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May 26, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

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

**Re: Implementation of the Local Competition Provisions of
the Telecommunications Act of 1996, CC Docket No. 96-98**

Dear Ms. Salas:

Please find enclosed for filing in the above-referenced proceeding, an original and twelve copies of the comments of Qwest Communications Corp. These comments are being filed in response to the request for comments in the public notice released April 16, 1999 in the referenced docket (FCC 99-70). A copy of the comments has also been filed electronically to <http://www.fcc.gov/e-file-ecfs.html>. Copies of these comments also are being hand-delivered today to Janice M. Myles at the Common Carrier Bureau and to International Transcription Services, Inc.

Please date stamp and return the additional copy of these comments. Please call the undersigned if you have any questions regarding this filing.

Respectfully submitted,



Linda L. Oliver
Counsel for Qwest Communications
Corp.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)
)

CC Docket No. 96-98

COMMENTS OF QWEST COMMUNICATIONS CORP.

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SUMMARY

I. Qwest's Need For Local Connectivity

Qwest is a multimedia communications company offering a full range of voice, data, video and information services both domestically and internationally. Qwest's goal is to use its high-speed, state-of-the-art broadband network to meet the demands of customers throughout the world who are seeking access to innovative, high-capacity services. For end users to realize the full benefits of network capabilities such as Qwest's, companies like Qwest will need access to the capabilities of the local network, which continues to exhibit enormous economies of scale, scope, and connectivity.

The incumbent local exchange carriers (ILECs) (including the regional Bell operating companies (RBOCs) when they qualify for interLATA authority) can easily acquire intercity capacity from carriers such as Qwest (as in fact GTE has done). That capacity is available, at cost-based rates, because a *wholesale market* exists for intercity capacity.

The same is not true for the local network. Entrants will build competitive local facilities, but only in cases where the economics and their business plans justify such construction. Making elements available until a wholesale market develops will ensure that all American consumers have choices of their local service provider. Until such a wholesale market exists for local network elements, competitors will be "impaired" without access to ILEC network elements, within the meaning of Section 251(d)(2). The United States' telecommunications industry will

continue to lead the world if all U.S. carriers can make economically rational lease-versus-build decisions in response to customer demands, cash flow, and opportunity costs -- in the local market as well as in the national and global market.

II. The Purpose of the UNE Provisions

Section 251(d)(2) must be read in light of the goals and structure of the 1996 Telecommunications Act and the purpose of the Section 251(c)(3) network unbundling obligation. First, broad access to ILEC network elements enables Qwest and others to fulfill Congress' goal of *rapid* entry into the local market. Second, broad access to network elements is essential if *all* customers are to see the fruits of local competition. Third, these provisions keep the entry barriers to the local market low. The ILEC mergers speak volumes in this regard. The ILECs have concluded that in order to compete successfully beyond their own incumbent territory, they must become a larger incumbent. Where they are not the incumbent, ILECs will need -- just like other CLECs -- to use network elements, including the network element "platform" -- to compete successfully.

Arguments that making network elements available will discourage facilities investment are dead wrong. They present a false choice: in fact, the wide availability of network elements will allow entrants to build a customer base which then will permit them to construct their own facilities as economically justified. These arguments also miss the real source of innovation -- which is not just in owning facilities, but in using the technical know-how, experience, and ideas of the companies that use local networks to "touch" the customer. Allowing broad use of

local network elements removes an important (and potentially insuperable) obstacle to innovation in pricing, service creation, packaging, and applications.

III. The Wholesale Market Test for “Impairment”

The scope of the Supreme Court’s decision was limited. The Court required only that the Commission articulate a rational standard related to the goals of the Act for the terms “necessary and impair” in Section 251(d)(2). The Court recognized, too, that the Commission had already identified many factors in its 1996 Local Competition Order that could satisfy that test on remand.

The impairment test in Section 251(d)(2), which is written from the point of view of the requesting carrier, requires an inquiry into whether a *wholesale market* exists for a particular element. For a wholesale market to exist, two criteria must be met. First, the competitively supplied network element must be *interchangeable* with the ILEC network element -- meaning that it is comparable in functionality, ease of operation, speed to market, quality and price with the ILEC supplied element. Second, if the element is interchangeable, there must be a sufficient number of *wholesale providers* of the element to produce an effectively competitive market for the network element. The Competitive Telecommunications Association (CompTel) has prepared proposed rules which incorporate this standard. A copy is attached to these comments.

The limited existence of self-supply of elements is not evidence that requesting carriers are no longer impaired. This activity is evidence only that some carriers, for some customers, during particular time periods, in particular

geographic areas, are able to cost-justify self-supply. As the ILECs themselves have recognized in opposing the separate affiliate proposal for advanced services, using an ILEC network element that is operationally integrated with the ILEC network is different from using a network element that is external to that network.

Operational reforms can help to remove the impediments to interchangeability. The FCC's recent collocation reforms, when fully implemented, are one such example. As another, competitively supplied operator services and directory assistance (OS/DA) could become interchangeable with ILEC OS/DA if there were, for example: automated access to equivalent data; operational ease of substitution of competitive OS/DA; and the availability of line class codes in the unbundled switching element to enable choice of a competitive supplier of OS/DA. Once interchangeability has occurred, firms are likely to be interested in being wholesale providers (as Northpoint is, for example, with respect to xDSL capabilities).

In applying the wholesale market test, the Commission should use a sufficiently large geographic area to represent a realistic market from the point of view of supplier and purchaser of elements -- we propose using the "Major Trading Area" or MTA used by the Commission in establishing reciprocal compensation for mobile providers in 1996. The ILEC should bear the burden of proof in removing an element from the mandatory list.

Whether a component of a network element qualifies as "proprietary" is a question that arises only if the Commission has already found impairment to

exist. Access to a proprietary component of an element is “necessary” if lack of access would cause a material loss in functionality for that element.

IV. Establishing, Adding, and Removing Elements from the List

It is essential, for the reasons given in the 1996 Local Competition Order, that the FCC establish a national list of mandatory network elements. The FCC also should have the job of determining, in response to petitions, when an element should come off the list.

The FCC is well-suited to decide the interchangeability issue, which generally could be done on an ILEC-wide (regional) basis, since the inquiry is largely about operational systems. The FCC also should decide whether a sufficient number of wholesale providers exist to produce an effectively competitive market. The Commission should provide in its rules for a formal role for state commissions, which could perform a fact-finding and consultative function similar to their role under Section 271. State commissions also have the authority to add elements to the list through their arbitration responsibility under Section 252 (applying the FCC Section 251(d)(2) standard), and may add elements pursuant to state law as well.

V. Other Statutory Interpretation Issues

The “at a minimum” language in Section 251(d)(2) gives the FCC the latitude to consider other factors in adding to the list of required network elements, although this authority is not needed to prescribe the original list of elements or to add advanced capabilities to that list. Factors such as carrier identity, customer

identity, type of service, and geography are not relevant under the “necessary and impair” test. The “essential facilities” antitrust doctrine is not relevant either, since Congress clearly intended to enact a very different scheme under the network unbundling provisions. Indeed, those provisions would have been unnecessary if Congress had simply codified antitrust law. The availability of retail services also is irrelevant to the impairment question, because retail services are not substitutable for network elements, as the Commission and Supreme Court have already concluded.

The FCC should reinstate its Rule 315(c)-(f), which required ILECs to combine elements for requesting carriers even if the elements are not already combined in the ILEC network. Although these rules were vacated by the Eighth Circuit, that was done on the same erroneous grounds on which it vacated Section 315(b). The Commission can exercise its Section 201(b) authority to reinstate those rules, which are required to give effect to the nondiscrimination and combination provisions in Section 251(c)(3). The Commission should also adopt a rule that requires ILECs to provide nondiscriminatory access to CLECs to the means of combining elements.

VI. Mandatory Network Elements

The presence of five of the seven original network elements in Section 271 dictates that Congress intended that at least these five should be mandatory. In addition to readopting the original seven network elements under the Sections

251(d)(2) test, the Commission should take this opportunity to revise the rules to reflect advances in technology (particularly broadband and packet capabilities).

The CompTel proposed rules incorporate the rule revisions that Qwest believes are necessary to accomplish these goals. In addition to the original list of network elements, the Commission should be sure to include the following capabilities in its revised list: broadband loops (including DS1, DS3, OC3, OC-n, PRI, and xDSL-equipped loops); packet switching; packet transport; and dark fiber.

All of these network elements qualify under any reasonable reading of the Section 251(d)(2) impairment test. The Commission itself already has made a number of the necessary factual findings in the 1996 Local Competition Order that would justify a conclusion of impairment under the Supreme Court's own reading of that term. There is also clearly neither interchangeability nor the presence of a wholesale market, as yet, for any network elements.

The Commission's prompt action adopting this list of elements, and establishing the wholesale market test under Section 251(d)(2), will go far to achieving the Congressional goal of bringing broad-based local competition to all consumers.

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of 1996)	
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COMMENTS OF QWEST COMMUNICATIONS CORP.

Qwest Communications Corp. ("Qwest") hereby respectfully submits its comments in response to the Second Further Notice of Proposed Rulemaking in the referenced proceeding, 1/ which addresses the questions remanded to the Commission by the Supreme Court in AT&T v. Iowa Utilities Board. 2/

I. QWEST REQUIRES ACCESS TO ILEC NETWORK ELEMENTS IN ORDER TO COMPETE IN A FULL-SERVICE MARKET FOR CONVENTIONAL AND ADVANCED SERVICES.

Qwest is a multimedia communications company offering a full range of voice, data, video and information services both domestically and internationally.

1/ Implementation of the Local Competition Provisions in the 1996 Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking, FCC 99-70 (rel. April 16, 1999) ("Notice").

2/ AT&T Corp. v. Iowa Utilities Board, ___ U.S. ___; 119 S.Ct. 721 (1999) ("AT&T v. Iowa Utilities Board").

Qwest is currently in the process of completing a 18,500-mile, 150-city fiber optic network that will offer customers and carriers the ability to transmit massive amounts of communications information throughout the United States. When completed in the middle of this year, Qwest's system will include the first nationwide 2.4 gigabit Internet Protocol ("IP") network, which will serve as the backbone for Qwest's IP-based services. This network will enable Qwest to move more information faster, more securely, and more reliably than any other network on earth.

Qwest's network extends 1,400 miles into Mexico, and includes undersea cables in the Atlantic Ocean. In addition, Qwest is part of a joint venture that will extend its reach into Europe. 3/ When completed, this European network will span 9,100 miles and will connect 40 European cities to Qwest's North American system. 4/ Qwest is also part of a consortium that is building undersea fiber links to Japan and the Asia Pacific Region. The first phase of these fiber links, a connection to Japan, is set for completion in the Year 2000. 5/

3/ On November 18, 1998, Qwest and KPN Telecom B.V. entered into a letter of intent to form a joint venture to create a pan-European IP-based fiber optic network, linked to Qwest's network in North America, for data, video and voice services. See <<http://www.qwest.com/press/kpnqwest.html>>.

4/ See id.

5/ Additional information about Qwest's international expansion plans can be found on the company's website (<www.qwest.com>) and in Qwest's 1998 Annual Report.

The Potential of Qwest's Network. Qwest believes that the efficiency, reliability and security of its network -- the first to have been built with the exact specifications of the new era of the Internet in mind -- will make it a significant force in the telecommunications marketplace. Qwest's bandwidth capabilities will stimulate the development of network-delivered software applications that require faster and more reliable transmission than is offered by other carriers. The development of new, high bandwidth applications will attract additional users, who will in turn encourage the development of additional high-bandwidth applications. Thus, Qwest believes that its network will play a key role in this "virtuous cycle" of bandwidth and applications that will transform daily life for millions of consumers. Qwest's goal is to use its worldwide broadband network to meet the demands of customers throughout the world who are seeking high-capacity, high-speed communications capabilities.

The Value of Competitive Wholesale Markets. For end users to realize the full benefits of Qwest's network, however, Qwest and similarly situated carriers will need to purchase, exchange and utilize the capacity of their competitors. This is an important point and should be carefully considered by the Commission in this proceeding. Because of the tremendous cost of constructing a network, no telecommunications company is single-handedly able to finance the construction of a nationwide network that directly reaches every home and business. Telecommunications companies should not be forced to do so. Consumers of telecommunications will see the lowest prices and the best menu of services only

if the suppliers of telecommunications are free to deploy facilities only where it is cost-effective to do so. Firms that are expanding their businesses, such as today's telecommunications carriers, are routinely faced with "lease-versus-build" decisions. Qwest believes that the United States' telecommunications industry will continue to lead the world if all U.S. carriers can make economically rational lease-versus-build decisions in response to customer demands, cash flow, and opportunity costs.

As ILECs (including Regional Bell Operating Companies ("RBOCs") once they win interLATA authority) seek to win customers by providing end-to-end service, they are in a position to make rational business decisions about how to assemble end-to-end product offerings. This is because ILECs can easily acquire interstate and international capacity, including capacity offered by Qwest. That capacity is available to ILECs is because the long distance market is competitive *and* because a wholesale market for long distance capacity has developed over time.

As a result, each ILEC is free to pursue a lease-versus-build strategy that makes the most sense given its own assets and objectives. Bell Atlantic, for instance, has made clear its desire to construct an intercity network throughout its region.^{6/} SBC, on the other hand, has established lease arrangements with an

^{6/} "Bell Atlantic Launches Next-Generation Long Distance Data Network to Address \$80 Billion Market for 21st Century Communications," (News Release), at 1 (June 8, 1998) (available at <<http://www.ba.com/nr/1998/Jun/19980608001.html>>).

existing long distance carrier for the transport of long distance traffic both inside and outside SBC's territory once SBC receives distance authority.^{7/}

The lease-versus-build freedom enjoyed by ILECs gives them a powerful ability to assemble end-to-end products for their customers. This freedom is good for ILECs and for their customers because it allows ILECs to adapt their networks and their product offerings in response to new information about customer needs, technological innovations, and changes in their own strategic vision.

Unfortunately, the availability of interstate and international capacity that makes this freedom possible stands in striking contrast to the absence of cost-effective *local exchange* capacity for carriers such as Qwest who seek to offer end-to-end products in competition with ILECs. The opportunity to purchase UNEs from ILECs would allow Qwest either to combine those UNEs with its own facilities (which will be the case in areas where Qwest is constructing local fiber rings), or to lease UNEs in areas where Qwest cannot cost-justify installing local networks.^{8/} In Qwest's view, the Commission will dramatically accelerate local competition --

^{7/} "Williams Communications Forms Unique Alliance with SBC to Transport Long Distance Voice, Data Traffic," News Release, at 1-2 (Feb. 8, 1999) (available at <<http://www.williams.com/newsframe.htm>>).

^{8/} Although UNEs are a critical component of Qwest's strategy for serving its nationwide customer base, Qwest would point out that no business would freely elect to rely on its competitors to supply part of its product if there were a feasible alternative. The use of UNEs by Qwest exposes its customers to accidental or intentional network disruption by those in control of the leased facilities. For these reasons, Qwest will continue to seek out other alternatives, including building out its own facilities in certain areas. But UNEs today remain a vital, if imperfect, component for Qwest's strategic vision.

including competition for advanced services -- if it enables carriers such as Qwest to lease UNEs in a way that begins to approximate the manner in which ILECs can lease long distance capacity.

II. SECTION 251(D)(2) MUST BE READ IN LIGHT OF THE GOALS AND STRUCTURE OF THE ACT.

It is essential that the Commission approach the task of interpreting Section 251(d)(2) 9/ with the goals and structure of the 1996 Act in mind. Qwest believes that Congress sought to achieve two primary goals when it required ILECs to furnish UNEs to competitors. First, Congress sought to promote local competition *in the near-term*. Second, it wanted to bring the benefits of competition to *all* customers, not just high-margin business users. Qwest respectfully submits that the Commission can fulfill both of these objectives only if competitors can lease the full complement of UNEs.

First, access to ILECs' UNEs will enable Qwest and others to fulfill Congress's goal of rapid entry into the local market. Qwest fully agrees that the construction of facilities is a good strategy for entering local markets where the economics so justify. Qwest is currently pursuing that strategy in a number of markets. But even where local facilities are cost-justified, the deployment of local facilities in a single city can consume significant time and resources. If every carrier were forced to deploy even some facilities in every market where it wants to compete, competition would be long delayed. If the Commission enables

9/ 47 U.S.C. § 251(d)(2).

competitors to use UNEs in a flexible and effective manner today, competitors such as Qwest will be able to build a local customer base far more quickly. If Congress had intended any other result, it would not have included Section 251(c)(3) in the Act. 10/

Second, the only way the Commission will fulfill Congress's goal of *broad-based* competition is if it makes UNEs available to competitors. It is axiomatic that Congress was concerned with broad-based local competition. In section 271, Congress determined that mark of a truly competitive local market is one in which both business and residential customers enjoy competitive alternatives.11/ That is why it permitted the RBOCs to enter the long distance market only if it could be shown that both business *and* residential markets had competitive alternatives.

In considering ways to promote broad-based competition, the Commission can learn from the three years of experience since the passage of the Act. That experience shows that competitive facilities are likely to be constructed first in dense geographic areas with high concentrations of business customers. That experience also shows that without access to the full complement of UNEs, including unbundled local switching, few CLECs have been able to justify serving

10/ 47 U.S.C. § 251(c)(3).

11/ 47 U.S.C. 271(c)(1)(A).

residential and small business customers^{12/} even though a number of CLECS have invested in local switching themselves in business districts.^{13/} Although CLECs have invested in transport and some high-capacity loop facilities, for the most part the main form of initial investment in local network facilities has been the purchase of a local switch.

UNEs are needed for broad-based competitive entry because they permit competitors to obtain some of the enormous economies of scope, scale, and connectivity now enjoyed exclusively by the ILECs. The government granted ILECs legally protected local monopolies primarily to permit ILECs to construct ubiquitous networks. Today, those networks give ILECs powerful economies of scale, scope, and connectivity, which together constitute a significant entry barriers for competitors.

^{12/} Access to UNEs is also necessary for CLECs to serve large, multi-location business customers. This is true even for CLECs that have deployed local facilities. See Section XII.C.3.a. (Circuit Switching), *infra*.

^{13/} A study of CLECs in New Jersey, for example, showed that 90.36% of the lines served by CLECs in Bell Atlantic-New Jersey's territory are business lines. Of the ten percent of the lines that are residential, every one is served via service resale. Thus, CLECs in New Jersey were not using their own facilities to provide service to residential customers. CLECs had captured only 1.27 % of all access lines (business and residential combined) in Bell Atlantic New Jersey territory by the end of 1998. "An Analysis of Local Switched Services Market Share Year End 1998 in the Bell Atlantic-New Jersey Region," Competitive Local Exchange Carrier Shared Study, Atlantic ACM, Attachment A to "Comments of MCI WorldCom on Staff's Recommendation for Access to Unbundled Network Elements," filed May 10, 1999 in Local Competition TSFT Process, New Jersey BPU Docket Nos. TX98010010, et al.

By giving CLECs access to UNEs, Congress sought to permit carriers such as Qwest to share in the economies of ILECs' large, ubiquitous local networks. The use of UNEs will permit competitors to enter the market quickly and to grow their customer bases. Competitors will then have the revenues to install their own local facilities where it makes economic sense to do so. Thus, through the creation of UNEs, Congress attempted to ensure that all customers would receive the benefits of competitive choice, and not just those customers that could be economically served by competitive facilities.

The experience of the past three years also demonstrates the enormous advantages of incumbency in another way. Despite the Commission's forceful efforts to open local markets to competition, the ILECs well recognize that the easiest path to *entering* the local market is by *merging* with the incumbent. While Qwest fully expects these ILECs to argue that their local markets are open, and that access to UNEs is not necessary, the actions of these ILECs speak far louder than their words. Currently pending before the Commission are mega-ILEC mergers that contrast sharply with the vision of the Act that incumbent LEC economies should be *shared* with entrants, not further *entrenched* by merger. 14/

The central logic of these mega-ILEC mergers is that the only way these carriers can successfully enter is if they first grow far larger by acquiring other incumbents. SBC, in fact, has characterized local entry (without first

14/ GTE/Bell Atlantic, CC Docket No. 98-184; SBC/Ameritech, CC Docket No. 98-141.

becoming a much larger local monopoly) as a “death march.” 15/ This is a particularly remarkable observation by SBC, given that its out-of-region entry strategy relies on the UNE platform to serve residential and small business customers. 16/ Similarly, the Bell Atlantic/GTE merger is partially founded on the claim (by Bell Atlantic) that it needs nearby GTE facilities to compete with other RBOCs. 17/ Clearly, if ILECs themselves have concluded that the ownership of incumbent networks are a predicate to out-of-region entry, then the Commission can confidently reach the same conclusion in requiring that these facilities be made available as network elements.

15/ In re Joint Application of SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control, Public Util. Comm. of Ohio, Case No. 98-1082-TP-AMT, Hearing Transcript, Volume 1, pp. 176-177, January 7, 1999 ,p. 177, lines 14-17 (testimony of SBC witness Kahan): "All I can tell you is our decision process and what we're going to do, okay. And what I'm telling you is we're not going to go into a de novo entry to evolve into a national company. It would be a death march, in our opinion."

16/ Although the details of SBC's out of region entry strategy are proprietary, the public record in Ohio and Illinois reveals that SBC intends to rely extensively on the UNE Platform (at least initially) to compete for residential and small business customers. See, for instance, Rebuttal Testimony of Joseph Gillan before the Illinois Commerce Commission, Docket No. 98-0555 and Deposition of James Kahan, Public Utilities Commission of Ohio, Case No. 98-1082-TP-AMT.

17/ See for instance Direct Testimony of James Attwood, Bell Atlantic/GTE, Before the Illinois Commerce Commission, Docket 98-0866, Exhibit 1.00 (page 14):

GTE's operational platform and presence in service territories around the country and in Illinois serve as a base from which to expand the merged company's facilities.

In its August 1996 Local Competition Order, the Commission correctly emphasized the importance of access to the economies of scope, scale, and connectivity that characterize the incumbent local exchange network. In order to compete with the incumbent, the Commission explained that competitors would need to achieve those same economies, either through construction of their own local facilities, where economic, or through use of ILEC network elements. ^{18/} The Supreme Court's decision does not disturb this fundamental point that the Commission identified in the Local Competition Order, and Qwest urges the Commission to ensure that competitors can share in the network economies now enjoyed by ILECs.

The Issue of Facilities Ownership. In spite of the collective findings of Congress, the Commission, and the Supreme Court, it will likely be argued that the Commission should now revise its earlier approach to UNEs and instead affirmatively encourage the deployment of facilities by competitors.

In considering those arguments, it is important for the Commission to be aware of two key points regarding the deployment of facilities. First, the deployment of facilities by competitors, where cost-justified, can have significant benefits: it can cut costs, provide CLECs with important control over quality, and reduce CLECs' dependence on ILECs. These are powerful incentives for CLECs to

^{18/} Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, at ¶ 316 (1996) ("Local Competition Order"), aff'd in part, AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999).

build out their own facilities wherever it is economical to do so. It would be a mistake for the Commission to adopt UNE policies aimed “encouraging” facilities deployment by denying access to key UNEs. Rather, Qwest submits that the Commission will facilitate efficient facilities deployment if competitors can decide whether to deploy local facilities using by first entering markets and serving customers with UNEs, and *then* deploying cost-justified facilities using revenues from existing local customers.

Second, there is a difference between encouraging the deployment of competing local facilities and encouraging innovation. Such innovation is less dependent on ownership of local facilities than on the technology, skills, and ideas of companies that use local networks to “touch” the customer. The Commission’s objective should be to promote innovation in the creation of new applications, new pricing structures, and new services. Qwest would encourage the Commission to consider those innovations that occur not just in the local facilities themselves, but also in the services and applications that use the local network as an input. Qwest believes that if customers become addressable through UNEs, applications developers will create more applications. In particular, Qwest strongly believes that if it can assemble an end-to-end broadband pipe using its own high bandwidth network in combination with leased UNEs (in those areas where Qwest lacks local facilities), Qwest will stimulate the development of innovative applications by

offering an end-to-end telecommunications product that minimizes friction between applications developers and end users.^{19/}

In sum, Qwest believes that if the Commission makes UNEs available to competitors, local competition will proceed more swiftly and across a broader range of customers than it has to date. In addition, the availability of UNEs will accelerate, not discourage, the deployment of competing local facilities, and it will do so in a way that increases incentives for the development of innovative applications and services.

III. REQUESTING CARRIERS ARE “IMPAIRED” UNDER SECTION 251(D)(2) UNLESS THERE IS A WHOLESALE MARKET FOR A NETWORK ELEMENT.

A. The Scope of the Supreme Court’s Remand is Limited

It is important, at the outset, to take note of exactly what the Supreme Court did and did not do. The Supreme Court’s remand is actually very limited in scope. The Court did not invalidate any of the original network elements identified by the Commission as mandatory in 1996. The Court required the FCC to “apply *some* limiting standard, rationally related to the goals of the Act,” in determining what network elements should be mandatory. ^{20/} The Court was concerned, in

^{19/} At least one competitor, Rhythms NetConnections makes this point by promoting its own high bandwidth service as a way of avoiding “the hassles of piecing together networking services from local and long distance companies, Internet service providers, and applications vendors.” See <http://www.rhythms.net/about/index.html>.

^{20/} AT&T v. Iowa Utilities Board, 119 S.Ct. at 734.

particular, that the Commission had not considered at all whether a requesting carrier might have an alternative source of supply for a particular network element, because the Commission had examined “impair” only in relation to use of *other* ILEC network elements. 21/ The Court also took issue with the FCC’s conclusion that “any increase in cost (or decrease in quality) would satisfy the “necessary and impair” test of Section 251(d)(2).

Significantly, the Court observed that the Commission had already identified a number of factors in its 1996 Local Competition Order that it could use to justify a finding of impairment under a more stringent test. 22/ The Court merely instructed the Commission to set forth a rational test for Section 251(d)(2) and make appropriate findings to justify its list of mandated network elements. The Commission has substantial latitude in developing a standard under Section 251(d)(2) to be sure that the standard gives full force to the goals of the Act. The Commission’s interpretation of the Congressional standard would be entitled to

21/ AT&T v. Iowa Utilities Board, 119 S.Ct. at 735.

22/ The Court observed that

“[t]hough some of these sections [of the 1996 Order] contain statements suggesting that the Commission’s action might be supported by a higher standard, . . . no other standard is consistently applied and we must assume that the Commission’s expansive methodology governed throughout.”

AT&T v. Iowa Utilities Board, 119 S.Ct. at 736.

deference, moreover, under the very terms of the Supreme Court's decision, which determined that Chevron deference was due the Commission in its interpretations of the Act's statutory provisions. 23/

As we show below, by reading Section 251(d)(2) to require an inquiry into whether a wholesale market for a network element exists, the Commission would fully satisfy the terms of the Supreme Court's remand and would give full force to the procompetitive goals and structure of the Act discussed in the previous section.

B. Is There a Wholesale Market for Each Network Element?

As a starting point in the Commission's analysis, the language of Section 251(d)(2) and the Supreme Court's own decision make it clear that the "necessary and impair" test is written from the perspective of the requesting carrier. The relevant question is whether a requesting carrier is impaired without access to a particular ILEC network element. In other words: "Is there an alternative source of supply for this network element such that failure to obtain the element from the ILEC would not impair a requesting carrier in its ability to provide any service to any customer?" 24/

From the point of view of requesting carriers, there must be a realistic alternative to reliance on the ILEC to obtain network elements. While self-supply

23/ AT&T v. Iowa Utilities Board, 119 S.Ct. at 738 ("Congress was well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency, see Chevron v. NRDC, 467 U.S. at 842-843, 104 S.Ct. 2778.")

24/ See Notice at ¶ 42.

is an option for some requesting carriers for some purposes, in general it will not be possible to conclude that requesting carriers have alternative sources of supply for a particular network element until a *wholesale market* for that network element has developed.

A prerequisite for the development of a wholesale market is the *interchangeability* of competitively supplied network elements with the ILEC-supplied network element. Interchangeability depends on the existence of *operational systems* that enable CLECs to substitute a competitively supplied (or self-supplied) network element for that of the ILEC without material delay, reduction in quality, or increase in cost.

In order to conclude that there is a wholesale market for a network element, there must also be a sufficient number of wholesale vendors to produce *effective wholesale competition* for a particular network element. Once the existence of interchangeability and the presence of an effectively competitive market for the network element has been demonstrated, the requesting carrier presumptively is not “impaired” under Section 251(d)(2) and the network element is no longer mandatory.

In sum, Section 251(d)(2) requires the adoption of a “wholesale market test” for impairment. We describe the elements of that test in Section IV, below.

C. Limited Self-Supply of a Network Element Is Not Evidence of a Lack of Impairment.

The Supreme Court referred in one part of its opinion to the Commission's failure to consider the relevance of "self-provision" under Section 251(d)(2) 25/ The Commission also asks this question in the Notice. 26/

As a threshold matter, interchangeability is just as necessary for self-supply to succeed, as it is for an effective wholesale market to develop.

Interchangeability simply means that an externally supplied facility can be used as efficiently as an ILEC network element. Such a condition is necessary for even large carriers to efficiently self-supply, which is itself a prerequisite to a wholesale market. Once a sufficient number of carriers have successfully self-supplied, installing adequate capacity to challenge the dominance of the ILEC's embedded network, then a wholesale market should develop. In fact, the best evidence that self-supply is a reasonable alternative to ILEC facilities is when sufficient self-supply has occurred to support wholesale competition.

No company would rationally choose to buy network elements from the ILEC when that company can provide those elements to itself through self-supply, all else being equal. Owning one's own facilities gives a carrier the maximum control, and is preferable to relying on a competitor for an essential input -- again, all else being equal. But ownership of facilities may not always be the most

25/ AT&T v. Iowa Utilities Board, 119 S.Ct. at 735.

26/ Notice at ¶ 24.

efficient or cost-effective approach. There may be economies of scale and scope, operational considerations, time to market considerations, and so on, that would impel a carrier to purchase a network element from a wholesale provider (whether the ILEC or a wholesale CLEC) rather than purchasing the element itself. Until a wholesale market develops for an element, it is difficult to draw the conclusion that there is no impairment merely because some carriers are engaging in self-supply. 27/

The fact that some CLECs today are engaging in self-supply of network elements also is not evidence of lack of impairment. It is evidence only that for some carriers, in some instances, for some customers, during particular time periods, in particular geographic areas, they are able to cost-justify self-supply. For example, loops are being self-supplied by a number of CLECs for some of their customers. 28/ This does not mean, obviously, that loops should be taken off the mandatory list of network elements.

27/ The Competitive Telecommunications Association (CompTel) has proposed revisions to the FCC's rules to incorporate the wholesale market test that Qwest also is proposing. A copy of CompTel's proposed rules is attached to these comments for the Commission's convenience.

The CompTel proposed rules provide that in the absence of a wholesale market for a network element, requesting carriers are presumed to be impaired without access to the network element. (CompTel Proposed Rule 51.3xx(c).) Thus, it is possible for an ILEC to overcome this presumption by a demonstration that self-supply is so useful an option as to make it unnecessary to await the arrival of a wholesale market for that element (for example, if self-supply is so easy that it is unlikely that wholesale providers will be needed).

28/ A recent survey of CLECs in New Jersey showed that CLECs leased fewer loops from Bell Atlantic than they self-provided, and that no loops were leased from another carrier. (11,439 unbundled loops from Bell Atlantic compared to 13,568

Similarly, just because some CLECs are using their own local switches to serve certain customers does not mean that the CLEC switch is interchangeable with the ILEC switch. Even a CLEC that owns its local switch could be impaired with respect to serving some customers. This is so because that switch is not already connected to the ILEC loop. Because it is not connected to the ILEC loop, it still requires a manual process for conversion of the customer. A software-based system for migrating ILEC loops to CLEC facilities in the central office has not yet been developed. Until it is, it will always be more expensive, create more delay, and be more difficult to convert customers to a competitor using a CLEC switch than using the ILEC switch. For these reasons, using a CLEC switch may not be economically justifiable for serving all potential customers in a particular central office. The point is that self-supply only works today for certain business plans.

The availability of equipment from a vendor also is not the same as lack of impairment. If it were, then again no network element would be on the list - because virtually everything can be duplicated in the local exchange, if cost, time to market, quality, and operational substitutability, is no object. In 1996, the Commission rejected a similar argument, advanced by the ILECs, that "if a requesting carrier could obtain an element from a source other than the incumbent,

self-provided loops). CLECs also reported leasing "other facilities" from Bell Atlantic. Source: "An Analysis of Local Switched Services Market Share Year End 1998 in the Bell Atlantic-New Jersey Region," Competitive Local Exchange Carrier Shared Study, Atlantic ACM, Attachment A to "Comments of MCI WorldCom on Staff's Recommendation for Access to Unbundled Network Elements," filed May 10, 1999 in Local Competition TSFT Process, New Jersey Board of Public Utilities Docket Nos. TX98010010, et al.

then the incumbent need not provide the element.” 29/ The Commission correctly reasoned that “this interpretation would nullify section 251(c)(3) because, in theory, any entrant could provide all of the elements in the incumbents’ networks.” 30/

Even the ILECs have stated that the ubiquity of their networks creates unique economies of scope and scale that are essential to a carrier’s ability to provide services on a broad basis. In objecting to the Commission’s advanced services separate affiliate proposal, for example, US West explained the importance of the ILECs’ economies of scope and scale as follows:

Incumbent LECs are uniquely well positioned among common carriers to bring advanced services to the mass market, because their networks reach into virtually all communities—big and small, urban and rural. The existence of extensive circuit-switched facilities will permit economies of scope in the rollout of packet-switched technologies; the efficiencies of integrated provision of voice and data services, in turn, make it possible to provide affordable advanced services to all Americans. 31/

US West also explained that the lack of access to integrated ILEC network facilities would make it impossible for either an ILEC separate affiliate or other competitive carrier to provide advanced services on a broad basis:

Structural separation would eliminate all integrative efficiencies. The NPRM’s separation proposal would saddle incumbent LEC’s data

29/ Local Competition Order at ¶ 287.

30/ Id.

31/ Deployment of Wireline Offering Telecommunications Capability, CC Docket No. 98-147, Comments of US WEST Communications, Inc., (filed Sept. 25, 1998), at 16-17.

affiliates with the same array of economic disincentives to serve less well-of communities that new entrants now face. The playing field would indeed be level: *Neither incumbents nor* new entrants would be able to justify the economic cost of deploying advanced services to small and rural communities. The new affiliate would be unable to rely on U S WEST's exiting ubiquitous network and accordingly, like other CLECs, would be able to serve only lucrative, high-density markets. 32/

In short, US West stated that preventing an ILEC separate affiliate from using the ILEC's network facilities would "destroy[] the efficiencies that are necessary for incumbents to build an economic case for mass market deployment." 33/ The same is true for competitive carriers.

In sum, given the scale and scope economies of incumbent local telephone exchange plant, the incumbent network's inherent connectivity and ubiquity advantages, the availability of self-supply as an option does not, without more, eliminate impairment. The Commission must still determine whether a competitively supplied (or self-supplied) network element is interchangeable with that of the ILEC, and, if so, whether a wholesale market for the network element has developed.

32/ Id. at 17.

33/ Deployment of Wireline Service Offering Telecommunications Capability, CC Docket No. 98-147, Reply Comments of US WEST Communications, Inc. (filed Oct. 16, 1998), at 11.

IV. THE COMPONENTS OF THE WHOLESALE MARKET TEST

The Commission should adopt as the test for “impairment” under Section 251(d)(2) whether a wholesale market exists for a particular network element. In order to conclude that such a wholesale market exists, the Commission must first be able to determine that (1) competitively supplied network elements are interchangeable with ILEC network elements, so that there is no material reduction in quality, speed of service, or cost, when a requesting carrier uses a competitively supplied element; and (2) that a sufficient number of wholesale providers of network elements exist to produce an effectively competitive market for that network element across a sufficiently large geographic area.

We discuss the components of this test more fully below. The wholesale market test we propose, and the specific network elements that Qwest believes must be provided pursuant to Section 251(d)(2), are set forth in the proposed revisions to Rule 319 filed by the Competitive Telecommunications Association (CompTel) in their comments in this proceeding. For the Commission’s convenience, Qwest has attached a copy of the CompTel proposed rules to these comments.

A. The Concept of Interchangeability

If a network element is available from another source (whether an equipment vendor or another CLEC), but is not equivalent in functionality, ease of operation, speed to market, quality, or price, to the ILEC network element, then it is not *interchangeable* with the ILEC’s network element. A requesting carrier

would be impaired if it were forced to go to an alternative source to obtain the network element, because that competitively supplied element could not be used in the same way as the ILEC-supplied element. In other words, achieving interchangeability means making the operational changes that would allow competitors to take advantage of the economies of the integrated, ubiquitous ILEC network when they use competitively supplied elements, just as they would if they were to use ILEC-supplied elements.

Reading Section 251(d)(2) to require interchangeability is also necessary in order to satisfy the consistent statutory requirements of nondiscrimination that appears so frequently in the network element and interconnection sections of the Act. ^{34/} A central requirement of the Act is that the ILECs must treat requesting carriers in a nondiscriminatory manner. If a CLEC were forced to use a network element from another source that is inferior to the element when obtained from the ILEC, then in effect the ILEC would be permitted to discriminate against its competitors by denying them access to the ILEC network.

As the Commission recognized in the Local Competition Order, and again in the Notice, the incumbent LEC network is characterized by significant

^{34/} See, e.g., 47 U.S.C. §§ 251(c)(2)(D), 251(c)(3), 251(c)(6), 252(d)(1)(A)(ii).

economies of “density, connectivity, and scale.” 35/ This is the basis for the ILEC’s duty to share its network with competing providers. 36/

The ubiquity and connectivity that characterizes the incumbent LEC network (and which does not characterize the network of any competitor) mean that a network element that is already part of the ILEC network may not be easily interchangeable with a competitively supplied element. What is required are operational reforms that eliminate the impairments to substitution of a competitively supplied element for that of the ILEC.

The ILECs themselves have explained the critical importance of using network elements that are operationally integrated with their networks. For example, an article appearing in the magazine of the incumbent LEC industry association, USTA, observed that:

Because of their fragmentary nature, UNEs will be operationally difficult to order and to provision by both sides. Product packages that comprise appropriate and pre-set UNE combinations could reduce some of the difficulties. 37/

35/ Notice at ¶¶ 26-27, quoting Local Competition Order, 11 FCC Rcd at 15508-09, ¶ 11.

36/ See AT&T v. Iowa Utilities Board, 119 S.Ct. at 726 (1999) (“Foremost among these duties [to open local markets] is the LEC’s obligation under Section 251(c) . . . to share its network with competitors.”)

37/ Arias, Salvador, “Wholesale Marketing Strategy: A Changing Portfolio of Opportunities,” Teletimes, United States Telephone Association, Vol. 12, No. 3 (1998) at 37.

Ameritech made clear the need for access to such operationally integrated facilities clear in objecting to the Commission's proposed requirement that the ILECs create separate affiliates for the provision of advanced services. 38/ Ameritech stated that when it integrates its advanced services facilities and equipment with its incumbent LEC network,

[s]horter provisioning times would be possible because of seamless network facilities and operations. Improved service reliability would also result from combined data and interLATA service entities because a single integrated network would eliminate a redundant layer of switching and transport between two subsidiaries, thus reducing the number of potential failure points. Moreover, a single set of OSS would ensure more effective network management, monitoring and troubleshooting. 39/

Ameritech observed that such operational integration is central to enabling the ILECs "to deliver the levels of service and reliability required by users of large data networks." 40/ CLECs face the same problems, because their competitively supplied network elements are not already operationally integrated with the ILEC network.

38/ Deployment of Wireline Service Offering Telecommunications Capability, CC Docket No. 98-147, Comments of Ameritech, (filed Sept. 25, 1998) at 59.

39/ Id.

40/ Id.

B. Examples of Operational Reforms That Can Lead to Interchangeability

Many of the current impairments to the interchangeability of competitively supplied network elements with ILEC network elements can be removed through operational reforms. Such reforms can help make the substitution of competitively supplied elements for ILEC elements seamless and transparent to the requesting carrier. The FCC's recently adopted collocation reforms, for example, is an example of an important operational reform that is a necessary prerequisite in making CLEC switching interchangeable with ILEC switching and in making competitively supplied xDSL loops interchangeable with ILEC xDSL-equipped loops. 41/

Operator services and directory assistance (OS/DA) is an example of a network element where few impairments to interchangeability remain. These remaining obstacles may be relatively easy to remove. They include, for example, (1) automated access by competitive OS/DA suppliers to the same data used by the ILECs, updated as frequently, and at similar cost; (2) ease of substitution of competitively supplied OS/DA for ILEC-supplied OS/DA, for any network configuration; (3) the existence of operational systems that would allow CLECs to use another source of OS/DA service (for example, if a CLEC is using ILEC unbundled local switching, the ability to create the appropriate line class codes in

41/ As discussed below in connection with the switching and loop network elements, other impairments to interchangeability still exist for each of those elements.

the ILEC local switch). These operational obstacles are “impairments” that the ILEC has it within its power to remove.

For every network element, there are operational reforms that are necessary before the Commission could conclude that interchangeability of competitively supplied elements with ILEC elements is possible. We discuss other such reforms in connection with the discussion of individual elements, in Section XII, below.

C. Sufficient Number of Wholesale Providers

Once interchangeability is established for a network element, the second stage of the inquiry is whether there is a sufficient number of wholesale providers of that network element, across a sufficiently large geographic area to constitute a commercial market, to produce a presumption that there is an effectively competitive wholesale market for that network element. There are already some companies that have as their business plans, at least in part, to be wholesale providers of network elements. For example, NorthPoint Communications, Inc. (“NorthPoint”), a national provider of high speed, local data network services using digital subscriber line technology, recently stated that it intends to market its network and data transport services to, among others, long distance and local telephone carriers. ^{42/} These carriers will in turn resell

^{42/} See NorthPoint Communications Group, Inc.’s Securities and Exchange Commission filing made pursuant to Rule 424(b)(3), May 5, 1999 at 3 (available at <<http://www.sec.gov/Archives/edgar/data/1080558/0000929624-99-000832.txt>>).

NorthPoint's data network services to end users at retail rates. 43/ As another example, Teltrust is interested in providing competitive operator services and directory assistance. 44/

Section 51.3xx(b)(2) of the CompTel proposed rules provides that this part of the wholesale market test would be presumed satisfied if it were shown that:

(2) for a geographic area no smaller than a Major Trading Area, there are sufficient alternative providers of the particular network element capable of supplying the network element on terms that are comparable in quality, cost and efficiency to those of the ILEC, and in quantities sufficient to result in a competitive market for such elements and facilities.

There is no magic number of wholesale providers that will automatically yield an effectively competitive market. Today there is a wholesale market in the equivalent of network elements intercity transport, because the operational problems underlying interchangeability have been solved and because there are enough wholesale providers to create a competitive wholesale market, with cost-based rates. There is every reason to believe that once interchangeability is achieved for local network elements, a wholesale market for local network elements also will develop. Spare capacity can be sold to carrier-customers, and the

43/ See *id.*

44/ Companies interested in offering competitive OS/DA still need access to nondiscriminatory inputs from the ILECs in order to offer this product on an interchangeable basis with the ILECs OS/DA. This stage has not yet been reached.

cost and risk of additional investment can be spread among retail and carrier-customers.

Once there are a sufficient number of wholesale providers to create effective competition for a particular network element, it will not be critical to determine whether the wholesale price for that network element is “materially” different from the price charged by the ILEC. In a competitive market, all providers (including the ILEC) should be pricing at forward-looking cost, so the Commission can presume that the wholesale prices are not materially different than those of the ILEC for those network elements. 45/

In sum, the Commission must not only determine that interchangeability has occurred, but that the wholesale market has developed in response to that interchangeability. As we discuss in the next section, the geographic scope of the market must be sufficiently large to make sense both from the perspective of the wholesale provider and the purchasing carrier.

D. Geographic Scope of Wholesale Market for Network Elements.

As interchangeability becomes possible and wholesale network element markets develop, it will be possible to remove network elements from the list. It is essential, in making the determination whether a wholesale market exists

45/ Of course, if wholesale providers of network elements are pricing their products substantially higher than the ILEC, this would be evidence that an effectively competitive market for network elements has not yet developed, or that the competitively supplied network elements are not yet interchangeable with the ILEC’s network element.

for a network element, that the size of the market is sufficiently large to function as a real market from the point of view both of the wholesale supplier and the requesting carrier. The market area has to be sufficiently large to take into account the practicalities of entering a market. CLECs cannot realistically buy network elements on a patchwork basis from multiple carriers within a small geographic area, and have this kind of arrangement work on an operational basis.

Qwest proposes that the Commission use the Rand McNally Major Trading Areas (MTAs) as the appropriate geographic market. 46/ This is the area that the Commission chose to define the scope of the “local service area” for purposes of determining reciprocal compensation obligations with respect to commercial mobile radio service (CMRS) providers under Section 251(b)(5) in the Local Competition Order. 47/

MTAs already are used to determine the licensing areas for PCS providers, 48/ paging providers, 49/ and some SMR providers. 50/ The Commission

46/ Rand McNally Commercial Atlas & Marketing Guide 36, 38-39 (130 ed. 1999). Rand McNally has identified 47 MTAs. Rand McNally Commercial Atlas & Marketing Guide at 39. The Commission, however, uses 51. These include, in addition to the 47 Rand McNally MTAs: Alaska, Guam and the Northern Mariana Islands, Puerto Rico and the United States Virgin Island, and American Samoa. 47 C.F.R. § 90.7. MTAs often, but do not always, track state boundaries. They are established based on studies of physiography; population distribution; newspaper circulation; economic activities; transportation patterns, services, and facilities; and the field reports of sales analysts. Rand McNally Commercial Atlas & Marketing Guide at 39. Each Rand McNally MTA is named after one or more cities which serve as the MTA’s primary center (or centers) of wholesaling, distribution, banking, and specialized services, such as advertising. Id. at 36.

47/ Local Competition Order at ¶ 1036.

48/ 47 C.F.R. § 24.202.

chose to use these geographic areas in the PCS context because MTAs “were designed by Rand McNally based on the natural flow of commerce.” 51/ The Commission also chose to use MTAs because it believed they would “provide the economies of scale and scope necessary to promote the development of low cost PCS equipment.” 52/ In addition, the Commission believed that the use of MTAs, rather than smaller geographic areas, would facilitate interoperability with other PCS systems within the MTA regions. 53/ The MTA is a good choice for the wholesale market test under Section 251(d)(2) because it is a natural market, defined by the way companies actually do business. The MTA is also large enough to permit wholesale suppliers and their customers to do business with each other on a commercially viable basis.

Determining interchangeability would be accomplished by evaluating the availability of operational systems that permit the substitutability of competitively supplied network elements for those of the ILEC. A region-wide (ILEC-wide) approach makes sense because the operational and provisioning

49/ Id. § 22.503(b).

50/ Id. § 90.661.

51/ Amendment of the Commission’s Rules to Establish New Personal Communications Services, Gen Docket No. 90-314, RM-7140, RM-7175, RM-7618, Second Report and Order, FCC 93-451 (rel. October 22, 1993), at 7732, ¶ 73 (subsequent history omitted).

52/ Id. at 7733, ¶ ¶ 75, 76.

53/ Id. at 7733, ¶ 76.

systems for UNEs are generally developed and implemented by each ILEC for its entire region, with the same systems being duplicated in individual states and markets. For those ILECs that can establish interchangeability in only one MTA (or one state), then the FCC still should be the one to determine interchangeability, because the systems the ILECs develops could presumably be used throughout that ILECs region to establish interchangeability as well. 54/

E. Burden of Proof.

As discussed below, the initial list of UNEs should be established by the FCC, in this rulemaking docket, and it should be a national list applicable everywhere. There is no location today where there is a wholesale market for the network elements on the original list -- although that could change in the near future.

The ILECs should have the burden of demonstrating that interchangeability has been accomplished. 55/ This is so because, as the ones with access to the operational data necessary to make alternatively-supplied network elements substitutable, they are the ones with the power to make such interchangeability a reality. In addition, as the entities asking to remove a network

54/ For example, in recognition of the value of ILEC-wide standard OSS, the FCC required Bell Atlantic, as a condition of its merger with NYNEX, to provide uniform interfaces throughout its region for all OSS functions, including pre-ordering, ordering, provisioning, billing, and maintenance and repair. Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries, File No. NSD-L-96-10, FCC 97-286, Memorandum Opinion and Order (rel. August 14, 1997).

55/ See Notice at ¶ 12.

element from the list, they must have the burden of proof. Otherwise, the ILECs could begin filing petitions immediately after the rules are adopted, asking to remove elements, with requesting carriers bearing the burden of proving that circumstances had *not* changed. The Commission in this proceeding will adopt rules prescribing the required network elements, and they must be presumed lawful, like all other rules.

The wholesale market test, moreover, sets up presumptions that ILECs could take advantage of. See CompTel Proposed Rule 51.3xx(c). If an ILEC proves that interchangeability has occurred, and that there are a sufficient number of wholesale providers, throughout a sufficiently large geographic area, then the ILEC will have established the equivalent of a *prima facie* case, with the burden shifting to requesting carriers to disprove the existence of a wholesale market.

Because the CompTel rule creates only a *presumption* that impairment exists if there is no wholesale market, it also might be possible for an ILEC to prove that impairment no longer exists even if there is no wholesale market yet. For example, it is possible (though unlikely) that the availability of self-supply alone would be sufficient to remove impairment (assuming, of course, that interchangeability has been established), though it would be necessary to explain why no wholesale market has developed in that situation.