U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

January 29, 2003

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Chairman Powell:

We ask that you take prompt action to change misguided regulations that have badly distorted important telecommunications policies. As we first made clear with our colleagues in our letter of September 12, 2002, Congress intended the Telecommunications Act of 1996 ('96 Act) to promote choice and competition for local exchange and other services - ultimately through facilities-based competition. In this respect, the implementation of the '96 Act by the Federal Communications Commission (FCC) has been a failure. Rather than fostering facilities-based competition, the FCC's local-competition rules have encouraged competitive local exchange carriers (CLECs) to rely exclusively on networks owned and operated by incumbent local exchange carriers (ILECs) to provide services to residential consumers. These policies subvert the intent of the '96 Act and must be reversed.

The '96 Act prescribed three methods of competitive entry for CLECs: reselling an ILEC's service, using a CLEC's facilities exclusively, and using a CLEC's facilities in combination with an ILEC's facilities through the purchase of unbundled network elements from the ILEC. However, the FCC distorted the '96 Act's requirements to manufacture a fourth method of entry by creating the unbundled network element platform or UNE-P – in essence a back-door way of forcing the ILECs to resell the entire local phone service. To further exacerbate the problem, the FCC developed a pricing model for the UNE-P that is based on a hypothetical cost model rather than on actual

operating costs. The hypothetical model permits CLECs to lease network elements at a price that is lower than what it cost ILECs to purchase and maintain the elements.

As a result, the FCC created a regulatory fiction that provided CLECs with a disincentive to invest in their own facilities. No competing carrier has an incentive to risk capital and invest in its own facilities when it can simply lease an ILEC's network elements at below-cost prices and resell the service. Recent FCC data has confirmed the absurdity of this policy. According to the FCC's 2002 Local Competition Report, the number of customers served by CLECs using UNE-P increased from approximately 500,000 in 1999 to 7.5 million at the end of June, 2002.[1] Ironically, AT&T and Worldcom, which are reported to have more than one million UNE-P customers in New York state, operate at least 28 local circuit switches in New York, but do not use the switches to provide local service to these customers.[2]

There is no question that the '96 Act contemplated that a CLEC would be permitted to use elements of an ILEC's network in combination with elements of the CLEC's network. But the UNE-P is a regulatory fiction that must be eliminated.

In addition, in the context of the Triennial Review, the FCC must produce a sensible national policy regarding which network elements meet the '96 Act's stringent "necessary and impair" analysis and, therefore, must be provided on an unbundled basis. Delegation of that determination to the states would be a gross abdication of the FCC's statutory responsibility and a clear violation of the law.

Section 251(d)(1) of the Communications Act, as amended by the'96 Act, requires the FCC, not the states, to "complete all actions necessary to establish regulations to implement the requirements of this section," including the determination of which network elements must be made available on an unbundled basis. Section 251(d)(2) requires the FCC to determine, for network elements that are not proprietary in nature, "whether the failure to provide access to such networks elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." While Section 251(d)(3) permits the preservation of state access regulations, such regulations cannot "substantially prevent implementation of the requirements of this section and the purposes of this part." Thus, if the FCC determines that the lack of access on an unbundled basis to a particular network element would not constitute an "impairment" under Section 251(d)(2), any state regulation that required unbundled access to that element would violate Section 251(d)(3).

The FCC, therefore, must engage in a rigorous analysis to justify why ILECs should be required to unbundle network elements, and a conclusion by the FCC that an element does not have to be unbundled cannot be contradicted, ignored, or overruled by

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[1] In contrast, the number of customers served by CLECs using their own switching increased from approximately 1 million in 1999 to 4 million at the end of June, 2002. In addition, the number of customers served by CLECs reselling an ILEC's service declined from approximately 4.5 million in 1999 to 3.5 million at the end of June, 2002.

[2] Telecordia, Local Exchange Routing Guide (LERG), January 2002.

state regulations. As the FCC conducts this analysis, there are particular elements that should not have to be provided on an unbundled basis in accordance with Section 251(c)(3).

For example, circuit switching should not have to be provided by an ILEC on an unbundled basis, with the possible exception of an extremely limited number of remote and rural areas.[3] More than 200 CLECs operate approximately 1,300 local circuit switches.[4] According to the National Cable and Telecommunications Association, by June 30, 2002, cable companies were providing telephone service to approximately 2.1 million subscribers, primarily over their own switches. How could the FCC determine that a CLEC would be impaired if it did not have access on an unbundled basis to an ILEC's circuit switch when thousands of such switches are being self-provisioned by hundreds of CLECs serving millions of customers?

Nor should the FCC require ILECs to provide unbundled access to fiber loops and subloops used to transmit packet-based services. The telecommunications manufacturing sector has been devastated by the dramatic decline in capital spending by telecommunications carriers and broadband service providers. While capital spending has declined for several reasons, the FCC's requirement that ILECs provide access on an unbundled basis to new facilities is one of the primary reasons why ILECs have reduced their capital investment. We cannot expect ILECs to invest in and deploy new facilities when they are required to share such facilities with competitors at below-market prices. Moreover, the pervasive deployment of fiber loops and subloops would dramatically improve the types of services that consumers could access at home and at work. While access to broadband services transmitted over copper loops has increased over the past several years, such services pale in comparison to the types of capabilities that consumers could enjoy if fiber accounted for a greater portion of so-called last-mile facilities. Our nation's consumers deserve no less. In addition, telecommunications equipment manufacturers need the "shot-in-the-arm" that would accompany massive investment in fiber deployment by ILECs.

The FCC's impairment analysis regarding fiber loops and subloops should support a conclusion that such facilities should not be subject to the unbundling requirement. The FCC's impairment analysis must take into consideration the fact that ILECs do not enjoy an advantage over CLECs with respect to investment in new facilities. The tens of billions of dollars that cable companies have invested to deploy fiber-based facilities throughout their networks demonstrates that investment made after the enactment of the '96 Act requires a different impairment analysis than facilities that have been deployed by ILECs for decades. Not surprisingly, the cable companies have

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[3] Packet switching should also not have to be provided on an unbundled basis. The FCC in the UNE Remand Order already acknowledged the pervasive deployment of packet switching by CLECs and declined to require packet switching to be unbundled except in limited circumstances. Given the even greater CLEC deployment of packet switching today, the FCC should eliminate the unbundling requirement for packet switching in all circumstances.

[4] Telecordia, Local Exchange Routing Guide (LERG), January 2002.

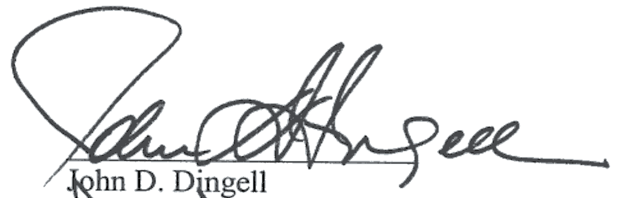
made this investment in the absence of the unbundling regulations currently imposed on ILECs.

Mr. Chairman, your agency faces a tremendous responsibility. The future of the U.S. telecommunications equipment manufacturing base will be greatly affected by the outcome of the Triennial Review. You have an opportunity to remove regulatory impediments to investment in new networks and to facilities-based competition. The current rules have greatly undermined the achievement of these important goals. We strongly urge you to reshape the FCC's existing framework and put the telecommunications sector on a path to increased investment and greater facilities-based competition.

We look forward to your response to our correspondence and to you and your fellow commissioners testifying before the Committee on Energy and Commerce's Subcommittee on Telecommunications and the Internet in the coming weeks.

Sincerely,

W.J. "Billy" Tauzin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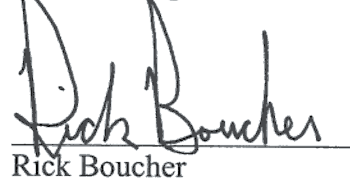
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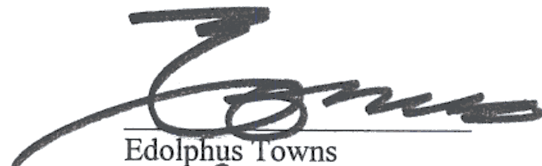
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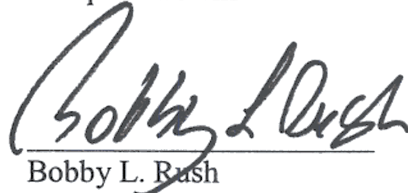
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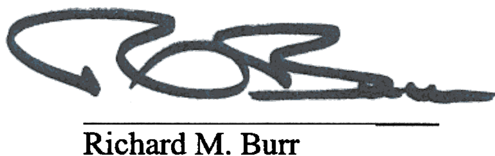
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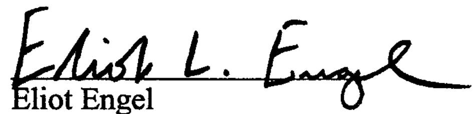
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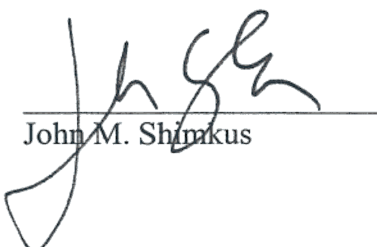
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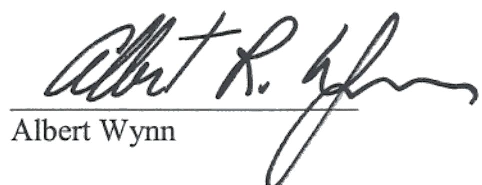
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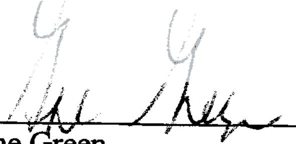
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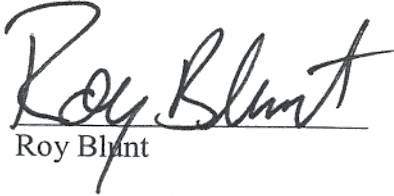
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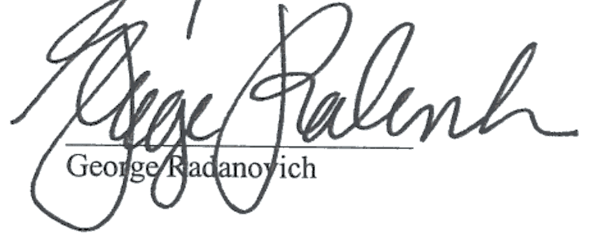
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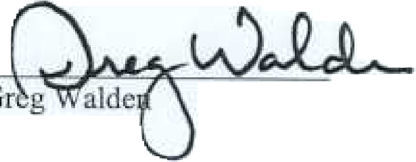
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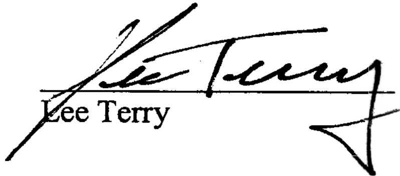
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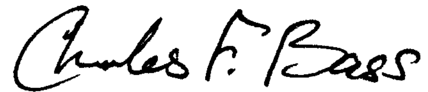

cc: Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Commissioner Kevin Martin