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February 18, 1999

EX PARTE OR LATE FILED

**Lynn Shapiro Starr**  
Vice President  
Regulatory Affairs

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

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FEB 18 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: **Ex Parte Statement**  
CC Docket 96-98

Dear Ms. Salas:

On February 8, 1999, John Lenahan, Associate General Counsel and I met with Larry Strickling, Don Stockdale, Carol Matthey, Jane Jackson and Michael Pryor of the Common Carrier Bureau to discuss the Supreme Court's Decision in AT&T Corporation, et al. v. Iowa Utilities Board. The specific content of our discussion is reflected in the attached document entitled, Section 251(d)(2) - FCC Remand Considerations, CC Docket No. 96-98.

Should any questions arise in connection with this matter, please contact me. Two copies of this letter are being submitted pursuant to the Commission's rules.

Sincerely,

A handwritten signature in cursive script that reads "Lynn Starr".

Attachment

cc: L. Strickling  
D. Stockdale  
C. Matthey  
J. Jackson  
M. Pryor

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Section 251(d)(2) – FCC Remand Considerations  
CC Docket No. 96-98

FEB 18 1999

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**Introduction.** *The Supreme Court's recent decision invalidating Rule 319 in its entirety is neither a "narrow holding" nor one of minor consequence. Rather, as the Court held, the Commission's Rule 319 violated the "clear limits" of the Act and, as a result, will have far reaching consequences. For example, the Court considered its review of the all elements rule ". . . largely academic in light of our disposition of Rule 319." Slip Op. at 25. And, in addressing Rule 315(b), the Court reasoned: "As was the case for the all-elements rule, a remand of 319 may render the incumbents' concern on this score academic." Slip Op. at 26. The obvious conclusion is that the Court assumed that on remand the Rule 319 list would shrink. That the list must shrink also follows necessarily from the market and technological developments that have occurred in the almost three years that have passed since the original Rule 319 list was adopted by the Commission.*

*The Commission must now develop and apply a limiting standard that is consistent with the Court's decision, the language of Section 252(d)(2) and current marketplace facts, and one that, given the dynamic nature of this industry, employs reasonable time horizons and sunset principles.*

*The purpose of this ex parte is to recommend an analytical framework that will facilitate and expedite the Commission's remand proceedings.*

**I. The Statutory Standard**

- ◆ Section 251(d)(2) imposes restrictions upon the Commission in determining which network elements incumbents will be mandated to make available to competitors under Section 251(c)(3).
- For proprietary network elements, the Commission shall consider, "at a minimum," whether "access to such network elements . . . is necessary."
- For all network elements, the Commission shall consider, "at a minimum," whether "the failure to provide access . . . would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

**II. Purpose of the Act.**

- ◆ The goals and objectives of the 1996 Act are clear: ". . . to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all

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February 18, 1999

Americans by opening all telecommunications markets to competition . . .” See Conference Report, 104<sup>th</sup> Congress, 2d Session, Report 104-458.

- ◆ The 1996 Act, therefore, rejects the premise that local phone service is a “natural monopoly” or that facilities-based competition would result in “wasteful duplication.” Slip Op. at 2-3, Breyer Op. at 18-21.
- ◆ In Justice Breyer’s view: “Despite the empirical uncertainties, the basic congressional objective is reasonably clear. The unbundling requirement seeks to facilitate the introduction of competition where practical, i.e., without inordinate waste.” In addition, the Act imposes “limits on the FCC’s power to compel unbundling” that are “analogous” to the essential facilities doctrine. Breyer Op. at 18.

### III. AT&T v. Iowa Utilities Board

- ◆ The Court held that, despite ambiguities in certain provisions of the 1996 Act, Section 251(d)(2) imposes “clear limits” on the Commission’s authority to determine which network elements must be made available under Section 251(c)(3). Slip Op. at 20-25, 30.
- ◆ The Court identified two independent reversible errors with respect to the FCC’s initial application of the Section 251(d)(2) standard:
  - “The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbents’ network. That failing alone would require the Commission’s rules to be set aside.”
  - In addition, “the Commission’s assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element” satisfies the “necessary” and “impair” test is “simply not in accord with the ordinary and fair meaning of those terms.” Slip Op. at 22 (emphasis in original).
- ◆ Accordingly, the Court vacated Rule 319 as inconsistent with the “clear limits” of the 1996 Act. Slip Op. at 30. As the majority reasoned, “...if Congress had wanted to give blanket access to incumbent’s networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included 251(d)(2) in the statute at all. “Slip Op. at 23.
- ◆ Therefore, in implementing Section 251(d)(2) on remand, the FCC is required, at a minimum, to undertake the following steps:
  - Adopt a genuine limiting standard for “necessary” and “impair” that is “rationally related to the goals of the Act.”

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February 18, 1999

- Determine whether alternative sources for the functionality provided by each network element are reasonably available from other sources.

#### IV. The “Limiting” Statutory Standard

- ◆ It was not necessary for the Court to decide “as a matter of law” whether the “limiting” standard contemplated by Section 251(d)(2) codified the “essential facilities” doctrine or an “equivalent” criterion. Nevertheless, the majority opinion adopted key principles of this doctrine when it held that the Commission may not “blind itself to the availability of elements outside the incumbent’s network” or assume that “*any* increase in cost (or decrease in quality)” establishes necessity or an impairment. Slip Op. at 21. And Justice Breyer’s concurring opinion, which includes an extensive discussion of economic theory, concludes that while the unbundling provisions do not explicitly refer to the essential facilities doctrine, the Act imposes “related limits upon the FCC’s power to compel unbundling.” Breyer Op. at 18.
- ◆ The statutory language of Section 251(d)(2), as construed by the Court, tracks well-recognized components of any essential facility analysis. Indeed, the essential facility doctrine embraces the precise matters that the Court held the Commission had failed to adequately consider. First, the claimed input must be essential to competition. Second, the claimed input must not be practically or reasonably available from another source or capable of being duplicated by others. Evidence that there is competition in the market, and that the competitors are not sharing the facility, shows that the claimed facility is not essential. See 3A P. Areeda and H. Hovenkamp, Antitrust Law ¶¶ 771-773 (1996).
- ◆ In addition to this statutory support, there are solid policy reasons for the Commission to construe Section 252(d) with reference to this antitrust principle, including (i) the “pro-competitive, de-regulatory” statutory purpose of promoting deployment of advanced technology to enhance consumer welfare is also identical to the economic underpinnings of the essential facility doctrine; (ii) the essential facility doctrine has been recognized and applied by courts for nearly a century and, during that time, has addressed the obligation of a firm with “monopoly” power to share access to facilities (including local exchange carriers);<sup>1</sup> and (iii) the lack of any other test that has gained support in the courts or among economists.

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<sup>1</sup> Even before the term “essential facilities” doctrine was coined by the District of Columbia Circuit in 1977, the doctrine had been applied, in substance, for 65 years. See United States v. Terminal Railroad, 224 U.S. 383 (1912). See also Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978). The doctrine has been applied to the telecommunication industry in a number of cases. See e.g. MCI Communications v AT&T, 708 F.2d 1081(7th Cir. 1983).

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February 18, 1999

- ◆ The basic components of the doctrine can be summarized as follows:
  - A requested input does not satisfy the “essential facilities” test if it can be practically or reasonably obtained from another source or self-provided. Case law examples include:
    - ❖ International Audiotext Network v. AT&T, 839 F Supp. 1207 (S.D.N.Y. 1994), aff’d, 62 F.3d 69 (2<sup>nd</sup> Cir. 1995) (AT&T’s international calling services were not an essential facility for plaintiff’s billing service provider because numerous other firms provided similar calling services).
    - ❖ Illinois ex rel. Hartigan v. Panhandle E. Pipeline Company, 730 F. Supp. 826 (C.D. Ill 1990), aff’d 935 F.2d 1469 (7<sup>th</sup> Cir.1991), cert. denied, 502 U.S. 1094 (1992) (No violation under the essential facilities doctrine where others could have entered the market through alternate pipelines).
    - ❖ Directory Sales Magmt. Corp. v. Ohio Bell Telephone Company, 833 F.2d 606 (6<sup>th</sup> Cir. 1987) (Ohio Bell’s simultaneous delivery of yellow and white pages directories was not an essential facility for the competing yellow pages publisher, given that competitor could arrange for its own simultaneous delivery).
  - Nor is it sufficient to show that the dominant firm enjoys a cost advantage with respect to the facility: “For example, a monopolist may enjoy economies of scale in its plant, advertising, or distribution network. If scale economies are substantial, then any new rival faces higher costs than does the monopolist. Nevertheless, we would not regard the monopolist’s large plant as an essential facility that must be shared with others.” See Areeda ¶ 773(b)(2) at p. 206. Case law examples include:
    - ❖ “Any monopolist presumably has such advantages, for otherwise its monopoly would be copied and it would disappear.” For this reason, the 7<sup>th</sup> Circuit held that a facility is not essential unless the plaintiff shows its “inability practically or reasonably to duplicate it.” See Areeda ¶ 773(b)(2) at 205, citing MCI Communications Corp. v. AT&T, 708 F. 2d 1081 (7<sup>th</sup> Cir. 1983).
    - ❖ Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544 (9<sup>th</sup> Cir. 1991), cert. denied, 112 S. Ct. 1603 (1992) (Rejecting essential facilities claim because denial of access would only

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February 18, 1999

impose a financial burden on excluded competitors, not eliminate them).

- ❖ Twin Labs v. Wieder Health and Fitness, 900 F.2d 566, 569 (2d Cir. 1990) (Holding that a successful essential facilities plaintiff must show “that denial of access has caused it ‘severe handicap,’” that is, the plaintiff “must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible”).
- ❖ Florida Fuels, Inc. v. Belcher Oil Co., 717 F. Supp. 1528, 1533 (S.D. Fla. 1989) (Holding that it is insufficient for a plaintiff to allege access to one facility is simply more economical than other alternatives – “although expensive in absolute terms, the cost of duplication may be reasonable in light of transactions that would be duplicated and the possible profits to be gained”).
- ❖ Laurel Sand & Gravel, Inc. v. CSX Transp., 924 F.2d 539, 544-45 (4<sup>th</sup> Cir.) cert. denied, 112 S. Ct. 64 (1991) (Holding that a denial of trackage rights to a competing railroad did not support an essential facilities claim where the plaintiff railroad could have purchased train service from the defendant railroad).

- Finally, sharing must be “essential” to market competition.

- ❖ The purpose of antitrust policy is to protect competition, not competitors.

## V. Properly Interpreting Section 251(d)(2)

On remand, the Commission should obtain comments on the meaning of “proprietary” in light of the underlying purpose of that concept, which is to promote and protect innovation. The Commission should also seek comment on the meaning of “necessary” and “impair.”

In addition, the Commission must undertake a detailed, factual competitive entry analysis that addresses actual and announced entry plans and assesses the ability of requesting carriers to obtain network elements from sources other than the incumbent.

Based on a reasonable “limiting” standard and the relevant facts, the Commission should then determine which network elements must be made available. The following is a preliminary recommendation regarding some of these “next steps.”

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February 18, 1999

- ◆ **Proprietary network elements.** The Commission should define “proprietary” elements to be elements with proprietary protocols, or elements that contain proprietary information or comprise intellectual property. The Commission should be guided by the DOJ/FTC 1995 “Antitrust Guidelines for the Licensing of Intellectual Property” for the definition of “intellectual property” and for the policy goals of protecting innovation.
  - The DOJ/FTC guidelines define “intellectual property” as property “protected by patent, copyright, and trade secret law, and of know-how.” ¶1.0.
  - The Commission should also be guided by the aim of protecting “proprietary” property as complementary to the objectives of competition. As the DOJ/FTC Guidelines state:
    - ❖ The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. DOJ/FTC Guidelines at ¶ 1.0.
  - Section 251(d)(2)(A) reflects the nation’s long-standing policy of encouraging innovation by protecting proprietary property.
- ◆ **“Necessary” standard for proprietary elements.** Under Section 251(d)(2)(A), access to network elements that are proprietary in nature must be provided only when “necessary.” The Commission should construe “necessary” to mean that access to the *incumbent’s* proprietary element is essential to open the market to competition.
  - Access to a proprietary network element can only be required if (i) such access is required to open the market and (ii) there are no economically reasonable substitutes for the functionality provided by such element available from alternative sources. (This “alternative source” component is similar to the second component of the “impair” test.) Unbundling can

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February 18, 1999

not be required, however, if the market can be opened to competitive entry without the proprietary element -- even if there are no alternative sources.

- A specific input is not “essential” if competition can occur without it. See e.g., Official Airline Guides v FTC, 630 F.2d 920 (2d Cir. 1980).
- ◆ **“Impairment” standard for other elements.** Under Section 251(d)(2)(B), no network element need be provided unless its unavailability would “impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” A nonproprietary network element meets the “impair” test only if (i) access to the functionality provided by that element is essential to competition for similar services and (ii) there are no economically reasonable substitutes for the functionality provided by the element available from alternative sources. As the majority opinion noted in discussing the impairment standard:

“The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent’s network. . . . In addition, . . . the Commission’s assumption that any increase in cost (or decrease in quality) imposed by denial of a network element . . . causes the failure to provide that element to ‘impair’ the entrant’s ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms”. Slip Op. at 22.

- **Alternate Sources.** In determining whether alternative sources for the functionality provided by the element are reasonably available from other sources, the Commission should be guided by the numerous antitrust precedents addressing this issue in the context of the essential facility doctrine. These precedents reflect the intensive analysis and debate over decades among economists, legal theorists, and courts on precisely the same issue now before the Commission. Those cases stand for the principle that impairment will exist only if the facility cannot be “practically or reasonably” duplicated. Therefore, impairment should be found only where the requested element is practically unavailable and the failure to make access to such element would harm competition, that is, cause consumers to ultimately pay *supra* competitive prices.
- **Increased Cost.** A finding of impairment cannot be based on a conclusion that although alternative facilities are reasonably available, they are more costly than the incumbent’s existing facilities because of economies of scale. If the Commission were to reach such conclusion, it

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February 18, 1999

would essentially eliminate the impairment test, once again, from the statutory analysis.

- If Congress intended the determination of whether access to a network element was required to depend on a simple cost comparison, it would have drafted Section 251(d)(2) quite differently, or would have excluded it altogether. See e.g., Slip Op. at 23. For example, it could simply have said (as the Commission did in the First Report and Order at ¶ 11) that upon request an incumbent must share “economies of density, connectivity, and scale.” However, Congress did not give such “blanket access” to incumbent’s networks; nor can this Commission. Rather, as described above, Congress adopted the approach of “necessary and impair,” e.g. alternative sources at reasonably economic terms, mirroring the essential facilities approach.
- **Time Horizon for Analysis.** To the limited extent that the Commission has addressed alternative supply, its analysis has been static: who is supplying what now. It needs to be dynamic or forward looking. It needs to examine alternative supply in terms of what would or will be available in a reasonable span of time. The Commission should apply the same two-year time horizon to evaluate alternative supply as it used in the MCI-WorldCom Order.<sup>2</sup>

To estimate potential alternative supply, the Commission could start from existing alternative supply, and apply the following factors over a two-year time horizon:

- ❖ Extension of existing alternative networks. For example, if a competitor has built its own transport network in downtown Chicago, incremental investment can provide alternative supply to many suburbs. This also applies to telephony/broadband upgrades to cable systems.
- ❖ Inference from availability in other areas. If Winstar is offering local exchange and transport over its own facilities in Milwaukee, then Winstar is a feasible potential alternative in other similar cities.
- ❖ Acknowledgment of overarching trends in pricing and technology. For example, the cost/price of wireless alternatives has steadily

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<sup>2</sup> See Memorandum Order & Opinion, In the Matter of Application of WorldCom, Inc. MCI Communications Corporation for Transfer of control of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211, September 14, 1998 at ¶¶ 36, 101, 105,114,151 discussing various input markets.

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February 18, 1999

declined for the last decade. Wireline access costs are stable or rising. The same is true of cable telephony upgrades.

Therefore, the Commission must evaluate alternative supply by determining potential supply at the end of a specific multi-year time horizon, considering the potential for extension of existing alternate supply, replication of successful business models in similar locales, and the likely cost declines in alternative technologies.

- **Market-Specific Analysis.** Because the purpose of the Act is to promote competition, not competitors; the Commission's analysis should not be on a carrier-specific basis. However, the Commission's analysis must be market-specific. As the Commission has emphasized in many other proceedings, competitive conditions vary widely across product, service and geographic markets.

## VI. Application of These Standards

◆ Some examples may be useful:

- ❖ Ameritech recently introduced an innovative service known as "Privacy Manager," which has the capability of screening telemarketing calls and providing certain recorded messages and instructions without interrupting the called party. Ameritech has acquired intellectual property rights and considers the underlying technology and design "proprietary." Assuming the facilities used to provide "Privacy Manager" fit within the definition of a "network element," the issue is whether Ameritech's Privacy Manager is essential to competition in local telephony. The answer is "no." First, competitors can compete in local service markets without Ameritech's Privacy Manager. Moreover, there are numerous firms competing successfully with Ameritech in the local exchange market that do not provide "Privacy Manager." Therefore, access to this proprietary network element is not "necessary."
- ❖ Another example of a proprietary network element is Ameritech's routing tables within its local switches. Ameritech considers its routing tables to be proprietary and maintains them as such. A routing table is "necessary" to provide telephone exchange service. Without routing tables, carriers could not complete calls. However, access to *Ameritech's* proprietary routing table is not required to compete, because carriers can create their own routing tables. Therefore, *Ameritech's* routing tables do not meet the "necessary" standard.

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February 18, 1999

- ❖ Moreover – even apart from the proprietary components of switching – the fact that hundreds of switches have been deployed by new entrants demonstrates that there are reasonably available alternate sources for switching. Thus, the local switch does not meet the “impair” standard.
- ❖ Likewise, many carriers have established their own operator and directory assistance service centers. The large interexchange carriers, for example, have established their own nationwide services and are competing against incumbents’ operator and directory assistance services.
- ❖ In contrast, even though there are numerous alternatives to the incumbent’s loop, such as CLEC fiber, fixed wireless, PCS and cable telephony, local loops may be required in certain areas. For example, in a market of low line density without a cable system, it is possible that the failure to make the incumbent’s loops available would “impair” local competition.

**VII. Factual Inquiries Required to Properly Apply the Section 251(d)(2) Standard to Each Network Element**

- ◆ In addition to articulating a reasonable standard consistent with the statutory purpose and language, the Commission must also undertake a factual inquiry to determine whether alternative sources are available on reasonable and economic terms.
- ◆ Such a factual analysis is clearly required by the majority’s opinion, but the data required to conduct such analysis is not currently in the possession of the Commission. See Industry Analysis Division, Common Carrier Bureau, Report – Local Competition at 3., issued Dec. 1998. (The Commission “does not yet possess the detailed information necessary to evaluate the current state of local telephone competition on a market-by-market basis”).
- ◆ The Commission should take immediate steps to gather the information that it currently lacks regarding alternative competitive sources. At a minimum, the Commission should obtain the following information for each network element, on an appropriate market-specific basis:

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February 18, 1999

## **Information Primarily from New Entrants**

### **Actual Deployment to Date**

1. What network facilities and equipment have been deployed by the new entrants to date? For example, in the Ameritech region, new entrants have deployed significant amounts of fiber optic transport facilities (both loop and inter-office) and approximately 110 competitive local switches.
2. What is the carrier's capacity to provide telecommunications service using these existing facilities?
3. In connection with this actual facilities-based entry, the Commission should inquire on an overall basis as to capital market investment in these new entrants, which would be probative of the market's assessment of the economic and financial viability of competitive facilities-based entry.

### **Planned Deployment and Expansion**

1. The Commission should ask all new entrants or potential new entrants to describe their announced facilities-based plans on a short-term, medium-term and long-term basis.
2. In particular, the Commission should analyze the acquisitions and facilities investments for local market entry made by large carriers such as AT&T, MCI/WorldCom and Sprint. The Commission should also analyze the ability of smaller carriers, such as Allegiance, Frontier, NorthPoint and McLeod, to enter successfully and expand.
3. In addition, the Commission should seek facilities-based entry plans of any cable company with intentions of providing cable telephony, including TCI, Time-Warner, Comcast and Cox Communications.
4. In connection with planned entry, the Commission should inquire about proposed implementation schedules to build out or expand equipment and facilities, either self-provided or obtained from alternate sources.

Ameritech  
February 18, 1999

### **Cost and Price**

1. All new facilities-based CLECs should furnish the Commission with the actual costs incurred, or provided for in existing purchase agreements, for all equipment and facilities self-provided or obtained from alternate sources. If such actual cost greatly exceeds the cost that would result from application of the Commission's TELRIC model, the carrier should explain the difference.
2. Each carrier with local entry or expansion plans should estimate how much its costs will be on a long run, incremental basis to obtain equipment and facilities from alternate sources. In addition, each carrier should disclose whether its business plan assumptions for such purchases are consistent with the Commission's TELRIC model.
3. In the event new entrants fail to disclose actual or estimated costs, the Commission's determination will be limited to an assessment of whether such facilities and equipment are practically available in reasonable time periods.
4. The Commission should ask each new carrier for their total actual expenditures related to telecommunications in 1998, and projected expenditures for 1999 and 2000, to assess each new entrant's "buying power" relative to the incumbent.
5. The Commission should obtain from each new entrant a retail – and, if applicable, a wholesale – price comparison for each local exchange or exchange access service it provides in competition with the incumbent's comparable service.

### **Information Primarily From Incumbents**

1. The Commission should obtain information regarding the extent to which each of the network elements covered by the now-vacated Rule 319 have actually been requested by and furnished to new entrants.
2. The Commission should also obtain information regarding those items that facilitate the use of a new entrant's facilities, including collocation, interconnection trunking arrangements and access to unbundled loops. In particular, the Commission should inquire as to the number of the incumbent's lines that are "addressable" by

Ameritech  
February 18, 1999

existing collocation capability and known or pending collocation requests. For example, as of January 1, 1999, there were over 800 operational collocation sites in the Ameritech Region, which currently address 70% of Ameritech's business loops and 58% of its residential loops.

3. The Commission should determine which of the seven network elements listed in Rule 319 have not been requested in commercially significant quantities.

### **Information From All Interested Parties**

1. The Commission should require commentors who believe that a proprietary element meets the "necessary" standard, or that any element meets the "impair" standard, to provide a convincing explanation of why unbundling is consistent with the purpose and objectives of the Act and outweighs any potential "downside" of compulsory unbundling. Also the Commission should inquire how proprietary components of a network element should be separated from non-proprietary features.
2. The Commission should inquire about and assess the "cost" of making access to network elements available; this would include administrative cost, inefficient uses, degradation of facilities, and impact on investment and innovation. In addition, how should the Commission take into account the disincentive effects on potential alternate supply and innovation of unbundling requirements? How would this social cost be incorporated in the welfare cost analysis that should guide unbundling policy?
3. The Commission should inquire into the viability of resale or availability of other services as a reasonable alternative to unbundling.
4. The Commission should also seek information on technology alternatives for each of the seven previously required elements.
5. For each element, the Commission should consider whether its alternative availability analysis will proceed on a geographic market basis, a line density basis, a basis similar to the zones the Commission required for unbundled loops, or some other relevant market segmentation.

Ameritech  
February 18, 1999

6. For any element that the Commission determines should be made available, it should, at the same time, determine an appropriate “sunset” provision, given the dynamic nature of the market and the significant and predictable advances in telecommunications technology.
7. To assist its “alternative source” analysis, the Commission should seek comment on the following:
  - What weight should be given to the potential supply of alternatives to ILEC network elements? Should the Commission employ standard antitrust analysis in weighing potential supply?
  - What time horizon is appropriate for the Commission’s potential alternate supply analysis? Does a two-year period strike an appropriate balance between the need for a forward-looking approach and the need for a reasonable expectation?
  - How should the Commission extrapolate experiences with alternate supply across markets? How should lessons about the essentiality of an element in one market inform the Commission’s general policy?
  - How should the Commission evaluate the known and expected technology trends in delivery modes, costs, and pricing to inform its potential supply analysis?
  - How should substitution be defined? Should the Commission employ the standard antitrust approach of evaluating substitutability from the buyer’s point of view – in this case from the perspective of the requestors of the UNEs? How should substitution possibilities between markedly different technologies be evaluated? How should substitution analysis account for UNE Platform prices that may differ markedly from resale prices or the prices that would prevail in a competitive market?

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February 18, 1999