

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

**COMMENTS OF SBC COMMUNICATIONS, INC. ON  
BELLSOUTH TELECOMMUNICATIONS, INC.'S PETITION FOR WAIVER**

Consistent with BellSouth Telecommunications, Inc.'s (BellSouth's) petition,<sup>1</sup> the Commission should waive ILECs' obligation to provide unbundled access to combinations of high capacity loop and transport UNEs (*i.e.*, EELs) under the Commission's revised commingling and service eligibility requirements set forth in the Commission's *Triennial Review Order*<sup>2</sup> pending adoption of lawful unbundling requirements for such loops and transport. In its petition, BellSouth asks the Commission to waive those requirements until state commissions complete the nine-month impairment proceedings required under the *Triennial Review Order* to determine where high-capacity loops and transport must be unbundled.<sup>3</sup> As BellSouth correctly

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<sup>1</sup> *BellSouth Telecommunications, Inc., Petition for Waiver*, CC Docket Nos. 01-338, 96-98, 98-147 (Feb. 11, 2004) (BellSouth Waiver)

<sup>2</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*).

<sup>3</sup> BellSouth Waiver at 2, 8. While BellSouth's petition specifically asked for a waiver until state commission's completed their nine month impairment analyses, it also requested that the Commission grant any other appropriate relief. *Id.* at 8. Its petition thus provides ample basis for the Commission to waive the revised service eligibility and commingling requirements for EELs, in light of the D.C.

points out, requiring ILECs to substitute EELs (including commingled EELs) for special access services before the scope of their obligation to unbundle high capacity loops and transport has been defined makes little sense due to the costs and inefficiencies associated with converting special access circuits to EELs, only to have them converted back later.<sup>4</sup>

To be sure, the circumstances have changed significantly since BellSouth filed its petition. The D.C. Circuit now has vacated the Commission's delegation of authority to the states to determine where high capacity transmission facilities must be unbundled, as well as the Commission's provisional national impairment findings with respect to such facilities.<sup>5</sup> And, as a consequence, many states have suspended their UNE impairment proceedings. While the specific relief BellSouth requests thus has been overtaken by the *USTA II* decision, the underlying premise of its petition is no less meritorious. Indeed, if anything, the D.C. Circuit's decision (and, in particular, its conclusion that the Commission cannot ignore the availability of special access services in evaluating impairment) underscores the need for granting BellSouth's request. The Commission therefore should waive the revised commingling and service eligibility requirements set forth in the Commission's *Triennial Review Order* pending adoption of lawful unbundling requirements for high capacity loops and transport.

## DISCUSSION

The Commission initially established its service eligibility requirements for EELs in the *Supplemental Order Clarification*.<sup>6</sup> In that order, the Commission found, *inter alia*, that allowing substitution of UNEs for special access services would undermine facilities-based

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Circuit's recent vacatur of the Commission's delegation of unbundling authority to the states and its provisional national impairment findings for high capacity loops and transport. *United States Telecom Ass'n v. FCC*, No. 00-1012 *et al.*, slip op. (D.C. Cir. Mar. 2, 2004) (*USTA II*).

<sup>4</sup> *Id.* at 2, 4.

<sup>5</sup> *USTA II* at 26-28.

<sup>6</sup> *Supplemental Order Clarification*, CC Docket No. 96-98, 15 FCC Rcd 9587 (2000) (adopting service eligibility requirements to determine when the "significant local service" test adopted in the *Supplemental Order* is satisfied), *aff'd Comptel v. FCC*, 309 F.3d 8 (D.C. Cir. 2002). See *Supplemental Order*, CC Docket 96-98, FCC 99-370 (Nov. 24, 1999).

competition for special access, destroying “a mature source of competition in telecommunications markets,” and that requesting carriers had not established they were impaired without unbundled access to EELs.<sup>7</sup> The Commission adopted the service eligibility requirements to maintain the status quo while it examined the ramifications of allowing substitution of UNEs for special access and considered whether requesting carriers were impaired without unbundled access to EELs.<sup>8</sup>

In the *Triennial Review Order*, the Commission established revised service eligibility and commingling requirements for EELs. The Commission made clear, however, that requesting carriers could not obtain EELs pursuant to these new requirements until the routes on which ILECs are required to unbundle high capacity loop and transport facilities are identified,<sup>9</sup> as the *de facto* nine-month transition period for implementation of those criteria (which dovetails with the nine-month state impairment proceedings) confirms.<sup>10</sup>

In *USTA II*, the D.C. Circuit affirmed the revised EEL criteria.<sup>11</sup> At the same time, however, it vacated the Commission’s delegation of authority to state commissions to determine

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<sup>7</sup> *Supplemental Order Clarification*, 15 FCC Rcd at 9596, and 9597 (“An immediate transition to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers.”).

<sup>8</sup> *Id.* at 9598.

<sup>9</sup> *Triennial Review Order* at para. 586 (“[T]o the extent a competitive LEC meets the eligibility requirements and a particular network element is available as a UNE pursuant to our impairment analysis, it may convert the wholesale service used to serve a customer to UNEs or UNE combinations in accordance with the relevant procedures.”) (emphasis added); *id.* at para. 577 (“[A] requesting carrier may obtain a high-capacity EEL any time the underlying network elements are available pursuant to our impairment analysis and the carrier meets the eligibility criteria.”); *id.* at 578 (“Because the comprehensive impairment analysis we adopt herein addresses the arguments of Qwest and other incumbent LECs concerning the availability of alternative transmission facilities, additional conditions are not necessary to determine the availability of EELs and other UNE combinations.”).

<sup>10</sup> *Triennial Review Order* at para. 583 (noting that the contract amendment process would afford ILECs sufficient time to complete all actions necessary to permit commingling); *id.* at para. 700-06 (establishing the nine-month negotiation and arbitration process as the default transition mechanism for implementation of the revised unbundling requirements, except as otherwise expressly provided).

<sup>11</sup> *USTA*, slip op. at 59.

where high capacity transmission facilities must be unbundled, as well as its provisional impairment findings with respect to such facilities.<sup>12</sup> The court also remanded to the Commission to analyze impairment with respect to EELs, and directed the Commission specifically to consider the availability of special access services as part of that analysis.<sup>13</sup> The court observed in this regard that, where carriers can compete in a relevant market using special access services, “competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates.”<sup>14</sup> Based on the court’s decision, it is by no means clear where, or even if, ILECs will be required to make EELs available once the Commission has conducted a proper impairment analysis.

In its petition, BellSouth seeks a waiver of the revised EEL service eligibility and commingling requirements until the state commissions have completed proceedings to determine where high capacity loops and transport must be unbundled.<sup>15</sup> While the specific relief BellSouth requests is no longer pertinent in light of the D.C. Circuit’s *USTA II* decision, the rationale for its petition (that ILECs should not be required to substitute EELs for special access services under the new eligibility requirements until their unbundling obligations for the underlying facilities has been established) still has merit. As BellSouth observes, implementing the revised EEL requirements will require significant changes to ILECs’ ordering and provisioning systems.<sup>16</sup> Plainly, it makes no sense to require ILECs to make these changes, and incur substantial costs, to substitute EELs for special access circuits, only to have them converted

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<sup>12</sup> *Id.* at 26-28.

<sup>13</sup> *Id.* at 58. *See also id.* at 59 (noting that the presence of competition in a relevant market in which CLECs use ILECs by purchasing special access services “precludes a finding that the CLECs are ‘impaired’ by lack of access to the element under section 251(c)(3)”).

<sup>14</sup> *Id.* at 58. *See also id.* at 59 (“if history showed that lack of access to EELs had not impaired CLECs in the past [because they were competing using special access services], that would be evidence that similarly situated firms would be equally unimpaired going forward”).

<sup>15</sup> BellSouth Waiver at 2, 8.

<sup>16</sup> BellSouth Waiver at 7.

back to special access later. Nor should ILECs be required to offer EELs in place of special access (at a substantial loss in revenues) prior to a lawful finding of impairment. Any such requirement would not only be inconsistent with the unbundling framework for EELs established in the *Triennial Review Order*, but also with the D.C. Circuit's *USTA II* decision. Good cause thus exists to waive implementation of the new service eligibility and commingling requirements for EELs pending adoption of lawful unbundling requirements for high capacity loops and transport.<sup>17</sup>

Although BellSouth's request for a waiver was limited only to the BellSouth region, the foregoing analysis applies equally to all ILECs. Accordingly, the Commission should waive the new EELs requirements for all ILECs until the unbundling requirements for high capacity loops and transport have been established.

## CONCLUSION

For the reasons discussed above, the Commission should grant BellSouth's petition, and waive implementation the revised EEL eligibility and commingling requirements pending adoption of lawful unbundling requirements for high capacity loops and transport.

Respectfully submitted,

SBC COMMUNICATIONS INC.

By: **/s/ Christopher M. Heimann**

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<sup>17</sup> See 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

## **CERTIFICATE OF SERVICE**

I hereby certify that, on this 19<sup>th</sup> day of March 2004, I caused copies of the foregoing Comments of SBC Communications in Response to BellSouth's Petition for a Limited Waiver to the following parties by first class mail postage pre-paid or electronic delivery.

**/s/ Loretia Hill**

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