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May 25, 1999

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**MAY 26 1999**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Hon. Magalie Roman Salas  
Secretary  
Federal Communications  
Commission  
445 12th Street, S.W., TWA-325  
Washington, D.C. 20554

Re: In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, Docket No. 96-98; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185 -- Second Further Notice of Proposed Rulemaking

Dear Secretary Salas:

Enclosed is an original and twelve copies of the Comments of the New York State Department of Public Service in the above-captioned proceeding. In addition, a copy was filed using the Commission's Electronic Comment Filing System and copies were sent to all parties on the attached service list.

Sincerely,

*Lawrence G. Malone*

Lawrence G. Malone  
General Counsel

Enclosure  
cc: All Parties

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MAY 26 1999

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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 )	CC Docket No. 95-185
Carriers and Commercial Mobile Radio )	
Service Providers )	

COMMENTS OF THE NEW YORK STATE  
DEPARTMENT OF PUBLIC SERVICE

INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) submits these comments in response to the Commission's Second Further Notice of Proposed Rulemaking (FCC 99-70, hereinafter Second Further Notice) in the above-captioned proceedings. The Commission seeks to revisit the standards set forth in Section 251(d)(2) of the Telecommunications Act of 1996<sup>1</sup> for determining which network elements must be unbundled under Section 251(c)(3) of the Act.

As the economics and technology of competitive telecommunications markets are constantly changing, federal policy must reflect these dynamics. Thus, rather than institute a minimum, nationwide list of unbundled network elements (UNEs), the Commission should establish an on-going process for determining the elements incumbent local exchange carriers (ILECs) must provide as UNEs. In formulating an initial list, we

<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. (the Act).

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recommend that the Commission begin with a rebuttable presumption that all of the original seven unbundled elements be provided as UNEs. Additional network elements could be added to the list upon a *prima facie* showing by the competitors that the network element is "necessary" and failure to provide the element would "impair" the entrant's ability to compete. The Commission should then determine whether the ILECs have provided sufficient evidence in this proceeding to establish that competitors have commercially viable alternatives available to justify excluding any of these elements from the initial list. After this initial list is established, ILECs on an ongoing basis should be permitted to show that the presence of commercially viable alternatives renders an element's treatment as a UNE unnecessary generally, or in a particular market.

The process should also allow parties to seek treatment of additional items as UNEs generally, or in particular markets, as network technologies evolve. Such a process, rather than a static national minimum list, would best accommodate the dynamic and geographically diverse nature of competitive markets. Finally, the Commission should permit a particular state to eliminate, as well as add, unbundling requirements in local markets.<sup>2</sup>

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<sup>2</sup> 47 C.F.R. §51.317. The Commission's current rules permit states to impose additional unbundling requirements. We note the Commission has asked the Eighth Circuit for a voluntary remand of Rule 317 but the Court has not acted.

## DISCUSSION

On January 25, 1999, the United States Supreme Court rejected the Commission's implementation of the network element unbundling obligations set forth in Section 251(c)(3) of the Act, and concluded that Section 51.319 of the Commission's rules should be vacated.<sup>3</sup> The Supreme Court found that the Commission had not adequately considered the "necessary" and "impair" standards of Section 251(d)(2) in determining which network elements must be unbundled pursuant to Section 251(c)(3).<sup>4</sup> In the wake of the Supreme Court's remand, the Commission must "apply some limiting standard, rationally related to the goals of the Act,"<sup>5</sup> to determine the facilities and equipment, including their features, functions, and capabilities, that must be unbundled pursuant to Section 251.

As a preliminary matter, any determination must consider the availability of elements outside the ILECs' networks. *AT&T Corp. v. Iowa Util. Bd.*, 119 S.Ct. at 735, 736. Other potential sources include self-provisioning, obtaining elements through other carriers, and leasing from telecommunications element providers. A substitute should be deemed sufficiently available if it is "commercially viable,"

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<sup>3</sup> *AT&T Corp., et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct. 721 (1999).

<sup>4</sup> *Ibid.* at 733-36.

<sup>5</sup> *Ibid.* at 734 (emphasis in original).

that is, promptly accessible in the market at a price that would allow the new entrant to participate in a competitive manner.

In a market of fully competitive networks, market forces would induce network providers to make the desired elements of their networks available under fair conditions and at reasonable prices. Indeed, it is reasonable to presume that in an increasingly competitive environment, ILECs themselves would willingly provide unbundled access to excess capacity on their networks in order to maximize revenues. Even if they did not, "commercially viable" alternatives would exist. To the extent commercially viable alternatives exist, market forces should determine the terms, conditions, and prices for ILEC provision of these particular elements.<sup>6</sup>

The Commission should establish a process that imitates the dynamic nature of competition to determine what items need to be classified as UNEs at any given time, in any given market. That process could begin by defining an initial national list of UNEs, starting from the rebuttable presumption that all of the Commission's original seven elements must be provided as UNEs. In establishing the initial list to be adopted in this proceeding, the Commission should evaluate whether the availability of commercially viable alternatives to any of the items on the list justifies their removal from the list, either

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<sup>6</sup> Needless to say if market forces have not created commercially viable alternatives for elements of the ILECs' networks, those elements will remain unbundled pursuant to Section 251(c)(3).

generally or within discrete market areas.<sup>7</sup> Having thus defined an initial list of required unbundled elements, the Commission should allow for future deletions from, and additions to, the list. Additional unbundled elements could be added to this list if the new entrant makes a *prima facie* showing that facilities, functions and capabilities that have been added to the ILEC network are "necessary" and failure to provide them will "impair" the entrant's ability to compete (47 U.S.C. §251(d)(2)). Upon that showing, they should be presumptively considered UNEs, until the ILEC shows that commercially viable alternatives exist.<sup>8</sup>

Elements should be removed from the initial list in the future, either generally or in specific markets, when commercially viable alternatives are available outside the ILECs' networks. Because determinations as to which elements should be removed from the initial list will likely hinge on specific local conditions, and because outcomes of those determinations will

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<sup>7</sup> The information sought by the Commission concerning the relative availability (e.g., cost, timeliness) of potential alternatives to ILEC elements (paras. 24-28) may provide a sufficient basis for eliminating any of the "presumed" UNEs from the initial list.

<sup>8</sup> The NYDPS supports requiring the incumbent to bear the burden of proof that an item need not be provided as an unbundled network element. The proposed evidentiary standard would not "blindly" accept a new entrant's request (*AT&T v. Iowa Utilities Board*, 119 S.Ct. at 735), but rather, would permit the ILEC to present evidence as to why the item does not satisfy the Act's criteria. The Commission or state could then review the evidence determine whether the item must be provided as an unbundled network element.

directly impact local markets, states should be given the opportunity to make such determinations, if they choose.<sup>9</sup> States are in the best position to review local markets to determine the availability of element alternatives and the effect that the price or quality of such alternatives would have on an entrant's ability to compete in the local market. State commissions should have reasonable latitude in determining what constitutes "commercially viable."<sup>10</sup> For example, the state could review whether or not an item is actually available for purchase and use in the market in question, and whether the purchase or lease from an alternative source is reasonable under prevailing market conditions. If the Commission deems it necessary to set guidelines or criteria, it should consider criteria such as the existence of competitors in the subject market that offer service through the use of alternatives to the ILEC's elements.

This approach should also provide for periodic modification of unbundling obligations as technological and market conditions evolve over time. Congress noted that access to unbundled network elements is a just means to allow competitive carriers to serve customers without replicating the incumbent's entire network overnight. Thus, carriers may

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<sup>9</sup> States could make these reviews either through "generic" proceedings or in the context of individual arbitrations. When a request for nationwide removal from the "list" is made, the removal determination would be made by the Commission.

<sup>10</sup> In delegating this authority to states, the Commission retains oversight responsibility.

currently require elements that, in just a few years, they will provide themselves or acquire from other competitive carriers. In such cases, of course, incumbent carriers would no longer have insurmountable competitive advantages and should no longer be required to provide access to facilities, at least not under terms that are not also imposed on their competitors.<sup>11</sup> Additionally, technology may render some of the elements unnecessary, outmoded, or obsolete, though, conversely, may also render new items essential to sustained competitive development. The process recommended here would remain responsive to continuously changing needs and would adapt the unbundled network element requirements to prevailing market conditions, mirroring a freely competitive market.

#### CONCLUSION

As competitive markets are evolving, the NYDPS recommends that the Commission establish an on-going process for determining which items incumbent local exchange carriers (ILECs) must provide as UNES. We propose that this process take, as a point of departure, the rebuttable presumption that all items of the ILECs' networks must be provided as UNES; that it afford ILECs the opportunity to show that the presence of commercially

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<sup>11</sup> The NYPSC has determined, as a matter of policy, that its local competition principles should apply to all local exchange companies in the state. Case 94-C-0095, Opinion No. 96-13, Opinion and Order Adopting Regulatory Framework, p.4 (Local Competition Proceeding).

viable alternatives, generally or in a given market, renders an element's treatment as a UNE unnecessary; and that the process remain sufficiently adaptable to accommodate evolving competitive needs and changing market conditions. We believe that such a process would reflect the dynamic and geographically diverse nature of evolving competitive markets. Moreover, the states should be permitted to add or eliminate unbundling requirements in local markets.

Respectfully submitted,

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Dated: May 25, 1999

In the Matter of

In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, Docket No. 96-98; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185

CERTIFICATE OF SERVICE

I, Lucille T. Dillenbeck, hereby certify that an original and twelve (12) copies of comments in the above-captioned proceeding were sent via Airborne Express to Magalie Roman Salas, Secretary of the Federal Communications Commission. In addition, a copy was filed using the Commission's Electronic Filing System and copies were sent by First Class Mail, postage prepaid, to all parties on the attached service list.

  
Lucille T. Dillenbeck  
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