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February 24, 2005

Jeffrey J. Carlisle  
Chief, Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *Unbundled Access to Network Elements*, WC Docket No. 04-313;

*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338

Dear Mr. Carlisle:

BellSouth is compelled to respond to the February 22, 2005 letter from the Association for Local Telecommunications Services (“ALTS”), in which ALTS accuses BellSouth of “violating” the Commission’s *Triennial Review Remand Order*,<sup>1</sup> “bypassing” the interconnection agreement negotiation process, and “refusing” to negotiate in good faith in violation of 47 U.S.C. § 252(b)(5). Such accusations are completely baseless.

In response to *USTA II*,<sup>2</sup> the Commission adopted the *Triennial Review Remand Order*, which imposed a more limited set of unbundling requirements. The Commission identified a number of formerly unbundled network elements for which it found there is no section 251 unbundling obligation. In addition to switching, the Commission held that incumbent local exchange carriers (“LECs”) have no section 251 obligation to unbundle certain high capacity loops in central offices meeting specified criteria, dedicated transport between central offices meeting specified criteria, and dark fiber under certain conditions.<sup>3</sup>

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<sup>1</sup> *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand (Feb. 4, 2005) (“*Triennial Review Remand Order*”).

<sup>2</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”), cert. denied, *NARUC v. United States Telecom. Ass’n*, 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

<sup>3</sup> *Triennial Review Remand Order* ¶ 126 (DS1 transport), ¶ 129 (DS3 transport), ¶ 133 (dark fiber transport), ¶ 174 (DS3 loops), ¶ 178 (DS1 loops), ¶ 182 (dark fiber loops), & ¶ 199 (switching”).

Recognizing that it had removed significant unbundling obligations formerly placed on incumbent LECs, the Commission adopted plans to transition the embedded base of customers served by these former unbundled network elements to alternative serving arrangements.<sup>4</sup> In each instance, the Commission unequivocally stated that the transition period for each of these former unbundled network elements -- loops, transport, and switching -- would commence on March 11, 2005, and that this transition process would be accomplished through the negotiation and arbitration process under section 252.<sup>5</sup>

By contrast, the Commission took a different approach with regard to “new adds” -- *i.e.*, requests by competitive LECs to add “new” unbundled switching, high-capacity loops and transport, and dark fiber where the Commission had determined that no unbundling obligation exists. Specifically, for those former network elements the Commission held no longer were required to be unbundled, the Commission made plain that no “new adds” would be allowed after the Commission’s rules took effect on March 11, 2005. Given that the majority of its prior unbundling regime had been vacated and that the Commission found that unbundling of these specific elements was not permitted under section 251, the no “new adds” mandate was entirely sensible, if not legally required.

For example, with respect to switching the Commission found that the “transition period shall apply only to the embedded customer base, and *does not permit competitive LECs to add new customers using unbundled access to local circuit switching.*”<sup>6</sup> The Commission made almost identical findings with respect to high-capacity loops and transport, holding that its transition rules “*do not permit competitive LECs to add new [high-capacity loops and transport on an unbundled basis] ... where the Commission has determined that no section 251(c)(3) unbundling requirement exists.*”<sup>7</sup>

Accordingly, under the framework adopted by this Commission, the parties must negotiate pursuant to section 252 the transition of the embedded base of existing customers served by network elements that no longer must be unbundled, which BellSouth is prepared to do. However, no such obligation exists with respect to “new adds.” For requests by competitive

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<sup>4</sup> *Triennial Review Remand Order* ¶ 142 (transport), ¶ 195 (loops), & ¶ 226 (switching).

<sup>5</sup> *Triennial Review Remand Order* ¶ 143 (transport), ¶ 196 (loops), & ¶ 227 (switching).

<sup>6</sup> *Triennial Review Remand Order* ¶ 199 (emphasis added); *see also* 47 C.F.R. § 51.319(d)(2)(iii) (“[r]equesting carrier may not obtain new local switching as an unbundled network element”).

<sup>7</sup> *Triennial Review Remand Order* ¶ 142 (transport) & ¶ 195 (loops) (emphasis added); *see also* 47 C.F.R. § 51.319(a)(4)(iii) (where nonimpairment thresholds have been met, “requesting carriers may not obtain new DS1 loops as unbundled network elements”); 47 C.F.R. § 51.319(a)(5)(iii) (where nonimpairment thresholds have been met, “requesting carriers may not obtain new DS3 loops as unbundled network elements”); 47 C.F.R. § 51.319(e)(2)(ii)(C) (where nonimpairment thresholds have been met, “requesting carriers may not obtain new DS1 transport as unbundled network elements”); 47 C.F.R. § 51.319(e)(2)(iii)(C) (where nonimpairment thresholds have been met, “requesting carriers may not obtain new DS3 transport as unbundled network elements”).

LECs to “add new” unbundled network elements where the Commission determined no unbundling obligation exists, the Commission made its rules “self-effectuating” as of March 11, 2005, without the need to resort to the negotiation or arbitration process under section 252.<sup>8</sup>

ALTS's recent filing completely ignores this carefully crafted framework. Instead, according to ALTS, the *Triennial Review Remand Order* requires BellSouth to: (1) negotiate (and then arbitrate before the state public service commissions) which wire centers currently meet the Commission’s nonimpairment thresholds; and (2) accept “any UNE orders submitted by a self-certifying CLEC” until such negotiations (and arbitrations) are concluded.<sup>9</sup> In short, under ALTS’s reading of the *Triennial Review Remand Order*, the Commission did not really mean what it said when it expressly held that competitive LECs were not permitted as of March 11, 2005 to add new unbundled network elements “pursuant to section 251(c)(3) where the Commission determines that no section 251(c)(3) unbundling requirements exists.”<sup>10</sup> ALTS misreads the *Triennial Review Remand Order* and also conveniently overlooks the D.C. Circuit’s decision in *USTA II*.

The Commission clearly understood the negotiation process and the existence of “change of law” provisions in existing interconnection contracts. For example, the Commission found that throughout the 12-month transition period (during which the Commission clearly held there would be no “new adds”), competitive LECs would continue to have access to the unbundled network element-platform (“UNE-P”), but at the state commission-approved TELRIC rate “plus one dollar,” until the migration of the embedded base was complete.<sup>11</sup> The Commission contemplated that interconnection agreements would be amended to address the transition period and expressly provided that the increased rates would be retroactive to the effective date of the order.<sup>12</sup>

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<sup>8</sup> *Triennial Review Remand Order* ¶ 3. There is no question that the Commission has the legal authority to create a self-effectuating change to existing interconnection agreements as it has done here. See, e.g., *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (quoting *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (citing, in turn, *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956) and *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956) (the FCC has the power to set aside any contract which it determines to be “unjust, unreasonable, unduly discriminatory, or preferential.”). For example, the required a fresh look at contracts between incumbent LECs and CMRS providers executed before the 1996 Act in light of the reciprocal compensation provisions of section 251(b)(5). In relevant part, citing *Western Union Tel. Co. v. FCC*, the Commission explained that “[c]ourts have held the Commission has the power ... to modify ... provisions of private contracts when necessary to serve the public interest.” *First Report and Order*, 11 FCC Rcd 15499, ¶ 1095 (1996) (additional citations omitted).

<sup>9</sup> ATLS Letter at 4.

<sup>10</sup> See, e.g., *Triennial Review Remand Order* ¶ 142 (transport).

<sup>11</sup> *Triennial Review Remand Order* ¶ 228.

<sup>12</sup> *Triennial Review Remand Order* ¶ 228, n.630. Thus, if a competitive LEC ultimately executed a interconnection agreement amendment on May 11, 2005, the transition period rates would apply as of March 11, 2005 and the competitive LEC would need to make a true-up payment to BellSouth.

The Commission's obvious reason for making the increased rates retroactive is to keep competitive LECs from unnecessarily delaying the amendment process and gaming the system by postponing the date for the higher rates applicable to the embedded base of UNE-Ps. It is equally clear that the Commission did not expressly require that existing interconnection agreements be amended before eliminating any obligation to provide new UNE-Ps. If the Commission had intended to allow competitive LECs to continue to add new UNE-Ps until the interconnection agreements were amended, it easily could have said so. It did not. Any suggestion that the Commission intended to allow carriers to add new UNE-Ps from March 11, 2005, until the time various interconnection agreements are actually amended would render the Commission's determination that there would be no "new adds" during the transition period utterly meaningless.

ALTS is noticeably silent on the issue of UNE-P, apparently conceding that incumbent LECs are no longer obligated as of March 11, 2005 to accept new UNE-P orders without resorting to the negotiation process. However, the language the Commission used in adopting the prohibition on "new adds" for UNE-P is identical in all material respects to the language used by the Commission in prohibiting "new adds" for unbundled high-capacity loops, transport, and dark fiber where the Commission had determined no unbundling obligation exists. ALTS does not and cannot explain this obvious inconsistency.

ALTS also does not bother addressing other language in the *Triennial Review Remand Order* making clear the Commission's intention that its rulings regarding "new adds" are to be self-effectuating. First, the Commission specifically stated that "[g]iven the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005 ...."<sup>13</sup> Second, the Commission expressly stated that its order would not "... supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis ...," but made no similar exception for existing interconnection agreements.<sup>14</sup> Third, the Commission directed parties to negotiate pursuant to the section 252 process the "appropriate transition mechanisms" for those high-capacity facilities "not currently subject to the nonimpairment thresholds" established in the *Triennial Review Remand Order* that subsequently "may meet those thresholds in the future."<sup>15</sup> However, the Commission did not require the parties to negotiate, let alone for 50 state public service commissions to arbitrate, those wire centers in which the nonimpairment thresholds are currently met.

ALTS is attempting to undermine the Commission's *Triennial Review Remand Order* and thereby perpetuate the prior unbundling regime that the D.C. Circuit ruled to be unlawful. First, ALTS argues that the negotiation and arbitration process is necessary to determine where BellSouth must continue to provide high-capacity facilities on an unbundled basis. Despite ALTS's repeated references to the sanctity of the negotiation process, however, ALTS has no

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<sup>13</sup> *Triennial Review Remand Order* ¶ 235.

<sup>14</sup> *Triennial Review Remand Order* ¶ 199; see also *id.* ¶¶ 148 & 198.

<sup>15</sup> *Triennial Review Remand Order* ¶ 142, n.399.

expectation that such negotiations would be successful even if they were to occur. This is clear from ALTS's statement "that it [sic] member companies vigorously dispute the methodology used by the Bells to calculate business access lines and fiber collocators ...."<sup>16</sup> In short, under ALTS's view of "an orderly implementation process," the parties would engage in negotiations that ALTS fully expects to be unsuccessful, thereby leaving the state commissions to arbitrate where BellSouth is no longer required to provide high-capacity facilities on an unbundled basis. And, of course, under ALTS's self-serving approach, its member companies would be able to continue adding new customers using unbundled high-capacity facilities during the pendency of such arbitrations, even though the Commission clearly prohibited such "new adds" effective March 11, 2005, and without regard to whether competitive LECs are impaired without unbundled access to such facilities.<sup>17</sup>

Second, relying upon paragraph 234 of the *Triennial Review Remand Order*, ALTS argues that simply by "self-certifying" a carrier can obtain unbundled loops and transport wherever and whenever it wants pending a state public service commission decision to the contrary. However, the Commission's determinations concerning the wire centers that satisfy the Commission's nonimpairment thresholds cannot be overridden merely by a carrier "self-certifying" that it disagrees with the methodology utilized or the result reached.

Furthermore, allowing 50 state public service commissions to decide the wire centers in which the Commission's nonimpairment thresholds are currently met is in such clear violation of *USTA II* that ALTS does not even bother addressing this issue. In *USTA II* the D.C. Circuit struck down the Commission's attempt to delegate to the state public service commissions the decision where its so-called "competitive triggers" had been met so as to relieve incumbent LECs from an obligation to unbundle high-capacity loops and transport. The D.C. Circuit's reasoning is fatal to ALTS's suggestion that the Commission could lawfully delegate to the state public service commissions the decision to determine where the Commission's new nonimpairment thresholds for high-capacity loops and transport are currently met. The Telecommunications Act of 1996 requires a uniform methodology and application of the Commission's unbundling rules, which cannot occur if unbundling determinations are left to the state commissions.<sup>18</sup>

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<sup>16</sup> ALTS Letter at 1, n.3.

<sup>17</sup> See *USTA II*, 359 F.3d at 579-80 (rejecting claims that the Commission can "order unbundling even in the absence of an impairment finding if it finds concrete benefits to unbundling that otherwise cannot be achieved").

<sup>18</sup> Counsel for ALTS was recently quoted in the trade press as suggesting that the role of the state commissions would be to engage simply in a counting exercise. See *ALTS Attacks Bell Wire Center Unbundling Filings*, TR Daily (Feb. 22, 2005) (quoting Jason Oxman as stating that the "standard" for determining which wire centers meet the Commission's nonimpairment thresholds "is set in stone" and that "[t]he only question is the math used to determine the list"). However, any such suggestion is inconsistent with the statements in ALTS's February 22, 2005 letter to the Commission, in which ALTS indicates its intention to challenge the "methodology" used to calculate business access lines and fiber collocators. Having 50 state commissions resolve disputes about such issues goes well beyond a mere counting exercise and likely will result in 50 different rulings on the appropriate methodology for determining how business access lines and fiber collocators should be counted and when the Commission's business access line and fiber collocator thresholds have been satisfied.

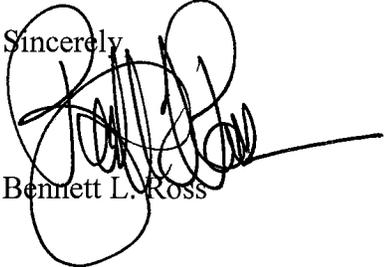
Although ALTS apparently does not appreciate the significance of *USTA II*, the Commission obviously does. In fact, the *Triennial Review Remand Order* repeatedly makes clear that the Commission would determine “where ... no section 251(c)(3) unbundling requirement exists” for high-capacity loops, transport, and dark fiber.<sup>19</sup> The Commission obviously did not intend for the state commissions to make this determination, nor could it lawfully have done so.

ALTS’s claim that “[t]he Bells now take the public position that they alone determine where unbundled loops and transport are available ...” is patently false.<sup>20</sup> Without speaking for the other Bell companies, BellSouth stated plainly and clearly in the cover letter accompanying its wire center filing that “[t]o the extent any party is concerned about the methodology BellSouth has employed or the wire centers identified on the enclosed list in which the nonimpairment thresholds have been met, it should bring that concern to the Commission’s attention.” Thus, BellSouth is not seeking to “unilaterally determine” where no obligation to unbundle high-capacity loops, transport and dark fiber exists, as ALTS erroneously contends. Rather, BellSouth seeks to ensure that this determination is made by the Commission in a consistent and lawful manner.

BellSouth agrees with ALTS on one point – namely, that “further immediate action is needed” from the Commission to the extent the Commission believes that BellSouth must accept requests after March 11, 2005 to “add new” unbundled network elements where the Commission has determined no unbundling obligation exists. BellSouth has made clear its position on this issue and will proceed consistent with this position absent direction from the Commission otherwise.

If the Commission truly believes that ALTS’s interpretation of *Triennial Review Remand Order* is correct – namely that incumbent LECs must negotiate (and then arbitrate before 50 state commissions) those wire centers where unbundling is not required and must accept “new adds” during the pendency of such negotiations (and arbitrations) – the Commission should so indicate. This would allow the industry and the state commissions to understand their roles in implementing the *Triennial Review Remand Order*. It also would allow BellSouth to bring this issue to the attention of the D.C. Circuit in connection with the Supplemental Petition for Writ of Mandamus, which is currently pending before the Court of Appeals.

Sincerely

  
Bennett L. Ross

BLR:kjw

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<sup>19</sup> See, e.g., *Triennial Review Remand Order* ¶ 142 (transport) & ¶ 195 (loops).

<sup>20</sup> ALTS Letter at 4.

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