

August 10, 1999

Mr. Lawrence E. Strickling
Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: UNE Remand Proceeding
CC Docket No. 96-98

Dear Larry:

For the past 18 years, CompTel has prided itself on being the principal national industry association for competitive telecommunications providers of all sizes and varieties. Its 350 members reflect the diversity of the competitive industry itself, including fiber-based, UNE-based, resale and wireless CLECs, internet providers, long distance carriers and equipment and service vendors. It is CompTel's fundamental policy mandate to ensure that all feasible competitive alternatives are available to both business and residential consumers, today and in the future. CompTel's mandate and the broad cross-section of the competitive industry it represents make this remand proceeding a top priority for CompTel.

This letter follows up on a topic CompTel previously has discussed with you and your staff. As you are well aware, the FCC's obligation in this remand is to interpret Section 251(d)(2)'s limiting principles consistent with the goals and purposes of the Telecommunications Act of 1996 ("1996 Act").¹ The Commission cannot accomplish this task, however, unless UNEs are defined consistent with the following five "*Pro-Competitive Principles for UNE Entry*."

These principles embody the specific requirements of Section 251(c)(3) and reflect the goals and purposes of the 1996 Act's local competition provisions. CompTel believes that adherence to these principles is the only way to respond to the Court's concerns and to provide competitive choice rapidly to all Americans as promised in the 1996 Act.

¹ *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. 721, 736 (1999).

Pro-Competitive Principles for UNE Entry

The parties to this proceeding have presented the Commission with several options for how to define each of the UNEs required by Section 251(c)(3). In many ways, how the Commission chooses among these options may be as important as the choice it makes. The 1996 Act's promise of widespread and vigorous local competition would be severely damaged if the Commission were to define a UNE in a way that discriminates among carriers or otherwise violates the fundamental principles on which the Act is predicated.

The Five Pro-Competitive Principles attached to this letter should be used as a standard against which each UNE defined in this proceeding should be evaluated. Each of the five Principles are described in more detail below.

1. THE COMMISSION SHOULD PROMOTE ALL ENTRY STRATEGIES EQUALLY

The first Principle is central to the Act. It is well-settled that the Act "neither explicitly nor implicitly expresses a preference for one particular entry strategy" available under the Act.² Indeed, the Commission's rejection of a facilities requirement for purchasing UNEs – which was upheld in *AT&T v. Iowa Utilities Board* – recognizes that the UNE provisions serve a different purpose than do the provisions of the Act providing for facilities-based interconnection to the ILEC networks. Moreover, UNE based entry not only speeds the introduction of competitive alternatives for all Americans, but it allows carriers to develop gradually a revenue base which justifies the deployment of local exchange facilities. Because the Act does not prefer one method over the other, the Commission must interpret the UNE requirement in a way that preserves the availability of this method as a third entry vehicle.

We, therefore, urge the rejection of arguments which explicitly or implicitly depend upon a preference for "facilities-based" market entry. Just as it is not permissible to require facilities as a prerequisite to using UNEs, it also is not permissible to restrict UNEs in order to "promote" facilities deployment. Congress recognized that the deployment of alternative facilities would be inconsistent and slow the pace of competition, and therefore provided also for a UNE-based entry method. The

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 12 (1996) (subsequent history omitted) (*Local Competition Order*).

Commission's task is (as it has said before) is to "ensure that all pro-competitive entry strategies may be explored."³

2. THE CHOICES OF ONE CLEC SHOULD NOT LIMIT THE OPTIONS OF ANOTHER

It is critical that all options remain open to competitors, regardless of the actions of other entrants. The history of competition in the long distance marketplace teaches that providers compete in many different ways, each of which requires different methods of providing service to the customer. The robustness of competition depends upon multiple alternatives being available simultaneously. Thus, each local service provider must be able to pursue its business plan unimpeded by the choices of its competitors. For example, the needs of a carrier serving an existing base of dispersed customers will differ from those of an entrant choosing new areas in which to enter. Accordingly, the Commission's UNE definitions must allow a requesting carrier to pursue any investment-backed business plan, regardless of the choices made by other entrants in the market.

This Principle requires, for example, that the Commission reject claims that the actions of one CLEC prove that no other CLEC needs a particular UNE. Given the variety of business plans and the unique capabilities of some carriers, the Commission cannot assume that a strategy that works for one CLEC can be replicated by another, or that it will be suitable for the second CLEC's needs. Moreover, it is dangerous for the Commission to try to make competition in the image of even a handful of carriers, and certainly, it is not in the interests of consumers to do so.

3. UNES MAY NOT BE RESTRICTED BASED ON THE SERVICE A REQUESTING CARRIER INTENDS TO PROVIDE OR THE CUSTOMER IT INTENDS TO SERVE

Section 251(c)(3) states that an ILEC shall provide access to a UNE to "any requesting carrier for the provision of a telecommunications service." Not limiting the type of telecommunications service a carrier may provide fulfills the Act's purpose of maximizing competitive alternatives for all customers. Thus, the Commission already has ruled that a requesting carrier may use a UNE "to provide any telecommunications service that *can be offered* by means of that network element"⁴ and that ILECs are prohibited from restricting the use of UNES or from discriminating among classes of

³ *Id.*

⁴ 47 C.F.R. § 51.307(c).

customers.⁵ It is critical, therefore, that the Commission not impose any use-based or customer-based restrictions on the availability of UNEs.

Section 251(d)(2)'s standard for evaluating impairment is consistent with the principle that UNEs may not be limited based on customer or usage-based restrictions. The impairment standard of Section 251(d)(2) requires the Commission to ask whether the requesting carrier is impaired in its ability to provide "the services that [the requesting carrier] seeks to offer." Nothing in this provision requires the requesting carrier to limit its services in any manner, or to follow the class of service distinctions made by an ILEC. Instead, the reference to the service *the requesting carrier* seeks to offer demonstrates an expectation that in many instances the competitor's offering will differ from what the ILEC has traditionally offered. By allowing these new services to develop, the Commission can maximize the benefits of competition to consumers.

4. UNE DEFINITIONS SHOULD BE TECHNOLOGY AND FACILITIES-NEUTRAL

In order to ensure competitive neutrality, the Commission should scrupulously ensure that its definitions of UNEs are technology and facilities-neutral. Thus, a definition of UNE should be flexible enough to meet the needs of both wireless and wireline providers, and to satisfy the demand for advanced telecommunications services. This requires that the Commission:

- ensure UNEs are defined by their functionality whenever possible; and
- avoid implicit bias toward the deployment of network transmission facilities.

This is especially critical since new service providers can add value to consumers in many ways, not just by duplicating the transmission capability of the ILEC network. For example, carriers may add value by:

- integrating sophisticated network intelligence capabilities with existing transmission functions;
- deploying network facilities to perform a related function other than local exchange service; or
- devoting resources to billing and customer care systems.

⁵ *Id.* §§ 51.309(a) (prohibiting use-based restrictions), 51.503(c) (prohibiting price discrimination).

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All of these entry strategies involve the deployment of “facilities,” albeit, each for a different purpose. The Commission should be careful not to interfere with the economic and business decisions of carriers by rewarding one type of facilities over another. **Any assumptions that the Commission makes regarding the capabilities of a carrier will determine which types of carriers are able to compete, and thus will reduce the market for competitive services.**

5. THE COMMISSION SHOULD PROMOTE WHOLESALE ENTRY OPTIONS IN ORDER TO SPUR COMPETITION

The primary purpose of UNE-based entry is to lower entry barriers by providing a wholesale entry option. As has been shown by the success of the long distance industry, wholesale supply avoids unnecessary duplication of facilities and enables carriers to focus their resources on product differentiation and innovation. With wholesale entry options widely available, new carriers enter the market quickly, and offer consumers new and different services. Unless and until externally-supplied elements may be used interchangeably and alternative wholesale suppliers enable carriers to choose among providers for network elements, preserving the availability of this option from the ILEC is essential.

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CompTel respectfully urges the Commission to adhere to these Five Pro-Competitive Principles for UNE Entry as it completes its task in the remand proceeding. If you have any questions about the application of the above to specific UNEs under consideration, please do not hesitate to contact us.

Sincerely,

Carol Ann Bischoff
Executive Vice President
& General Counsel

Enclosure

cc: Magalie R. Salas (2 copies for file)
Bob Atkinson
Jake Jennings

COMPTTEL'S FIVE PRO-COMPETITIVE PRINCIPLES FOR UNE ENTRY

- 1. THE COMMISSION SHOULD PROMOTE ALL ENTRY STRATEGIES EQUALLY**
- 2. THE CHOICES OF ONE CLEC SHOULD NOT LIMIT THE OPTIONS OF ANOTHER**
- 3. UNE MAY NOT BE RESTRICTED BASED ON THE SERVICE A REQUESTING CARRIER INTENDS TO PROVIDE OR THE CUSTOMER IT INTENDS TO SERVE**
- 4. UNE DEFINITIONS SHOULD BE TECHNOLOGY AND FACILITIES-NEUTRAL**
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