

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	WC Docket No. 04-313
Unbundled Access to Network Elements)	
)	CC Docket No. 01-338
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	
Carriers)	

**REPLY COMMENTS OF
MOMENTUM TELECOM, INC.**

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I. INTRODUCTION AND SUMMARY

Momentum Telecom, Inc. (“Momentum”), through counsel, hereby submits its reply comments in the above-captioned proceeding. Momentum is a Birmingham, Alabama-based competitive local exchange carrier (“CLEC”) that provides local telephone, long distance and data service to over 150,000 primarily residential consumers in BellSouth’s nine state region: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. Momentum filed comments on October 4 in the initial round of this proceeding.

The record of this proceeding clearly demonstrates that competing carriers are impaired in the market for residential conventional voice services (“POTS”) service without access to unbundled local switching (“ULS”), along with unbundled loops and common transport in the combination known as the Unbundled Network Element Platform (“UNE Platform” or “UNE-P”). If this Commission reaches a generic finding of non-impairment in the mass market, competition in the residential market will be extinguished overnight. Momentum, and the other carriers commenting in this proceeding that focus exclusively upon the local residential POTS market have demonstrated that the Commission must undertake an impairment analysis that

examines the residential market separate from the business market, and make a nationwide finding of impairment in that market.

As this record shows, there are simply no economic or operational substitutes for incumbent local switching in the local POTS residential market, and the Bells' (and the Chairman's) mantra that "intermodal" competition from Voice over Internet Protocol ("VoIP") wireless and cable are market substitutes for POTS service is intellectually dishonest, as well as contrary to the plain facts and market experience of Momentum. Indeed, while the Bell Operating Companies ("BOCs") spill a great deal of ink repeating tired arguments about how wireless, cable and VoIP services are intermodal competitors to POTS service, not even they go so far as to affirmatively assert that competition in the residential market is sustainable without access to UNE-P.

The BOCs are salivating at the prospect of being on the cusp of achieving their goal of wiping out the residential UNE-P CLEC interlopers, with the aid of this Commission. Now, having almost achieved their objectives there, the BOCs are setting their sites on the "VoIP free-riders" whose virtues they are so loudly extolling here.¹ As SBC Chairman Ed Whitacre told investors last week: "I've always said and I still say consolidation would be helpful"² Well, the "consolidation" of which Mr. Whitacre is so desirous will no doubt happen on an expedited basis if UNE-P availability is not preserved for residential local service.

¹ See e.g., *Southwestern Bell Telephone, LP et al. v. VarTec Telecom, Inc., PointOne Telecommunications, Inc. Unipoint Holdings, Inc., Transcom Enhanced Services LLC, Transcom Holdings, LLC and John Does 1-10*, U.S. District Court, E.D. Missouri (filed Sept. 23, 2004) in which SBC seeks to recover access charges it claims it is owed on VoIP calls.

² "AT&T, MCI May Be Cheap, But No One Buying," Reuters (Oct. 16, 2004).

Indeed, this Commission has had the dubious distinction of presiding over, and in fact, facilitating, the rapid decline of a once robust industry. As Reuters noted, “the Baby Bells and some private equity firms eyeing the telecom industry may be wise to wait for AT&T and other long-distance carriers to cut jobs, pare debt and shake free of the low-margin residential phone business.”³ The record of this proceeding clearly shows that carriers competing in the residential market face economic and operational impairment that warrants a finding of impairment in the residential market. UNE-P based entry is the only method of entry that can address that impairment.

If the Commission is willing to evaluate the facts here objectively, it will find that providers of residential POTS service are impaired without access to UNE-P. The Commission should also reaffirm in this proceeding that even if an element is no longer required to be provided pursuant to Section 251, Section 271 requires that the elements set forth in that section must be provided on terms and at rates that are just, reasonable and nondiscriminatory in accordance with sections 201 and 202 of the Act, and that those rates can be set by state commissions.

³ *Id.*

II. THE RECORD OF THIS PROCEEDING DEMONSTRATES THAT WITHOUT ACCESS TO UNE-P, COMPETITORS IN THE LOCAL RESIDENTIAL TELECOMMUNICATIONS MARKET ARE IMPAIRED.

A. The Commission Should Reject BOC Calls To Revise The Impairment Test

The record overwhelmingly indicates that the Commission should reaffirm the definition of impairment adopted in the TRO.⁴ Application of that definition to this record will lead to a nationwide finding of impairment for ULS in the local residential POTS market. The *USTA II* court upheld the Commission's impairment definition, but simply directed the Commission to apply it differently. Specifically, with respect to the part of the standard that directs the FCC to inquire whether economic and operational barriers "make entry into a market uneconomic" the court told the FCC to answer the question: "Uneconomic by whom?"⁵ Predictably, however, after having clearly failed to make the showings of non-impairment in every state where they put on a case, the ILECs insist that the D.C. Circuit's decision in *USTA II* requires that the Commission undertake a wholesale revision of its impairment standard in this proceeding. They are flatly wrong.

BellSouth argues that the Commission should formulate a standard that turns upon the question of "whether competition is possible without access"⁶ to UNEs by an "efficient CLEC deploying an efficient network architecture using the most current technology, while pursuing all potential revenue opportunities and taking all steps necessary to satisfy customers

⁴ See e.g., Comments of ACN, 12; Comments of ALTS, 91; Comments of ATX and BlueVista, 8; Comments of Dialog Telecommunications, Inc., 7-8; Comments of Digital Telecommunications, Inc., 3; Comments of the PACE Coalition, Broadview Networks, Grande Communications, and Talk America, Inc., 59-60; Comments of MCI, 23; Comments of McLeod USA Telecommunications Services, Inc., n3-4.

⁵ *USTA II*, 359 F.3d, 572.

⁶ Comments of BellSouth, 10.

and reduce churn.”⁷ Sprint proposes a standard that asks if a “reasonably efficient CLEC, based on the technology available at the time of the analysis” would be impaired.⁸ The Bells’ assertions that *USTA II* requires the Commission to undertake a wholesale re-working its impairment standard is incorrect. The standard--whether lack of access to a network element would “pose an entry barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic”--should be reaffirmed.

The parties filing comments in this proceeding agree almost unanimously with Momentum, that no such revision to the impairment standard is necessary. As numerous parties noted, the D.C. Circuit did not reject the Commission’s impairment standard itself, but rather the Commission’s *implementation* of that standard.⁹ It is clear to anyone reading the opinion that the court left in place the Commission’s impairment test, and the Commission should reaffirm it in this proceeding.

B. The Commission Must Conduct an Impairment Analysis for the Residential Market that Is Separate from the Business Market

The record clearly shows that the Commission must conduct a separate impairment analysis for the local residential POTS market and the business telecommunications market.¹⁰ As Momentum noted in its initial comments, the industry has always treated residential and business customers separately from a product, marketing, and pricing

⁷ *Id.* 12-13, 10.

⁸ Comments of Sprint, 14.

⁹ *See e.g.*, Comments of CAN, 12; Comments of ALTS, 91; Comments of ATX and BlueVista, 8; Comments of Dialog Telecommunications, Inc., 7-8; Comments of Digital Telecommunications, Inc., 3; Comments of the PACE Coalition, Broadview Networks, Grande Communications, and Talk America, Inc., 59-60; Comments of McLeod USA Telecommunications Services, Inc., n3-4.

¹⁰ *See e.g.*, Comments of CAN, 14; Comments of Utah Committee of Consumer Services, 10-11.

standpoint,¹¹ and the operational and economic impairments identified by the Commission in the first TRO proceeding continue to plague carriers seeking to serve the single line residential market. Both the record in this proceeding, and the records provided by state commissions herein substantiates this fact, and demands that a separate impairment analysis of the residential market be undertaken by the Commission. Momentum agrees with the New Jersey Ratepayer Advocate, who said that the Commission must examine the traditional POTS service market as the relevant market for conducting the impairment analysis.¹²

As the Utah Committee of Consumer Services observed, “evidence that a CLEC serves the small business market is not sufficient to show that the CLEC also serves, or is even likely to serve, the residential market” and the Commission should “separately examine evidence regarding residential and small business customers” because the characteristics and the economics of the small business and residential markets are starkly different.¹³ Nothing forecloses the Commission from evaluating the residential market distinctly from business market, and indeed, such market segmentation for impairment analysis is compelled by the industries’ separate treatment of residential and business subscribers.

The Commission should reject the BOCs’ demands that the “mass market” be analyzed with the blunt instrument that is a single “mass market impairment test.” The BOCs wrong-headedly insist that the “extensive deployment of competitive switches and the wide availability of competitive alternatives”¹⁴ which serve enterprise customers warrants a finding that all CLECs, including those like Momentum, focused solely on the local residential POTS

¹¹ Comments of Momentum, 4.

¹² Comments of New Jersey RPA, 18.

¹³ Comments of Utah Committee of Consumer Services, 10-11.

¹⁴ Comments of BellSouth, 10.

market, are not impaired without access to unbundled local circuit switching. BellSouth's switch deployment analysis addresses only the enterprise market, and neither BellSouth, nor any of its ILEC brethren assert that impairment does not exist in the residential market, nor could they support that assertion with evidence if they had in fact made it.¹⁵

BellSouth says that it counts "906 CLEC switches and/or switch POIs in the BellSouth region" and argues that "taking into account the pervasive deployment of switches and switching POIs, especially in market where the switch owners have also purchased UNE-P, there is simply no reason to allow CLECs continued access to unbundled local switching from BellSouth."¹⁶ But even BellSouth admits that deploying a switch in a given area does not allow a carrier to serve a market. BellSouth's own witness acknowledges that "in many cases, CLECs have deployed their own switching capabilities in the same markets in which they are also purchasing UNE-Ps from BellSouth."¹⁷ Indeed, BellSouth agrees that even where a carrier has determined that it is economically and operationally feasible to deploy a switch, UNE-P is still required to make market entry possible in the small and medium business market, to say nothing of the residential market.

Even ALTS, which represents facilities-based carriers focused on the enterprise market, and not residential POTS providers, argues that ULS must be made available in order for market entry to be economic in the small-medium sized business market.¹⁸ Similarly, GCI, a facilities-based carrier, stated that "UNE-P is necessary" in certain instances when ILECs block access to voice grade loops, and noted that "in Fairbanks, GCI serves 26% of its customers via

¹⁵ Comments of BellSouth, 25.

¹⁶ *Id.*, Attachment 1, Affidavit of Pamela A. Tipton, 15-16.

¹⁷ *Id.*, 16.

¹⁸ Comments of ALTS, 91.

UNE-P” and in “Juneau, 47% of GCI’s customers are served via UNE-P.”¹⁹ These facts conclusively prove that access to ULS is necessary in order for all carriers, even those carriers serving the business market with their own switches. For carriers like Momentum who serve residential POTS customers the need for ULS is not simply a matter of operational efficiency, but is absolutely critical to serve residential customers at all. The record in this proceeding clearly demonstrates that under any reasonable application of the Commission’s unbundling guidelines to the factual circumstances as they exist today, CLECs serving residential customers are materially impaired as an economic and operational matter without access to UNE-P.

C. Residential POTS Competition Will Be Dead Without UNE-P

The record of this proceeding overwhelmingly demonstrates that without access to UNE-P, competition for residential POTS customers will be dead overnight. As the Small, Independent Competitive Local Exchange Carriers, a group of 16 small CLECs reliant upon UNE-P put it, “requiring us to transition our businesses away from the ILEC facilities within six months, a year, or even four years is naïve,” and will undermine the very competition that was the objective of the Act.²⁰ UNE-P is the only demonstrated method of achieving ubiquitous local competition in the residential market, as demonstrated by both residentially focused carriers and state commissions alike, and all conclude that UNE-P is the only viable delivery mechanism for competitors to offer ubiquitous local telecommunications service to residential customers. Without UNE-P, CLECs focused on single line residential consumers will simply go out of business.

¹⁹ Comments of GCI, 4, n.8.

²⁰ Comments of the Small, Independent Competitive Local Exchange Carriers, 2.

The Utah Division of Public Utilities agreed with Momentum when it said that “elimination of UNE-P, especially in the residential market” will likely “reverse the progress of competition and provide the incumbent with the vast majority of residential access lines.”²¹ The Minnesota Commission also agreed, noting that “eliminating UNE access without a fair determination of whether impairment exists will be a major setback for competition in the State of Minnesota. Further, without a reasonable impairment analysis ... local exchange competition will have been just a promising experiment that was cut short”²² As the National ALEC Association noted, “there are simply no alternatives to the ILEC for switching in residential markets.”²³ Obviously, UNE-P availability is a condition precedent to local residential POTS competition.

Residential providers, state commissions and the U.S. Small Business Association have submitted an overwhelming amount of evidence in this proceeding that unequivocally demonstrates that without accesses to UNE-P, CLECs will be foreclosed from providing local telecommunications services to millions of residential consumers, who will once again be at the mercy of the monopolists, while at the same time wiping out hundreds of carriers. As Dialog Communications noted, “a finding of no impairment of switching for residential customers will ensure that consumers in smaller communities will not benefit from the choices, savings and innovation like customers in larger markets. Premature elimination of UNE-P will eliminate any competitive alternative” for residential consumers.²⁴

²¹ Comments of Utah Division of Public Utilities, 4.
²² Comments of the Minnesota Public Utilities Commission, 4.
²³ Comments of National ALEC Association, 5.
²⁴ Comments of Dialog Telecommunications, Inc., 4.

The Alabama Public Service Commission, Momentum's home-state Commission said it well when it observed that CLECs in Alabama "do not have an alternative provider for local switching other than BellSouth."²⁵ The "wholesale switching market" touted by the BOCs simply does not exist because "most of the competitors which own switches are not willing or able to accommodate other competitive carriers because the owner of the switch has already committed the capacity of that switch to current customers or to the growth of the system"²⁶ and as a result, CLECs using UNE-P "have no alternative if UNE-P is not available or priced too high for them to cover their costs and make a profit."²⁷ That is precisely the situation in which Momentum will find itself if the Commission kills UNE-P availability.

As the New Jersey Ratepayer Advocate observed: "The only real prospect for mass market residential and small business customers having meaningful choice of service providers envisioned by the Act is through maintaining of UNE-P under Section 251 and 252 of the Act."²⁸ The Michigan Public Service Commission conducted a fact-intensive mass market impairment proceeding for "well over a year," which concluded that mass market switching must be maintained as a UNE throughout the state.²⁹ Similarly, the Pennsylvania Office of Consumer Advocate noted that: "The record in the Pennsylvania TRO proceeding contains evidence regarding the impact that results of the current FCC proceeding may have on residential customers in particular Over 315,600 residential lines ... in Verizon's territory [are] served using UNE-P. UNE-P has become a mainstay of residential competition in Pennsylvania. Termination of UNE-P would further strengthen Verizon's hold on the residential market in

²⁵ Comments of Alabama Commission, 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Comments of New Jersey RPA, 15.

²⁹ Comments of Michigan Public Service Commission, 4.

Pennsylvania.”³⁰ The Michigan proceeding also found that based upon the record, SBC “failed to demonstrate that the [mass market switching] trigger has been satisfied in any geographic area”³¹ in Michigan. The ALJ further concluded that “mass market switching, high capacity loops, and dedicated transport should continue to be provided as UNEs....” in the state of Michigan.³² The granular examinations of the evidence conducted by state commissions reveal that UNE-P must continue to be made available to serve residential customers.

At bottom, the record makes it clear that to the extent that UNE-P is not available, residential competition will dry up over night. The BOCs fail to offer any evidence in support of their claims that residential competitors are not impaired without UNE-P. There simply is no question that CLECs seeking to provide local telecommunications services to residential consumers are impaired without access to ULS and UNE-P.

III. “INTERMODAL” COMPETITION FROM VOIP, WIRELESS AND CABLE DO NOT PROVIDE ALTERNATIVES FOR SINGLE LINE RESIDENTIAL CUSTOMERS SERVED BY UNE-P.

As sure as one could predict that day will follow night, it could have been predicted that the BOCs would insist that so called “intermodal competition” obviates the need for the Commission to maintain the availability of ULS. Once again, the Bells trot out another “UNE Fact Report” which argues in its entirety that alleged “intermodal” competition should be the touchstone of the new impairment analysis it proposes the Commission adopt. Never once, however, does the UNE Fact Report assert that there is a competitive supply of wholesale

³⁰ Comments of Pennsylvania Office of Consumer Advocate, 3.

³¹ Proposal for Decision, Michigan PSC Case No. U-13796 at 24 (May 10, 2004).

³² Comments of Michigan Public Service Commission, 5.

switching capability available to CLECs serving the residential POTS market.³³ The UNE Fact Report argues that cable, VoIP and wireless services must be considered in the same market as narrowband wireline networks for purposes of the impairment analysis, and asks the Commission to overlook the fact that single-line POTS service requires the availability of wholesale circuit switching.³⁴ Indeed, the BOCs' UNE-Fact Report consists of 182 pages of meaningless statistics about the wonders of intermodal competition, and the decreasing importance of UNE-P. BellSouth adds its voice to the refrain, arguing that "residential and small business customers have ready access to intermodal alternatives that are equally available to medium and large businesses."³⁵

While the *USTA II* court requires the FCC to evaluate intermodal alternatives when conducting the impairment analysis, the court also specifically held that the FCC need not address how it evaluates such alternatives, or the weight such alternatives should be assigned in this proceeding. The court merely stated that "we reaffirm *USTA I*'s holding that the Commission cannot ignore intermodal alternatives."³⁶ Accordingly, the Commission should again conclude that intermodal alternatives be given little weight, and reject the BOCs' calls to rely upon VoIP, cable or wireless services as substitutes for analog residential POTS service.

The Commission and the BOCs cannot gloss over the fact that so-called intermodal offerings are not subject to state commission regulation or common carrier regulation under Title II of the Act, and as a result, leave the most unsophisticated consumers who have not

³³ See UNE Fact report, I-3 ("Competing providers have deployed an average of nearly 20 networks in each of the to 50 MSAs and have collocated fiber in at least 55 percent of the wire centers that account for 80 percent of BOC special access revenues.")

³⁴ UNE-Fact Report, I-3.

³⁵ Comments of BellSouth, 20.

³⁶ *USTA II*, 573-574.

adopted these nascent technologies in a consumer protection no-mans-land. As Momentum demonstrated in its initial comments, VoIP, wireless and cable are not substitutes residential POTS service, and it would make little sense to eliminate unbundled local switching (and thereby UNE-P) based upon theoretical competition from these sources.

It simply could not be more clear that the intermodal competitors upon which the BOCs ask the Commission to rely in concluding that there is no impairment in the mass market are simply not substitutes for single line POTS service.³⁷ Cable telephony, VoIP and other modes of competition are simply not substitutes for UNE-P services provided using ULS, no matter how loudly the “UNE Fact Report” insists that they are. A customer must purchase a broadband line in order to avail itself of any VoIP service offering. Indeed, the cost of either a broadband line, or a basic cable subscription, for that matter, well exceeds the cost of a standard single line POTS line. Therefore, cable and/or VoIP are not substitutes for UNE-P based offerings.³⁸

Moreover, as discussed above, now that the BOCs are on the cusp of successfully eradicating the UNE-P threat, they have moved the attack to VoIP providers, and are targeting such carriers with insidious and baseless lawsuits for “access charges” for calls made over IP. The clearest demonstration of this fact is the response by the BOCs to competition from the intermodal technologies.

The BOCs choose to ignore the evidence that intermodal technologies serve different markets from POTS. For example, although wireless services encroach on portions of the POTS market, a cell phone is no substitute for a wired phone. Indeed, the vast majority of

³⁷ Comments of MCI, 86-87.

³⁸ *Id.*, 87-88.

elderly consumers rely exclusively on POTS service, and do not view wireless service as a viable substitute, given the poor quality of service, difficulty of deciphering complex service contracts, and other issues.³⁹ Accordingly, while the Commission is required to consider intermodal alternatives, it is clear that they should be given little weight in the impairment analysis of the residential POTS market.

IV. REGARDLESS OF THE OUTCOME OF THE IMPAIRMENT ANALYSIS, SECTION 271 IMPOSES AN INDEPENDENT UNBUNDLING OBLIGATION ON THE BOCS WHICH CANNOT BE “PREEMPTED,” NOR MAY THE COMMISSION PREEMPT STATE AUTHORITY OVER PRICING 271 ELEMENTS

Regardless of what impairment findings this Commission makes, Section 271 creates an “independent and ongoing obligation for BOCs to provide access to the competitive checklist elements, loops, transport and switching are ‘network elements’ that must be unbundled, even if the Commission were to make a finding of ‘no impairment’ and those elements were no longer required to be made available under Section 251(c)(3) of the Act.”⁴⁰ No matter how eager certain members of the Commission might be to preempt the state commissions, or forbear from enforcing Section 271 unbundling requirements, the Commission is simply not empowered to do so.⁴¹ The Telecommunications Act preserves state access regulations and commands that the Commission shall not preclude the enforcement thereof. Furthermore, any attempt to defeat state commission authority under Section 252 is a threat to

³⁹ “In Pitch To Seniors, Cell Phone Static,” CNET News (http://news.com.com/2102-1037_3-5406084.html?tag=st.util.print) (Oct. 11, 2004).

⁴⁰ TRO, ¶¶ 654-657.

⁴¹ Comments of Arizona Corp. Comm., 6.

telecom regulation, and has been recognized as such by the Commission.⁴² Section 251 and 271 elements must be provided on terms and at rates that are just, reasonable and nondiscriminatory in accordance with sections 201 and 202 of the Act, and those rates can be set by state commissions.

As the state commissions and numerous other parties reminded the Commission in the initial round of these comments, BOCs must provide the Section 271 network elements in order to gain in region interLATA authority, and once the Commission grants such authority, a BOC is obligated to provide continuing access to these network elements. The BOCs' obligations under Section 271 are wholly separate and apart from any unbundling obligation under Section 251 of the Act, and Section 271(d)(4) of the Act clearly precludes the Commission for limiting or extending the terms of the competitive checklist, either by forbearance or otherwise.⁴³

Even if a particular element is no longer subject to Section 251 unbundling obligations and Section 251 TELRIC pricing, state commissions retain plenary jurisdiction over the pricing of such elements. A finding of non-impairment, and a change in the pricing standard does not alter the price dispute resolution process, or the state-federal division of responsibility for pricing in the 1996 Act or otherwise divest state commissions of their Section 252 authority. State commissions have authority to review, approve, arbitrate, interpret and enforce the price term for both Section 251 and Section 271 unbundling, and are perfectly capable of applying pricing methodologies.

⁴² See e.g., *In Re: Qwest Corp., Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, March 12, 2004 (“*Qwest NAL*”) (largest proposed forfeiture in FCC history (\$9 million) for Qwest’s refusal to file interconnection agreements for state review and approval).

⁴³ See e.g., Comments of SAFE-T, 5.

V. CONCLUSION

The record of this proceeding clearly demonstrates that the Commission should re-affirm that competitors are impaired without access to ULS and UNE-P in the residential POTS market.

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