

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

In the Matter of)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
Of 1996)	
)	
Interconnection between Local Exchange)	
Carriers and Commercial Mobile Radio)	
Service Providers)	

**COMMENTS OF UTC
ON
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

Pursuant to Section 1.415 of the Federal Communications Commission (FCC) Rules, UTC, The Telecommunications Association (“UTC”) hereby submits its comments on the *Second Further Notice of Proposed Rulemaking*¹ in the above referenced proceeding. Although UTC agrees in principle that the FCC should reexamine the unbundling obligations that apply to previously identified network elements, it opposes modifying the definition of “loops” or “transport” to include dark fiber.² It is unnecessary to unbundle dark fiber, because it is widely available from alternate sources. Nor will it impair the ability to provide local exchange service if requesting carriers do not have access to dark fiber from an incumbent carrier, because dark fiber is a thinly-margined service that is already available to competing carriers at or near cost.

¹ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Second Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, FCC 99-70 (Apr. 16, 1999). (“*Second Further Notice*”)

² *Id.* at ¶ 34.

I. Introduction

UTC is the national representative on communications matters for the nation's electric, gas, and water utilities and natural gas pipelines. Over 1,000 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities which serve millions of customers, to smaller, rural electric cooperatives and water districts which serve only a few thousand customers each. All utilities depend upon reliable and secure communications to assist them in carrying out their public service obligations. In order to meet these communications requirements, utilities and pipelines operate extensive private, internal communications networks consisting of both wired and wireless components.

II. Dark Fiber should not be included as sub-elements of “loops” or “transport”

The *Second Further Notice* inquires whether the Commission should modify the definition of “loops” or “transport” to include dark fiber. UTC believes that access to dark fiber from incumbents is unnecessary and would not impair competition if it was withheld. Alternative inexpensive sources of dark fiber are already widely available from utilities and other providers.

While many utilities are poised to provide competitive telecommunications, thus far the overwhelming majority that have entered the telecommunications market have limited themselves to carrier's carrier agreements and telecommunications partnerships. Typically, utilities lease dark fiber over their private networks to other carriers, which in turn utilize those assets to provide service to the public.

The price of leased dark fiber has been estimated to range from \$20-80 per fiber mile per month with rates typically higher in urban centers and lower in sparsely populated areas. One utility disclosed to UTC that its profit margin for leased dark fiber is only 8% above the cost of the fiber, installation, maintenance and overhead.

As recently as 1997, UTC's members reported that they had deployed an average of 359.3 route miles of fiber cable. Approximately 19% of the respondents indicated they leased dark fiber to third-parties, with approximately 4% of the then installed fiber under lease as "dark fiber".³ Overall, as of 1997, utilities had installed 40,000 route miles of fiber optic cable representing over 750,000 fiber miles, and they indicated an intent to install another 36,000 route miles within the next three years.⁴ In addition to utilities, non-incumbent local exchange carriers reported in 1997 that they had deployed 1,861,413 miles of dark fiber.⁵ These statistics demonstrate the existence of widespread deployment of alternative sources of inexpensive dark fiber.

The Supreme Court has mandated that such alternative sources of network elements limit the extent of the unbundling obligations on incumbent carriers. "[T]he Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act, which it has simply failed to do. The Commission cannot, consistent with the Statute,

³ UTC, The Telecommunications Association, 1997 Report on Fiber Optic Applications and Developments in the Utility and Gas Pipeline Industries, at 13, A-8, A-12. Survey results were based on 157 utilities reporting, composed of 53.6% municipal or government utilities; 26.8% investor-owned and 19.6% cooperatives.

⁴ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Report*, CC Docket No. 98-146, at ¶40 (Feb. 2, 1999).

⁵ *1997 Statistics of Communications Common Carriers*, at 137.

blind itself to the availability of elements outside the incumbent's network."⁶ Consistent with the Court's mandate that the FCC limit the list of unbundled network elements, the Commission should continue to exclude dark fiber.

II. The FCC should adopt national standards for access to unbundled network elements without term limitations or sunset provisions.

UTC generally supports the adoption of nationwide, uniform, stringent network unbundling obligations that ensure that requesting carriers can obtain elements that, now and in the future, are fundamentally necessary, and that would impair competition in their absence. In order to fulfill the Supreme Court mandate, the standard need only limit the type of network elements to be furnished, not the time during which they must be provided. The scope of the obligation should be limited to network elements used to provide telecommunications service (i.e. directly to the public for a fee). UTC reads no mandate from the Supreme Court to further limit the scope of the obligation to a narrower class of "proprietary" elements, nor does it consider it possible to limit the necessary and impair standard without jeopardizing competition and frustrating the "pro-competitive deregulatory framework" that Congress intended.

The *Second Further Notice* reexamines the meaning of the terms "proprietary", "necessary", and "impair", as if the Supreme Court rejected each of them. In fact, the Supreme Court only demanded that the standard needed some limitation "*rationally related to the goals of the Act.*"⁷ Specifically, it stated that the standard may not ignore the availability of substitutes apart from those provided by the incumbent, and it may not obligate the incumbent to meet unrealistic expectations. In the wake of the Court's

⁶ *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721, 734-35 (1999).

decision, incumbents must still provide the most efficient network elements available, only now they are excused if another source is capable of providing the same unbundled network elements at equal or nearly equal cost and quality.

An accurate comparison of cost and quality may only be made between identical network elements that are available from the incumbent and those available from other sources. In the absence of such identical elements, the incumbent must be obligated to provide its network element to a requesting carrier. In the rare instance when identical substitute network elements are available, the incumbent should bear the evidentiary burden of demonstrating that any increase in cost or reduction in quality does not create a barrier to entry

IV. Conclusion

Wherefore, the premises considered, UTC urges the Commission to exclude dark fiber as a network element that incumbents must provide on an unbundled basis. Instead, the Commission should limit the unbundling obligations to those elements used to provide telecommunications service that are unavailable from alternate sources at equal or nearly equal cost and quality.

Respectfully submitted,

UTC

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⁷ *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. at 735 (emphasis added).

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