November 19, 2004

VIA ELECTRONIC COMMENT FILING SYSTEM

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Filing of NTS Communications, Inc.
WC Docket No. 04-313; CC Docket No. 01-338

Dear Ms. Dortch:

On behalf of NTS Communications, Inc. ("NTS"), this letter responds to SBC Communications Inc.'s ("SBC") November 5, 2004 *ex parte* filing in the above-referenced dockets in which SBC asserts, among other things, that UNE access to ILEC high-capacity loops and interoffice transport is unnecessary because CLECs are using special access to compete successfully in the enterprise market,[1] and that access to such UNEs are not impaired because CLECs have shown that they are capable of deploying their own fiber in wire centers with at least 5,000 business lines.[2] SBC's statements in its letter distort facts to skew statistics in its favor. Access to UNE high-capacity loops and interoffice transport is essential for CLECs to compete in the local exchange market, and the use of special access circuits by CLECs is not an option for the provision of local exchange service to enterprise customers.

SBC would have the Commission believe that because "more than three-quarters" of the DS1 loops and 97% of the DS3 loops that it sells to CLECs are sold as special access, this conclusively demonstrates that "efficient competitors are not impaired . . . from serving the enterprise market without UNE access to ILEC high-capacity facilities."[3] SBC confuses NTS's use of special access to provide interexchange service with its dependence upon UNEs to provide local exchange service. SBC's conclusion that CLECs can successfully compete in the enterprise market without UNE access to such loops is flawed because high-capacity loops ordered as special access services to provide interexchange service cannot be used by CLECs to provide local exchange service. As the FCC is aware, "special access service employs dedicated,

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[1] *Ex Parte* Letter of Gary Phillips, SBC Telecommunications, Inc., to Marlene H. Dortch, FCC, p.2 (Nov. 5, 2004) ("*SBC Letter*").

[2] *Id.* at 6.

[3] *Id.* at 1-2.

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high-capacity facilities that run directly between the end user, usually a large business customer, and the IXC's point-of-presence."[4]

The use of high-capacity special access lines by CLECs to provide interexchange service has no bearing on the impairment analysis regarding access to DS1 and DS3 loops by CLECs to provide local exchange service. SBC improperly lumps into the same group two completely different services that are used for separate and distinct purposes. If anything, SBC's information shows that there is a great need for UNE access to DS1 and DS3 loops. The low percentage of those facilities sold to carriers for the provision of local exchange services indicates that CLECs have not been successful at competing with SBC for local exchange enterprise customers.

SBC claims that there is "abundant evidence of CLEC competition in the enterprise market . . . ."[5] However, NTS's experience is in sharp contrast to that claim. In Texas, NTS is constrained to ordering high-capacity loops from SBC because, by and large, there are no other carriers with last-mile facilities from whom NTS can order high capacity loops to connect to end users. In order to provide service to its enterprise customers, NTS orders special access facilities for interexchange services via SBC's special access tariffs, and UNE circuits for local exchange service through SBC's "T2A" interconnection agreement.

The T2A interconnection agreement prohibits NTS from ordering UNE DS3 circuits to provide service to end users at all, whether such circuits are for interexchange or local exchange services. In addition, dark fiber is only available under the T2A to provide transport and is not available at all to CLECs or IXCs under special access. Therefore, unless made available as UNEs, CLEC will be unable to provide these high capacity facilities to end users. High capacity facilities are vital for the provision of local exchange service to enterprise customers as they cannot be adequately served using single line, or DS0, circuits. The Commission must require SBC to make DS1 and DS3 loops available to CLECs as UNEs in Texas because, as NTS's experience shows, those facilities are not generally available to NTS in Texas from carriers other than SBC to connect to enterprise customers.

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[4] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9593 n.36 (citing *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers, et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 8 (1999)).

[5] *SBC Letter* at 2.

SBC further states that the appropriate inquiry regarding whether access to high-capacity transport is impaired is "not whether particular routes are *already* fully competitive . . . but rather whether 'competition is possible' without UNEs in a particular market."[6] SBC cites the D.C. Circuit's decision in *USTA II* as standing for the proposition that "the Commission must consider the presence of 'competition on one route' when it 'assess[es]' impairment on other routes."[7] SBC further states that where CLECs have shown that they are capable of deploying their own fiber, which SBC contends that CLECs have done in wire centers with at least 5,000 business lines, competition is not impaired without UNE access. SBC's position is extreme and not supported by *USTA II*.

In vacating the Commission's *Triennial Review Order*, the D.C. Circuit criticized the FCC for failing to explain why competition on one route is insufficient to establish that competition is possible on a similar route.[8] The Court did not, however, hold that the availability of competition on a single route is dispositive of the question of whether competition is possible in the entire market containing that route. Taken to its logical conclusion, SBC's position would require the Commission to rule that because a solitary route in a given market is competitive, competition is therefore "possible" throughout the entire market. Therefore, no UNEs would be required to be made available in that market, regardless of the realities of obtaining access to high-capacity loops anywhere else in the market.

Moreover, the deployment of fiber in a wire center does not demonstrate that competition is not impaired without UNE access to ILEC transport originating in that wire center. It is merely an indication that CLECs are attempting to compete in that market. The adoption of a policy like that promoted by SBC will have the effect of snuffing out competition just when CLECs are beginning to make inroads in the ILEC's territory, and solidify the incumbent's position as the monopoly provider in that market.

The lack of competition regarding high-capacity facilities in Texas also highlights the need to require ILECs to unbundle high-capacity network elements and dark fiber that would otherwise only be available to the incumbent. CLECs cannot effectively compete with ILECs if those facilities are available only to serve an ILEC enterprise customer, but not to serve a CLEC enterprise customer. The Commission should require ILECs to offer DS1 and DS3 loops, high-capacity interoffice transport, and dark fiber as UNEs in Texas because NTS's provision of local exchange services would be substantially impaired without access to those network elements. CLECs cannot effectively compete against ILECs like SBC if those network elements are readily available to the incumbent, but not to competitive carriers.

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[6] *Id.* at 5 (citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 575 (D.C. Cir 2004) ("*USTA II*").

[7] *Id.*

[8] *USTA II* at 575.

Should you have any questions with respect to this matter, please do not hesitate to contact the undersigned at (806) 797-0687.

Respectfully submitted,

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