

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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

**REPLY COMMENTS OF VERIZON**

The comments filed in opposition to BellSouth's petition for waiver emphasize the need for the Commission to waive the applicability of its new eligibility requirements for combinations of loop and transport known as "EELs" until the Commission has completed a valid impairment analysis with respect to the individual elements making up the EELs and with respect to EELs themselves. This is especially true during any period that the *Triennial Review Order* rules remain in effect pending the issuance of the D.C. Circuit's mandate in the *Triennial Review Order* appeal. The incumbent local exchange carriers ("ILECs") should not be subject to both the more liberal eligibility requirements of the *Triennial Review Order* and unbundling requirements that the Court found unlawful. During the period of any such waiver, the Commission's previous eligibility rules (which were upheld by the D.C. Circuit) would continue to apply.

## DISCUSSION

In their comments opposing BellSouth's waiver petition, some commenters argue that the D.C. Circuit rejected the ILECs' challenge to the EELs eligibility criteria established in the *Triennial Review Order*. See, e.g., AT&T Comments at 1-2. But they uniformly ignore the more fundamental fact: the D.C. Circuit vacated the rules that impose *any* obligation on ILECs to make high-capacity facilities available to requesting carriers. Thus AT&T's claim that "the court of appeals left in place" (*id.* at 2) any EELs conversion rules is beside the point. The court has squarely ruled that the Commission's rules requiring unbundling of the high-capacity facilities that make up EELs, and thus EELs themselves, are unlawful. See *United States Telecom Assoc. v. FCC*, 359 F.3d 554, 564-65, 592 (2004) ("*USTA II*"). Until there is a valid impairment finding with regard to such facilities, there can be no valid unbundling requirement with respect to EELs. See *id.* at 592 ("On remand, therefore, the Commission will presumably turn to the issue of impairment"). And any impairment analysis must take into account the fact that competitors already have available, and are successfully competing using, the ILECs' special access facilities.

In light of that indisputable fact, requiring carriers to implement new *eligibility* criteria when the underlying unbundling obligations have been struck down would be both wasteful and obviously inequitable. While parties opposing BellSouth's request attempt to minimize the burdens associated with implementing new provisioning and billing procedures, there is no reason to require the carriers to undergo *any* burdens, as such expenses would be wasted. The new eligibility criteria are much more liberal than the previous rules, allowing substantially greater conversions of special access services to UNEs in circumstances where there have been no lawful impairment findings. Under the unusual circumstances present here – where the

commenters are seeking to force implementation of *unlawful* requirements – a waiver is unquestionably in the public interest. This would merely allow the carriers to follow the prior eligibility rules, which were upheld by the D.C. Circuit. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000); *aff'd Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

This is particularly true because, as noted above, competitive local exchange carriers have an obvious alternative to the purchase of EELs at TELRIC rates – that is, tariffed special access services. There is simply no room for dispute that telecommunications carriers have successfully competed in a variety of markets using special access. Competing carriers that rely exclusively or predominantly on ILEC special access services have won tens of millions of voice grade access lines and have captured a third or more of all special access revenues.<sup>1</sup> They have competed successfully for various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local business lines.<sup>2</sup> The record in the *Triennial Review Order* shows that competitive local exchange carriers serve 85 to 95 percent of their self-switched business lines using “alternative facilities” rather than UNES, and that many of these alternative facilities are special access lines. *See Triennial Review Order*, 18 FCC Rcd 16978, ¶¶ 299-300 (2003). And growth by wireless carriers, who have built their systems using the ILECs’ special access services rather than UNES,

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<sup>1</sup> *See* Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Attachment, pp. 22, 24-27 (filed Jan. 31, 2003).

<sup>2</sup> *See id.*, pp. 29-31. Verizon also provided an example of a CLEC that has established a network serving a wide variety of small, medium and large business customers across the Eastern seaboard using Verizon’s high capacity special access services to obtain connections between its end users’ locations and its points of presence. *See* Letter from W. Scott Randolph, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, p. 1 (filed Jan. 10, 2003).

has been “spectacular.” *See, e.g.*, NERA Reply Declaration, ¶¶ 170-19 & Tables 18-19, attached to BellSouth Reply Comments, CC Docket 01-338 (filed July 17, 2002). Although some commenters claim that any delay in implementation of the new EELs criteria would be “anticompetitive” (*see, e.g.*, NewSouth Comments at 2), the record demonstrates that carriers are already competing successfully to provide high capacity dedicated services to end users without access to EELs. In light of this evidence of vibrant competition using special access, there can be no plausible argument that competitors are unable to compete without access to EELs.

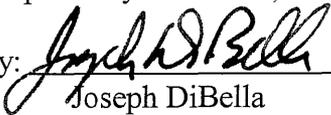
This analysis was critical to the D.C. Circuit’s determination that the FCC’s unbundling rules with respect to high-capacity facilities are unlawful. “As we noted with respect to wireless carriers’ UNE demands, competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic.” *USTA II* 359 F.3d at 592. The fact that carriers *are already* competing using special access services indicates that their wish to “flip” additional circuits to UNE rates simply reflects their desire to create an opportunity to line their pockets at the expense of competition.

Certain carriers argue that the D.C. Circuit did not vacate the Commission’s rules requiring access to enterprise loops, and that a requesting carrier can therefore create the same type of circuit by commingling an unbundled high-capacity loop with special access transport. *See, e.g.*, AT&T Comments at 9. This argument is irrelevant to EELs – which are by definition combinations of unbundled high-capacity loops with unbundled high-capacity transport – and it is also flatly wrong. The D.C. Circuit explicitly stated that its analysis of the FCC’s unbundling rules for high-capacity facilities applied to *all* “dedicated transport elements (transmission

facilities dedicated to a single *customer* or carrier).” *USTA II*, 359 F.3d at 573 (emphasis added). The D.C. Circuit also vacated *all* of the FCC’s rules involving subdelegation of impairment determinations under section 251(d)(2) – and that includes impairment findings for high-capacity loops. *See id.* at 574; *cf. Triennial Review Order* ¶ 328 (“we delegate to states . . . to identify where competing carriers are not impaired without unbundled high-capacity loops”). And the Court likewise struck down all of the Commission’s provisional impairment findings with respect to “DS1, DS3, and dark fiber” (*USTA II*, 359 F.3d at 573-74), with no limitation to *interoffice* DS1, DS3, and dark fiber. Moreover, the Court likewise struck down the route-specific impairment analysis that the Commission sought to apply to all high-capacity facilities – loops and inter-office transport. *See id.* at 574-75. The Court’s unified treatment of high-capacity loops and transport is consistent, moreover, with the petition for review that the Court granted. The briefing in support of that petition for review framed its challenge to the Commission’s loop and transport jointly, under a single heading and with arguments that applied equally to loops and transport. Indeed, AT&T’s argument to the contrary assumes that the D.C. Circuit simply ignored the ILECs challenge to the Commission’s enterprise loop rules, notwithstanding the fact that the issue was squarely raised and fully briefed by all sides. Once the mandate in *USTA II* issues, ILECs will have no obligation to make high-capacity facilities available on an unbundled basis at all.

Accordingly, the Commission should declare that ILECs have no obligation to provision EELs pursuant to the eligibility rules established in the *Triennial Review Order* until valid unbundling rules with respect to the underlying facilities are in place and that the previous eligibility rules shall continue to apply.

Respectfully submitted,

By:  \_\_\_\_\_

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