

III. THE FCC SHOULD APPLY THE NECESSARY AND IMPAIR STANDARDS TO YIELD A NATIONAL LIST OF UNES.

Evaluation of impairment on a central office by central office basis is a war of attrition in which consumers are destined to lose. The implementation of such a procedure would surely cause the costs of entry to skyrocket, and carriers would be delayed in entering the local market. To avoid such an impediment to competition, CompTel recommends that the Commission adopt a uniform, national list of UNES that will be provided everywhere. In addition, the Commission should evaluate impairment (or necessity, if an element is found to be proprietary in nature) based on the circumstances of a carrier most likely to utilize a wholesale entry strategy. By ensuring that UNES are available whenever this type of carrier is impaired, the Commission opens the local market to the largest number of entrants and also promotes the goal of universal availability of telecommunications services.

A. Uniform National Rules Are Needed to Achieve Section 251's Goals

In the *FNPRM*, the FCC tentatively concluded that it “should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis.”⁵² There is no reason for the Commission to stray from adopting this conclusion. Nationwide rules would be consistent with the Commission’s Local Competition proceeding from its inception and would serve Congress’ “national policy framework” goal.

The benefits of national UNE rules, as previously recognized by the Commission, are many. In the *Local Competition Order*, the Commission concluded that “national rules are highly desirable to achieve Congress’ goal of a pro-competitive national policy framework for the telecommunications industry.”⁵³ The Commission identified several advantages to national

⁵² *FNPRM*, ¶ 14.

⁵³ *Local Competition Order*, ¶ 62.

rules, especially as a source of consistency and certainty that reduces barriers to competitive entry.⁵⁴

Specifically, the Commission recognized that nationwide unbundling rules serve to equalize the bargaining positions of interconnecting parties, especially since many CLECs seek to enter nationwide or regional markets.⁵⁵ It also noted that uniform nationwide rules would avoid re-litigating the same issue in dozens of jurisdictions and would reduce the administrative burdens placed on state commissions by facilitating more efficient arbitrations.⁵⁶ Importantly, the Commission refuted the argument that it was attempting to impose a uniformity unintended by Congress. To the contrary, the Commission's rules will provide a national baseline for terms and conditions in arbitrated agreements, "consistent with the broad delegation of authority that Congress gave the Commission to implement the requirements set forth in section 251."⁵⁷ Nothing in the Court's decision alters this reasoning and inevitable conclusion in favor of national rules.

The Court's decision reinforces the Commission's authority to establish national rules and highlights that the promotion of local competition is a *national* goal, placing the FCC in the primary position of national rule implementation. Although it is true that the Court instructed the Commission to consider factors (such as the availability of elements outside the ILEC network) which might vary according to the circumstance, this instruction does *not* mandate a hodge-podge of UNE availability. In other words, the Court disagreed with the Commission's interpretation of the necessary and impair standards, not with the fact that the

⁵⁴ See *id.*, ¶¶ 53-62.

⁵⁵ See *id.*, ¶ 55.

⁵⁶ See *id.*, ¶ 56.

⁵⁷ *Id.*, ¶ 60.

agency compiled a nationwide UNE list. In fact, the Commission’s original impairment standard *also* relied on factors that could differ according to the circumstance – specifically, the availability of alternative capabilities within the ILEC’s network. Yet, the Court never questioned the logic of the FCC specifying a list of uniformly available UNEs.

In fact, by making local competition a national priority, the Act requires a primary role for the FCC to ensure the goal is achieved. Indeed, it would defeat the very purpose of making local competition a national priority if the FCC were immediately to cede control of this objective back to the states. As the Court noted, Congress had “unquestionably” shifted regulation from the state to the federal level.⁵⁸ Simply put, nothing in the Court’s decision alters the Commission’s conclusion that “certain national rules are consistent with the terms and goals of the statute. . . . [I]t is reasonable to identify a minimum number of network elements that incumbent LECs must unbundle and make available to requesting carriers pursuant to the standards set forth in sections 251(c) and (d) . . .”⁵⁹ The Commission should do so.

The Commission recently exercised such authority to issue nationwide collocation rules. In the *Advanced Services First R&O*, the Commission concluded that nationwide rules are necessary to remove barriers to entry and to accelerate the provision of advanced services.⁶⁰ Following the lead of state commissions in New York and Texas, the FCC acted quickly to expand the availability of cageless and shared cage collocation arrangements nationwide. In so doing, it followed the “states as laboratories” model. These states showed that the lack of collocation was hindering competition *and* that easier and less expensive collocation was possible. The FCC then extended these benefits nationwide. Without these national rules,

⁵⁸ *AT&T Corp.*, 119 S. Ct. at 730 n.6.

⁵⁹ *Local Competition Order*, ¶ 54.

competition would have been delayed (and occasionally denied) by repetitious state-by-state consideration of the same issues.

As it did in the *Advanced Services First R&O*, the Commission should make room for use of a best practices approach here. CompTel agrees with the *FNPRM* that, as with the initial unbundling rules, state commissions should have the ability to add UNEs to the nationwide list of those that must be made available.⁶¹ However, allowing states to rule on whether a particular element must be unbundled in the first instance would be inconsistent with the adoption of nationwide unbundling rules and would greatly diminish the value of such rules.⁶²

B. Characteristics of a Requesting Carrier for Purposes of the Impairment Analysis

Although national rules should be adopted, a nationwide entry strategy need not be the paradigm which the Commission uses to evaluate UNEs. On the other hand, it also is true that the Commission should not apply its standards on a carrier-specific basis. Rather, the Commission should evaluate impairment from the perspective of the type of requesting carrier for which Congress created the UNE requirement in the first place. This requesting carrier should have all the attributes contemplated for Section 251(c)(3) network elements, and should be presumed to be utilizing UNEs to provide mass market services throughout an appropriately sized geographic market. By ensuring that UNEs are available for this type of requesting carrier,

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⁶⁰ See *Advanced Services First R&O*.

⁶¹ See *FNPRM*, ¶ 14. Obviously, states must follow standards and, more importantly, may not impose other limitations on UNEs not included by the FCC.

⁶² As discussed below, the states should play a substantial role in the *removal* of specific UNEs from the nationwide list.

the Commission will promote rapid entry by as many carriers as possible, thereby furthering the pro-competitive goals of the Act.

Section 251(c)(3) permits “any requesting carrier” to obtain access to network elements, on a nondiscriminatory basis, “for the provision of a telecommunications service.”⁶³ In addition, the Act permits requesting carriers to combine network elements with each other “in order to provide [any] telecommunications service.”⁶⁴ Further, the Commission found that requesting carriers need not have *any* facilities of their own: the statute permits them to provide service exclusively through the use of ILEC UNEs.⁶⁵ Indeed, in upholding the FCC’s so-called “all elements” rule, the Supreme Court expressly rejected a facilities-based requirement for the use of UNEs. The Court explained:

[W]e think that the Commission reasonably omitted a facilities-ownership requirement. The 1996 Act imposes no such limitation; if anything, it suggests the opposite, by requiring in § 251(c)(3) that incumbents provide access to ‘any’ requesting carrier.⁶⁶

By making network elements available to “any” requesting carrier, and by declining to impose a facilities based requirement on UNE availability, Section 251(c)(3) broadens the pool of potential competitors that may enter local telecommunications markets, and as a result, all telecommunications markets.⁶⁷

⁶³ 47 U.S.C. § 251(c)(3).

⁶⁴ *Id.*

⁶⁵ *Local Competition Order*, ¶ 328 (“We conclude, therefore, that Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications services.”; *see* 47 C.F.R. § 51.307).

⁶⁶ *AT&T Corp.*, 119 S. Ct. at 736.

⁶⁷ *Local Competition Order*, ¶ 4 (local competition “is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing providers to enter all markets”) (*italics in original*).

The Commission's model of a requesting carrier for purposes of its impairment analysis must reflect these broad purposes of the UNE requirement. First, clearly, the requesting carrier should be a new entrant to the local market. The entrant should be presumed to be a start-up entity, which will have an incentive to maximize revenues as soon as possible and which will have no incentive to delay entry into a market.

Second, the requesting carrier should not be presumed to have any local exchange facilities of its own. A Requesting Carrier has a right to utilize UNEs exclusively in its provision of service, and the Commission's model should enable a requesting carrier to exercise this right. As a corollary, this principle requires that the Commission evaluate impairment assuming that a requesting carrier will attempt to use the functionality (whether obtained from the ILEC or supplied externally) in conjunction with other piece-parts of the ILEC network. In other words, impairment must evaluate whether this element can be combined with other ILEC elements in a nondiscriminatory manner.

Third, the requesting carrier should be presumed to be attempting to enter the market on both a business and residential basis. Section 251(c)(3) gives requesting carriers the right to provide any type of service, whether it is business or residential. By asking whether a requesting carrier will be impaired in providing either class of service, the Commission ensures Section 251(c)(3) is available for service to all consumers.

Fourth, the requesting carrier should be presumed to be providing a scope of services at least as extensive as those supported under Section 254's universal service policies. Universal service is one-third of the Commission's "competition trilogy" implemented after the 1996 Act. The policies of the trilogy are interrelated, and the Commission's actions implementing the interconnection provisions must also further the Act's universal service goals.

The Commission made clear in the *Universal Service* proceeding that eligible carriers may provide supported services using network elements, which count as the carrier's "own facilities" for purposes of Section 254.⁶⁸ Like an eligible carrier for universal service purposes, a requesting carrier should be presumed to be providing service on a nondiscriminatory basis to all eligible end users. Therefore, for purposes of evaluating impairment, the Commission should presume that a requesting carrier intends to offer service on a mass market basis to residential and business subscribers.

Finally, the service area the requesting carrier seeks to serve should be sufficiently large to reflect the type of area this carrier would be expected to serve. In its competition trilogy, the Commission identified two geographic areas that may be useful for this purpose. First, in the context of universal service, the Commission required eligible carriers to provide service throughout a relevant study area, which generally speaking is no larger than a particular state. Second, the Commission used a market trading area ("MTA") for purposes of determining the local calling areas of wireless providers. Either of these two geographic areas would be well suited for the impairment analysis also. Both areas are consistent with the likely strategy of a mass market carrier, who cannot enter a market on an end office by end office basis. Moreover, both standards promote competition by ensuring that requesting carriers can provide service throughout as large a geographic area as possible.

It is this type of carrier for which the Commission has an obligation to ensure that UNEs are available. The existence of a specific carrier with other capabilities that arguably make it better able to provide service without ILEC network elements does not impact the analysis. Indeed, whatever characteristics the Commission assumes a carrier to possess will

⁶⁸ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and (continued...)

operate as a cut-off for competitive entry: those with those characteristics and those that possess more abilities will enter the market, but those with lesser capabilities will be excluded. Thus, if the Commission forced other carriers to obtain the capabilities possessed by a specific carrier that possesses more abilities, it would inevitably reduce the number of competitors that can enter the market, thereby reducing competition as well. The pro-competitive goals of the Act are best promoted by ensuring that the bar for competitive entry is established at a place where those carriers most in need of UNEs (*i.e.*, those possessing the characteristics described in this section) have the option available.

IV. APPLICATION OF THE NECESSARY AND IMPAIR STANDARDS COMPELS RETENTION OF ALL OF THE UNES DEFINED IN SECTION 319, WITH MODIFICATIONS TO ENSURE UNES ARE USEFUL FOR THE DELIVERY OF BROADBAND DATA SERVICES.

In the *Local Competition Order* the Commission identified seven network elements that, pursuant to Section 251(d)(2), were subject to the unbundling obligations of Section 251(c)(3). Application of the “necessary” and “impair” standards as proposed herein compels retention of all of these UNEs, and, further, the modification of certain of the UNE definitions in order to ensure their application to the delivery of advanced broadband services.

CompTel member companies, regardless of size or market entry strategy, need access to *all* of the UNEs previously identified. This is true for an entity like Golden Harbor, which has deployed local exchange facilities in 30 cities but need ubiquitous access to UNEs in order to extend its “footprints” to locations where its *customers* need service.⁶⁹ This also is true for small local exchange carriers such as ATX or Birch Telecom, who cannot afford the time, or

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Order ¶ 154 (1997).

⁶⁹ Affidavit of Jerry Jones, ¶ 4 (*Appendix F*).

cost of collocation and other expenses necessary to rely solely on extension of switches.⁷⁰

Moreover, this is true for software applications providers such as Z-Tel, which has deployed a sophisticated applications control system as are “overly” to work in conjunction with the ILEC local networks.⁷¹

A. The Commission Must Retain All of the UNEs Originally Listed in Section 319, With Some Modifications

1. Local Loops

In the *FNPRM*, the Commission states its “strong expectation” that under any reasonable interpretation of the necessary and impair standards of Section 251(d), the local loop will be subject to the unbundling obligations of Section 251(c)(3). CompTel wholeheartedly concurs. Access to the local loops is a cornerstone of the ability of new entrants to compete with incumbents. Indeed, Congress expressly recognized the importance of access to the local loop as a means of fostering competition by including the loop in Section 271: the competitive checklist requires Bell Operating Companies (“BOCs”) to offer unbundled loops separate from switching as a precondition to entry into the in-region, interLATA services market.⁷² By any reasonable conception, the local loop must be included in the list of network elements subject to Section 251(d)(2).

a. Description of the Element

In the *Local Competition Order* the Commission defined the local loop simply as “a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises.” CompTel submits that the definition of the

⁷⁰ Affidavit of Martin J. Arias, ¶ 5 (*Appendix D*); Affidavit of Richard L. Tidwell, ¶ 5 (*Appendix E*).

⁷¹ Affidavit of David Malfara, ¶¶ 2-3, 9 (*Appendix F*).

⁷² 47 U.S.C. § 271(c)(2)(B)(iv); *see also Local Competition Order*, ¶ 377.

local loop must be refined, to facilitate entry into the local markets *and* enable CLECs to compete with incumbents on an equal basis as regards the provision of advanced services. Specifically, the Commission should modify the loop definition to: (1) permit CLECs to obtain loops in any technically feasible transmission medium or capacity (*i.e.*, to obtain high capacity and xDSL loops); (2) clarify that a loop includes all necessary electronics attached to it (*e.g.*, includes a digital subscriber line multiplexer (“DSLAM”) or other multiplexing equipment); and (3) permit CLECs to designate the termination point of a loop as any technically feasible termination (not just the main distribution frame).

First, the development of data applications dictates that the local loop element not be restricted only to voice grade POTS uses. Therefore, it is imperative that the Commission clarify that the local loop element encompasses all types of local loops, including ISDN loops (both PRI and BRI ISDN), xDSL capable (*i.e.*, “clean copper” loops), dark fiber loops and high capacity loops (DS1, DS3 and OC12 and higher).⁷³ These loops are pipelines over which advanced services are being transmitted today and increasingly will be in the future. CLECs need loops with these capabilities just as much as a voice-only provider needs a traditional loop. The FCC’s loops definition should explicitly require the delivery of loops in any and all technically feasible transmission media and at all transmission capacities.

The second proposed change is necessary to clarify that ILECs are obligated to provide loops which include the electronics integrated with the loop. Loop electronics, including ILEC-installed DSLAMs, are “features, functions, and capabilities that are provided by means of such facility or equipment” of the ILEC network, and therefore are expressly within the scope of

⁷³ CompTel notes that many states have already established rates for many of the loop-types identified here. Consistent with the Commission’s objective to adopt the “best in class” (continued...)

Section 251(c)(3).⁷⁴ Competitors will require access to these electronics to, for example, obtain loops which are passed through ILEC digital loop carrier (“DLC”) systems.

Finally, the loop definition should be modified to permit requesting carriers to designate any technically feasible termination point within an ILEC central office (or its equivalent) for termination of the loop element. This modification will facilitate the combination of the loop with other elements -- such as switching capabilities -- in the most economical manner, and without the necessity of a collocation arrangement in the end office.

Accordingly, CompTel proposes the following definition of the local loop network element:

the transmission capability (regardless of the transmission media involved, including unused transmission media such as dark fiber) between a requesting carrier-designated point in an incumbent LEC central office (or an equivalent location designated by the requesting carrier where the loop can be connected to other ILEC network elements, or the network facilities of another carrier) and an end-user customer premises.⁷⁵

The loop element should encompass all features, functions, and capabilities of the underlying transmission facilities used to provision the local loop, and, further, wherever it is technically feasible, the incumbent must provide the loop configured in a manner to support the transmission specifications of the requesting carrier.⁷⁶

(...continued)

of state decisions, clarifying its rule to explicitly recognize these loop types would now be appropriate.

⁷⁴ 47 U.S.C. § 153(29)(definition of network element); *cf. Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 ¶ 52 (rel. Aug. 7, 1998).

⁷⁵ See CompTel Proposed Rule 319(a) (attached as *Appendix A*).

⁷⁶ CompTel Proposed Rules 319(a)(1), (4) (attached as *Appendix A*).

b. Application of the "Impair" Standard⁷⁷

Application of the "impair" test to the local loop mandates that the Commission require that the loop be provided on an unbundled basis. First, it is clear that the model Requesting Carrier described *supra* in Section III.B (and, indeed, virtually every conceivable carrier operating today) would experience a material increase in cost if it were denied access to ILEC loops. The ILECs' networks of local loops are ubiquitous, having been built as a result of decades of monopoly provision of service. By virtue of their monopoly position, incumbents reap the benefits of substantial economies of scale and scope connected with the local loop, particularly with regard to shared assets and costs, existing customer base, and mature support infrastructure.

The model Requesting Carrier, by contrast, as the Commission notes in the *Local Competition Order*, without access to the existing loop with all of its scope and scale advantages, would be required to invest immediately in duplicative facilities in order to compete for customers. This type of investment is cost-prohibitive, and likely will remain so indefinitely. Even in the densely populated areas where some alternative construction is occurring, a Requesting Carrier would have to make a large initial sunk investment in loop facilities before having a customer base large enough to justify an expenditure of the required magnitude; this raises the competitor's cost of capital and, more significantly, increases the risks of entry exponentially. Although it is not impossible in these areas to build alternative loops, Requesting Carriers clearly face significantly higher costs which satisfy the materiality component of the impairment standard.

⁷⁷ The FCC found that local loops are not proprietary in nature. *Local Competition Order*, ¶ 388. Therefore, only the impair standard is relevant.

For these same reasons, a lack of access to the unbundled local loop would materially delay entry by competitors into the market. As discussed above, the inordinate expense and effort that would be required to construct new loops would undoubtedly delay entry into the local markets. Specifically, for example, deployment of new infrastructure requires rights-of-way acquisition, a large capital investment, and time-consuming construction. Given the expense involved and the current state of competition (or lack thereof) in the local markets, few investors are inclined to fund a ubiquitous replacement of ILEC facilities; moreover, the time requirements involved with new construction would be prohibitive. In sum, the obstacles to new entry into the local markets are virtually insurmountable absent unbundled access to the local loop.

Finally, given the costs and other burdens of new construction of local facilities and the corresponding delays in, or downright obstacles to, entry into the local market, the number and scope of customers that will receive new, competitive services inevitably would be materially restricted unless new entrants have access to the incumbents' local loops. Moreover, even where new entrants would have the financial capability to construct new loop facilities, the competitive realities of their situation would result in their targeting only certain limited categories of customers. Accordingly, competition would develop only with respect to high volume users (such as businesses) and to premises with multiple customers (either business or residential), thereby enabling new entrants to maximize the profits from their investments.

2. Network Interface Device (“NID”)

a. Definition of the Element

As before, the Commission should mandate that the NID be made available as a network element. When a requesting carrier purchases a local loop, the NID should be included

at no separate charge (with the associated costs covered by the loop charge). However, the NID should also be available separately, if a competitor requests it.

CompTel proposes one modification to the definition of this network element.

The Commission should define the NID as the cross-connect device used to connect loop facilities to inside wiring (the current definition), *and* include ILEC-owned inside wiring as part of the element.⁷⁸ Access to ILEC-owned inside wire – particularly access to ILEC riser cable in apartment buildings and other multiple dwelling units (“MDUs”) – increasingly is being used as a barrier to CLEC competition. Many CompTel member companies are being denied access to ILEC-owned intrabuilding circuits by the ILEC (often with the cooperation of the building owner), which has the effect of barring CompTel members from providing competing services to residents of the building. The most effective way of dealing with the roadblock is to include ILEC-owned inside wire within the definition of the NID, so that competitors may obtain access to the customer by cross-connecting to the ILEC NID.

b. Application of the "Impair" Standard⁷⁹

Like the local loop, because of the dedicated nature of the NID, competitive alternatives are not currently available on a wholesale basis. CLECs are unable to compete with the ILECs’ scope, scale and timeliness advantages inherent to their ubiquitous integrated plants. Without access to the NID, the model Requesting Carrier would face increases in cost and delays to enter a market that would not only be material, but essentially cost prohibitive.

⁷⁸ See CompTel Proposed Rule 319(b)(1) (attached as *Appendix A*). In addition, the Commission clarify that the rule, as now written, entitles competitors to unrestricted access to the customer side of the NID, *without facing additional charges from the incumbent*.

⁷⁹ No party has asserted that the NID is proprietary in nature. Moreover, because the NID is included within the loop element, the Commission has implicitly concluded that this element is not proprietary. *Local Competition Order*, ¶ 388.

When a competitor deploys its own loops, it must be able to connect its loops to inside wiring in order to provide viable competing service. In most cases, inside wiring is connected to the incumbent's loop plant at the NID. Accordingly, if Requesting Carriers are denied access to this element, they would be impaired in their provision of service. No customer will pay for duplication of existing intrabuilding wires, and building owners may bar such alternative in any event. The only practical alternative is use of the ILEC's facility (including the riser cable and other inside wire that it owns).

3. Local Switching

The Commission found in the *Local Competition Order* that access to unbundled local switching, and to tandem switching, was "essential for the provision of competing local service."⁸⁰ Indeed, Congress expressly highlighted the importance of competitive access to switching capability by including it in the Section 271 checklist that BOCs must satisfy in order to provide in-region interLATA services.⁸¹ The provision of switching, whether local or tandem circuit switching or packet switching, on an unbundled basis satisfies the "impair" standard of Section 251(d)(2).

a. Definition of the Element

CompTel does not believe that any significant modifications in the Section 319 definition of either local switching capacity or tandem switching capacity are needed. However, for clarity, CompTel urges the Commission to add packet switching capability as a separate element in addition to circuit switching. Packet switching should be defined as the assembling,

⁸⁰ *Local Competition Order*, ¶ 420.

⁸¹ 47 U.S.C. § 271(c)(2)(B)(vi); *see also Local Competition Order*, ¶ 410.

disassembling, addressing, conversion or routing of digital information in packet form.⁸² This element should include all features, functions, and capabilities of the packet switching and routing device, including equipment used to multiplex and packetize such information. Inclusion of packet switching as a separate element is essential given the technological developments of the past four years.

In the Advanced Services Proceeding, the Commission recognized that, in order to fulfill the mandate of Section 706 and encourage competition among carriers to develop and deploy new advanced services, it is “critical” that the marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers.⁸³ To that end, the Commission reinforced its commitment to “removing barriers to competition” so that competitors are able to compete effectively with incumbents and their affiliates in the provision of advanced services.⁸⁴ Although it deferred action on various proposals that would require the unbundling of certain elements for the specific purpose of promoting advanced services, the Commission did expressly recognize the importance of packet-switched transmission of voice and data services.⁸⁵

b. Application of the “Impair” Standard

In the *Local Competition Order*, the Commission expressly found that switch unbundling did not raise proprietary concerns under the agency’s interpretation of Section 251(d)(2)(A).⁸⁶ Moreover, the Commission further found that even if switches were proprietary

⁸² See CompTel Proposed Rule 319(c)(3) (attached as *Appendix A*).

⁸³ *Advanced Services First R&O*, ¶ 2.

⁸⁴ *Id.*, ¶ 3.

⁸⁵ *Id.*, ¶¶ 5, 7.

⁸⁶ *Local Competition Order*, ¶ 419.

in nature, access to unbundled switching would be “necessary” under Section 251(d)(2)(A).⁸⁷ CompTel submits that switching facilities still are not proprietary, and hence only the “impair” test is relevant to a determination of whether switches must be provided on an unbundled basis pursuant to Section 251(d)(2).

Local switching satisfies the impairment standard. First, denial of access to local switching will materially increase the cost to a Requesting Carrier and will materially delay its provision of service. As the Commission noted in the *Local Competition Order*, it ordinarily takes anywhere from nine months to two years to purchase and install a switch.⁸⁸ CompTel member company experience confirms this conclusion.⁸⁹ Moreover, in addition to the cost of obtaining the switch, use of non-ILEC switching requires substantial other costs, including the cost of collocating equipment in each end office where a carrier serves customers.⁹⁰ For one CompTel member, the costs of collocating exceeded \$300,000 per end office in some areas.⁹¹ CompTel’s small carrier members simply lack the financial capability to utilize their own switching for all of the customers they intend to serve.

In addition, a wholesale market for switch capacity has not developed. For example, one CompTel member company, Birch Telecom, Inc., reports that although it would like to purchase wholesale switch capacity if it were available, it is unaware of any providers offering such capacity.⁹²

⁸⁷ *Id.*

⁸⁸ *Id.*, ¶ 411.

⁸⁹ Affidavit of Martin J. Arias Aff., ¶ 5 (switch installation has taken almost two years and cost several million dollars); Tidwell Aff., ¶ 5 (switch installation cost an average of \$4-6 million per switch and took up to 9 months).

⁹⁰ Arias Aff., ¶ 5.

⁹¹ Tidwell Aff., ¶ 5.

⁹² Tidwell Aff., ¶ 5.

Most significant, however, would be the material restriction in number and scope of potential customers resulting from a lack of access to local and tandem circuit switches and packet switches. In order for a competitive LEC to penetrate into the local market to any great extent, both the cost of migrating a customer from an incumbent to a competitor and the timeframe for so doing must be minimized. As the Commission noted in the *Local Competition Order*, “new entrants will be disadvantaged if customer switchover is not rapid and transparent.”⁹³ Local switching is far from interchangeable at this time. Indeed, as noted above, any use of one’s own switch requires numerous collocation arrangements with the ILEC, which are both cumbersome and costly. Moreover, in order to utilize a local switch to serve a customer, a carrier must connect that switch to ILEC local loops on the line side of the switch and to ILEC transport elements on the trunk side. Under current ILEC conditions, these connections are done manually, and require significant time and resources to ensure that the combination is done correctly by the ILEC (and it often is not). As a result, the time to provision a customer using externally supplied local switching is materially longer than it would be to utilize ILEC local switching.

Before externally-supplied local switching can become useful for a mass-market application, it must have customer migration costs and capacity levels comparable to the PC-change level -- with migration costs substantially less than five dollars per line. To accomplish this, mechanized provisioning capabilities must be employed, which is possible only if such capabilities are software-based -- possible only with UNE switching and loop combinations.

⁹³ *Local Competition Order*, ¶ 421. Significantly, the Commission codified this requirement in rule 319(c)(1)(ii) that requires ILECs develop software-based switch provisioning systems with customer migration intervals equal to the PIC change process. Clearly, this rule is as critical today as it was three years ago and should be retained.

Further, as explained in the attached affidavit of David Malfara, access to existing switch capacity is essential to bringing innovative applications-based services to the mass market, whether business or residential.⁹⁴ The existing switches of the ILECs have a geographic reach and market penetration that is unparalleled – in effect, the customers served by these switches *define* the mass-market.⁹⁵ The only viable way to approach this market is to rely on these existing facilities to provide an entrant is basic local platform from which to offer its service. The critical value of the local switching network element is discussed further in a later section that addresses network element combinations.

4. Interoffice Transport

In the *Local Competition Order*, the Commission recognized the importance of competitive access to unbundled interoffice transmission facilities to the development of local competition, which is reflected in the fact that the 1996 Act requires BOCs to unbundle transport facilities before entering the in-region, interLATA market.⁹⁶ Accordingly, as demonstrated below, the provision of interoffice transmission facilities on an unbundled basis clearly satisfies the impair standard of Section 251(d)(2).

a. Definition of the Element

CompTel believes that the Commission's existing Section 319 definition of the interoffice transmission element is generally appropriate. CompTel proposes, however, that the Commission define packet transport as a separate UNE in order to ensure that competitors may

⁹⁴ Malfara Aff., at ¶¶8, 10.

⁹⁵ Furthermore, to bring competitive AIN-based services to mass markets fundamentally requires access to switch triggers – triggers which are *only* available in conjunction with unbundled local switching. Thus, the future of competitive AIN services is inextricably linked to the availability of the unbundled local switching network element.

⁹⁶ 47 U.S.C. § 271(c)(2)(B)(v); *see also Local Competition Order*, ¶ 439.

provide advanced, packet-switched services without experiencing a material impairment in their ability to provide service. CompTel suggests that the Commission define “packet transport” as the transport of packetized information between, and including, two or more packet devices, or between interconnected transmission facilities which terminate at a packet device, including any intermediate routing, *without regard to the protocol or packet definition scheme involved.*⁹⁷ As discussed above with respect to packet switching, it is critical to the timely development and deployment of advanced telecommunications services that all carriers have competitive access to the facilities needed to provide such services to their customers.

b. Application of the “Impair” Standard⁹⁸

The importance of interoffice transport is such that application of the impair standard clearly demonstrates that this element must be provided on an unbundled basis. First, access to the transport UNE will materially decrease the cost of entry for competitors. Although there may be alternative suppliers of transport in some areas,⁹⁹ those alternative sources are not many, and their networks are geographically limited. For a transport network to be a commercial substitute for that of the ILEC it must have a footprint of adequate dimension to meet the transport needs of its customers. If a potential customer must split its transport requirements between two providers, the customer loses traffic efficiency and gains additional administrative costs. Since the customer must obtain at least some of its needs from the ILEC in any event, it will only consider an alternative if its potential savings exceed these higher costs.¹⁰⁰

⁹⁷ See CompTel Proposed Rule 319(d)(3) (attached as *Appendix A*).

⁹⁸ Unbundled provision of interoffice transmission facilities does not raise any proprietary concerns. See *Local Competition Order*, ¶ 446.

⁹⁹ See *Local Competition Order*, ¶ 441.

¹⁰⁰ Of course, for some customers with specialized data needs, the diversity that is possible from using multiple providers is a primary goal for selecting a competitive provider.

(continued...)

In addition, and more significantly, unbundled access to ILEC transport facilities will increase the speed with which competitors can enter the market, and, further, reduce entry barriers by enabling new entrants to establish efficient local networks by combining their own interoffice facilities with those of the incumbent, thereby expanding their transport “footprint.” Further, access to interoffice transport facilities will vastly improve competitors’ ability to design efficient network architecture that is comparable in quality to that of the incumbent, and, importantly, to combine their own switching functionality with the incumbent’s unbundled loops. By entering the market on an expedited basis and being able to offer customers with service of a quality comparable to that of the incumbent, new entrants will be able to offer competitive services to a greater number of customers

5. Signaling and Call-Related Databases

In the *Local Competition Order*, the Commission recognized that access to signaling links, signaling transfer points, and call-related databases such as the LIDB, Toll Free Calling, and AIN databases, as well as the Service Management Systems necessary to use these call-related databases effectively, is critical to entry into the local markets and to the ability of new entrants to compete with incumbents on a comparable basis.¹⁰¹ Indeed, the importance of signaling systems and related databases is reflected in Section 271, which requires BOCs to make these available on a nondiscriminatory basis as a precondition to entry into the in-region interLATA services market. In addition, the provision of signaling systems and call-related databases on an unbundled basis clearly satisfies the impair standard of Section 251(d)(2).

(...continued)

However, for purposes of applying the impair test, the Commission should assume a more typical, price conscious, customer.

¹⁰¹ See *Local Competition Order*, ¶¶ 478-79.

a. Definition of the Element

CompTel has no suggested changes to make to the existing Section 319 definition of the signaling and call-related databases elements.

b. Application of the “Impair” Standard¹⁰²

As noted above, the Commission found in the *Local Competition Order* that access to signaling systems and the related databases is critical to providing competing local exchange and exchange access services. Specifically, access to the incumbents’ signaling systems and associated databases are crucial to the ability of competitors to offer the same services to customers as do the incumbents, on similar terms and under similar timing. CompTel notes in this regard that in the *Local Competition Order* the Commission found that alternative signaling methods would provide a lower quality of service;¹⁰³ the availability of these technologies has not changed since that order was released. Moreover, access to the incumbents’ service management systems is necessary to enable new entrants to effectively use the call-related databases. In sum, lack of unbundled access to these elements would place competitors at a material disadvantage vis-à-vis incumbents: new entrants would be materially impaired if forced to develop their own capabilities immediately, which involve not only a substantial cost, but would materially delay competitors’ entry into the local markets. This, in turn, would materially restrict the number of customers able to receive these services, which, moreover, would not be of a comparable quality to the services offered and provided by the incumbents.

¹⁰² Unbundled provision of signaling and call-related databases elements does not raise any proprietary concerns. See *Local Competition Order*, ¶¶ 480-81, 484, 486, 490.

¹⁰³ See *Local Competition Order*, ¶ 482.

6. Operations Support Systems (OSS)

a. Definition of the Element

CompTel has no suggested changes to make to the existing Section 319 definition of the OSS elements.

b. Application of the “Impair” Standard

The Commission found in the *Local Competition Order* that the “massive” operations support systems employed by incumbents, and the information those systems maintain and update to administer telecommunications networks and services, represent a significant and material barrier to entry.¹⁰⁴ Much of the information maintained by these systems is critical to the ability of new entrants to compete with incumbents using UNEs. Without access to, for example, available telephone numbers, service interval information, and maintenance histories, competitors would not be able to provide customers with comparable, competitive services, and hence they would have to operate at a material disadvantage with respect to incumbents.

Further, other information, such as the facilities and services assigned to a particular customer, is essential to a new entrant’s ability to offer and provide competitive services to customers. If competitors are not able to perform the essential functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions for UNEs in substantially the same time and manner as the incumbent, the competitor will be materially disadvantaged -- if not precluded -- from marketing to the incumbents’ customers, providing comparable services, and, generally, competing in the local markets. Quite simply, new entrants do not have an alternative independent means of accessing this information, could not finance

¹⁰⁴ *Id.*, ¶ 516.

any such alternative access without material expense and delay to market, and must have access to the incumbents' operations support systems on an unbundled basis.

7. Operator Services/Directory Assistance

a. Definition of the Element

CompTel has no suggested changes to make to the existing Section 319 definition of the operator services and directory assistance elements.

b. Application of the "Impair" Standard¹⁰⁵

In the *Local Competition Order*, the Commission found that unbundled access to the facilities and functionalities used by incumbents to provide operator services and directory assistance is necessary to facilitate competition in the local exchange market.¹⁰⁶ The Commission further found that such unbundled access is consistent with the intent of Congress: the 1996 Act imposes on BOCs as a condition of entry into the in-region interLATA services market the duty to provide nondiscriminatory access to directory assistance services and operator call completion services.¹⁰⁷ Customers expect to have access to these services from their telecommunications services providers, whether incumbent or new entrant, and, accordingly, competitors must have access to the incumbents' operator and directory assistance services on an unbundled basis in order to be in a position to serve the incumbent's customers on an equal and competitive basis. At this time, replication by competitors of the facilities and functionalities used by incumbents to provide operator services and directory assistance would involve substantial and material cost, would materially delay entrance by competitors into the local

¹⁰⁵ The Commission expressly found that unbundled provision of operator services and directory assistance do not raise any proprietary concerns. See *Local Competition Order*, ¶ 539.

¹⁰⁶ See *Local Competition Order*, ¶ 534.

¹⁰⁷ 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III).

market, and would, therefore, materially limit access by consumers to the new competitive services that ultimately may be provided by new entrants.¹⁰⁸

B. TO AVOID ANY FURTHER DELAY IN EXERCISING REQUESTING CARRIERS' RIGHTS TO COMBINATIONS, THE COMMISSION SHOULD EXPLICITLY MANDATE THE PROVISION OF UNE-P, EXTENDED LINK AND OTHER COMBINATIONS

The Commission has already concluded that “[t]he ability of requesting carriers to use unbundled network elements, including combinations of unbundled network elements, is integral to achieving Congress’ objective of promoting rapid competition in the local telecommunications market.”¹⁰⁹ It must now take the next logical step by affirming that ILECs are required to provide access to UNE combinations, including the UNE platform and the Extended Loop, without restriction. In addition, the Commission should implement those requirements by prohibiting ILECs from imposing any restrictions on combinations, which would be contrary to the statute and the Commission’s rules. The Commission must require unrestricted access to UNE combinations to promote competitive local telecommunications markets.

Any possible doubts as to the Commission’s authority to require ILECs to provide access to combinations of UNEs was put to rest in the *AT&T v. Iowa Utils. Bd.* decision. In reinstating Rule 315(b), which prevents ILECs from separating UNEs that are already combined in their networks, the Court made clear that UNEs must be made available to competitors *in*

¹⁰⁸ Today, alternative providers of OS/DA services are critically dependent upon access to ILEC-controlled databases for current subscriber information. Until these databases become available on nondiscriminatory terms to competitive providers, carriers will continue to be impaired without access to the ILEC’s OS/DA capabilities.

¹⁰⁹ *FNPRM*, ¶ 2.

*combinations.*¹¹⁰ The Court recognized that Rule 315(b) entitles entrants to obtain “an entire preassembled network” through UNE combinations.¹¹¹ That “truth,” together with the Court’s validation of the Commission’s all elements rule, confirms that competitors have a right to obtain and use UNE combinations and to provide any telecommunications services entirely through UNE combinations, *i.e.*, via the UNE platform. Therefore, the Commission should clarify and re-affirm that ILECs are obligated to provide unrestricted access to all technically-feasible UNE combinations, including the UNE Platform and the Extended Loop, on nondiscriminatory terms.

If genuinely competitive local markets are to be realized, the Commission must prohibit ILECs from restricting CLECs’ access to and use of UNE combinations. Otherwise the ILECs will continue to impede competitive entry by imposing restrictions on the ability of entrants to provide services through UNE combinations. In proceedings in New York and New Jersey, for example, Bell Atlantic has sought restrictions on: which elements would be available in combination, which services CLECs could provide over particular combinations, which classes of customers could be served using the combinations, which geographic areas could be served using the combinations, and how long the combinations would be available to CLECs.¹¹²

¹¹⁰ *AT&T Corp.*, 119 St. Ct. at 736. An inconsistency was created when the 8th Circuit struck the Commission’s pre-existing combination rule, 315(b), and new combination rules, 315(c)-(f), and the Supreme Court reversed only the pre-existing combination rule before it, 315(b). Pursuant to the Supreme Court’s wholesale rejection of the 8th Circuit’s combination analysis, the Commission and CompTel have asked the 8th Circuit to reinstate or remand Rules 315(c)-(f), so the Supreme Court’s decision regarding the Commission’s combination rules will apply consistently to both pre-existing and new combinations. However, the Commission should take this opportunity to re-adopt “new” rules similar to 315(c)-(f) requiring ILECs to provide new UNE combinations wherever technically feasible.

¹¹¹ *Id.* at 736.

¹¹² Another anti-competitive practice by the ILECs is the assessment of so-called “glue charges” on combinations. There is no legal or rational basis for the imposition of glue charges. ILECs incur no legitimate costs in combining UNEs that are already combined, and the ILECs themselves provide service to their own customers via combinations
(continued...)

These restrictions – indeed, any restrictions – on combinations will reduce the number of customers to whom competitors are able to provide service.

In order to demonstrate this, CompTel attaches hereto a profitability analysis comparing the average profitability of serving typical multi-line business customers in New York.¹¹³ Notably, the analysis is intentionally skewed to be conservative, including in its selection of multi-line business customers (with their higher average revenues) and several assumptions concerning CLEC costs.¹¹⁴ Thus, the analysis is a “best case” for the ILECs’ arguments that facilities deployment may be used for mass market applications. However, the analysis shows that even under the ILECs’ best case scenarios, only UNE-P presents a viable mass market strategy.¹¹⁵

This judgment is confirmed by the experiences of CompTel member companies. For example, Birch Telecom, which has experience with all three methods analyzed in Appendix B, has found that the number and scope of customers it is able to serve is significantly higher in Texas than elsewhere, because UNE-P is available in Texas.¹¹⁶ Similarly, Z-Tel’s implementation plan *requires* the availability of UNE-P and it is rolling out the service only where such an option is made available.¹¹⁷

(...continued)

without incurring any such costs. Further, any cost-based charges for the initial installation of UNEs is already included in the charge for those UNEs.

¹¹³ Profitability Analysis, attached as *Appendix B*.

¹¹⁴ *Id.*

¹¹⁵ *Id.* UNE-P provides an average profitability margin of 17.7%. By contrast, loop resale (facilities deployment) is at best a break even proposition, with a margin of 1.9%, while 251(c)(4) resale results in a net loss for the carrier.

¹¹⁶ Tidwell Aff., ¶ 7.

¹¹⁷ Malfara Aff., ¶ 8-9.

These problems are exacerbated where carriers must serve customers with multiple locations. In order to serve such customers, the carrier must be able to provide service *wherever* the customer is located, which requires the availability of UNE-P and other combinations.¹¹⁸ As Jerry James of Golden Harbor put it, CLECs need the ability to serve customers where the customers need service (not where the CLEC has deployed facilities).¹¹⁹ Any restrictions on the availability of UNE-P and other combinations impedes a carrier's ability to serve its customers' needs.

The Commission would not be breaking new ground to prohibit these sorts of restrictions. Rule 309 makes clear that ILECs may not impose any "limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."¹²⁰ The rule clearly provides that it is the requesting carrier, *not the ILEC*, who determines whether and how to use UNE combinations to provide service. The fact that ILECs have sought to restrict CLECs' access to and use of combinations in face of this rule underscores the need for explicit prohibitions on such restrictions.

It is imperative that the Commission mandate unrestricted access to combinations because they represent the only realistic option for competitive carriers to obtain "last-mile" connectivity to a wide range of potential customers. Viable connectivity to all customers is crucial to effective competition and especially important for residential and rural users. The relatively few CLEC facilities currently in place were designed primarily to serve those

¹¹⁸ Arias Aff., ¶ 6; Tidwell Aff., ¶ 6.

¹¹⁹ James Aff., ¶ 4.

customers whose high traffic volumes economically justify the deployment of facilities. At present, there simply is no economic rationale for building last-mile facilities to most, if not all, lower volume local telephone users or subscribers in sparsely-populated areas. As a result, UNE combinations are fundamental for sustained local market entry if that market is to include access to a truly broad customer base.

Promoting widespread distribution of the benefits of a competitive market to a broad customer base, including all classes of users in all geographic areas, can only be achieved through unrestricted access to UNE combinations (loops, switching and transport) known as the UNE platform. The platform maximizes the ability of CLECs to enter the mass market efficiently. Such mass market competition is essential to those carriers seeking to offer regional or national integrated service offerings. The platform also enables CLECs employ technological innovations to provide advanced network functionalities and capabilities rapidly. Accordingly, unrestricted access to the platform is critical to the ability of CLECs to provide service to a broad customer base while offering services, prices, and capabilities that differ from ILEC offerings.

In addition, unrestricted access to the Extended Loop is also vital to the development of competitive local markets. The Extend Loop is a highly efficient way for switch-based CLECs to extend the geographic range of their service offerings. Using the Extended Loop, CLECs may provide service to distant customers without having to incur the costs, delays, and problems associated with trying to collocate in every central office necessary to serve those distant customers. The Extended Loop enables switch-based CLECs an economic means of serving some customers beyond the central offices in which they are collocated. While the Extended Loop is an important option for the ability of switch-based CLECs to reach a broad

(...continued)
120 47 C.F.R. §51.309(a).

range of customers, it may not be able to spur the development of truly mass-market competition to all subscribers because CLECs utilizing the Extended Loop must still endure a manual cutover of each customer and other charges. Therefore, the Extended Loop should be considered to be a UNE combination that is complementary to, rather than a substitute for, the UNE platform.

Unrestricted access to both the UNE platform and the Extended Loop prevents CLECs from being forced to collocate with the ILECs on a massive scale to gain access to UNEs. Mandatory collocation would only exacerbate the already significant problem of exhaustion of suitable collocation space in central offices. Further, forcing CLECs to collocate to gain access to UNEs would impose substantial, if not prohibitive, financial burdens upon their ability to obtain sufficient access to the UNEs they wish to use. As already recognized by the Commission, the Department of Justice, and a number of state commissions, imposing such financial burdens upon CLECs through mandatory collocation is discriminatory and unwarranted.¹²¹ Certainly, forced collocation would eliminate the ability of CLECs to provide competing local services to subscribers other than the highest-volume business customers in dense urban areas. Unrestricted access to combinations, including the platform and the Extended

¹²¹ See *Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Provision of In-Region InterLATA Services in Louisiana*, Memorandum Opinion and Order, Federal Communications Commission, CC Docket No. 98-121 (rel. October 13, 1998); *Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Provision of In-Region InterLATA Services in Louisiana*, Federal Communications Commission, CC Docket No. 98-121, Evaluation of the United States Department of Justice (filed August 19, 1998); *Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts, et al., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration of Interconnection Agreements Between Bell Atlantic—Massachusetts and the Aforementioned Companies*, DPU/DTE 96-73/74, 96-75, 96-83, 96-94, Phase 4-E (Mass. Dept. of Pub. Utils., March 13, 1998); *Application and Complaint of MCI Metro Access Transmission Services, Inc., against Ameritech Michigan Requesting Non-Discriminatory, Efficient and Reasonable Use of Unbundled Loops Using GR303 Capability*, Opinion and Order, Case No. U-11583 (Mich. Pub. Serv. Comm'n, June 3, 1998).

Loop, removes the need for CLECs to undertake the daunting task of collocating in the serving central office for every single customer for whom they wish to compete.¹²²

V. THE COMMISSION SHOULD ESTABLISH ORDERLY PROCEDURES FOR THE CONSIDERATION OF REMOVAL OF UNES

A. THE COMMISSION MUST RETAIN SOLE AUTHORITY TO REMOVE NATIONWIDE UNES FROM THE LIST

State commissions must not be permitted unilaterally to remove a UNE from the nationwide list for the same reasons they should not be permitted to decide which UNES must be unbundled in the first place – doing so nullifies the benefits of adopting minimum nationwide rules. These benefits are inextricably tied to the industry’s understanding that a list of minimum UNES *will be uniformly available* pursuant to the FCC’s decision in this proceeding. Allowing states to remove UNES on their own would inevitably lead to the Balkanization of the unbundling rules among the states. Even before any state actually removed a UNE from the list, the mere possibility that UNES could be removed on a state-by-state basis would eliminate the certainty and efficiency of nationwide rules. Accordingly, the Commission must adopt truly nationwide unbundling rules, namely, a list of minimum available UNES that cannot be whittled away by state commissions acting on their own accord.

B. THE COMMISSION SHOULD ADOPT A PROCEDURE FOR EXAMINING UNES THAT INCLUDES INPUT FROM STATE COMMISSIONS

As competition in the local exchange develops, UNES may no longer need to be included on the minimum nationwide list. The Commission should, therefore, adopt a procedure for removing UNES from the nationwide list. Such a procedure should be analogous to a highly

¹²² Even assuming, *arguendo*, that a CLEC could secure an ideal collocation environment, it would remain dependent upon manual methods for provisioning service to customers, placing it at a competitive disadvantage relative to the ILECs.

streamlined version of the Section 271 application process. To begin the process, the FCC should determine, for a particular network element, that the interchangeability criteria has been satisfied. Since this finding is likely to depend upon ILEC-wide, regional (or, perhaps, for some network elements such as OS/DA, national) conditions, this decision should be made by the FCC.

Evaluating wholesale conditions in any individual market, however, should also involve the input from states. The suggested process should consist of two basic steps. First, an ILEC would petition a state commission for a ruling that specific local circumstances have removed the need for mandatory access to a particular ILEC UNE. The state commission would develop and consider the record presented by the ILEC to render an opinion on the petition, pursuant to the criteria established in this proceeding. This process should be governed by explicit guidance from the FCC concerning, for example, the type of evidence that is necessary to demonstrate a wholesale market is indeed in place.¹²³

Assuming that a state issues a favorable opinion on the ILEC petition, ILEC would next petition the FCC to remove the UNE from the minimum list, presenting the state commission's opinion and the record developed thereunder. The FCC would then render a final decision on whether the UNE should in fact be removed from the nationwide list in the specified market locations. Procedurally, this step process would be similar to the Section 271 procedure, albeit a greatly pared-down version.

¹²³ UNEs should be removed based on a geographic market no smaller than the market used by the Commission to evaluate impairment in the first place.

C. THE COMMISSION MUST PROVIDE AN ORDERLY TRANSITION FOR UNES THAT ARE REMOVED FROM THE NATIONWIDE LIST

Upon a Commission determination that a particular UNE should no longer be unbundled, that UNE should undergo a “phase out” period, during which it would remain available, in order to avoid market disruption. CLECs must have a minimum period before that UNE becomes unavailable to them to take whatever steps are necessary to continue the provision of service as a result of losing access to that UNE. CLECs will need to make alternative arrangements to provide service without access to a UNE that is removed from the nationwide list. The alternative – allowing the ILECs to immediately cease unbundling a UNE as soon as it is removed from the list – would put CLECs at a great competitive disadvantage because the ILECs, and their customers, would never face the possibility that a particular UNE that is critical to their business plan may be yanked away from them before they could have alternative arrangements in place.

Such a phase out period must be sufficient to allow CLECs the practical ability to reconfigure their operations without degrading or disrupting service to their customers. This period must take into account the length of time required to obtain alternative network arrangements from the ILECs. However, provisioning intervals have been a significant point of contention among parties and state commissions. Disagreements have arisen as to what the appropriate intervals should be, the frequency of missed provisioning intervals and what the consequences for missed intervals should be. One conclusion is clear, it takes time to configure, order, obtain, and deploy UNEs taken from the ILEC. The Commission should consider that such ILEC provisioning intervals should be the minimum time required for CLECs to ensure that they can obtain and implement substitutable service without customer disruption.

It is also crucial that ILECs continue to honor existing interconnection agreements until their expiration. CLECs have invested substantial resources in negotiating, arbitrating, and implementing their current interconnection agreements. They, and their investors, committed these resources with an expectation of reliance upon these agreements. As contemplated by the Act, the FCC, and state commissions, CLECs and ILECs have looked primarily to their agreements to arrange their operations. These agreements are complex documents that embody the interconnecting parties' "give and take" on great number of interrelated pieces of their relationship. Both CLECs and ILECs expended the resources to develop these agreements under a regime of a nationwide minimum list of available UNEs that does not allow currently for the removal of one or more of those UNEs from the list. It would be patently unfair and a waste of the substantial resources already committed to local competition to allow ILECs to ignore fundamental obligations in their current interconnection agreements. Therefore, the Commission should adopt rules that require ILECs to continue to unbundle, at a minimum, those UNEs identified in their existing agreements.

In addition, all reconfiguration, early termination and non-recurring charges should not apply or should be waived for CLECs that are forced to transition from a UNE that becomes unavailable as a result of being removed from the nationwide list. Upon removal from the list, ILEC provisioning of such a UNE would be left to the discretion of the individual ILEC. If an ILEC voluntarily chooses to cease making that UNE available, it should bear the cost of seeking to change the parties' relationship. CLECs already will be forced to incur the costs of making alternative business and operational arrangements to accommodate the unavailability of the UNE. The CLEC should not be forced to pay the additional transition costs for a network

change initiated by the ILEC. The Commission's UNE rules must require that ILECs bear the costs of their voluntary network changes.

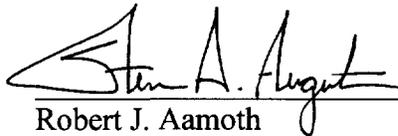
The rules adopted by the FCC should also grant CLECs a right to petition the Commission for waiver of any determination that access to a particular UNE should no longer be available. Such a right to petition for continued access to the UNE would allow CLECs the opportunity to demonstrate that removal of the UNE under specific conditions or in specific locations is inappropriate. This right would provide an important "backstop" for CLECs before the significant step of actually losing access to a UNE takes place. This procedural right would be especially important in smaller and rural markets that may be subsumed into locations that successfully remove a UNE from the nationwide list, but where true competitive alternatives to the UNE may not be realized sufficiently. In such markets, local competition would suffer a disadvantage if CLECs are not allowed to demonstrate unique circumstances that require continued access to a particular UNE.

VI. CONCLUSION

For the foregoing reasons, the Commission should act promptly to redefine UNEs in furtherance of the Act's goal of robust local competition. It should interpret the terms "necessary" and "impair" to promote the objectives of lowering entry barriers and encouraging the widespread introduction of competition for end user customers. Applying these standards, it should define the UNEs described above and mandate their availability on a national basis.

Respectfully submitted,

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May 26, 1999