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CompTel ASCENT ALLIANCE

October 13, 2004

VIA ELECTRONIC FILING

EX PARTE

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *TRO Remand; CC Docket Nos. 01-338; WC Docket 04-313*

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, CompTel/ASCENT hereby gives notice that on October 12, 2004, Jonathan Lee and the undersigned met with Jeremy Miller, Ian Dillner, Cathy Zima, Carol Simpson, Russell Hanser, Tim Stellzig, Marcus Maher, Gail Cohen, Chris Canter, Chris Killion, Christina Langlois, Tom Navin and Erin Boone to discuss the comments it filed in the above-captioned proceeding relating to the adoption of permanent unbundling rules in the wake of *USTA II*. CompTel/ASCENT left copies of the attached power point presentation with the Commission staff.

Respectfully submitted,

Mary C. Albert
Vice President, Regulatory Policy

cc: Jeremy Miller
Ian Dillner
Cathy Zima
Carol Simpson
Russell Hanser
Tim Stelzig
Chris Killion
Marcus Maher
Gail Cohen
Chris Canter
Christina Langlois
Tom Navin
Erin Boone

TRO Remand Presentation

October 12, 2004

Impairment Standard

- The DC Circuit asked for the FCC to clarify its standard that UNEs be available when entry would otherwise be uneconomic. “Uneconomic by whom?”
- The concept of minimum viable scale, embedded in the FCC’s Guidelines-based standard, is the key to answering this question.

Impairment Standard

- Minimum Viable Scale is the minimum scale of entry at which an efficient entrant could sustain a viable (as distinguished from profitable) presence in the market.
- Thus, if it is unlikely that a competitor could capture enough demand to reach the point of being cash-flow neutral (a proxy for avg. revs=avg. costs) in some reasonable time period, then the requesting carrier is impaired without access to UNEs.

Impairment Standard

- The virtue of using a modified form of MVS as a proxy for efficient entry is that the FCC implicitly conducted this analysis already when it developed the capacity-based presumptions in the TRO impairment tests for high-cap loops and transport.
- The incorporation of the MVS standard would, by recognizing that past investment does not necessarily mean that entry barriers have been eliminated, justify the continuation of the FCC's nationwide impairment presumptions.

Competitor-Specific Impairment

- In analyzing impairment from the standpoint of the services a competitor seeks to offer, the FCC should acknowledge at least 3 classes of competitors, all of which are impaired in their ability to enter markets and expand their businesses without access to critical UNEs:
  - Retail Mass-Market Competitors
  - Retail Enterprise Competitors
  - Wholesale, Exchange Access Competitors

Retail Mass Market Competitors

- Retail Mass Market Competitors Are Impaired Without Access to:
  - Switching
  - Analog and DS0 Loops
  - Line Sharing (High Frequency Portion of Loop)
  - Line Splitting
    - Performance metrics are needed to ensure line splitting is viable
  - High Cap Transport

Retail Enterprise Competitors

- Competitors Serving the Retail Enterprise Market Are Impaired Without Access to:
  - DS1/DS3 Loops, regardless of transmission media
  - DS1/DS3 Transport, regardless of transmission media
  - Dark Fiber accessible at any technically feasible point, between any two points in the ILEC network

Wholesale Exchange Access Competitors

- Development of this market segment is critical to the development of meaningful inter, and intra, modal competition.
- Wholesale competitors are impaired without access to:
  - Dark Fiber
  - DS1/DS3 Loops and Transport

Sources of Impairment-Retail Mass Market Competitors

- Retail Mass Market Competitors:
  - Switching: Hot Cut Issue Is Critical
    - AT&T's $11B asset write-down is dispositive evidence that competitors cannot reach minimum viable scale in mass markets without access to switching
  - Analog Loops and Hi-Cap Transport
    - Necessary to facilitate transition to competitor – owned switches where scale allows9

Sources of Impairment-Retail Mass Market Competitors

- Line Sharing and Line Splitting:
  - Mass market broadband competition is not sustainable if carriers must enter both voice and broadband markets at once using own facilities
  - Because of "incentives" to ILECs, broadband competitors can only enter the market in a very facilities-intensive way
  - It is far from clear whether any carrier will be able to provide mass-market voice services using its own facilities

Sources of Impairment-Retail Enterprise Market Competitors

- Retail Enterprise Market:
  - DS1/DS3 Loops/Transport: All those identified by FCC previously. See, CompTel/NuVox DS1 Study.
    - Transport alternatives not widely available
    - ILEC conduct barriers: no standards for performing circuit grooms to competitors' own fiber, or competitive wholesale providers
  - Dark Fiber: Even more fixed and sunk costs are required to use ILEC dark fiber, and competitive dark fiber is even less widely available than lit transport services.

Sources of Impairment-Wholesale Competitors

- Wholesale Carriers:
  - DS1/DS3 Loops and Transport
  - Dark Fiber
    - All have the same high fixed and sunk costs noted previously by the Commission
  - Conduct Barriers to Entry:
    - Anticompetitive Terms of Special Access Contracts Are a Major Impediment to Competitive Entry and Expansion

Sources of Impairment-Wholesale Competitors

- The Commission cannot eliminate access to any transmission UNEs without eliminating ILEC-imposed barriers to wholesale competition. CompTel suggests the FCC eliminate:
  - Termination, or “shortfall,” liabilities that extend beyond the initial term of the volume tariff discount;
  - Volume commitments based on significant percentages of prior purchase requirements;
  - Discounts—especially “first dollar” discounts—predicated on moving circuits off competitive carrier networks;
  - Any restrictions which discourage special access purchasers from using their own fiber facilities, or the facilities of a third party.