

July 21, 2004

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

CC Docket Nos. 96-98, 98-147, 01-338

Dear Chairman Powell:

We strongly support adoption of interim rules and requirements that will preserve UNE access and pricing pending *USTA II* remand proceedings. These interim rules are necessary in order to preserve ongoing business relationships between CLECs and their customers on a temporary basis while the Commission considers new rules and to provide for an orderly transition to whatever new UNE rules the Commission ultimately adopts. We and others have previously written to the Commission pointing out that BOC commitments are inadequate in a number of respects.¹

It is our understanding that the Commission is considering a framework that would automatically increase pricing for UNEs if the FCC has not established new UNE rules or acted on the remand by a date certain. Although we support interim stabilization for all UNEs, including dark fiber and DS-3 loops and transport, it would be particularly harmful and unnecessary to establish such price increases for DS-1 loop UNEs and DS-1 EELs. DS-1 loop and DS-1 EEL UNEs are essential for competition in the small and medium-sized business market. We support the recent proposal by CompTel that the Commission preserve unbundled access at TELRIC prices to DS-1 loops, transport, and combinations pending remand proceedings.² CompTel reports, based on a study by Microeconomic Consulting & Research Associates, Inc., that special access pricing would on average approximately double CLEC costs. A price increase of this magnitude for DS-1 loop and DS-1 EEL UNEs would more than impair the ability of CLECs to compete for small and medium sized business customers. While this fact alone should preclude any requirement for a price increase to special access pricing pending completion of remand proceedings, this would be particularly inappropriate given that the

¹ Letter from Allegiance Telecom, Inc., Cbeyond Communications, LLC, El Paso Networks, L.P, Focal Communications Corp., Integra Telecom, Inc., Lightship Telecom, LLC, Mpower Communications Corp., TDS Metrocom, LLC., and XO Communications, Inc. to Hon. Michael K. Powell, CC Docket No. 01-338, June 16, 2004.

² Letter from H. Russell Frisby, Jr., Comptel to Honorable Michael K. Powell, CC Docket No. 01-338, July 9, 2004.

Commission has failed to address that special access pricing is far above economic costs.³ BOC average rates-of-return have increased from 8% in 1996 to more than 40% in 2003 and in some cases to 70%.⁴ On the present record, there is no basis for the Commission to assume that special access pricing is reasonable or acceptable for UNE or other network element pricing.

We are also concerned that it would be arbitrary and capricious for the Commission to now select a price for network elements other than TELRIC that would be applied at some future date assuming the remand proceeding has not been completed. There is no record supporting any such apparently arbitrarily selected price. These price increases could be particularly harmful as they might remain in effect for an extended period until superseded by rules adopted on remand.

Moreover, it would be unnecessary for the Commission to depart from TELRIC pricing, even on a temporary basis, for DS-1 loop and DS-1 EEL UNEs because the Commission has already found that CLECs seeking to serve customers at this capacity level “face extremely high economic and operational barriers in deploying DS-1 loops to serve these customers.”⁵ The Commission found that it is “economically infeasible for competitive LECs to self-deploy DS-1 loops, which require the same significant sunk and fixed costs of higher capacity loops.”⁶ The Commission stated that the “DS-1 loop unbundling rules we adopt today recognizes the dependency that smaller business customers and carriers have on DS-1 capacity loops and accommodates those needs consistent with our impairment framework.”⁷ In fact, the evidence of impairment at the DS-1 capacity level was so overwhelming that the Commission chose “not to delegate to the states the authority to consider DS-1 loop impairment on a location-specific basis based on a self-provisioning trigger.”⁸ It would therefore make little sense to depart from TELRIC, even on a temporary basis, when the record definitively establishes impairment for these UNEs. In connection with interim requirements the Commission should readopt its findings of impairment for DS-1 loops, transport, and combinations. The record established in the *Triennial Review Order* remains fresh on this and other issues and the Commission may rely on it in establishing temporary, interim requirements that provide for continued unbundled access to these facilities at TELRIC prices pending remand proceedings.

Nor is there any legal necessity to impose rate increases or flash cuts to special access pricing for DS1 level UNEs assuming remand proceedings remain pending at that time. The attached memorandum shows that the Commission has ample authority to impose interim

³ *Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Public Notice*, RM No. 10593, DA 02-2913, October 29, 2002.

⁴ T-Mobile USA, Inc., *Ex Parte*, CC Docket No. 01-338, July 8, 2004.

⁵ *Triennial Review Order*, para. 325.

⁶ *Id.*

⁷ *Id.*, n. 961.

⁸ *Id.* para. 327.

requirements for a reasonable period pending remand proceedings without now selecting some arbitrary self-imposed deadline for completion. In particular, *USTA II* specifically limited its *vacatur* to the rules governing unbundled access to switching and dedicated transport. It did not vacate loop rules or the Commission's impairment finding supporting loop unbundling. Absent an explicit *vacatur* of loop rules, the Commission may continue unbundled access to DS-1 loops, transport, and combinations simply because those rules continue in effect even if the Commission chooses on remand to reexamine loop rules.

We are also concerned that interim requirements that envision rate increases by a date certain would create the wrong incentives for incumbents. Incumbents may prefer a delayed completion of remand proceedings and consequent increases to CLECs if it appears, as is likely, that the Commission will reaffirm its findings of impairment for DS-1 loops, transport, and combinations. Instead of building-in potentially perverse incentives, the Commission should impose stand-still requirements for a fixed period of time and take the necessary steps to complete the proceeding on a timely basis. It is not necessary or appropriate to impose rate increases in advance, or at all, if the Commission does not complete remand proceedings within the stand still period.

In the business experience of the undersigned companies, and as the Commission found, the small and medium-sized business market has been "typically underserved" by incumbents.⁹ CLECs have been first to innovate and bring to this market segment affordable and innovative services previously only available to larger companies. VOIP is only the latest example. CLECs have used DS-1 capacity UNE loops and transport to be the first to bring affordable packages of IP-enabled services to small and medium-sized businesses. Price increases for these UNEs would harm the further development of IP-enabled services. For all these reasons, the Commission should move forward to expeditiously complete remand proceedings while preserving current pricing pending remand at a minimum for DS-1 loop and DS-1 EEL UNEs.

Sincerely,

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⁹ *Triennial Review Order*, n. 961.

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cc: Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Jonathan S. Adelstein
Honorable Kevin J. Martin
Honorable Mike Gallagher, NTIA

MEMORANDUM

Issue: Is there any legal necessity that the Commission establish as part of interim UNE requirements that ILECs may impose price increases on existing or new UNEs after a pre-selected date assuming the Commission has not acted on remand from *USTA II*?

Answer: No.

As explained below, the Commission has ample authority under several independent statutory provisions to continue for a temporary period ILEC obligations to provide UNEs at TELRIC prices pending remand proceedings. The touchstone for the lawfulness of any such requirements is that they be temporary pending remand proceedings that will implement the guidance provided by the Court. Nothing in the case law or the governing statutes suggests that the Commission must do more by establishing ahead of time a schedule for price increases assuming the Commission has not adopted final rules by a predetermined date. ILECs may argue that it is theoretically possible they could be prejudiced if remand proceedings are unduly delayed (although not if ILECs seek to delay the proceeding to better obtain their preferred outcome). However, any such prejudice can only be determined in the event. The Commission should not assume that it will unduly delay completion of remand proceedings. In fact, it may be arbitrary and capricious for the Commission, in effect, to establish a verdict before the trial by determining now that CLECs should experience price increases if new rules are not adopted by January 1, 2005 or some other date. The legally sufficient approach would be to proceed expeditiously with remand proceedings and defer consideration of any price increases until later in the remand proceeding if necessary.

Section 251. In the *Triennial Review Order*, the Commission determined that the “at a minimum” language of Section 251(d)(2) permits the Commission to consider factors other than impairment in establishing ILEC unbundling obligations.¹⁰ If the Commission’s interpretation is correct, this section provides ample authority for the Commission to order temporary unbundling at TELRIC prices notwithstanding the *vacatur* of transport and switching rules based on the important consideration of avoiding industry disruption. The “at a minimum” language certainly authorizes the Commission to establish temporary unbundling obligations to avoid industry disruption. The Commission may additionally rely in part on the substantial record evidence in the *Triennial Review Proceeding*, which is not stale, showing impairment.

Section 271. With respect to the Bell Companies, the Commission’s authority to require unbundling is even more clear pursuant to section 271. As a condition of maintaining their interLATA authority, sections 271(c)(2)(B)(iii)-(v) require the Bell companies to continue to provide unbundled loops, transport and switching regardless of the Commission’s determinations under section 251.¹¹ Although the Commission determined that TELRIC pricing does not apply to Section 271 unbundling, the Commission has not yet determined what pricing regime should apply under Section 271. Because the Commission has not determined Section 271 pricing, it may choose to apply TELRIC on a temporary basis because that would be the least disruptive approach.

Section 201. Even if the Commission did not have authority to order temporary unbundling at TELRIC prices under Sections 251 and 271 of the Act, it may alternatively or in

¹⁰ *Triennial Review Order*, para. 172.

¹¹ *Triennial Review Order*, ¶¶ 653-655.

addition rely on Section 201.¹² The Commission has on several occasions exercised its authority to adopt interim rules when its permanent rules have been vacated, in order to avoid a disruptive “flash cut” to the absence of rules or to new rules.¹³ Most recently, after *USTA I* vacated the Commission’s line sharing rules, the *Triennial Review Order* reinstated some line sharing unbundling rules for a three-year transition period despite the fact that the Commission determined that CLECs were not impaired under the standards of section 251. The Commission relied on its “broad authority” under section 201 “to minimize disruption to the customers that obtain xDSL service through line shared loops and to provide a reasonable glide path to competitive LECs currently availing themselves of this UNE.”¹⁴ The transition rules required ILECs for the first year to continue to price all existing arrangements at pre-*Triennial Review Order* rates, while new arrangements would be priced at 25% of the UNE loop rate.¹⁵ Despite the fact that the Commission had determined that CLECs were not impaired, it found that CLECs should be able to continue to add new line sharing arrangements during the first year of the transition to “enable requesting carriers, especially data LECs, to continue their day-to-day operations while modifying their business plans and working to preserve access arrangements with incumbent LECs”¹⁶ and that it is “entirely appropriate to fashion a transition period of

¹² The D.C. Circuit has plainly recognized that an agency may readopt a vacated rule without regard to a court’s vacatur if the agency has an independent and lawful basis for doing so. *See Solite Corp. v. EPA*, 952 F.2d 473, 493-494 (D.C. Cir. 1991).

¹³ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9186-87, ¶¶ 77-78 (2001) (*ISP Remand Order*) (in establishing a three-year interim intercarrier compensation regime for ISP-bound traffic, the Commission stated that it would be “prudent to avoid a ‘flash cut’ to a new compensation regime that would upset the legitimate business expectations of carriers and their customers.”)

¹⁴ *Triennial Review Order* at ¶¶ 264-268.

¹⁵ *Triennial Review Order* at ¶¶ 264-265. This rate of 25% of the UNE loop rate was in some cases higher, and some cases lower, than the pre-existing rate for line sharing.

¹⁶ *Triennial Review Order* at fn. 787.

sufficient length to enable competitive LECs to move their customers to alternative arrangements and modify their business practices and operations going forward.”¹⁷

The Commission’s authority and justification to preserve transport UNEs in the wake of *USTA II* is even more clear than it was for line sharing. Line sharing was a UNE that was being phased out after a Commission finding of non-impairment; transport unbundling, by contrast, is likely to be at least substantially restored. Whatever the precise outcome of the new rulemaking, the evidentiary record of the *Triennial Review Order* and the state *Triennial Review Order* implementation proceedings clearly demonstrate that CLECs are impaired without these UNEs in at least many instances.¹⁸ A flash cut to eliminate UNEs only to have them restored in the near future would unduly disrupt both CLECs and their customers, without sufficient public benefit to warrant such disruption.

ILECs did not appeal the *Triennial Review Order*’s new section 201 line sharing unbundling rules. Indeed, it would have been difficult for it to do so, given that the *Triennial Review Order*’s decision on line sharing cited an SBC letter that was written “to underscore that the Commission unquestionably has the authority under section 201(b) of the Act” to adopt SBC’s proposed post-impairment transition plan for unbundled switching.¹⁹ SBC’s letter

¹⁷ *Triennial Review Order* at ¶ 266.

¹⁸ The *Triennial Review* record clearly establishes impairment for at least a majority of transport routes. See *Triennial Review Order* at ¶ 360 (“competitive facilities are not available in a majority of locations”); see also *id.* at ¶ 391 (DS1 transport), ¶ 387 (DS3 transport), and ¶ 384 (dark fiber transport). The Commission observed that “[e]ven some incumbent LECs concede that some impairment exists at the DS1 level according to the impairment tests they propose.” *Triennial Review Order* at fn. 1215. Moreover, in the state *Triennial Review Order* implementation proceedings, the ILECs generally only sought impairment review for a limited number of transport routes, and in some states, none at all. With respect to switching, the *Triennial Review Order* record established that operational and economic barriers (e.g., hot cuts) created impairment in at least many instances. *Triennial Review Order* at ¶¶ 475-478. The Commission also was “persuaded that other economic factors ... may make entry uneconomic without access to the incumbent’s switch,” and noted that even the studies by some BOCs found that entry would be uneconomic for wire centers of under 5,000 lines. *Triennial Review Order* at ¶ 484.

¹⁹ See Letter from Gary L. Phillips, Counsel for SBC, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-338 at 2 (filed Dec. 19, 2002) (“SBC Dec. 19, 2002 *Ex Parte* Letter”).

recounted numerous instances in which the Commission had lawfully established transitional or interim requirements pursuant to section 201 “to minimize industry disruption when new regulatory policies are put into place.”²⁰ Citing numerous D.C. Circuit and other cases, SBC concluded that “[t]he courts have uniformly upheld the Commission’s authority to establish these transitional or interim regimes.”²¹

Section 4(i). Section 4(i) of the Act authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not consistent with this Act, as may be necessary in the execution of its functions.”

Loops. The Commission may require incumbents to continue to provide UNE loops because *USTA II* did not vacate loop rules or the finding of impairment for loops. *USTA II* stated that it was only vacating the findings of impairment for switching and transport.²² The Court also relied on the availability of high capacity loops in affirming the Commission’s findings concerning access to hybrid fiber-copper loops.²³ Therefore, the Commission may continue to require loop unbundling without resort to interim rules because the loop rules were not vacated.

Bell Atlantic/GTE and SBC/Ameritech Merger Conditions. The FCC approved the mergers of Bell Atlantic and GTE and SBC and Ameritech subject to conditions designed to offset its finding that the mergers would harm competition. Among others, the Commission

²⁰ See SBC Dec. 19, 2002 *Ex Parte* Letter at 2 (citing *ISP Remand Order* (see supra note 14), the decision in the *Local Competition Order* to temporarily require payment of above-cost access charges, the interim EEL rules set forth in the *Supplemental Order Clarification*, and the interim benchmark established in the *CLEC Access Charge Order*).

²¹ See SBC Dec. 19, 2002 *Ex Parte* Letter at 2 (citing *MCI Telecomms. Corp. v. FCC*, 750 F. 2d 135, 140 (D.C. Cir. 1984); *Capital Cities/ABC, Inc. v. FCC*, 29 F. 3d 309, 316 (7th Cir. 1994); *Southwestern Bell Tel. Co. v. FCC*, 153 F. 3d 523, 538-39, 550 (8th Cir. 1998)).

²² 359 F. 3d at 594.

²³ *Id.*

required these companies to continue to provide UNEs in accordance with then existing obligations “until the Commission’s decision in the [*UNE Remand Proceeding*], and any subsequent proceeding, becomes final and non-appealable.”²⁴ Since UNE proceedings are not yet final, these companies are obligated to provide UNEs in accordance with their previous obligations.

ILECs Agree that the Commission May Adopt Interim Requirements. In its recent white paper concerning interim rules, USTA agrees as a general matter that the Commission may adopt interim rules in the wake of a *vacatur* of existing rules. As noted, in 2002, SBC advised the Commission that it may adopt interim or transitional requirements “to minimize industry disruption when new regulatory policies are put into place.”²⁵ This advice should give the Commission considerable support in adopting interim unbundling requirements pending remand proceedings.

²⁴ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14,712 (1999), para. 394. *See also, Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 14,032 (2000), para. 316.

²⁵ *See n. 20, supra.*