December 2, 2004

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J.Copps
Commissioner Kevin J. Martin

Chairman and Commissioners:

The commission is obligated, under section 254(d)(3) of the Act and section 706 of the 1996 Act, to encourage the deployment to rural areas of the infrastructure necessary to support advanced telecommunications services and of the services themselves.
The Commission's industry analysis data, data provided by state commissions from their TRO proceedings, and data provided by a great number of carriers in this proceeding, demonstrate that facilities-based and intermodal competition is largely non-existent in rural areas. Without UNE-P there is no significant competition in rural areas.

This commission has in the past concluded that "CLECs often are more likely to deploy in rural areas the new facilities capable of supporting advanced calling features and advanced telecommunications services than are non-rural ILECs, which are more likely first to deploy such facilities in their more concentrated, urban markets."[1] Eliminating UNE-P will cause great harm to the small companies that have invested in and committed to these areas, and by causing this harm the FCC will eliminate the best vehicle for the future propagation of new telecom technologies in rural areas**.**

As evidence that competitors are impaired without access to mass market switching and UNE-P to serve rural areas, we point to the following:

- The evidence in the record for rural areas clearly shows that (i) CLECs face substantial barriers to entry and economic disadvantages that result in impairment without access to all unbundled elements at TELRIC rates and (ii) intermodal and facilities-based competition in rural areas is very limited, especially when contrasted with urban areas.
- The Commission has recognized the unique economic characteristics and barriers to entry associated with the provision of telecommunications services in rural markets.[2]

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[1] *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Orders and Further Notice of Proposed Rulemaking, 15 FCC Rcd 9923 para. 65 (2001)("*CLEC Access Reform Order*").
[2] *Id.*

- Of the state commission TRO proceedings that were sufficiently far along, all that were filed in this proceeding found impairment or preliminary indications of impairment in rural areas.[3]
- As the comments filed by numerous state commissions in this proceeding shows, the ILECs have implicitly acknowledged this condition by failing to contest in state proceedings the TRO's nationwide finding of impairment for mass-market switching for hundreds of markets across the country.

The undersigned companies have each focused their businesses to bring innovation, competitive choice and economic benefits to consumers and businesses in rural areas. We are committed to work with the Commission, Congress and the courts to achieve unbundling rules which properly reflect the intent of Congress in the Telecom Act and recognize the unique, factual and commonly-accepted characteristics of delivering competitive telecommunications services in rural markets. To reach this goal in an expedient fashion, which furthers the common goal of all parties to foster telecommunications development in rural markets, we have hereby set forth a common proposal for unbundling in rural areas.

Our proposal, based on the foregoing summary of evidence, follows:

- The Commission will find that competitors are impaired without access to unbundled switching (and UNE-P) in central offices in rural markets.
    - Rural markets will be defined in accordance with the criteria established in the *CLEC Access Reform Order* for a definition of a "rural CLEC." If a central office spans an urban and rural area, that central office will be presumed to be urban.
    - CLECs with lines in non-rural areas will be eligible to receive such unbundled elements in the rural markets they serve
    - This definition of rural areas is more appropriate than the more common proposal based on access line count because:
        - the fundamental economic forces affecting unbundling are the same as those considered when selecting this definition in the access charge reform order
        - The information is readily available and not subject to interpretation (e.g., Should wireless and/or VoIP lines be counted as equivalent lines served by a CO? If the number of lines in a CO declines over time, does impairment change?)
- In these markets, the incumbent will continue to provide unbundled elements at TELRIC rates.
- This impairment finding will be reviewed biennially by the FCC on a market-by-market basis based on recommendations of the state commissions using the criteria set forth in the TRO.

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[3] *See, e.g.* Comments of Montana Public Service Commission at 3, Comments of Minnesota Public Utilities Commission at 5, Comments of Michigan Public Service Commission at 5, Oklahoma Corporation Commission Comments at 7, California Public Utilities Commission Comments at 66.

This proposal:

- reflects market realities and rural consumer's legal right to competitive choice
- is simple to administer (as noted in the *CLEC Access Reform Order*)
- is legally sustainable and demonstrates a granular analysis to satisfy USTA II
- should be acceptable to most rural competitors and the ILECs.
- Enables the commission to incorporate all of the factual data (regarding service in rural areas) provided in this proceeding rather than ignoring it.

We respectfully request that this proposal be incorporated in the upcoming TRO Remand Order.

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President
ATL Communications
OR

Cc: Scott Bergmann
Matthew Brill
Jessica Rosenworcel
Daniel Gonzalez
Christopher Libertelli

Urgent Appeal to the Rural Caucus on Telecommunications:
I appreciate the opportunity to be heard by the Rural Caucus on Telecommunications issues. I am the President and CEO of Superior Spectrum, Inc. a Competitive Local Exchange Carrier (CLEC) based in Marquette, Michigan. Due to the cost, complexity and time involved with traveling to Washington D.C. from the rural Upper Peninsula of Michigan, I am submitting my comments in writing for your consideration.

Small companies in general and small companies from rural areas in particular are at an extreme disadvantage in the federal political process. We do not have the financial or human resources to trumpet our message effectively and are easily overwhelmed by the billion dollar corporations that have mastered the process. Therefore, it is imperative that we receive government protection from the anticompetitive actions of the Incumbent Regional Bell Operating Companies (RBOCs). Please treat this document as though you are hearing it from five hundred different sources over a period of two weeks so that it matches the impact of the United States Telephone Association (USTA) money machine.

I am aware that a primary topic of the Caucus is how to craft new telecom legislation. However, I submit to you that the first order of priority should be a thorough review of the current Telecommunications Act of 1996 (FTA) and the apparent disdain for which it is being treated by the FCC Chairman, Michael Powell, and the RBOCs. The FCC, as a result of a massive public relations and legal campaign by the RBOCs, is attempting to take away CLEC access to facilities that are clearly essential to our ability to compete. Without continued access to the Essential Facilities of switching and the UNE-P platform (UNE-P was legally upheld as a legitimate method if carrying out the 1996 FTA by the Supreme Court) wire line competition in rural America will be dead and gone within 14 months. When that happens, many of the companies currently fostering innovation and competition in telecommunications will be gone as well.

The RBOCs have a long history of thwarting innovation and competition. They are now on the verge of destroying the entire CLEC industry. Please act now to restore the vision and intent of the 1996 FTA.

What Happened to the Telecommunications Act of 1996?
Opening local monopolies to competition in exchange for long distance entry was the keystone of the Telecommunications Act of 1996. Government leaders must not forget this fundamental aspect of the entire issue. Recall that prior to 1996 the RBOCs were not allowed to serve the Interstate long distance market as a result of the 1984 breakup of AT&T. The 1996 FTA gave them a road map to long distance entry, which included <u>the primary requirement that the RBOCs open their local monopolies to competition</u>. Remember, the RBOCs asked for this deal and backed the passage of the 1996 FTA.

For several years, until about 2000, the RBOCs dragged their collective feet. Finally, UNE-P emerged as a platform to make local competition a reality. The competition fostered through UNE-P allowed the RBOCs to begin meeting the conditions set forth to gain long distance entry. Fast forward to late 2003; with UNE-P spurring local competition, the RBOCs met the conditions required to enter the interstate long distance market in most states. Concurrently, a major shift in RBOC tactics emerged. The RBOCs, through their trade association USTA, became significantly more aggressive in their campaign to overturn rules fostering local service

competition. Eliminating UNE-P, by eliminating their requirement to provide access to switching, has been the focus of their massive effort. The sole intent of their actions has been to cripple the competitor's ability to compete after they got what they wanted. Due to low customer density in rural America, no reasonable alternatives to the RBOCs' Essential Facilities of switching exist. Therefore, by eliminating access to the Essential Facility of switching, the RBOCs are effectively eliminating competition and its many benefits from their local service territories. This month the FCC, under Chairman Michael Powell's explicit direction, is poised to implement rules that will nail the coffin shut on local competition and laugh in the face of those who crafted and passed the 1996 FTA. Further the FCC and the RBOCs are apparently ignoring the enormous anti-trust liability they are creating through their actions. If UNE-P is eliminated, then the FCC has the obligation to once again prohibit the RBOCs from offering interstate long distance and begin the approval process over.

FCC About to Make a Major Policy Blunder Regarding Essential Facilities:
The FCC is about to eliminate access to the Essential Facility of switching. Americans in general and rural Americans in particular will suffer negative consequences once the new rules are implemented and UNE-P is eliminated. While not on the scale of the Social Security issues or the war in Iraq, make no mistake that millions of Americans will soon experience a negative financial impact on their telephone bills. Perhaps more importantly, innovation will slow as competitors, faced with no reasonable alternatives to RBOC switching, are financially crippled and their business models destroyed.

Competition in Rural America will Die without Access to Essential Facilities:
Rural America stands to be particularly hard hit. The Essential Facilities Doctrine (EFD) guidelines have evolved to include four essential criteria. With the looming elimination of UNE-P, the wire line facilities in rural America are a text book case of a monopoly company withholding access to an Essential Facility to cripple the competition. The lack of reasonable alternatives in the rural telephone market, coupled with the monopoly RBOCs' refusal to deal with CLECs, clearly has anti-trust activity written all over it. Small businesses do not have the resources to fight this cause, which is why we need government protection. Since Essential Facilities in rural areas cannot be reasonably or practically duplicated, rural consumers and the rural companies serving these customers will have no reasonable competitive alternative to UNE-P. The result: wire line competition and the benefits competition has brought, will be eliminated from rural America.

Telephone Monopolies Are Reemerging:
I am sure you have seen the recent headlines that SBC is in talks to merge with AT&T. Twenty years after the historic breakup of AT&T, the RBOCs are reemerging as dominant monopolies. Only this time they are burdened with far less regulation than prior to 1984. How does this serve the best interests of the American consumer? The answer is simply that it does not. Consumers are just beginning to realize the benefits of competition (innovation, lower rates and better service) due to UNE-P making local telephone competition a reality. Now that the RBOCs have attained their coveted goal of entry into the long distance market, they are making crafty legal maneuvers that threaten to pull the plug on local service competition. Without the Essential Facilities made available through UNE-P, CLECs will be left with no viable alternative to serve their customers. In 14 months, the monopoly will be handed back to the RBOCs in rural America and the consumer will suffer.

Essential Facilities Require Continuing Supervision by Government Authorities:
The misguided FCC Chairman is pushing for competitors to enter into private commercial agreements with the RBOC monopolies - a ludicrous idea that would not even deserve discussion except that Chairman Powell is promoting the idea as good policy. The FCC has declared the Essential Facility of monopoly switching off limits and yet they expect that CLECs can negotiate a commercial agreement for other Essential Facilities, potentially including switching, just because legal access had been granted! When Essential Facilities are involved, simply declaring access must be made available is not enough. The EFD requires continuing government supervision of the terms under which access shall be available, including price and performance. The RBOCs are making a mockery out of government regulation and they are thumbing their noses at American antitrust laws.

Conclusion:
Local service competition and its benefits are on the verge of being eliminated, particularly in rural areas. In order to preserve competition and innovation in telecommunications services, immediate government action to stop the new FCC rules from being implemented is required. CLECs, particularly CLECs in rural areas, need to be granted continued access to Essential Facilities in order to compete with incumbent RBOC monopolies. The RBOCs' removal of CLEC access to facilities that are so clearly essential to our ability to compete is a textbook case of antitrust action. However, the ability of a small company or even a group of small companies to take on the daunting task of an antitrust lawsuit against the billion dollar monopoly RBOCs is virtually nonexistent. The appropriate government authorities must take an aggressive stance against the elimination of CLEC access to Essential Facilities. Millions of voting Americans are counting on you to protect their best interests by fostering healthy competition in the telecommunications marketplace. Please act now to preserve competition and its many benefits for the American consumer!

Sincerely,

David A. Puskala
President and CEO
Superior Spectrum, Inc.
Marquette, Michigan

FC: Congressional Rural Caucus
House Committee on Energy and Commerce: Subcommittee on Telecommunications
House Committee on the Judiciary
Senate Judiciary: Subcommittee on Antitrust Competition and Consumer Rights
Senate Committee on Small Business and Entrepreneurship
House Committee on Small Business: Subcommittee on Rural Enterprises
EC: FCC Commissioners