

I. OVERVIEW OF PROBLEMS POSED BY THE NEED TO RELY ON LARGELY UNREGULATED ILEC SPECIAL ACCESS END USER CONNECTIONS.

- A. TWTC generally builds its own transport and loop facilities, but there are some loops and even transport facilities that it cannot self-deploy efficiently. Where this is the case, TWTC has relied on ILEC special access transmission facilities.
- B. Where TWTC purchases ILEC special access, there are no viable alternatives to the ILEC transmission facility.
- C. Where the ILECs control such bottleneck facilities, they have the incentive to (1) raise TWTC's costs by increasing the price of special access TWTC purchases and by degrading the quality of the special access TWTC purchases, and (2) engage in price squeezes by selectively lowering the price of retail offerings offered in competition with TWTC.
- D. The only protection against this behavior is effective regulation of ILEC special access offerings and continued availability of unbundled DS1 loops and transport and EELs.

II. THE ILECS HAVE BEEN ACTING ON THEIR INCENTIVES TO EXPLOIT THEIR CONTROL OVER TRANSMISSION FACILITIES TO HARM TWTC'S ABILITY TO COMPETE, ESPECIALLY SINCE THE RELEASE OF THE *USTA II* DECISION OVERTURNING THE *TRIENNIAL REVIEW ORDER*.

- A. Even before *USTA II*, the ILECs aggressively exploited their pricing flexibility authority by locking up large customers pursuant to volume/term agreements that dramatically restrict the scope of the addressable market for competitors like TWTC and that force competitors to continue to rely on special access.
- B. In order to obtain special access at reasonable prices TWTC is being asked to make volume/term commitments that limit TWTC's ability deploy fiber and to transition to other technologies such as Wi Fi and other DSL providers.
- C. The business environment has deteriorated significantly since the release of *USTA II*.

1. The *USTA II* decision has offered the ILECs the prospect that unbundled loops and transport will be far less available than in the past, thus reducing substantially the one meaningful regulatory check on ILEC special access pricing behavior.
2. Since the release of the *USTA II* decision, ILECs have been acting in a manner that is consistent with a diminished incentive to negotiate reasonable terms and conditions for special access.

III. THE COMMISSION'S UNBUNDLING RULES FOR DS1 LOOPS AND TRANSPORT SHOULD REFLECT THE IMPACT THAT THE AVAILABILITY OF THESE UNES HAS ON ILEC SPECIAL ACCESS OFFERINGS AND ON CLECS' INCENTIVE AND ABILITY TO DEPLOY THEIR OWN TRANSMISSION FACILITIES.

- A. The continued availability of DS1 unbundled loops and transport is an essential check on ILEC discrimination in the provision of special access in areas where CLECs cannot self-deploy. At the same time, too much unbundling can undermine facilities-based CLECs' incentive and ability to self-deploy. Thus, a proper balance must be struck in formulating the impairment standard. In establishing its impairment test for transmission facilities, the Commission should consider the following factors that TWTC itself considers as part of its buy/build analysis:
 1. First and foremost, CLECs cannot build loops to buildings where reasonable building access terms and conditions are unavailable;
 2. Access to ILEC conduit must be available within reasonable timeframes and on reasonable and nondiscriminatory terms and conditions;
 3. Access to public rights-of-way must be available on reasonable and non-discriminatory terms and conditions;
 4. TWTC must be reasonably assured that it can generate enough revenue by providing service via its own transmission facility to make construction economic. For fiber construction, this means that a particular customer must commit to a contract that generates enough revenue to make fiber deployment economic.

IV. THE ONLY WAY TO RESTRICT ILECS' ABILITY TO RAISE THEIR RIVALS' COSTS IS TO APPLY APPROPRIATE REGULATION TO ILEC LOOPS AND TRANSPORT.

- A. Reaffirm Title II classification of ILEC transmission inputs in accordance with the Computer Inquiry requirements.
- B. Ensure continued availability of unbundled DS1 loops, transport and EELs.
- C. Adopt comprehensive performance reporting, measurements and standards for special access.
- D. Initiate a rulemaking proceeding in response to the AT&T petition with special emphasis on the need to ensure reasonable prices for DS1 special access services.