

**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

**REPLY COMMENTS OF SBC COMMUNICATIONS INC. ON  
BELL SOUTH TELECOMMUNICATIONS, INC.'S PETITION FOR WAIVER**

SBC Communications Inc. (SBC) respectfully submits these reply comments in support of BellSouth Telecommunications, Inc.'s (BellSouth's) request that the Commission waive ILECs' obligation to provision EELs pursuant to the commingling and service eligibility criteria established in the *Triennial Review Order*<sup>1</sup> pending adoption of lawful unbundling requirements for high capacity loops and transport.<sup>2</sup>

In its initial comments, SBC demonstrated that, in establishing revised service eligibility and commingling requirements for EELs, the Commission made clear that requesting carriers

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<sup>1</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>2</sup> BellSouth Telecommunications, Inc., Petition for Waiver, CC Docket Nos. 01-338, 96-98, 98-147 (Feb. 11, 2004) (BellSouth Waiver). As SBC observed in its opening comments, BellSouth's specific request for relief (*i.e.*, that the Commission waive the commingling and service eligibility requirements for EELs until state commissions complete their nine-month impairment proceedings for high capacity loops and transport) has been overtaken by the D.C. Circuit's vacatur of the Commission's unbundling rules for those facilities. SBC Comments at 2, citing *United States Telecom Ass'n v FCC*, No. 00-1012 *et al.*, slip op. (D.C. Cir. Mar. 2, 2004) (*USTA II*). But, as SBC noted, that decision, including the court's conclusion that the Commission cannot ignore the availability of special access services in considering impairment, only emphasizes the need for waiving the rules until lawful unbundling requirements for high capacity loops and transport have been adopted. *Id.*

could obtain EELs pursuant to those requirements only where the underlying high capacity loop and transport facilities must be unbundled.<sup>3</sup> SBC further observed that, although the D.C. Circuit affirmed the revised EELs criteria, the court vacated the Commission's unbundling rules with respect to the underlying facilities, and concluded that the Commission could not find competitors are impaired without access to EELs if history showed that they were able to compete using special access services.<sup>4</sup> SBC thus showed that, consistent with the unbundling framework for EELs established in the *Triennial Review Order* and the *USTA II* decision, the Commission should waive implementation of the revised EELs service eligibility and commingling requirements pending adoption of lawful unbundling rules for high capacity loops and transport.

Not surprisingly, CLECs oppose any waiver of the revised EEL requirements. They claim that the Commission did not intend to establish any connection between an ILEC's obligation to provide EELs pursuant to the new rules and completion of state proceedings to determine the routes on which CLECs are, in fact, impaired without access to the underlying high capacity loop and transport facilities.<sup>5</sup> Rather, they assert, the Commission only "grudgingly accepted nine months" as a "maximum" transition period,<sup>6</sup> and intended the revised EELs requirements to take effect without delay, irrespective of whether state's completed their impairment reviews.<sup>7</sup>

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<sup>3</sup> SBC Comments at 3, citing *Triennial Review Order* at paras. 586, 577, and 578.

<sup>4</sup> *Id.* at 4, citing *USTA II* at 58, 59.

<sup>5</sup> MCI Opposition at 5-6; AT&T Opposition at 6; Opposition of Cbeyond, *et al.* at 5-6; Sprint Opposition at 10-11.

<sup>6</sup> AT&T Opposition at 7. *See also* MCI Opposition at 6 (arguing that the *de facto* nine-month transition for implementation of the new EELs requirements was a "*maximum* transition period, not a minimum period") (emphasis in original); Opposition of NewSouth, *et al.* at 4 (arguing that the *de facto* nine-month transition was "a '*maximum*' transition period for carriers that needed it") (emphasis in original) (citing *Triennial Review Order* at para. 703).

<sup>7</sup> AT&T Opposition at 6; MCI Opposition at 5-6; Sprint at 11.

The Commission did not, however, “grudgingly” accept nine months as a “maximum” transition period, nor did it intend ILECs to provide EELs pursuant to the new service eligibility and commingling rules before their obligation to provide the underlying loop and transport facilities was established through state impairment proceedings. Rather, the Commission specifically adopted “the statutory maximum transition period of nine months” as the *de facto* transition for implementing the new unbundling requirements (including the revised service eligibility and commingling requirements for EELs) in order to “ensure an orderly transition to the new rules.”<sup>8</sup> And, as SBC explained in its comments, the Commission repeatedly made clear that CLECs could purchase EELs (including commingled EELs) pursuant to the new rules only if they are impaired without unbundled access to the underlying facilities.<sup>9</sup>

AT&T asserts that the Commission also should reject BellSouth’s request because the *Triennial Review Order* and *USTA II* purportedly “make clear that the requested conversions [from special access to EELs] are long overdue.”<sup>10</sup> It further argues that, in any event, the Commission should not waive the new EELs requirements because BellSouth’s obligation to unbundle the underlying high capacity loops and transport will continue, despite the D.C. Circuit’s decision in *USTA II*. Specifically, it contends that: (1) the D.C. Circuit did not vacate the Commission’s rules requiring unbundling of high capacity loops; (2) the D.C. Circuit’s decision might be stayed (and, ultimately, overturned); and (3) even if the D.C. Circuit’s decision is not stayed, states are likely to continue to require access to high capacity loops and transport pursuant to state law.<sup>11</sup>

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<sup>8</sup> *Triennial Review Order* at para. 703 (“[W]e believe that the statutory maximum transition period of nine months will ensure an orderly transition to the new rules.”); *id.* at para. 585 (noting that the contract amendment process would “afford incumbent LECs sufficient time to complete all actions necessary to permit commingling”).

<sup>9</sup> SBC Comments at 3, citing *Triennial Review Order* at paras. 586, 577 and 578.

<sup>10</sup> AT&T Opposition at 7-8.

<sup>11</sup> AT&T Opposition at 8-9.

AT&T's claims are specious. First, neither the Commission nor the D.C. Circuit suggested that conversion of special access circuits to EELs was "long overdue." As discussed above, the Commission did not require ILECs to provide EELs ubiquitously. ILECs were required to provide combinations of elements, including EELs, only where the underlying facilities (here, high capacity loops and transport) are unbundled. And, far from suggesting that ILECs long ago should have converted special access circuits to EELs, the D.C. Circuit expressed considerable doubt that ILECs ever could be required to provide high capacity loops or transport, either alone or in combination as EELs, in place of special access services. Indeed, in remanding to the Commission to analyze impairment with respect to EELs, the court directed the Commission specifically to consider the availability of special access as part of that analysis.<sup>12</sup> It further admonished that, where carriers are already competing (or could compete) using special access services, they "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>13</sup>

Second, AT&T is simply wrong that the D.C. Circuit did not vacate the Commission's rules requiring unbundling of high capacity loops. In vacating the Commission's unbundling requirements with respect to "dedicated transport facilities," the court made clear that its analysis applied equally to all high capacity transmission facilities, including both loops and dedicated transport. Specifically, it identified the "dedicated transport elements" that were the subject of its vacatur as "transmission facilities dedicated to a single *customer* or carrier."<sup>14</sup> The court thus included loops (*i.e.*, "transmission facilities dedicated to a single customer") in its analysis and vacatur of the "transport" rules. The fact that the court included loops in its analysis of

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<sup>12</sup> *USTA* at 58-59.

<sup>13</sup> *USTA II* at 58.

<sup>14</sup> *USTA II* at 26 ("The Commission has made multiple impairment findings with respect to dedicated transport elements (transmission facilities dedicated to a single *customer* or carrier), varying the findings by capacity level.") (emphasis added).

“dedicated transport elements” is consistent with the ILEC petitioners’ appeal, which challenged the Commission’s unbundling requirements for all dedicated transmission facilities (including dedicated transport, high-capacity loops, and dark fiber) together and on the same grounds.<sup>15</sup>

Moreover, the D.C. Circuit’s rationale for vacating the unbundling rules for “dedicated transport elements” applies equally to both high capacity loops and transport. In particular, the court vacated those rules on the grounds that: (1) the Commission’s delegation to state commissions of authority to determine whether CLECs are impaired without access to transmission facilities was unlawful, and (2) the Commission itself implicitly acknowledged in the *Triennial Review Order* that the record did not support its provisional national finding of impairment with respect to such facilities without the safety valve of the state impairment proceedings.<sup>16</sup> These grounds apply with equal force to the Commission’s analysis of both high capacity loops and transport. The court’s conclusion that the Commission’s route-specific analysis for transmission facilities was unsupportable<sup>17</sup> also applies to the Commission’s impairment framework for both high capacity loops and transport. Finally, the court specifically vacated every portion of the *Triennial Review Order* subdelegating the Commission’s section 251(d)(2) responsibilities to state commissions as unlawful:

We therefore vacate, as an unlawful subdelegation of the Commission’s § 251(d)(2) responsibilities, *those portions of the Order* that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements, and in particular we vacate the Commission’s scheme for subdelegating mass market switching determinations. (This holding also requires that we vacate the Commission’s subdelegation scheme with respect to dedicated transport elements, discussed below.)<sup>18</sup>

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<sup>15</sup> Brief for ILEC Petitioners and Supporting Intervenor, *United States Telecom Ass’n v. FCC*, Nos. 00-1012, *et al.* at 31-35 (filed Jan. 16, 2004).

<sup>16</sup> *USTA II* at 27-28.

<sup>17</sup> *Id.* at 28-29 (“We do not see how the Commission can simply ignore facilities deployment along similar routes when assessing impairment.”).

<sup>18</sup> *USTA II* at 18 (emphasis added).

The court's vacatur of "those portions of the Order" that subdelegate unbundling decisions to state commissions plainly encompasses the Commission unbundling framework for high capacity loops. Thus, contrary to AT&T's claims, the D.C. Circuit vacated the Commission's rules requiring ILECs to unbundle high capacity loops.

Third, states cannot require access to high capacity loops and transport pursuant to state law as AT&T claims. As the D.C. Circuit has recognized, the unbundling provisions of the 1996 Act require a balancing of competing interests.<sup>19</sup> Congress assigned this task to the Commission and, as the *USTA II* court just held, Congress precluded the Commission from sharing that authority.<sup>20</sup> Any attempt by states to usurp this statutory balancing necessarily would thwart both congressional intent and the Commission's unbundling authority. The states thus are not free pursuant to state law to require ILECs to unbundle high capacity loops and transport without regard to the clear limits on unbundling established by the 1996 Act.

Finally, ALTS laments that, once the EELs rules are implemented, "it might be too late – the transmission network elements that comprise the EEL might not be subject to unbundling and the ILECs will never have had to provide unbundled, cost-based access to the [purportedly] essential, bottleneck facilities."<sup>21</sup> ALTS argues that, until an ILEC can demonstrate that a "CLEC is not impaired without unbundled access to ILEC loop and/or transport, the CLEC must be entitled to the EEL, where it has satisfied the FCC's EEL architectural safeguards."<sup>22</sup> But the Commission itself has repudiated the notion that it can "impose [unbundling] obligations first

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<sup>19</sup> *United States Telecom. Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

<sup>20</sup> *USTA II* at 12-18.

<sup>21</sup> ALTS Opposition at 3-4.

<sup>22</sup> *Id.* at 4-5.

and conduct [its] “impair” inquiry afterwards.<sup>23</sup> Moreover, the fact that the underlying transmission facilities likely will not be subject to unbundling does not support immediate implementation of the new EELs requirements. Rather, it counsels against any action that would require ILECs to offer EELs in place of special access services, at a substantial loss in revenues, before a lawful finding of impairment with respect to the underlying high capacity loop and transport facilities.

## CONCLUSION

Accordingly, the Commission should grant BellSouth’s petition, and waive implementation of the revised EEL eligibility and commingling requirements pending adoption of lawful unbundling requirements for high capacity loops and transport.

Respectfully submitted,

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<sup>23</sup> *Supplemental Order Clarification* at para. 16, citing *UNE Remand Order*, 15 FCC Rcd at 3712, para. 21.

CERTIFICATE OF SERVICE

I hereby certify that, on this 5<sup>th</sup> day of April 2004, I caused copies of the foregoing Reply Comments of SBC Communications Inc. on BellSouth Telecommunications, Inc.'s Petition for Waiver to the following parties by pre-postage paid first-class mail.

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