recent Supreme Court and D.C. Circuit decisions interpreting the impairment requirement of section 251(d)(2). Specifically, it is BellSouth's understanding that the Commission is considering a requirement that, in sharp contrast to its current rule -- which ensures that high-capacity facilities are used primarily for local service, not special access -- would require ILECs to allow access to high-capacity facilities without limitation and for *all* purposes, including special access, subject only to certain lax criteria. Importantly, moreover, the Commission would mandate the use of UNEs for special access *without* determining separately whether CLECs would suffer impairment without access to these facilities in the distinct market for special access voice and data transport. Such a result would be an about-face from the Commission's prior, highly successful supervision of the special access market and would flout binding precedent. It would also undermine Congress's core goals in implementing the 1996 Act, including the promotion of facilities-based competition and the preservation of universal service.

In the past, the Commission has properly distinguished between special access and local exchange service, and it has sharply limited the use of UNEs to provide special access. The result has been vibrant competition in special access, where competitors now have approximately one-third of the market. BellSouth urges the Commission not to reverse course now. Such a change in direction would permit massive arbitrage, undermine investment, and do great harm to the industry without countervailing benefit.

1. The 1996 Act, as Interpreted by This Commission, the Supreme Court, and the D.C. Circuit, Requires the Commission To Make a Separate Impairment Finding for Separate Services

Congress has permitted the Commission to require unbundled access to network elements only upon a finding of impairment in the provision of a specific services: requesting carriers must be impaired in the "services that [they] seek[] to offer." 47 U.S.C. § 251(d)(2)(B). Binding judicial decisions make plain that, as that language indicates, the Commission must make service-specific findings of impairment before a UNE can be used in providing a specific service. For that reason, the Commission can be justified in relaxing its current restrictions and requiring high-capacity facilities be provided as UNEs for use in providing special access voice and data services *only* if it could first find that CLECs would be impaired *in providing those services* without access to those facilities.

That conclusion follows directly from the decisions of the Supreme Court and the D.C. Circuit. As an initial matter, in *Iowa Utilities Board*, the Supreme Court squarely determined that any appropriate impairment test must consider the availability of facilities "outside the incumbent's network." *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 389 (1999). Amplifying on

that point, the D.C. Circuit subsequently made plain that it is incoherent to consider whether such alternative facilities are "available" without defining a relevant product and geographic market. Indeed, it was precisely the failure to undertake such market-specific inquiries that rendered the *UNE Remand Order* unlawful. The court of appeals explained that, by "loftily abstract[ing] away all specific markets," the *UNE Remand Order* had improperly ensured that "UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of the sort that might have [been] the object of Congress's concern." *USTA v. FCC*, 290 F.3d 415, 422, 423 (D.C. Cir. 2002). In other words, the Commission was required to make market-specific judgments to ensure that unbundling was ordered only where appropriate, and not in markets where CLECs could compete without such forced access. The court of appeals thus explained that the Supreme Court's decision in *Iowa Utilities Board* indicated that the Commission could not support a decision to unbundle through impairment findings that were "detached from any specific markets or market categories," as was the case with the *UNE Remand Order*. *Id.* at 426; *see also CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002).

These decisions establish that it is contrary to the 1996 Act for the Commission to require that ILECs permit the use of UNEs in specific product markets, such as special access, without determining whether CLECs are impaired in those markets. The Commission simply may not conclude that because a CLEC needs a facility for one purpose, it can use that facility for any purpose. Rather, at the very least, the Commission must place significant restrictions on the use of the facility to ensure that it is being used primarily, if not exclusively, in the market where impairment has been found.

Indeed, that is precisely the lesson of the Commission's own *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000), which was issued even before *USTA* and which of course deals with the same issue presented here. Acknowledging that the Supreme Court had found the Commission's prior impairment analysis "insufficiently rigorous," the Commission concluded there that an impairment finding as to the use of a facility for local exchange service should not control the separate issue of that facility's use to provide special access. *Supplemental Order Clarification*, 15 FCC Rcd at 9594, ¶ 12. The Commission reasoned that, unless it found these distinct markets to be economically and technologically interrelated -- a finding that the Commission has not made and could not make -- "it is unlikely that Congress intended to compel us, once we determine that a network element meets the 'impair' standard for the local exchange market, to grant competitors access -- for that reason alone, and without further inquiry -- to that same network element solely or primarily for use in the exchange access market." *Id.* at 9595, ¶ 14. Of particular importance here, the Commission further explained that it "*must* gather evidence on the development of the marketplace for exchange access . . . before [it] can determine the extent to which denial of access to network elements would impair a carrier's ability to provide special access services." *Id.* at 9596, ¶ 16 (emphasis added). The Commission thus expressly acknowledged the need to make a distinct impairment finding as to access services before permitting unrestricted use of UNEs for that service.

In stark contrast to its vacatur of the *UNE Remand Order* -- where the Commission had generally refused to make market-specific conclusions -- the D.C. Circuit affirmed the *Supplemental Order Clarification* because the Commission had distinguished between the local

exchange market and the special access market. Indeed, although the issue before the court of appeals involved whether it was *permissible* for the Commission to make service-specific distinctions, in accord with the holding in *USTA,* the court went out of its way to make plain its skepticism that UNEs could be used for special access without an impairment finding as to that separate market: "[I]t is far from obvious to us that the Commission has the *power*, without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *CompTel,* 309 F.3d at 14 (emphasis added); *see id.* (stating that the Commission was "clearly correct" that *Iowa Utilities Board* required it to reconsider its prior "all-encompassing," non-service-specific interpretation of section 251(d)(2)). In this regard, the Court dismissed out of hand CompTel's argument that, under the statute, "once the Commission found a single purpose as to which an 'element' met the impairment standard, no matter how limited, [the Commission] would be forced to mandate provision of the element for all, no matter how little impairment was involved in the remainder of the telecommunications field." *Id.* at 13. In sum, the D.C. Circuit once again left little doubt about its belief that, by their nature, impairment findings must be made on a market-specific basis to be lawful.

2. Given the Competitive Nature of the Special Access Voice and Data Market, Permitting UNEs To Be Used in That Market Without Real and Significant Limitations Would Be Particularly Irrational and Contrary to the Goals of the Act

As a matter of both law and sound policy, it is particularly important that the Commission make service-specific judgments about UNE access in the context of special access services. Because overbroad unbundling can undermine facilities-based competition and thus be contrary to the "goals of the Act," *Iowa Utils. Bd.*, 525 U.S. at 388, it is wholly inappropriate to mandate unbundling where a market *already* has significant facilities-based competition. *See USTA,* 290 F.3d at 429 (determining that the Commission had acted unlawfully in mandating unbundling in market that was already characterized by "'intense facilities-based competition'") (quoting Petitioners' Br. at 3). As the D.C. Circuit declared, such a "naked disregard of the competitive context" is not permitted under the statute. *Id.*

That analysis is directly applicable here. This Commission has long distinguished the special access market from the market for local exchange service, and concluded that special access facilities were suitable for competitive supply. As long ago as 1992, the Commission acknowledged the extensive build-out of alternative fiber networks and concluded that DS1 and DS3 special access service were subject to competitive supply. *Special Access Order,*[1] 7 FCC Rcd at 7454-55 n.412. The Commission further noted that this competitive pressure was growing rapidly and would continue to do so. *Id.* at 7453, ¶ 177 (recognizing that in 1992 "competition is already developing relatively rapidly in the urban markets and will only accelerate with the implementation of expanded interconnection").

As a result of the Commission's decisions, a competitive market for special access continues to flourish today. As the Commission has properly recognized, competition in the

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[1] *See* Report and Order and Notice of Proposed Rulemaking, *Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, 7 FCC Rcd 7369 (1992) ("*Special Access Order*").

special access market is now "mature." *Supplemental Order Clarification*, 15 FCC Rcd at 9597, ¶ 18. Indeed, it was the existence of extensive facilities-based competition that the Commission relied upon in large part to justify the *Supplemental Order Clarification*. The Commission was clear that it wanted to limit the use of UNEs to provide special access to avoid "undercut[ting] the market position of *many facilities-based competitive access providers*." *Id.* (emphasis added).

The record in this proceeding demonstrates that extensive facilities-based competition continues to exist in this market. The facts establishing the highly competitive nature of special access markets have been discussed in detail in prior filings (including the *UNE Fact Report 2002*[2] and Verizon's December 17, 2002 ex parte), but a few key points demonstrating the lack of impairment in these markets are worth noting.

First, competitive access providers serve over 140 million voice-grade equivalent special access and private lines.[3] That is approximately *double* the number of special access lines served by the BOCs (BOCs serve about 80 million voice-grade equivalent special access lines, including those resold to competing carriers).[4] Indeed, competitors serve approximately 95 million voice-grade equivalent special access lines -- more than the total number of voice-grade equivalent BOC lines -- *entirely over their own facilities or those of competitive suppliers.*[5]

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[2] *UNE Fact Report 2002*, attached to Comments and Contingent Petition for Forbearance of the Verizon Tel. Companies, CC Docket Nos. 01-338 (FCC filed Apr. 5, 2002).

[3] As of June 2002, CLECs served approximately 17-24 million switched access lines using their own local switches, plus approximately 10 million lines through resale or UNE-P – for a total of roughly 30 million switched access lines. *See UNE Rebuttal Report* at 2; *UNE Fact Report 2002* at I-5. Subtracting that 30 million from the 170 million voice-grade equivalent lines that CLECs report yields 140 million special access lines.

[4] FCC, *Statistics of Communications Common Carriers 2001/2002 ed.*, at Table 2.6 (Sept. 2002). Although the BOCs report serving fewer voice-grade equivalent special access line than what the CLECs report, this is likely due to the fact that CLECs have captured many individual customers with very intense demand for high-capacity lines. This reflects the fact that the demand for special access is highly concentrated. Significantly, CLECs have acknowledged that they typically serve their largest customers entirely with their own facilities. *See, e.g.*, Declaration of Anthony Fea and Anthony Giovanucci ¶ 58, attached to AT&T Reply Comments, CC Docket Nos. 01-338 (FCC filed July 17, 2002) (acknowledging that AT&T often "self-provides DS-3 transport.").

[5] Assuming that the BOCs provided approximately 44 percent (35 million) of their voice-grade equivalent special access lines directly to end users – which is the same percentage of special access revenues they generate from end-users – means that they are providing the other 45 million voice-grade equivalent special access lines to competing carriers. Subtracting that figure from the 140 million voice-grade equivalent special access lines that competitors are providing yields 95 million.

Moreover, the leading independent study of the CLEC industry – New Paradigm Resources Group's *CLEC Report 2002* – reports that CLECs earned approximately *$10 billion* in special access and private line revenues in 2001.[6] By comparison, according to the FCC's most recent *Telecommunications Industry Revenues* report, the Bell companies earned approximately $13 billion in the provision of special access revenues in 2000 – the most recent year for which such data are available.[7] Based on these figures, and factoring in a year's worth of growth, competing carriers have now captured *more than one-third of all revenues* for special access services -- and they have done so under the *Supplemental Order Clarification* regime that has largely prevented the use of UNEs to bypass BOC special access.

This extensive level of competition includes special access provided at the DS-1 level. In at least 45 of the top 50 MSAs, there are at least two – and in most cases three or more – companies providing DS-1 service on a wholesale basis. One company alone, Allegiance Telecom, offers DS-1 service in 34 of the top 50 MSAs.[8] Numerous other companies, including Cable & Wireless, AT&T, PaeTec, WorldCom, WilTel and Electric Lightwave, offer wholesale and/or retail DS-1 special access in markets throughout the country.

Given the fact that competitors already have captured such a large share of the special access market -- and have done so with strictly limited access to UNEs to provide special access -- there can be no serious dispute that special access services are not "unsuitable for competitive supply" so as to justify unbundling. *USTA*, 290 F.3d at 427. Simply put, the best evidence that CLECs *can* provide this service over their own facilities or those leased from others is surely the fact that they *are* doing so in geographic markets throughout the country.

Indeed, the Commission's *Pricing Flexibility Order*[9] -- which like the Supplemental Order Clarification was affirmed by the D.C. Circuit, *see WorldCom, Inc. v. FCC*, 238 F.3d 449

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[6] *See* New Paradigm Resources Group, Inc., *CLEC Report 2002*, Ch. 3 at Table 13 (16th ed. 2002); ALTS, *The State of Local Competition 2002*, at 18 (Apr. 2002). In analyzing special access competition, New Paradigm's *CLEC Report 2002* takes the same approach as the FCC's own local competition surveys, and treats special access and local private line service as a single category. *See* Ind. Anal. Div., FCC, *Local Competition: August 1999* at Table 2.4 (Aug. 1999) (computing CAP/CLEC market share of "Local private line and special access service").

[7] J. Lande & K. Lynch, Ind. Anal. Div., FCC, *FCC Telecommunications Industry Revenues 2000* at 13 (Table 5, Lines 305 & 312) and 17 (Table 6, Lines 406 & 415) (Jan. 2002). Special access revenues are the sum of two revenue categories: "local private line and special access" and "long distance private line service." The FCC defines "long distance private line services" to "include revenues from dedicated circuits, private switching arrangements, and/or predefined transmission paths, extending beyond the basic service area. *This category should include revenues from the resale of special access services.*" FCC, *Telecommunications Reporting Worksheet, FCC Form 499-A, Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms* at 20 (Feb. 2001) (emphasis added). AT&T has acknowledged that special access revenues represent the sum of these two categories. *See* Declaration of Michael Pfau, attached to AT&T Reply Comments, CC Docket No. 96-98 (FCC filed Apr. 30, 2001).

[8] Allegiance Telecom, *Wholesale Telecom Solutions, Dedicated DS1 Aggregation*, http://www.algx.com/wholesale/dds1.jsp.

[9] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd 14221 (1999).

(D.C. Cir. 2001) -- was expressly based on the fact that there is special access competition in many MSAs throughout the country, and thus that the market, not regulators, should set prices. *See Pricing Flexibility Order*, 14 FCC Rcd at 14233, ¶ 21 ("We now conclude that market forces, as opposed to regulation, are more likely to compel LECs to establish efficient prices."). At the very least, therefore, in markets where BOCs have met the Commission's competitive triggers, and in markets with similar characteristics, competitors can compete without UNEs and unbundling is wholly inappropriate and unlawful.

For the Commission to disregard the facts in this record, and its own prior conclusions that competition exists for special access, and mandate unbundling of high-capacity facilities for special access -- even in markets where the Commission has granted pricing flexibility -- would be to engage in the same "disregard of the competitive context" that the D.C. Circuit found unlawful in *USTA*. Just as in that case, the Commission would be ignoring extensive evidence that the market is *already* characterized by extensive facilities-based competition and "inflict[ing] on the economy" the significant costs associated with unbundling "under conditions where it had no reason to think doing so would bring on a significant enhancement of competition." *USTA*, 290 F.3d at 429. As in *USTA*, that result would be deeply contrary to the goals of the Act and thus unlawful. Accordingly, the Commission should adhere to its precedent in the *Supplemental Order Clarification,* and ensure that it does not permit access to UNEs for special access, at least without significant restrictions of the type contained in that prior Commission order.

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The Commission should avoid these results by maintaining the restrictions contained in the *Supplemental Order Clarification* or adopting other meaningful limits on the use of high-capacity facilities to provide special access.

Modified Safe Harbors
(Without a Usage Measure)

ILECs are not required to provide or convert to a UNE any circuit that does not meet the local exchange service requirement. Local exchange service criteria shall apply at the level of the individual local channel and transport circuit:

- Each local circuit must have a local number assignment tied to the Public Switched Telephone Network and porting capability.

- Each local circuit must have 911 capabilities such that calls to 911 PSAPs will show the assigned number or hunt group containing the assigned number.

- Each local circuit must originate and terminate local voice traffic. 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) or equivalent registered in the LERG as a Class 5 switch capable of local exchange service.

- The service must be marketed, advertised and sold as a local exchange service, or a bundle of services including local.

The revised safe harbors should include:

- ILECs are not required to provide or convert to a UNE any DS-1 channelized high capacity loop unless at least 50% of the activated channels on the loop meet the local exchange service requirement.

- ILECs are not required to provide or convert to a UNE any DS-3 channelized high capacity loop unless 100% of the activated DS-1s meet the local exchange service requirement.

- UNE loops must be terminated into a collocation arrangement or connected to a UNE transport facility.

- ILECs are not required to provide or convert any DS-1 or DS-3 interoffice facility to a UNE unless all the loops subtending the interoffice facility meet the local exchange service requirement.

- UNE interoffice transport facilities must have both ends terminating into a collocation arrangement or be part of a valid UNE combination.

Integrated Packet Services (excluding switching):

For next generation integrated packet services to be eligible for provisioning over UNEs, the CLEC must demonstrate that at least 50% of the circuit's bandwidth is used and continuously available for dialing and conducting simultaneous local voice calls. To be eligible, there must be a sufficient number of working local telephone numbers assigned to the circuit to allow 50% of the bandwidth to be used for simultaneous local voice calls, with porting capability as described above, 911 capacity as described above, originating and terminating local voice traffic as described above, and the circuit must connect to a Class 5 switch or equivalent as described above. Only non-channelized DS-1 circuits ordered after the effective date of the Triennial Review Order could be or will be eligible for provisioning over UNEs under this provision.

As with other UNEs, UNE loops used in this fashion must terminate into a collocation arrangement or be connected to a UNE transport facility. UNE interoffice transport facilities being utilized in a packet network must have both ends terminating into a collocation arrangement or be part of a valid UNE combination.

Audit Rights:

If the CLECs are allowed to attest to compliance to receive UNEs and EELs, then ILECs should be allowed to audit. 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 or otherwise be impeded in exercising its audit rights. 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.