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Public Service Commission

December 1, 2004

VIA ELECTRONIC FILING

The Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: *Ex Parte* Commets Regarding Unbundled Access to Network Elements
WC Docket No. 04-313, Unbundled Access to Network Elements and
CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

Dear Ms. Dortch:

Forwarded herewith are *ex parte* comments, of the Florida Public Service Commission in the above dockets with regard to unbundled access to network elements.

The Commissioners voted at the November 30 Internal Affairs to file these comments.

Sincerely,

/ s /

Cindy B. Miller
Director

CBM:tf
cc: Honorable Michael K. Powell, Chairman
Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Brad Ramsay, NARUC

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

In the Matter of	)	
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

EX PARTE COMMENTS OF THE FLORIDA PUBLIC SERVICE COMMISSION IN RESPONSE TO THE FEDERAL COMMUNICATIONS COMMISSION'S NOTICE OF PROPOSED RULEMAKING REGARDING UNBUNDLING RULES

CHAIRMAN BRAULIO L. BAEZ

COMMISSIONER J. TERRY DEASON

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The Florida Public Service Commission (FPSC) submits these comments in response to the FCC's Notice of Proposed Rulemaking (Notice) released on August 20, 2004. In this Notice the FCC seeks comment on how best to respond to the D.C. Circuit Court's USTA II decision[1] and arrive at legally sustainable unbundling rules. Key areas identified by the FCC for comment include what changes to the Triennial Review Order's (TRO) unbundling framework are needed in light of USTA II; how to accommodate the availability of ILEC tariffed offerings (notably, special access) and RBOC 271 unbundling obligations into the unbundling rules; and how the relevant markets should be defined in order to arrive at rules that account for market variability and service-specific analyses.

The FPSC bases its comments on the following three guiding principles:

- To avoid a patchwork of potentially conflicting or inconsistent state policies, a national policy framework is critical.
- Promoting facilities-based competition should be the focus of the FCC's rules.
- Clarity in a timely manner is critical.

Our comments address four critical topics to be addressed in the final rules. Specifically, we recommend the following within each topic:

- *Transition Period for UNE-P Where Delisted.* The transition period should be analogous to the two-stage twelve-month transition plan contained in the FCC's Interim Order.
- *Batch Hot Cuts.* ILECs should be required to demonstrate to state commissions that they have adequate hot cut processes in place to meet anticipated demand efficiently, quickly, and in a cost-effective manner, by the conclusion of the UNE-P transition. If an ILEC fails to make such a demonstration by the end of the transition period in a given state, the FCC should consider whether or not the transition plan should be extended.

[1] 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*), pets. for cert. filed, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

- *Section 271 Obligations versus Section 251 Requirements.* We encourage the FCC to provide clarification in the remand proceeding between these sections as it relates to the interconnection and unbundling requirements.

- *Line Sharing.* If the FCC desires to revisit its line sharing decision, we encourage it do so by year-end.

II. GUIDING PRINCIPLES

A. National Policy Framework Needed

As the FCC recognized in its 1996 First Report and Order,[2] national rules regarding interconnection are necessary to further Congress' goal of creating conditions that will facilitate competition. Clearly, the federal government's role in this endeavor is to promulgate such national interconnection rules. Uniform rules, paired with clear and consistent definitions and standards, are needed to best ensure consistent, minimum, nondiscrimination safeguards and "equal in quality" standards in every state. Such rules should be designed to avoid re-litigating, in multiple states, the issue of whether interconnection at a particular point is technically feasible.

The state's role, if any, should be clarified and must be guided by clear and consistent definitions and standards from the FCC to prevent – to the greatest degree possible – a patchwork of disparate state policies. However well-intentioned, contradictory state decisions – given relatively similar circumstances – appear to bring less, not more, regulatory certainty to the market.

Specifically, the FCC has the obligation to determine what the unbundled elements will be. A state may be able to assist in carrying out the national policy in some manner, but the state's mission should be guided by national uniform rules that facilitate a level playing field for competitors across state borders.

[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act, released August 8, 1996.

Chairman Michael Powell, quoting Justice Antonin Scalia, stated in his Separate Statement on the Triennial Review Order:

> [t]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions in the administration of the new federal regime is to be guided by federal-agency regulation. If there is any 'presumption' applicable to this question it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange . . . .
> AT&T v. Iowa Utilities Board, 525 U.S. 388.391.

The FPSC agrees that a national policy should be clearly established. The Florida Legislature and the FPSC can be expected to act in the best interest of our state regarding competition policy. Inconsistent policies enacted by other states, however, may increase costs to our consumers (due to multi-state service providers) and may lead to calls for uniformity by federal policymakers. It is best to focus efforts on establishing a national uniform policy that is consistent with Florida's interests on the front end rather than trying to combat application of opposing, irrational, or harmful policies on the back end.

With that in mind, the FPSC believes the following components are integral to the formation of a national uniform policy that will best serve the public interest:

- *No Presumptive Impairment.* Elements should not be retained on, or added to, the national UNE list, unless, following a principled granular analysis, the FCC specifically finds impairment. Mandated access to elements seems unnecessary where a CLEC has the ability to reasonably duplicate, purchase, contract for, or otherwise acquire access to a functionally equivalent element.
- *Clear & Consistent Definitions.* The policy should define – or at least provide standards for defining – the relevant geographic market for determining impairment. Additionally,

the policy should determine – or provide standards for determining – the number of analog lines that must be supplied to a multi-line DS0 customer before that customer is considered to be an enterprise customer (as opposed to a mass market customer).

- *Clarification: When a Switch Counts.* A national policy must account for the basic economic reality that a switch is a switch is a switch. The FCC should provide clear justification for not counting any switch in the relevant market and should provide clear guidance regarding application of any triggers.
- *Investment as Litmus Test.* In developing the policy, the FCC should err on the side of competitively neutral policies that encourage greater investment in facilities by all providers.
- *Status of Commercial Agreements.* The FPSC joins the FCC in its call for commercially negotiated agreements regarding services or facilities for which no section 251 mandate exists. Negotiated solutions among carriers are preferable, by far, to prolonged litigation and continued uncertainty that benefit no one – not the carriers and surely not the consumers. We respectfully request that the FCC clarify the legal status of such agreements.
- *State Assistance.* While we advocate a national uniform policy, we believe that there are certain functions that may be carried out at the state commission level, provided there are clear and uniform standards to apply that are consistent with the overall goal of promoting facilities-based competition.

B. Promoting Facilities-Based Competition

The FCC should adopt unbundling rules that promote facilities-based competition.[3] We believe that consumers in Florida and across the nation are best served by facilities-based competition as a sustainable form of competition that will promote greater innovation and investment and, therefore, will provide expanded products and services for our consumers.

The U.S. Court of Appeals in USTA II, noted, "In competitive markets, an ILEC can't be used as a piñata." At a certain point, the CLECs should be moving away from their reliance on their ILEC competitors and toward facilities-based competitive strategies. We recognize that complete independence from the ILEC may be difficult to achieve overnight in a way that preserves alternatives for our consumers. While that concern must be accounted for, the FCC – in conducting the required impairment analysis – must ensure that facilities-based competition is not impeded.

In her Separate Statement to the Triennial Review Order, Commissioner Kathleen Abernathy stressed the importance of facilities-based competition. She stated that, from a policy perspective, she would have placed greater faith in market forces and facilities-based competition where CLECs have deployed their own switches. She criticized that the "majority simply ignores the possibility—indeed likelihood—that CLECs are generally refraining from using their own switches to serve mass market customers because of the availability of UNE-P. Why undertake the cost of connecting loops to your own switch if you can avoid investing any capital or taking any risk by purchasing the entire platform at a superefficient TELRIC price?"

[3] According to responses to FPSC data requests, as of May 31, 2004, UNE-P providers accounted for 77% of the total Florida CLEC residential market. CLECs serving residential customers with their own switches accounted for only 13% (much of which is provisioned over cable facilities that use traditional circuit-switched technology), with the remaining 10% consisting of resale. While facilities-based CLECs have made much greater headway into the business market (at 76% of all CLEC business lines), existing policies have led to suppressed investment in the residential market and have favored UNE-P providers.

Acknowledging the significance of facilities-based competition, the FPSC has increasingly expressed that the move to facilities-based competition should not be impeded.

C. Clarity in a Timely Manner is Critical

We acknowledge the bifurcation of responsibilities between the federal government and the states and urge the FCC to take the necessary steps to respond to the issues remanded by the D.C. Circuit expeditiously in order to restore certainty and stability to the telecommunications markets. As noted by the Arizona Corporation Commission in its initial comments, the Telecommunications Act of 1996 and its subsequent implementation have been based on a scheme of cooperative federalism, whereby the FCC generally promulgates broad guidelines in the form of its rules (e.g., for Section 251) and the states' role is primarily one of implementation. Twice the U.S. Supreme Court has confirmed the FCC's role[4], as did the D.C. Circuit Court in USTA II.

The legal wrangling over federal versus state jurisdiction will likely continue, but our goal should be a common one – to restore clarity, timeliness, and certainty to the market. At the end of the proceedings, state commissions, ILECs, and CLECs must know which network elements must be made available on an unbundled basis. We encourage all stakeholders to work toward achieving that end in the least litigious manner possible.

III. CRITICAL TOPICS TO BE ADDRESSED IN FINAL RULES

A. Transition Period for UNE-P Where Delisted

In its Interim Order, the FCC found that there was a ". . . pressing need for market certainty until we issue final unbundling rules . . ."[5] and concluded that ILECs are required to continue providing access to unbundled mass market switching, enterprise market loops, and dedicated

[4] AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999); Verizon v. FCC, 535 U.S. 467 (2002).
[5] Order and Notice of Proposed Rulemaking, FCC 04-179, page 9.

transport under the same rates, terms, and conditions applicable under their interconnection agreements as of June 15, 2004. This requirement is to remain in place until the earlier of the effective date of final FCC unbundling rules or six months after the Federal Register publication of the Interim Order. Accordingly, this interim freeze presumably will expire no later than March 13, 2005.

The FPSC believes it is quite likely that in order to comply with the granular impairment analysis envisioned by the D.C. Circuit Court, mandated access to unbundled mass market local switching at TELRIC-based prices will no longer be required in some geographic areas. When this occurs, the potential for confusion by consumers and by CLECs will be great, as CLECs attempt to reevaluate their business plans and determine where and how they will continue to offer service. Such confusion and any resulting disruption in service – after access to mass market switching is no longer available – would occur primarily for residential customers. We note that in Florida, CLECs account for 10% of the residential market, and approximately 77% of those CLEC residential lines are being served via UNE-P.[6]

The probable confusion following the "delisting" of mass market local switching as a UNE represents a pressing need for market certainty and warrants imposition of a transition plan. The FPSC proposes that a two-stage transition plan modeled after the twelve-month plan contained in the Interim Order would be reasonable. Under this proposal, access to mass market switching as a UNE at the rates applicable as of June 15, 2004 would continue for six months after the Federal Register publication of the new unbundling rules. After this first six-month period, access to mass market switching in combination with shared transport and loops as a UNE would continue for an additional

[6] Source: Responses to FPSC Data Requests, Figures as of May 31, 2004, Florida Public Service Commission's Office of Market Monitoring and Strategic Analysis.

six months, but a modest increase in the rate would be allowed; mirroring the Interim Order would allow for a $1.00 increase for UNE-P.

Chairman Powell has indicated his intent to issue new unbundling rules in December 2004. Assuming that the resulting order is published in January 2005, our proposal would provide transitional access to UNE-P through approximately the end of 2005. Compared to the twelve-month plan in the Interim Order, the FPSC's transitional plan would extend access to UNE-P by roughly 3-4 months. We believe this modest extension is reasonable and would not unduly burden the ILECs.

B. The Hot Cut Process

In the TRO, the FCC concluded that the operational and economic barriers associated with "the hot cut process constituted an insurmountable disadvantage to carriers seeking to serve the mass market"[7] absent access to unbundled local switching as a UNE. Although the D.C. Circuit Court overturned this particular finding, the significance of a cost-effective, timely, and efficient means to migrate loops from an incumbent's switch to a CLEC's switch is a critical component for facilities-based competition to occur. Moreover, the availability of a viable hot cut process that can accommodate large quantities of loops will be essential for those CLECs currently serving customers via UNE-P who opt to migrate these customers to their own switches.

Due to its importance, the FPSC believes that ILECs should be required to establish a hot cut process that can adequately accommodate anticipated demand – efficiently, quickly, and at the lowest achievable cost – by the conclusion of the aforementioned UNE-P transition period. We acknowledge that the processes required may well vary by ILEC and as a function of demand for hot cuts in a given ILEC's territory. Because of this variability and its fact-intensive nature, determination of the exact

processes needed for a given ILEC is a role best played by state commissions. Accordingly, we believe that each ILEC subject to unbundling requirements should be required to demonstrate to its state regulatory body by the end of the aforementioned UNE-P transition period that it has appropriate and cost-effective processes in place sufficient to handle anticipated hot cut requests from CLECs. If an ILEC has not demonstrated such sufficiency to its state commission by the conclusion of the transition period, the FPSC believes it would be reasonable for the FCC to extend, for that ILEC in that territory, access to UNE-P until the state commission had certified to the FCC the appropriateness of the ILEC's hot cut processes.[8]

C. Section 251 and Section 271

Section 251 of the Act is the source of ILECs' unbundling obligations for interconnection agreements. Section 252 of the Act requires the companies to file their interconnection agreements with state commissions. There is uncertainty, however, as to whether Section 252 requires companies to file commercial agreements in light of the fact that the agreements may not be negotiated subject to Section 251. The FPSC respectfully requests resolution of this important matter as soon as possible. Quick resolution will provide certainty and stability in an uncertain regulatory landscape. While the FPSC is pleased to see the FCC address this matter with the remand, we will refrain from commenting on the merits due to a matter pending before us.

Under Section 271(c)(2)(B)(ii) of the Act, certain Section 251 obligations are referenced and incorporated as obligations of Bell Operating Companies (BOCs). Section 271 specifies the "competitive checklist" of access and interconnection requirements a BOC must meet before it is

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[7] FCC 03-36, para. 475.
[8] The performance by a state commission of the certification of the sufficiency of an ILEC's hot cut processes should not be construed as rendering an impairment determination.

allowed to offer in-region long-distance. Four of these 14 checklist items previously have been deemed to be UNEs under the standards of Section 251(c)(3), but this may change.

The FPSC seeks guidance on whether unbundling a certain element is required under Section 271's checklist where unbundling of that element is no longer required under Section 251. It is clear that the FCC should be the primary decision-maker; nevertheless, the FCC should clarify what role, if any, it believes should be reserved for state commissions (pursuant, of course, to a state's authority under state law). While it could seek input from the state commissions, the FCC also should expressly delineate a national framework and applicable standards to avoid a patchwork of different state requirements and the associated regulatory costs.

The FPSC recognizes the FCC's recent decision to specifically forbear from applying the unbundling obligations listed in Section 271 of the Act for fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid copper-fiber loops, and packet switching.[9] Without speaking to the merits of that decision, the FPSC is encouraged that the FCC is taking action to provide clarity with respect to Section 271 unbundling requirements in light of the D.C. Circuit decision regarding Section 251. We seek the FCC's additional and timely guidance on whether the Section 271 unbundling obligations apply to the remainder of a BOC's network (i.e., narrowband).

Recent and divergent state commission decisions provide additional evidence as to the need for the FCC to resolve this issue quickly. The Pennsylvania Public Utility Commission, in a July 8, 2004, order pertaining to Verizon and Covad, stated:

> This Commission lacks independent authority under Section 271 of TA96 to relieve Verizon PA of the obligation to provide access to line sharing . . . Unless or until the FCC affirmatively relieves Verizon PA of this Section 271 access obligation imposed

[9] FCC, October 22, 2004, by Report and Order (FCC-04-254). Chairman Powell, Commissioners Abernathy and Martin. Commissioner Copps dissenting. Commissioner Adelstein concurring in part and dissenting in part. WC Docket Nos. 01-338, 03-235, 03-260, 04-48. Petitions for forbearance were filed by all four RBOCs.

> as a condition of Section 271 approval, we will not relieve Verizon PA of its corresponding tariff obligation to provide such access.[10]

In a similar proceeding involving Covad and BellSouth before the Kentucky Public Service Commission, the Kentucky PSC, on October 18, 2004, ordered that:

> We specifically find that BellSouth's obligations pursuant to competitive checklist item 4 do not include line sharing arrangements as line sharing is not a separate loop type. Thus, BellSouth is no longer obligated to provide Covad access to new line sharing arrangements after October 2004. The determinations of this Commission do not, however, prohibit BellSouth from voluntarily agreeing to line sharing arrangements with Covad or any other local exchange carrier through the negotiation and execution of interconnection agreements.[11]

Two state commissions, faced with similar issues, have ruled differently. Several other state commissions are facing these issues, and the FPSC suggests that the FCC step in to resolve them in a uniform manner. Although the FPSC would like to comment in greater detail, we currently have an open docket on this issue and, therefore, will withhold opinions on the merits.

D. Line Sharing

In its TRO, the FCC provided for the phase-out of access to line sharing as an unbundled network element. Among other aspects of the line sharing transition plan, access to new line sharing arrangements per Section 251(c)(3) are no longer required after October 2004, and line sharing arrangements that were added during the first year following the effective date of the TRO are subject to annual increases, until the ultimate rate charged equals the rate for an unbundled copper loop.

Although the D.C. Circuit affirmed the FCC's decision to eliminate line sharing, it is our understanding that there may be sentiment from some FCC Commissioners to revisit the line sharing decision. Since we have proceedings pending before the FPSC that relate to line sharing, we express no opinion on the merits. However, to the extent it is the will of the FCC majority to reconsider its

[10] Opinion and Order in R-00038871C0001, Pennsylvania Public Utility Commission, July 8, 2004, P. 21.

prior elimination of line sharing in the TRO, we encourage the FCC to take action by year-end, in order to eliminate uncertainty in the market for broadband services.

IV. CONCLUSION

The FPSC's recommendations pertain to four areas. First, we recommend that the FCC adopt a two-stage twelve-month transition plan for UNE-P analogous to that provided for in the Interim Order. Second, we believe that ILECs should be required to demonstrate to their state commission that they have adequate hot cut processes in place to meet anticipated demand efficiently, quickly, and in a cost-effective manner, by the conclusion of the UNE-P transition period. If an ILEC fails to make such a demonstration by the end of the transition period in a given state, the FCC should consider whether or not the transition plan should be extended. Third, we trust that the FCC will clarify the relationships between interconnection and unbundling requirements in Sections 251/252 and Section 271 in the remand proceeding. Fourth, if the FCC desires to revisit the elimination of line sharing as a Section 251(c)(3) UNE, we encourage the FCC to act by year end, in order to eliminate market uncertainties.

Respectfully submitted,

CHAIRMAN BRAULIO L. BAEZ
COMMISSIONER J. TERRY DEASON
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Dated: December 1, 2004

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[11] Order in Case No. 2004-00259, Kentucky Public Service Commission, October 18, 2004, P. 5.