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Via Electronic Filing  
Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room TWB-204  
Washington, DC 20554

Re: In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers and Implementation of the Local Competition Provisions in the Local Telecommunications Act of 1996, CC Docket Nos. 01-338

Dear Ms. Dortch:

Attached please find a memorandum on transitional rules that AT&T has prepared in the afore mentioned proceeding.

Very truly yours,

A handwritten signature in cursive script that reads "Robert W. Quinn, Jr.".

Robert W. Quinn, Jr.

Enclosure

**THE COMMISSION HAS BROAD AUTHORITY TO ESTABLISH INTERIM AND TRANSITIONAL RULES TO MAINTAIN COST-BASED UNBUNDLING**

The Commission has broad authority to adopt unbundling rules that continue access to combinations of switching and other elements at existing rates, with an appropriate phase-out of those requirements under proper conditions and after an adequate and stable transition period. First, given the chaos that would result if cost-based access were ended at the close of this calendar year, the Commission should promptly issue interim rules that maintain the *status quo* of existing switching unbundling requirements (and make clear that there will be no subsequent “true ups” to higher rates), pending final rules that respond comprehensively to *USTA II*. The need for this immediate Commission action is so clear that they can be and should be adopted without notice and comment pursuant to the “good cause” exception in the Administrative Procedure Act. *Mid-Tex Electric Coop. v. FERC*, 822 F.2d 1123 (D.C. Cir. 1987).

But this stop-gap measure is not alone sufficient to preserve local competition. Competitive carriers must make decisions *now* that will commit capital well beyond the Commission’s promulgation of final rules. In order to continue to provide competitive local services, carriers must therefore have reasonable assurances *today* that they will continue to be able to lease switching at cost-based rates for a significant period after final rules issue to allow for an orderly transition to the provision of facilities-based service to new and existing customers. Accordingly, the Commission should immediately, expressly, and unequivocally commit that its final rules will include a reasonable multi-year transition plan for unbundled switching. Anything less would be read by the competitive carrier and investment communities as a clear signal that the Commission lacks any commitment to take the steps necessary to facilitate local competition, and anything less would therefore inevitably cause competitive

carriers and investors to redeploy their capital and resources and radically scale back or eliminate their mass market offerings.

The reason that such transitional rules for switching are necessary is the same reason that virtually no competitive carrier today uses its own switches to provide local telephone services to mass market customers – despite the incentives and massive efforts by AT&T and other CLECs to do so. There have been and continue to be severe operational and economic barriers to the provision of such services. It will necessarily take several years of hard work by the Commission, state commissions and the industry for these existing operational and economic barriers to be eliminated. Specifically, it is conceded that the ILECs do not currently have, and need to put into place, “bulk hot cut” procedures that will allow customers to be transferred to new facilities-based arrangements without service disruptions and that are shown to be sufficient to meet foreseeable demand and performance standards. Further, the Commission and the states need to take the steps necessary to ensure that today’s competition-foreclosing ILEC hot cut and collocation charges are constrained to levels that will support competitive switch deployment. And even after the conditions that give competitive carriers the *capability* of economically using their own switches have been created, it will take substantial time before these switches can be deployed, tested and made operational in volumes that will allow millions of UNE-P lines to be cut-over using the newly developed bulk hot cut processes.

The courts routinely approve of the use of transitional rules as “a standard tool of the Commission,” *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1505 (D.C. Cir. 1987). And, as explained below, both § 271 and § 251 of the Communications Act give the FCC clear authority to reflect the economic and marketplace realities by adopting reasonable multi-year transitional rules. Moreover, SBC and Verizon are independently obligated to continue to provide cost-

based unbundled switching under the merger conditions to which those entities volunteered to gain approval of the Ameritech-SBC and Bell Atlantic-GTE mergers, respectively.

To ensure that facilities-based arrangements will be possible, the Commission must also act quickly with respect to high-capacity loops, transport and loop-transport combinations (known as “EELs”). Although the D.C. Circuit upheld the Commission’s high-capacity loop rules, the ILECs are claiming that those rules were implicitly vacated by the “reasoning” of that decision. The Commission should promptly confirm that its high-capacity loop rules remain binding. In addition, the Commission should immediately issue a standstill order with respect to unbundled dedicated transport that preserves the capacity-based unbundling obligations that were endorsed by all five FCC commissioners in the *Triennial Review Order*. The Commission should then promptly address the D.C. Circuit’s concerns with respect to the availability of special access tariffs and issue permanent rules requiring access to dedicated transport up to the capacity thresholds identified in the *Triennial Review Order*. Finally, the Commission should eliminate all existing “use restrictions” on EELs, as these can no longer be maintained in light of *USTA IP*’s vacatur of the FCC’s “qualifying service” definition (and, indeed, have never been supported by any valid justification).

Regardless of what statutory vehicle used on remand by the Commission to maintain existing unbundling obligations, the Commission’s interim rules will not require state commission-approved revision of the contracts that govern the interconnection rights enjoyed by competitive carriers vis-a-vis ILECs. These binding contracts currently require ILECs to provide unbundled loops, transport and switching and, as a general matter, may be reformed only when there has been a “change of law” that eliminates entirely an ILEC’s obligation to continue to provide unbundled access to its network. Thus, to the extent that the FCC simply *preserves*

existing unbundling obligations, there has been no action that would necessitate contract reformation under interconnection agreement “change of law” provisions.

***Section 271 Authority.*** Section 271 grants the Commission clear authority to adopt transitional rules that will protect competition during the period in which existing operational and economic barriers to self-deployment of switching are eliminated and customers are migrated to new facilities-based arrangements. Although each BOC has received long distance authority in each state, § 271(d)(6) of the Communications Act gives the Commission the authority to revoke this authorization or to impose conditions on its exercise if the BOC is no longer in compliance with the competitive checklist or if changed conditions mean that the BOC’s provision of long distance is no longer in the public interest. The Commission’s authority to insist that the BOCs continue to provide access to combinations of switching and other elements at cost-based rates during a transitional period – that will allow competition until competitive carriers have been able to transition customers over to their own switches – is beyond serious dispute.

First, the competitive checklist unambiguously *requires* that switching be made available by BOCs with long distance authority – even if switching has been removed from the national list of § 251 network elements – and the Commission is authorized under § 201(b) of the Communications Act to adopt rules capping the rates under which such switching (and other elements) must be made available by BOCs. Second, the Commission can determine that the BOCs’ continued provision of long distance services would not be in the “public interest” under § 271(d)(3)(C) unless they continue to provide cost-based access to switching during the transitional period until millions of mass market customers can, in fact, be served through facilities-based arrangements.

The Commission can and should implement these findings by adopting national rules that so provide. Although § 271(d)(6) provides, as an enforcement matter, for state-by-state revocation proceedings, § 201(b) authorizes the Commission to adopt rules to implement each of the provisions of the Act, including § 271. These rules can embody generic determinations, and the Commission can apply its rules in individual revocation proceedings under § 271(d)(6). Alternatively, the Commission could make “generic” determinations in a unified complaint proceeding and confirm that these findings apply to particular BOCs in individual orders.

***Section 251 Authority.*** The Commission also has authority under § 251 of the Communications Act to adopt both interim and transitional unbundling rules that continue access to combinations of switching and other elements at existing rates, with an appropriate phase-out of those requirements under proper conditions after an adequate and stable transition period. In *USTA II*, the court of appeals faulted the Commission for not examining more carefully whether impairment could be solved by requiring the ILECs to provide bulk hot cuts that were sufficient to support expected demand. Should the Commission on remand “regulate directly” ILEC hot cut processes, it would not follow that existing operational and economic sources of impairment would be immediately eliminated. To the contrary, there is every reason to believe that it would be several years before the conditions would exist to allow competitive carriers to self-deploy their own switches.

Critically, to the extent the unbundling rules that the Commission promulgates on remand reflect a predictive judgment as to the time in the future when switching impairment would be eliminated by the mechanisms it was relying on to solve the hot cut problem and other barriers to self-deployment of switches, a predictive finding that impairment would be eliminated in the future would not mean that the Commission would be required to eliminate unbundled access to

switching at that precise point in time. To the contrary, the Commission has authority to phase-out unbundling over a reasonable period of time. Under the “at a minimum” language in § 251(d)(2) of the Act, for example, the Commission has the authority to adopt rules that require cost-based access to an element during transitional periods even after the Commission has made findings of non-impairment for the particular element. As noted, even after the several year period required to establish adequate bulk hot cut processes, it will take time for competitive carriers to purchase the necessary switches, secure the necessary collocation arrangements, deploy those switches, secure the necessary backhaul transport arrangements, and cut-over existing customers to those switches. For these reasons, in instances when unbundled access to network elements is eliminated on the basis that competitive carriers have the *capability* of deploying their own switches, § 251(d)(2) gives the Commission authority to promulgate reasonable rules to protect the public interest by preserving existing unbundling requirements to give competitive carriers a realistic opportunity to deploy their own facilities.

*Mid-Tex Electric Cooperative v. FERC*, 822 F.2d 1123 (D.C. Cir 1987) confirms that the Commission also has § 251 authority to establish interim rules requiring that unbundled switching remain available at existing rates pending completion of the remand proceeding. In that case, the D.C. Circuit vacated a FERC rule allowing utilities to change depreciation methodologies, because the FERC had failed adequately to address arguments that the change in methodology could produce anticompetitive price squeezes. On remand, FERC promulgated an interim rule that did not change “the substance of the general provisions of the [vacated] CWIP rule,” *id.* at 1124, but responded to the court’s concerns by noting that it would consider requests to waive the rule upon a showing of anticompetitive effects, *id.* at 1131. In upholding the FERC’s interim rules, the court of appeals stressed that its mandate “was clear on what was

expected of FERC at the end of the line, *i.e.*, on the standards against which any *permanent* [depreciation] rules would be measured,” *id.* at 1130, and not a requirement that *interim* rules exhaustively address every aspect of the court’s opinion vacating the prior rules. *Id.* at 1131 (“FERC has put into place safeguards adequate, at least on their face, to protect customers against the kind of injuries its [depreciation] policy may cause”). The Commission could similarly justify maintaining cost-based unbundled switching during the remand proceeding by agreeing to entertain waiver requests supported by conclusive evidence that the hot cut and other entry barriers to the present use of competitive switches have been removed in particular geographic areas.

***The Merger Condition Unbundling Obligations Of SBC And Verizon.*** In both the *Ameritech-SBC Merger Order*, 14 FCC Rcd. 14,712 (1999) and the *Bell Atlantic-GTE Merger Order*, 15 FCC Rcd. 14,032 (2000), the Commission found that the mergers would harm local competition. Nonetheless, it permitted the parties to merge on certain conditions, including those specifically designed to facilitate local competition. One of the central conditions was a condition designed to protect local competition given the uncertainty surrounding the Commission’s unbundling rules. To address this, SBC agreed “to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission’s order in its UNE Remand proceeding,” and agreed that “from now until the date on which the Commission’s order in that proceeding, *and any subsequent proceedings*, becomes final and non-appealable” it “will continue to make available to telecommunications carriers each UNE that was available under SBC’s and Ameritech’s interconnection agreements as of January 24, 1999, even after the

expiration of existing interconnection agreements.” *Ameritech-SBC Merger Order* ¶ 394.<sup>1</sup> In the subsequent Bell Atlantic-GTE merger, the parties agreed to a virtually identical condition (that also preserves line-sharing requirements under the same standard). *See Bell Atlantic-GTE Merger Order* ¶ 316.

Thus, the Commission need do nothing to continue existing unbundling obligations with respect to SBC and Verizon. These ILECs voluntarily agreed to provide all existing UNEs until the Commission affirmatively relieves them of that obligation (and that Commission order becomes final and non-appealable). In its remand order, the Commission should confirm that the merger conditions continue to obligate SBC and Verizon to provide unbundled switching and transport pending any final and non-appealable rules that relieve them of that obligation.

**Section 4(i) Authority.** Some have suggested that the Commission should adopt interim or transitional rules relying exclusively on § 4(i) of the Communications Act. Although the Courts have recognized that § 4(i) gives the Commission authority to protect its core jurisdiction and to issue interim rules, *see, e.g., Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1108 & n.76 (D.C. Cir. 1981), they have also held that “section 4(i) is not a stand-alone basis of authority” and “section 4(i) authority must be reasonably ancillary to other express provisions.” *Motion*

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<sup>1</sup> The merger condition itself (Merger Condition XVII) states that SBC/Ameritech will continue to provide UNEs

under the same terms and conditions that such UNEs or combinations of UNEs that were made available on January 24, 1999, . . . until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs *is not required to be provided* by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs *is not required to be provided* by SBC/Ameritech in the relevant geographic area. This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding.

*Ameritech-SBC Merger Order*, App. C, ¶ 53 (emphases added, footnote omitted).

*Picture Ass'n of America, Inc. v. FCC*, 208 F.3 796, 805 (D.C. Cir. 2002). Thus, although § 4(i) confirms the ability of the Commission to issue interim and transition rules pursuant to § 251 and § 271, transitional rules expressly based upon authority under sections 251 and 271 would be easier to defend.

***Authority To Continue Unbundled Access To High Capacity Loops and Transport Facilities.*** These same provisions give the Commission the authority to mandate interim and permanent access to high capacity loops and transport facilities, both individually and in combined form. Indeed, *USTA II* compels retention of high-capacity loops and the elimination of use restrictions, and left undisturbed the Commission's key impairment findings with respect to dedicated transport facilities – each of which were endorsed by all five FCC commissioners. Immediate action by the Commission is necessary as access to these network facilities is essential to those carriers seeking to deploy their own networks.

With respect to high capacity loops, *USTA II* upheld the Commission's rules. The D.C. Circuit clearly specified that it only vacated the Commission's impairment findings with respect to "dedicated transport" and that, "the petitions for review are otherwise denied." 359 F.3d at 594. Further, the D.C. Circuit expressly relied on availability of unbundled high capacity loops in affirming the Commission's rules with respect to hybrid fiber-copper loops. *Id.* at 582. In light of ILEC threats to withhold access to these facilities, the Commission should immediately clarify that its high capacity loop rules remain in effect.

With respect to dedicated transport, the *USTA II* court expressly approved the Commission's basic impairment test and did not disturb the Commission's factual findings that these facilities enjoy natural monopoly characteristics. Thus, the Commission has ample authority again to find that "impairment" exists under § 251(d) for dedicated transport below

certain capacity thresholds— as it unanimously did in the *Triennial Review Order*. All that *USTA II* required was for the Commission to make final impairment determinations itself (rather than “delegating” those determinations to state commissions) and for the Commission to address why above-cost special access services (that effect price squeezes) are not a substitute for cost-based dedicated transport. To be sure, the *USTA II* court also struck down the Commission’s attempts to eliminate unbundled access to entrance facilities by redefining “dedicated transport,” but that holding clearly supports *expansion* of unbundling obligations to all point-to-point transport facilities, whether those facilities connect ILEC end offices or connect an ILEC end office to a competitor’s network.

In this regard, the Commission can also maintain existing dedicated transport unbundling obligations under § 271 and, for SBC and Verizon, under the federal merger obligations of those ILECs. Section 271 requires BOCs to provide “local transport from the trunk side of a wireline local exchange carrier’s switch” regardless of whether or not dedicated transport must be unbundled as a network element under § 251. The SBC and Verizon merger conditions likewise require those ILECs to continue to provide all existing network elements, including dedicated transport, until a final determination by the Commission to relieve them of that obligation.

Finally, the Commission should eliminate all “eligibility criteria” on EELs. As the *USTA II* court made clear, the “qualifying service” definition upon which these use restrictions were based is foreclosed by the plain text of the Act. *USTA II* thus confirms that unbundled network elements may be used to provide any “telecommunications service.” Full access to EELs is critical to facilities-based competition, for EELs permit competitive carriers to extend their networks to serve “low volume” locations where it is not economical for them to deploy their own last-mile facilities.