

**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
	)	

**OPPOSITION OF BELLSOUTH, QWEST, SBC, USTA, AND VERIZON TO  
EMERGENCY MOTION FOR STABILIZATION ORDER**

Pursuant to 47 C.F.R. § 1.45(b), BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., United States Telecom Association, and the Verizon telephone companies hereby file this opposition to the Emergency Motion for Stabilization Order filed by CompTel/ASCENT (“CompTel”) on June 24, 2004.<sup>1</sup> CompTel seeks imposition of what it refers to as a “stabilization order,” by which it means an order reinstating an obligation of indefinite duration to provide UNE access at TELRIC rates to mass-market switching, high-capacity loops and dedicated transport, and dark fiber nationwide. CompTel seeks this order notwithstanding the D.C. Circuit’s vacatur of the Commission’s nationwide impairment finding as to those elements and notwithstanding the fact that both the D.C. Circuit and the Supreme Court expressly refused to stay that vacatur. CompTel’s motion is a blatant attempt at an end-run around the courts and, as such, a plain invitation to error. In

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<sup>1</sup> Although titled as a motion, CompTel’s pleading is, in fact, a petition for the issuance of interim rules and thus subject to 47 C.F.R. §§ 1.401 *et seq.* See CompTel Mot. at 1 (requesting issuance of “stabilization order” as “exercise of [the Commission’s] discretion to adopt interim or temporary rules”).

granting the requested relief, the Commission would be granting itself the very stay of the mandate that both the D.C. Circuit and the Supreme Court denied.

Even aside from the fact that the D.C. Circuit undoubtedly would take prompt action to invalidate any such Commission decision, the facts on the ground in the marketplace today demonstrate that the so-called “stabilization order” CompTel seeks would be detrimental to both facilities-based competition and the public interest. If the Commission does wish to adopt interim rules, those rules must be reasonably calculated to address the key deficiencies the D.C. Circuit identified in the vacated rules and, in doing so, must also take into account evidence of current market conditions that is readily available to (and in key respects already before) the Commission.

**I. INTERIM RULES REQUIRING CONTINUED NATIONWIDE UNBUNDLING WOULD BE UNLAWFUL**

The Commission’s authority to promulgate interim rules does not permit it to adopt interim rules that simply reinstate the same unbundling requirements that have now been vacated three times by the federal courts. The D.C. Circuit has previously rejected, in no uncertain terms, interim rules that “reimplemented precisely the same rule[s] that this court vacated” and through which the agency, “in effect, implemented [a] stay on [its] own.” *International Ladies’ Garment Workers’ Union v. Donovan*, 733 F.2d 920, 923 (D.C. Cir. 1984) (per curiam). Given the frustration the court has expressed with the Commission’s “failure, after eight years, to develop lawful unbundling rules” and its “apparent unwillingness to adhere to prior judicial rulings,” *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004) (“*USTA II*”), the D.C. Circuit’s response to any Commission decision that results in incumbents “again be[ing] subject to the [same] rules” “is preordained and the mandamus will issue,” *Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269, 271-72 (D.C. Cir. 2000).

As CompTel acknowledges, in *USTA II*, the D.C. Circuit vacated the rules promulgated in the *Triennial Review Order*<sup>2</sup> that required unbundling of “local circuit switching, high capacity loops, dedicated transport and dark fiber.” CompTel Mot. at 2.<sup>3</sup> But CompTel is wrong in asserting that the Commission could re-adopt its nationwide impairment findings in issuing interim rules because the D.C. Circuit “did not base its decision to vacate the rules in any part due to concern about the record” in the Triennial Review proceeding. CompTel Mot. at 8. In fact, the D.C. Circuit vacated the Commission’s rules not only because of the unlawful delegation to state commissions, but also (and independently) because those rules could not be sustained on the record the Commission compiled.

First, with respect to mass-market circuit switching, the D.C. Circuit expressly “consider[ed] whether the Commission’s nationwide impairment determination can . . . survive, even without the safety valve provided by subdelegation to the states,” and “conclude[d] that it cannot.” *USTA II*, 359 F.3d at 565. Indeed, the court stated that, “[a]fter reviewing the record,

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<sup>2</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”), vacated in part and remanded, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

<sup>3</sup> Although some CLECs have claimed that the D.C. Circuit left intact the Commission’s rules requiring unbundling of high-capacity loops, that cannot be squared with the D.C. Circuit’s clear statement that it was vacating *all* of the Commission’s delegations of impairment determinations to the states. See *USTA II*, 359 F.3d at 568. The FCC made such a delegation in the context of both high-capacity loops and transport. See *Triennial Review Order* ¶¶ 328, 394. Moreover, the D.C. Circuit made clear that it was using the term “transport” to refer to “transmission facilities dedicated to a single customer” — that is, what the Commission defines as “loops” — as well as to facilities dedicated to a “carrier.” *USTA II*, 359 F.3d at 573; 47 C.F.R. § 51.319(a) (defining “loop”). The D.C. Circuit’s treatment of high-capacity loops and transport was consistent with the manner in which the incumbents briefed the issue, by addressing both simultaneously. And the two substantive flaws the D.C. Circuit identified with respect to the Commission’s analysis of high-capacity facilities — considering impairment on a route-specific basis and the failure to consider the availability of special access, see *USTA II*, 359 F.3d at 575, 577 — apply equally to the Commission’s determinations as to both loops and transport, see *Triennial Review Order* ¶¶ 102, 332, 341, 401, 407.

we conclude that we must vacate the (no longer provisional) national impairment finding.” *Id.* at 569 (emphasis added). The court recognized that “the Commission’s own conclusions do not clearly support a non-provisional national impairment finding for mass market switches,” expressed its own “doubt[s] that the record supports a national impairment finding for mass market switches,” *id.*, and pointedly noted that, with respect to “mass market switching[,] . . . the evidence indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling,” *id.* at 587. The D.C. Circuit also vacated the nationwide impairment finding based on the Commission’s failure to consider record evidence of “several more narrowly-tailored alternatives to a blanket requirement that mass market switches be made available as UNEs.” *Id.* at 570.

Second, with respect to high-capacity loops, dedicated transport, and dark fiber, the D.C. Circuit found that, “as with mass market switching, the Order itself suggests that the Commission doubts a national impairment finding is justified on this record.” *Id.* at 574. As the court recognized, the Commission had “frankly acknowledged that competitive alternatives are available in some locations” for these network elements, such that it had to “vacate the national impairment findings with respect to DS1, DS3, and dark fiber.” *Id.* (internal quotation marks omitted). The court also found that the nationwide impairment finding was unlawful for two additional reasons: the Commission had “ignore[d] facilities deployment along similar routes when assessing impairment” and had refused to “consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired.” *Id.* at 575, 577.

For these reasons, any “stabilization order” — which would have the effect, if not the express purpose, of compelling incumbents to unbundle nationwide the very elements as to

which the D.C. Circuit vacated the Commission's nationwide impairment findings as contrary to the record evidence — would comply with neither the “letter [n]or spirit of the mandate.” *Coal Employment Project v. Dole*, 900 F.2d 367, 368 (D.C. Cir. 1990) (per curiam) (quoting *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1130 (D.C. Cir. 1987)). Nor can the Commission use interim rules “to avoid . . . the analysis that [the D.C. Circuit] required in [its prior opinion].” *American Gas Ass'n v. FERC*, 888 F.2d 136, 148 (D.C. Cir. 1989) (vacating interim rule that did not adequately respond to prior D.C. Circuit judgment).

Instead, any interim rules the Commission does adopt must be “reasonably calculated” to address the deficiencies identified in the D.C. Circuit's most recent decision (as well as in the prior D.C. Circuit and Supreme Court judgments that the D.C. Circuit was effectuating). *Mid-Tex*, 822 F.2d at 1130; see *Brae Corp. v. United States*, 740 F.2d 1023, 1070-71 (D.C. Cir. 1984) (per curiam) (interim rules “must avoid the problems we have identified in this opinion”). Interim rules must therefore take account of market facts demonstrating that CLECs can and do compete in many classes of markets today without unbundling, including through the use of special access. To take but one example, Time Warner — one of the most successful CLECs — recently announced that it “does not rely upon UNEs” at all, and instead provides service using its “own network facilities” and facilities purchased from “special access tariffs or under agreements with the ILECs.”<sup>4</sup> Likewise, the Commission cannot disregard the indisputable fact

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<sup>4</sup> Time Warner Telecom Press Release, *Time Warner Telecom Not Impacted by UNE Ruling* (June 10, 2004). Verizon has also recently provided the Commission with evidence, on an MSA-by-MSA basis, that competitors are capable of — and, indeed, are — competing for high-capacity services where demand exists throughout the top 20 MSAs served by Verizon using either their own facilities or a combination of competitive facilities and special access purchased from Verizon. See Ex Parte Letter from Susanne A. Guyer, Verizon, to Chairman Michael K. Powell, *et al.*, FCC, CC Docket Nos. 01-338 *et al.*, at 1 (June 24, 2004) (“Verizon 6/24/04 Ex Parte”); see generally Ex Parte Letter from Michael E. Glover, Verizon, to Marlene

that competitors (including fast-growing cable telephony providers) can and currently do compete without mass-market switching around the country. Cable companies now offer local telephone service, whether circuit switched or VoIP, to millions of additional homes, including approximately 12 million homes in Verizon's service areas alone, and are aggressively rolling service out to many millions more. Between 85-90 percent of U.S. homes now have access to cable modem service and, therefore, access to VoIP, whether provided by their cable operator, by national providers such as Vonage, by major long-distance carriers such as AT&T, or by others.<sup>5</sup>

Relying on *Mid-Tex*, however, CompTel claims that the D.C. Circuit would uphold interim rules that reinstated the Commission's vacated nationwide impairment findings as long as the Commission eliminated the delegations to state commissions. *See* CompTel Mot. at 7-9. But in *Mid-Tex*, the D.C. Circuit upheld the agency's interim rule because it was "reasonably calculated" to address *all* of the failings of the initial rule that the court "considered substantial enough to call the entire [agency] policy into question." 822 F.2d at 1130. Specifically, the court found that FERC, in its interim rules, had "put into place safeguards adequate" to address each of the flaws in the initial rule that "FERC did not — and has not — convinced [the court] can safely be ignored." *Id.* at 1131. Interim rules that require nationwide unbundling, by contrast, would not address *any* of the failings in the nationwide impairment findings in the

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H. Dortch, FCC, CC Docket Nos. 01-338 *et al.*, High-Capacity Services Attach. (July 2, 2004) ("Verizon 7/2/04 Ex Parte").

<sup>5</sup> *See* Verizon 6/24/04 Ex Parte at 2; *see generally* Verizon 7/2/04 Ex Parte, Mass Market Switching Attach at 6-12. AT&T's recent announcement that it will continue to compete for local customers using VoIP, even in markets where it will no longer sign up new UNE-P customers, further confirms that competition is possible without UNE access to ILEC switches. *See* AT&T News Release, *AT&T To Stop Competing in the Residential Local and Long-Distance Market in Seven States* (June 23, 2004) (AT&T's withdrawal of UNE-P based service will "not affect customers with DSL and cable modem offerings who subscribe to the company's Voice over IP offering").

*Triennial Review Order* that provided independent grounds for the D.C. Circuit's vacatur of the mass-market switching, high-capacity loops and dedicated transport, and dark fiber rules.

## II. THERE IS NO NEED FOR A STABILIZATION ORDER

CompTel contends that a stabilization order is necessary to protect the "financial viability of competitive carriers that depend on the[] UNEs" affected by the D.C. Circuit's decision in *USTA II*. CompTel Mot. at 4-6. But CLECs have raised this same claim to the D.C. Circuit and the Supreme Court, which rejected their requests for a stay of the D.C. Circuit's mandate. Undeterred, CLECs raised the same claim with state commissions throughout the country and the majority have rejected requests for the very relief that CompTel seeks here. Indeed, CompTel's assertion that a stabilization order is needed is demonstrably wrong, for at least three reasons.

*First*, and most important, it is factually unsupported. The ILECs have not threatened (or taken) immediate unilateral action in the wake of the issuance of the D.C. Circuit's mandate. On the contrary, each of the major ILECs has expressly offered to *continue* to provide network elements affected by the D.C. Circuit's decision for a substantial period and to follow orderly processes during any transition. The major ILECs have also made clear that they remain willing to negotiate mutually agreeable commercial terms that allow other carriers to use their networks on a wholesale basis. Based on these commitments, state commissions in California,<sup>6</sup> Florida,<sup>7</sup> Louisiana,<sup>8</sup> Massachusetts,<sup>9</sup> New Hampshire,<sup>10</sup> New York,<sup>11</sup> North Carolina,<sup>12</sup> Oregon,<sup>13</sup> South

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<sup>6</sup> See Administrative Law Judge's Ruling Denying Motion, R.95-04-043, I.95-04-044, at 7 (Cal. Pub. Utils. Comm'n June 25, 2004).

<sup>7</sup> See Order on Motions To Hold in Abeyance, Docket No. 040156-TP, Order No. PSC-04-0578-PCO-TP, at 6 (Fla. Pub. Serv. Comm'n June 8, 2004).

<sup>8</sup> See Minutes from Open Session at 4 (La. Pub. Serv. Comm'n June 9, 2004).

<sup>9</sup> See Letter Ruling, DTE 03-60 (Mass. Dep't Telecomms. & Energy June 15, 2004).

<sup>10</sup> See Letter Ruling, DT 04-107 (N.H. Pub. Utils. Comm'n June 11, 2004).

Carolina,<sup>14</sup> Tennessee,<sup>15</sup> Texas,<sup>16</sup> Utah,<sup>17</sup> and Vermont<sup>18</sup> have all rejected virtually identical requests for relief by CompTel and various CLECs.<sup>19</sup> Indeed, *CompTel itself* sought to withdraw one such request for emergency relief, explaining that the need for relief “dissipated” once the incumbents explained their commitments and the processes that would apply after the mandate issues.<sup>20</sup>

*Second*, because there is no imminent threat of disruption of service or higher prices, the Commission has ample time to promulgate lawful rules and need not issue an “emergency”

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<sup>11</sup> See Ruling Granting Motions for Consolidation and To Hold Proceeding in Abeyance, Cases 04-C-0314 & 04-C-0318, at 7-8 (N.Y. Pub. Serv. Comm’n June 9, 2004).

<sup>12</sup> See Order Denying Emergency Relief, Docket No. P-100, Sub 133t, at 1-2 (N.C. Utils. Comm’n June 11, 2004).

<sup>13</sup> See Order Denying Petition for Clarification, ARB 531, at 6 (Or. Pub. Util. Comm’n June 30, 2004).

<sup>14</sup> See Open Meeting of Commission (S.C. Pub. Serv. Comm’n June 22, 2004).

<sup>15</sup> See Transcript of Authority Conference, Docket No. 04-00158, at 34-35 (Tenn. Reg. Auth. June 7, 2004).

<sup>16</sup> See Order No. 1, Docket Nos. 29829 *et al.*, at 6 (Tex. Pub. Util. Comm’n June 11, 2004).

<sup>17</sup> See Order Denying Joint CLEC Motion, Docket No. 03-999-04, at 2-3 (Utah Pub. Serv. Comm’n June 14, 2004).

<sup>18</sup> See Order Re: Motion To Hold Proceeding in Abeyance Until June 15, 2004, Docket No. 6932, at 2-3 (Vt. Pub. Serv. Bd. May 26, 2004).

<sup>19</sup> To the extent other state commissions have issued orders purporting to require incumbents to continue providing access to UNEs notwithstanding *USTA II* and the change-of-law provisions in specific interconnection agreements, those decisions are unlawful. Among other things, those decisions require unbundling absent a lawful finding of impairment by this Commission and override provisions of “binding” interconnection agreements to the extent those agreements permit incumbents to cease providing access to those elements as UNEs, either immediately or after a specified notice period. Indeed, where interconnection agreements enable incumbents to cease providing UNEs as a result of *USTA II*, CLECs have no legitimate complaint that compliance with agreements that they signed and state commissions approved might affect their relationships with their creditors.

<sup>20</sup> *E.g.*, Motion To Withdraw, Without Prejudice, the Request for Emergency Relief ¶ 9, *CompTel/ASCENT Alliance, et al. v. Michigan Bell Tel. Co., et al.*, Case No. U-14139 (Mich. Pub. Serv. Comm’n filed June 1, 2004).

stabilization order. In promulgating such rules, as explained above, the Commission would be required to identify the salient factors of markets in which CLECs are capable of competing without UNEs and eliminate mandatory unbundling in markets that share those characteristics. Although the Commission may have room, in the context of interim rules (assuming it elects to pursue that route), to engage in some degree of approximation in identifying these contestable markets, it may *not* simply ignore the concerns that the D.C. Circuit identified, nor may it disregard the detailed evidence demonstrating that CLECs can and do compete in many markets using alternative facilities and special access.

*Third*, CompTel's claims of impending financial ruin are not credible.<sup>21</sup> For example, CLECs today enjoy extremely large UNE-P margins, which industry experts have recently put as high as a "guaranteed 60%."<sup>22</sup> And incumbents have in many cases reached agreement with competitors over the network access terms that will apply when incumbents are no longer required to provide the UNEs affected by *USTA II*.<sup>23</sup> Sage Telecom, which has signed one such agreement, recently stated that it will continue to "actively market" its services throughout its 11-state region, including in three of the states where AT&T has stated it will stop offering UNE-P services allegedly as a result of *USTA II*.<sup>24</sup>

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<sup>21</sup> As an initial matter, CompTel's claims should be viewed skeptically in light of its inexplicable delay in seeking this "emergency" relief. The D.C. Circuit denied requests for a stay of the mandate on June 4, the Commission announced that it would not seek a stay from the Supreme Court on June 9, and the Supreme Court denied private parties' requests for a stay on June 14, yet CompTel waited until June 24 to file this motion.

<sup>22</sup> Timothy Horan, *et al.*, CIBC World Markets, Equity Research Industry Update, *D.C. Circuit Overturns UNE-P Rules* at 5 (Mar. 3, 2004).

<sup>23</sup> BellSouth has already signed 10 commercial agreements. SBC has reached a seven-year agreement to provide facilities on a commercial basis to the third-largest UNE-P provider in its 13-state region, Sage Telecom. Qwest has reached agreements with Covad and MCI. Verizon has signed four commercial agreements for either mass-market or enterprise switching.

<sup>24</sup> *Wireline*, Communications Daily, June 28, 2004, at 6.

Similarly, with respect to high-capacity services, CLECs typically provide these services *without* the use of UNEs and instead, like Time Warner, use special access, either alone or in combination with competitive facilities, to compete successfully with incumbents to serve large and small business customers. Verizon, for example, has recently submitted evidence showing that competing carriers are successfully providing high-capacity services to business customers located throughout the MSAs that Verizon serves, wherever there is demand for those services. Moreover, to the extent these carriers do use facilities obtained from Verizon, they obtain them overwhelmingly in the form of special access, with 93 percent of DS-1 loops, 95 percent of DS-1 loops purchased along with transport, and 98 percent of DS-3 loops purchased as special access, rather than UNEs.<sup>25</sup> And they are successfully using special access to serve business customers of all shapes and sizes, ranging from the enterprise segment of the market, which they dominate, to a host of smaller business customers including antique dealers, book stores, dry cleaners, florists, gas stations, and hair dressers, to name just a few.

### **III. THE COMMISSION COULD NOT ADOPT A STABILIZATION ORDER WITHOUT NOTICE AND COMMENT**

As CompTel recognizes, the Commission's authority to adopt interim rules without notice and comment is limited. *See* CompTel Mot. at 9. For the reasons set forth above, a stabilization order would not satisfy at least two of the three relevant criteria. First, reimposition of nationwide unbundling would be contrary to the D.C. Circuit's rejection of the nationwide

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<sup>25</sup> *See* Verizon 7/2/04 Ex Parte, High-Capacity Services Attach. at 19; *see also* Verizon 6/24/04 Ex Parte, High-Capacity Services Presentation at 10. Moreover, because of the availability of volume and term discounts, competitors typically purchase special access at discounts averaging 35-40 percent off of the base rates. *See id.* These discounted rates are substantially lower than CompTel's wholly unrealistic — and entirely unsubstantiated — claims of a 2.5- to 10-fold increase over UNE rates. *See* CompTel Mot. at 5. In any event, as the Supreme Court made clear in *Iowa Utilities Board*, the impairment standard is not satisfied simply because unbundled access would permit competitors to reduce their costs and earn higher profits. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999).

impairment findings in the *Triennial Review Order*, not to mention the overwhelming evidence of even greater competition today. *See Mid-Tex*, 822 F.2d at 1133 (finding good cause to promulgate interim rule without notice and comment where, unlike here, the court had previously “sustained, in large measure,” FERC’s determinations based on the previously compiled record).

Second, the absence of rules for a short period while the Commission promulgates lawful interim or permanent rules will result in neither “regulatory confusion” nor “irremedial financial consequences.” *Id.* (internal quotation marks omitted). As explained above, incumbents have committed to continue to provide the network elements affected by the D.C. Circuit’s decision for a substantial period. In addition, in the two previous instances when *all* of the Commission’s UNE rules were vacated, considerable time elapsed without any effective UNE rules, yet the parade of horrors described by CompTel did not take place. That is so notwithstanding the fact that, in the most recent instance, fully eight months passed between the issuance of the D.C. Circuit’s mandate in *USTA I* and the release of the *Triennial Review Order*, during which time incumbents did not commit to adhere to any particular unbundling regime.

Finally, as CompTel acknowledges, any interim rules the Commission adopts without full notice and comment must be in effect for *only* the short period until final rules may be issued — *i.e.*, as a way to bridge the gap until the agency can promulgate permanent rules pursuant to notice and comment. *See, e.g., Brae*, 740 F.2d at 1070 (agency can promulgate “temporary emergency rules . . . until . . . [agency] can, under the notice and comment procedure of the [APA], promulgate new permanent rules which reflect [the court’s] holding”). Thus, even if the Commission were to adopt interim rules that did reasonably address the deficiencies the D.C. Circuit identified, it would need to move quickly to issue final rules in order to demonstrate that

“it is not engaging in dilatory tactics.” *Mid-Tex*, 822 F.2d at 1132. Indeed, given that Congress allowed the Commission only six months to issue all the rules necessary to implement section 251, *see* 47 U.S.C. § 251(d)(1), under no circumstances would it be lawful for the Commission to take *more* than six months to issue new rules involving this subset of section 251 issues.

## CONCLUSION

For the foregoing reasons, the Commission should deny CompTel's motion.

Respectfully submitted,

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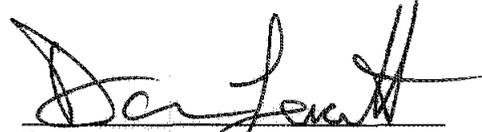
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July 6, 2004

## CERTIFICATE OF SERVICE

I hereby certify that, on this 6<sup>th</sup> day of July 2004, I caused copies of the foregoing Opposition of BellSouth, Qwest, SBC, USTA, and Verizon to Emergency Motion for Stabilization Order to be served on the following parties by hand-delivery.



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