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March 25, 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: CC Docket No. 96-98, FCC 99-70
In the Matter of Implementation of the Local Competition
Provisions in the Telecommunications Act of 1996

To the Secretary:

Enclosed herewith for filing with the Commission are an original plus twelve copies of the
Comments of the Public Utility Commission of Texas in the above captioned matter. We are
also providing copies to ITS and the Common Carrier Bureau. We are also providing an
electronic copy of these comments via your ECFS interface.

Sincerely,

Stephen J. Davis
Chief, Office of Policy Development

cc: ITS, Inc.
Janice Myles, Common Carrier Bureau

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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In the Matter of)
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Implementation of the Local)
Competition Provisions in the)
Telecommunications Act of 1996)
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CC Docket No. 96-98

**COMMENTS OF THE
PUBLIC UTILITY COMMISSION OF TEXAS**

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EXECUTIVE SUMMARY

The Public Utility Commission of Texas is vitally interested in concluding the current review of the Commission's interconnection rules. For over three years, the FCC and state regulators have been attempting to implement the local competition aspects of the Telecommunications Act of 1996. We have made a great deal of headway, with a strong group of competitors lined up to enter the local exchange markets in Texas. We have conducted hearings on interconnection, approved contracts, and arbitrated issues in dispute. Although it has been a tedious process, we have moved forward toward meeting the goals of the Act. In order to continue this progress, however, state and federal regulators must resolve the concerns with the purchase of unbundled elements.

We support a regulatory model in which the FCC establishes the starting point for unbundling elements with a presumptive national list, coupled with guidelines addressing how elements would be added to or deleted from the list. State regulators would then be allowed to apply those guidelines to the specific market circumstances in their region. If a market contains sufficiently competitive infrastructure components, then the incumbent carrier should no longer be the provider of last resort for those elements. On the other hand, if competitors can show that the incumbent carrier possesses a network element that is necessary for the provision of a new service, and that element is not available elsewhere, then state regulators should be allowed to add that element to the list.

In these comments, we provide the Commission with our perspectives with respect to certain terms to be used in guidelines on the need for unbundling. We recommend that the established standard be "meaningful opportunity to compete", rather than the "essential facilities" doctrine. We recommend the use of market power tests in evaluating the need for unbundling, and we suggest ways in which the Commission's earlier decision may be modified to include the evaluation of non-incumbent network elements. The Texas PUC continues to support the Commission's original seven UNEs, and we suggest the addition of two more (dark fiber and sub-loop) elements.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of the Local)	CC Docket No. 96-98
Competition Provisions in the)	
Telecommunications Act of 1996)	
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**COMMENTS OF THE
PUBLIC UTILITY COMMISSION OF TEXAS**

I. INTRODUCTION

1. On April 8, 1999, the Federal Communications Commission (“FCC” or “Commission”) released the Second Further Notice of Proposed Rulemaking (“Second FNPRM”) regarding Implementation of Local Competition provisions in the Telecommunications Act of 1996, seeking comment on the unbundling of network elements.¹ The Commission is seeking to refresh the record in this proceeding in response to the U.S. Supreme Court’s rejection of a portion of the Commission’s plan to unbundle network elements.² The Public Utility Commission of Texas (Texas PUC), having been given general regulatory authority over public utilities within our jurisdiction in Texas, hereby submits these Comments on the Second FNPRM.

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking, FCC 99-70, adopted April 8, 1999.

² *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. (1999).

II. TEXAS PUC'S EXPERIENCE IN INTERCONNECTION ISSUES

2. The Texas PUC is committed to bringing competition to the local exchange market as envisioned in the Telecommunications Act of 1996.³ There are presently over 250 competitive local exchange carriers ("CLECs") authorized to do business in Texas, and over 350 agreements have been approved for local interconnection with Southwestern Bell's and GTE's networks. Our arbitration of interconnection issues under section 252 of the Act began in 1996 and continues today, as we push forward in the transition from the predominant monopoly in local exchange service into the competitive environment. The issues upon which the Commission seeks comment in the Second FNPRM represent the refinement and clarification of public policy as regulation adapts to the changing local market. Our comments in this portion of this proceeding will generally be focused on the policy issues before the Commission, knowing that there are other commenters that will be supplying relevant facts and statistics.

III. IDENTIFICATION OF UNBUNDLED NETWORK ELEMENTS ON A NATIONWIDE BASIS

3. The FCC seeks comment on its tentative conclusion that it should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis.⁴ The Texas PUC supports the establishment of a national list of unbundled network elements ("UNEs") that should be presumptively available. The Act directs the FCC, rather than the individual state commissions, to make the initial determination on what network elements should be made available.⁵ The Texas PUC also agrees with the Commission's reasoning that nothing in the

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* ("Act").

⁴ Second FNPRM, ¶ 14.

⁵ 47 U.S.C. § 251(d)(2).

Supreme Court's decision questions the FCC's authority to establish a minimum national unbundling requirement. In fact, by reinstating the Commission's pricing rules, the Court has implicitly recognized the need for a measure of consistency through a national set of minimum unbundled elements.

4. The FCC affirms the states' authority to impose additional unbundling requirements, pursuant to the Commission's standards and criteria. The Commission seeks comment on whether states may determine that network elements need not be unbundled in light of the availability of that element outside the incumbent local exchange carrier's (ILEC's) network.⁶ It is the Texas PUC's belief that the Commission has the authority to allow states to have substantial discretion in the addition or removal of network elements from the presumptive national list, within guidelines established by the Commission. As the agencies charged with arbitrating and implementing arbitration agreements, the state commissions are uniquely positioned to determine what network elements should be added to or subtracted from the national list for application in their respective states. Such a system provides for a national uniformity of rules -- which is what the Act and the Supreme Court's reading of it requires -- but allows for regional application of those rules. The same concept comes into play in the arbitrations themselves -- the FCC prescribes the rules, but the state commissions decide how the individual circumstances fit the rules.

5. The application of standard evaluation criteria for the "necessary" and "impair" standards may well produce varied results across geographical regions and among services, just as the availability of local service alternatives in the marketplace will continue to vary from region to region. The entire list of UNEs identified at a national level, while being generally applicable in many areas, may not meet the "necessary" and "impair" standards for a specific region or

service. State commissions should have the authority to decide, based on their specific context, whether a nationally identified UNE should be provided by the ILEC.

6. In determining what elements should be on the national standard UNE list, the Texas PUC believes that the evidence must focus on an analysis of the overall market rather than on the capabilities of the individual CLEC. Examination of the particularized capabilities of a CLEC for purposes of deciding what the ILEC may refuse to sell is inappropriate in light of the Supreme Court's reinstatement of the FCC's "pick and choose" rule,⁷ which allows new entrants to opt into individual provisions of other interconnection agreements. The Supreme Court's affirmation of the "pick and choose" rule is also further support for the view that a national presumptive list based on overall market analysis would be consistent with the Act.

7. In addition to the standards to be established regarding competitive market analysis, we believe the Commission should establish guidelines for the process to be used by states in the determination of network elements that should become or remain unbundled. As an example, we believe that the ILEC must have the burden of proof through clear and convincing evidence that a standard element should no longer be required to be unbundled in a particular geographic area. Conversely, a CLEC must have the burden of proving why a new network element should be added to the list of those that must be provided on an unbundled basis by an ILEC. A state regulatory agency must retain the discretion to determine that it is reasonable to evaluate the need to unbundle an element on a statewide basis, if that is found to be in the public interest. The states should also have the discretion to defer consideration of removal from the list to a subsequent arbitration in those circumstances where a proceeding on the issue could itself create a barrier to entry.

⁶ Second FNPRM, ¶ 14.

⁷ 47 C.F.R. 51.809.

8. The Second FNPRM seeks comment on whether the FCC should review state decisions on unbundling.⁸ The Texas PUC believes that the appropriate mechanism for review of state decisions on unbundling is in the context of an appeal to the federal district court of an arbitration decision pursuant to § 252(e)(6) of the Act. Creating a new mechanism for FCC review of state commission unbundling decisions could hinder the judicial review process for these arbitrations and impede the implementation of competition. The FCC, of course, would have the discretion to express its views to the federal courts on the matter or could request the district court to refer the issue to the FCC.

IV. CRITERIA FOR DETERMINING THE NEED FOR UNBUNDLING

9. The Commission seeks comment on the definition of the terms “proprietary” and “necessary” for the purpose of determining proprietary network elements that must be unbundled pursuant to section 251(d)(2)(A) of the Act.⁹ In addition, the Commission seeks comment on the meaning of the term “impair.”¹⁰ Further, the Commission seeks comments on the difference between the “necessary” and “impair” standards of section 251(d)(2)(B).¹¹ In the following paragraphs, the Texas PUC provides responses on the above issues.

A. INTERPRETATION OF THE TERM “PROPRIETARY”

10. The meaning of the term “proprietary” is important because the statutory construction of the Commission and the courts is that the “necessary” standard applies only to “proprietary” network elements, and that the “impair” standard applies to “nonproprietary” network elements.

⁸ Second FNPRM, ¶ 14.

⁹ Second FNPRM, ¶¶ 15 and 16.

¹⁰ Second FNPRM, ¶ 17.

The Texas PUC agrees with the approach of the FCC in the *Local Competition First Report and Order*, in which the Commission referred to proprietary elements as including, for example, “those elements with proprietary protocols or elements containing proprietary information.”¹² The Texas PUC has been faced with evaluation of proprietary claims within its interconnection arbitration proceedings, and we have addressed those claims in accordance with the evidence presented, placing the burden of proof on the ILEC. We anticipate an increased complexity of proprietary arguments as more new elements are provided by affiliates or third party vendors. While it may be reasonable for the Commission to establish guidelines for the evaluation of proprietary claims, we believe that the state commissions are the appropriate venue for individual decisions on those claims, as they will impact the need for unbundled elements.

B. INTERPRETATION OF THE TERM “NECESSARY”

11. The Texas PUC generally agrees with the FCC’s conclusion in the *Local Competition First Report and Order* that a “necessary” network element is an element that is a prerequisite to competition.¹³ Operation support systems (OSSs) are a good example of a proprietary element that must be provided to competitors as a prerequisite to competition. Without nondiscriminatory access to such systems, competitors’ access to other network elements (such as loops) becomes uneconomic. If a competitor is not able to gain access to the ILEC’s proprietary OSS elements – in order to obtain nondiscriminatory provisioning intervals, for example – the new entrant will be held at a significant competitive disadvantage. We further

¹¹ Second FNPRM, ¶ 18.

¹² Local Competition First Report and Order, ¶ 282.

¹³ Id.

believe that the concerns regarding availability of non-ILEC networks should be included in the evaluation of “necessary” standards.

C. INTERPRETATION OF THE TERM “IMPAIR”

12. In its Local Competition First Report and Order, the FCC determined that the Commission and the states are required to unbundle a network element in the ILEC’s network when “the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost for the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the ILEC’s network.”¹⁴ The Texas PUC would modify two aspects of that prior conclusion in light of the Supreme Court decision and our experience in implementing the Act through our arbitration proceedings. First, as was recommended with the “necessary” standard, the Texas PUC believes it is important to look at the marketplace as a whole when determining whether a competitor will be impaired if a particular network element is not offered by the ILEC on an unbundled basis. The broader inquiry will limit regulatory intervention to those situations where such intervention is necessary to protect competitors from the ILEC’s market power.

13. Second, based on the Supreme Court’s decision, it is clear that the “any increase in cost” standard is not to be applied literally as part of the “impair” test. As an alternative, the Texas PUC suggests that the “any increase in cost” standard could be replaced with “increase in cost such that a competitor does not have a meaningful opportunity to compete” standard. Such a standard will allow the Commission and the states to base their decisions on marketplace information, while recognizing that minor increases in a competitor’s costs must be weighed

¹⁴ Local Competition First Report and Order, ¶ 285.

against potential factors such as service quality, technological innovation, and the loss of efficiency in a rapidly changing marketplace.

D. DIFFERENCE BETWEEN THE “NECESSARY” AND “IMPAIR” STANDARDS

14. The Texas PUC agrees with the framework developed by the FCC in the Local Competition First Report and Order, i.e., that the “necessary” standard, which is the stricter of the two standards, should be applied to proprietary elements, and that the “impair” standard, which is an economic standard, should be applied to non-proprietary elements. This distinction between the “necessary” and “impair” standards places an additional hurdle when an ILEC’s proprietary elements are sought. However, these standards become linked. Under both standards, the marketplace as a whole is surveyed to determine whether adequate substitutes exist from third parties. Additionally, for the proprietary elements, which fall under the necessary standard, the review also examines whether adequate non-proprietary elements may be available in the ILEC’s network.

V. ESTABLISHING STANDARDS FOR UNBUNDLING

15. The Commission seeks comment on the criteria that should be considered in determining whether a network element is subject to the unbundling obligations of section 251(d)(2) of the 1996 Act.¹⁵ The Texas PUC believes that the Supreme Court has determined that market conditions must be taken into account in determining whether a particular network element constitutes a UNE. Further, while not dismissing cost and quality factors as criteria, the Supreme Court stated that other factors must also be taken into consideration to satisfy the “necessary”

¹⁵ Second FNPRM, ¶ 11.

and “impair” standards of Section 251(d)(2). The Court clearly stated that, to be consistent with the unbundling provisions of Section 251(d)(2), the availability of network elements outside an incumbent’s network have to be considered. The Court also opined that “*any* increase in cost (or decrease in quality)” is not a sufficient condition to satisfy the “necessary” and “impair” standards of Section 251 (d)(2). The courts appear to place the burden on regulators to consider several factors in determining the criteria for unbundling a network element. This is because competition varies across different geographic areas and among different services. Consequently, it is possible that the results from applying “necessary” and “impair” standards could also vary. For example, while there may be entities other than the ILEC that can provide a CLEC access to switching equipment or interoffice transport in some urban areas, that may not be the case in suburban or rural areas of the state.

**A. “MEANINGFUL OPPORTUNITY TO COMPETE” vs.
“ESSENTIAL FACILITIES DOCTRINE”**

16. The Texas PUC opposes the wholesale adoption of the essential facilities doctrine as the standard for determining which network elements must be unbundled pursuant to §§ 251(c)(3) and 251(d)(2). While some of the principles of the essential facilities doctrine come into play in identifying network elements to be made available,¹⁶ the doctrine as developed by the courts does not properly fit the goals of the Act or the express provisions of § 251(d)(2). The doctrine was developed to address improper, monopolistic conduct violative of the antitrust laws.¹⁷ The Act has much broader purposes. It seeks not to address wrongdoing but, instead, to actively

¹⁶ See, e.g., *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (describing the four elements of the essential facilities doctrine as “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility”).

¹⁷ P. Areeda & H. Hovenkamp, *Antitrust Law* at 771 (1996).

create an environment for competition by deregulating an industry that has long operated under laws that actually fostered the growth of monopolies. That goal cannot be properly served by strict application of the essential facilities doctrine, which reflects antitrust principles developed under the Sherman Act. It would be inappropriate to incorporate wholesale into the Act principles designed for an already competitive marketplace rather than for a transitional market. Deregulation of a monopoly market creates unique circumstances and raises a broader set of anticompetitive concerns that are not taken into account by the essential facilities doctrine. The doctrine therefore is too restrictive to apply to anticompetitive behavior in a transitional market.

17. Under the essential facilities doctrine, a facility is considered essential when two conditions are met: 1) an alternative facility is unavailable or unduly expensive to construct and 2) the facility is central to the competitor's viability in the market.¹⁸ In many instances, the courts have required the cost differential to be enormous and the need extreme.

18. Section 251(d)(2) does not contemplate such rigorous restrictions on access. As to nonproprietary elements, § 251(d)(2) merely directs the Commission to consider whether the failure to provide access would "impair" the ability of a CLEC to provide the services that it seeks to offer. This impairment concept does not embrace the notion that the service sought to be provided also be essential or critical to the CLEC's general ability to compete in the telecommunications market. Further, impairment of ability to compete is not properly equated to the kind of enormous cost differential often required under the essential facilities doctrine. In certain circumstances, even relatively small differentials in costs can significantly impair a CLECs' ability to engage in meaningful competition in the telecommunications industry.

19. Insofar as proprietary elements are concerned, while it is certainly true that the Act contemplates a more rigorous test for requiring their availability than it does for nonproprietary

elements, the differential is not great enough to make proprietary elements properly subject to the essential facilities doctrine. The Texas PUC believes that the differing standards that it has proposed in these comments for what “necessary” and “impair” mean more properly reflect the express provisions as well as the underlying goals of the Act.

B. MARKET POWER AND OTHER MEASURES

20. Some of the criteria the Texas PUC believes should be considered for unbundling network elements include factors such as cost, quality, technical feasibility, market dominance, and availability or access from other sources. As a part of a complete analysis including qualitative and quantitative examination, market dominance should be studied mathematically. Two common examples are the Herfindahl¹⁹ and Entropy Indices.²⁰ Using these measures, state commissions could determine an ILEC’s strength in a particular area and/or for a specific service. Again, it is more logical to allow this decision-making process to be conducted at the state level, as state commissions will have more specific and granular knowledge of regional market environments.²¹

¹⁸ P. Areeda & H. Hovenkamp, *op. cit.* at 773

$$^{19} R_H \equiv \sum_{i=1}^n \alpha_i^2$$

where i = number of dominant providers; α = market share of providers in i ; n = total number of firms in a market.

$$^{20} R_e \equiv \sum_{i=1}^n \alpha_i \ln \alpha_i$$

where i = number of dominant providers; α = market share of providers in i ; n = total number of firms in a market.

²¹ This method may also prove to be more conducive to policy adaptation and evolution than a list of UNEs alone. The Texas PUC anticipates an increase in the number of facilities based LECs and data carriers in the future. If this assumption holds true, the need to unbundle certain network elements may diminish as multiple companies would have comparable equipment.

C. AVAILABILITY AND COST OF NETWORK ELEMENTS OUTSIDE THE ILEC'S NETWORK

21. The Commission seeks comment on the possibility that network elements could be attained through means other than an ILEC.²² The Commission also seeks information on the costs of such alternatives, the length of time it takes to obtain these alternatives, and the extent to which alternatives to ILECs' unbundled network elements are being utilized now.²³ The Texas PUC will offer general policy comments and observations, but much of the specific information requested could only be obtained in the context of an evidentiary proceeding.

22. In the *Local Competition First Report and Order*, the Commission determined that the Commission or the states may unbundle an element in the ILEC's network unless the ILEC can prove that: "(1) the element is proprietary, or contains proprietary information that will be revealed if the element is provided on an unbundled basis; and (2) a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network."²⁴ The Texas PUC recommends that the FCC's prior conclusion be modified to allow the ILEC to argue that other elements and/or services could be obtained from third parties at rates, terms, and conditions that would not violate the "impair" standard.

23. Such a determination, while potentially increasing a competitor's transaction costs by requiring it to investigate the availability of other options for elements/services, has two positive results. First, it assures the ILEC that it will not be required to unbundle elements until the CLEC demonstrates that competition will be either impaired or excluded from the market if that element is not provided. Second, it plants the seeds for the development of a robust wholesale

²² Second FNPRM, ¶ 24.

²³ Second FNPRM, ¶ 24.

²⁴ Local Competition First Report and Order, ¶ 283.

market in which the marketplace will assist regulators in disciplining the prices charged by ILECs.

24. It is our understanding that the majority of competitive local service providers in Texas have very little network infrastructure of their own. They are dependent upon the resale and/or lease of network elements from the ILEC or an alternative source. The availability of network elements from sources other than the ILEC varies quite significantly, depending upon the particular element sought and the location of the element. It is probable, especially in rural regions of the state, that the ILEC is the only source of a network element. Conversely, it is more likely for CLECs to have access to multiple providers of network elements in Texas' urban areas. Moreover, non-geographic elements, like database information, may be available on a statewide basis. The central question, however, is whether a competitor can obtain reasonably comparable network elements from non-incumbent (and non-regulated) carriers at rates, terms, and conditions that will allow a meaningful opportunity to compete.

25. The cost and ability to access network elements from alternative sources may vary quite significantly. Additional costs may be incurred in determining what supplier (other than the ILEC) has the network element, and negotiating with the supplier for acceptable rates, terms, and conditions for use of the element. It is possible for diverse companies to possess network elements. For example, cable providers, computer companies, internet providers, competitive access providers, and other large companies who own networks, information, or equipment may offer use of their infrastructure. We believe the presence of these elements is most likely in urban, concentrated areas, leaving suburban and rural areas without non-ILEC alternatives. Depending upon the extent of competition in the geographic area, the costs to the CLECs in acquiring network elements from alternative sources may vary significantly.

26. The FCC seeks comments on the extent to which it should consider the quantity of facilities that may be necessary for competitors to obtain in order to compete effectively.²⁵ The Texas PUC believes that economies of scope and scale do exist, and suggests that factors such as carriers' particular market segments are valid in any "necessary" and "impair" analysis. If a competitive carrier seeks to provide local telephone service throughout the state, then it would be impractical if not impossible for that carrier to replicate the ILEC's network. In the state of Texas, for example, ILECs own nearly 98% of all access lines.²⁶ ILECs have deployed 1538²⁷ switches in the State of Texas. Such statewide network presence must be recognized through marketplace evaluations.

VI. UNBUNDLED ELEMENTS IN TEXAS

A. THE ORIGINAL LIST

27. For the purpose of establishing a presumptive national standard list, the Texas PUC supports the list of seven UNEs set forth by the FCC in the *Local Competition First Report and Order*. The Texas PUC offers the following discussion and rationale for inclusion on the list of UNEs, based on past experience and the availability of alternatives to these elements outside the ILEC's network. Fundamentally, these seven elements are necessary to provide telecommunication service. Without unbundled access to these elements, the Texas PUC believes that the CLECs' meaningful opportunity to compete for local telecommunication services would be impaired. They are all integral parts of existing, approved interconnection agreements. However, in the process of our arbitration proceedings, we did not engage in the

²⁵ Second FNPRM ¶ 27.

²⁶ Scope of Competition in Telecommunication Markets in Texas, Texas PUC Report to the 76th Texas Legislature.

²⁷ Id.

examination of market power, since the seven elements were contained on the FCC's original list.

B. ADDITIONAL UNES APPROVED IN TEXAS

28. Based on our experience, the Texas PUC recommends that the FCC unbundle two more network elements, "sub-loop" and "dark fiber," in addition to the previously identified list of UNEs. In contrast with the initial list of unbundled elements, the two additional elements are offered with some limitations. As will be explained in more detail, the Texas PUC established these limitations in order to ensure technical feasibility, compliance with the "necessary" and "impair" criteria, and minimum disruption in the ILEC's expansion plans.

1. Sub-Loop Unbundling

29. The FCC inquired whether it should require sub-loop unbundling at the remote terminal or other points within the ILEC's network.²⁸ As the FCC notes in the Second FNPRM, the ILECs have conceded that the local loop must be unbundled.²⁹ Sub-loop unbundling would be consistent with the U.S. Supreme Court's interpretation of the 1996 Act as providing access to only those network elements that CLECs would need in order not to be "impaired" in providing the desired services. It would also promote the Act's goals of encouraging the development and use of the ILEC's own facilities, and the facilitation of technological advancements in the types of services provided.

30. The Texas PUC addressed the issue of sub-loop unbundling in two separate arbitration proceedings,³⁰ determining that unbundling of the network from the central office to the remote

²⁸ Second FNPRM, ¶ 33.

²⁹ Second FNPRM, ¶ 32.

³⁰ Consolidated Docket Nos. 16189, 16196, 16226, 16285, and 16290, Consolidated Docket Nos. 16300 and 16355.

terminal, and from the remote terminal to the customer premises, is technically feasible.³¹ However, due to technical issues associated with DLC equipment, the Texas PUC also ruled that the remote terminal would not be a part of the unbundled sub-loop.³² The Texas PUC also determined that, in order to protect the public interest, the segment of the local loop between the remote terminal and the feeder distribution interface (FDI) and the segment between the FDI and the customer premises would not be offered as separate unbundled network elements.³³

2. Dark Fiber

31. The Commission has requested comment on whether it would be appropriate to modify the definition of “loops” or “transport” to include dark fiber.³⁴ Fiber-optic technology is undoubtedly one of the most important elements in a high capacity telecommunication network, and we have determined that it should be an unbundled network element.

32. The Act defines a network element as “a facility or equipment used in the provision of a telecommunications service.”³⁵ The Supreme Court has recognized that this definition is a broad one.³⁶ The definition does not include a requirement that the ILEC must actually be using the equipment when the new entrant requests access to it. Dark fiber merely has to be “lit” to be activated (and terminated if not already terminated). It is not being “currently used” in the same

³¹ Consolidated Docket Nos. 16189, 16196, 16226, 16285, and 16290 section III.A.8.

³² Although the parties have stipulated on this issue, the Texas PUC did not allow the unbundling due to lack of industry standards regarding “protected mode” operation. Consolidated Docket Nos. 16300 and 16355 section III.A.1(b)(1).

³³ Consolidated Docket Nos. 16300 and 16355 section III.A.1(a)(3). In a subsequent arbitration proceeding involving GTE, even though AT&T and MCI stipulated the unbundling of the FDI segments, the Texas PUC expressed concerns regarding service disruptions to the modem users, and required the parties to implement certain safeguards. Sub-loop unbundling at the FDI location may affect customers who use modems over the lines served through the FDI box while being reconfigured by half-tapping the distribution cables. The Commission required GTE to provide a 30-day advanced notice to inform customers who may be affected by the reconfiguring of the FDI box.

³⁴ Second FNPRM, ¶ 34.

³⁵ 47 U.S.C. § 153(29).

³⁶ See *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 734 (1999).

way that some of the wires within a telephone cable are not being “currently used.” Under the FCC’s TELRIC pricing requirements, a portion of those unused wires is required to be included in the TELRIC price, based on fill factors that estimate the extent to which those currently unused wires were prudently deployed for future network usage.³⁷ If those “currently unused” wires can be characterized as network elements, dark fiber should be as well.

33. The Texas PUC has determined that dark fiber in the feeder segment of the loop (*i.e.*, from the central office to the remote terminal) and in the interoffice segment, constitutes a unbundled network element.³⁸ By requiring the unbundling of dark fiber in the interoffice segment, the Texas PUC encourages CLECs to deploy their own electronic and optic equipment, instead of using the ILEC’s network for interoffice transport. The Texas PUC believes that this policy encourages efficient use of fiber. In fact, this policy has already resulted in the introduction of Dense Wavelength Division Multiplexing (DWDM) equipment in several central offices in Texas.

34. The Texas PUC is aware that dark fiber serves an important role in the ILEC’s long-term network plans, and is necessary for an ILEC to meet its infrastructure obligations under the Public Utility Regulatory Act.³⁹ Therefore, the ILEC has the right to revoke the leased fiber from the CLEC, with 12 month notice, if it can demonstrate that the dark fiber is needed to meet its or another CLEC’s bandwidth requirement.⁴⁰ If the ILEC can demonstrate, in a 12 month period after the dark fiber was leased, that the CLEC is using the fiber at a level of transmission

³⁷ See Local Competition First Report and Order at ¶ 682.

³⁸ Consolidated Docket Nos. 16189, 16196, 16226, 16285, and 16290 sections III.A.4. and III.A.6.

³⁹ Chapter 58. General Infrastructure Commitments.

⁴⁰ *Id.*

less than OC-12, it may revoke the lease agreement and supply the CLEC with a reasonable and sufficient means of transport.⁴¹

35. In a recent arbitration proceeding,⁴² the Texas PUC allowed the use of dark fiber at transmission levels of less than OC-12. To address concerns that a CLEC's use of dark fiber below the OC-12 level could cause under-utilization of that fiber, the take-back notice period was reduced from 12 months to 45 days, or until the ILEC can provision alternate transport. The take-back notice for Ethernet usage was set at 12 months to assure parity with the ILEC's provision of Ethernet services to its own end users. In addition, the ILEC was allowed access to the CLEC's dark fiber pool on reciprocal terms.

36. In addition, to create parity between CLECs, the Texas PUC has imposed a limit on the percentage of dark fiber available for lease by a CLEC. In a 24 month period a CLEC can not lease more than 25% of the dark fiber in a certain segment of the network. The Texas PUC's objective in imposing this limit, is to enable more than one CLEC to have access to the dark fiber pool.

VII. Conclusion

37. The Texas PUC appreciates this effort by the Commission to expand the record of this proceeding to address concerns regarding unbundling standards. A final methodology should balance the immediate needs of competitors with the ILEC's proprietary concerns as well as the long-term development of the market place. The Texas PUC urges the FCC to continue its efforts in arriving at such a methodology.

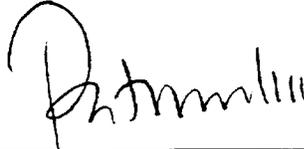
⁴¹ Id.

⁴² Docket No. 17922, Petition of Waller Creek Communications, Inc. for Arbitration with Southwestern Bell Telephone Company, Order Approving Interconnection Agreement (April 28, 1998).

Respectfully submitted,

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May 25, 1999



Pat Wood, III
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Judy Walsh
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