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May 27, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, DC 20554

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Ms. Salas:

Enclosed are an additional twelve (12) courtesy paper copies of the comments of NEXTLINK Communications, Inc. filed electronically in response to the Commission's Second Further Notice of Proposed Rulemaking in CC Docket No. 96-98.

No. of Copies rec'd 0+12
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Very truly yours,

Davis Wright Tremaine LLP

Robert S. Tanner, Esq.

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

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In the Matter of	)	
	)	
IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996	)	CC Docket No 96-98

COMMENTS OF

NEXTLINK COMMUNICATIONS, INC.

NEXTLINK COMMUNICATIONS, INC.

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May 26, 1999

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SUMMARY

NEXTLINK Communications, Inc. ("NEXTLINK") hereby submits its comments in response to the Commission's Second Further Notice of Proposed Rulemaking in the above-captioned proceeding. As a facilities-based competitive local exchange carrier ("CLEC") with operations in fourteen (14) states, NEXTLINK has substantial experience operating under the Commission's existing rules for network elements. NEXTLINK believes that a key to the continued development of local competition is the Commission's adoption of unambiguous national unbundling requirements.

NEXTLINK supports the Commission's tentative conclusion that it should identify a minimum set of network elements that must be unbundled on a nationwide basis. The rationale supporting the Commission's decision in the First Local Competition Order to adopt a minimum list of network elements is still valid today. In fact, with nationwide entry by CLECs and consolidation among incumbent local exchange carriers ("ILECs"), the need for nationwide standards is even greater now than it was three years ago. NEXTLINK also supports the Commission's proposal to allow state commissions to continue to require ILECs to provide additional network elements, but NEXTLINK is opposed to granting state commissions any authority to relieve ILECs of their obligations to provide those minimum network elements identified by the Commission under Section 251(d)(2).

NEXTLINK urges the Commission to identify standards for Section 251(d)(2) that promote the pro-competitive goals of the Telecommunications Act of 1996. Under either the "necessary" or "impair" standard the Commission should require ILECs to provide network elements unless potential alternatives present no material decrease in quality, increase in cost,

limitation in scope, or delay in bringing a competitive service offering to market. ILECs should be required to provide critical network elements unless there is a functioning wholesale market for that network element. In addition, for the purposes of Section 251(d)(2)(A), the Commission should identify as proprietary only those network elements where an ILEC's proprietary interest in a network element must be compromised by virtue of providing access to a CLEC. If a network element is proprietary under the Act, the ILEC must still provide the network element unless there are viable non-proprietary alternatives available to the CLEC that are not materially different in quality, cost, scope and timeliness.

The Commission should clarify its rules for network elements to reflect the practical experience of NEXTLINK and other carriers. NEXTLINK urges the Commission to confirm that ILECs must provide network elements that support all telecommunications services, including advanced, high-bandwidth services. The Commission should clarify that the definition of loop includes cross-connect facilities and conditioning necessary to provide any requested telecommunications service. The Commission should confirm that ILECs must make available to CLECs all loop facilities, including high capacity loops and dark fiber loops. The Commission should also specifically address access to loops provisioned by digital loop carrier facilities, extended loops and loops provisioned by remote switching units.

The Commission should affirm that the definition of interoffice transport includes entrance facilities and high capacity transport facilities. The Commission should also clarify that interoffice transport includes multiplexing functionality. In addition, the Commission should require ILECs to provide CLECs with access to Inside Wire, Network Interface Devices ("NIDs"), SS7 Signaling, Call-related Databases, and Operations Support Systems ("OSS"). Finally the Commission should explicitly require ILECs to provide CLECs with access to

combinations of network elements that are technically feasible and prohibit ILECs from restricting CLECs' use of those combinations. The Commission should also identify specific network element combinations, such as the loop and transport, that ILECs are required to provide under Rule 315(b) in order to avoid unnecessary disputes.

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

In the Matter of	)	
	)	
IMPLEMENTATION OF THE LOCAL	)	
COMPETITION PROVISIONS OF THE	)	CC Docket No 96-98
TELECOMMUNICATIONS ACT	)	
OF 1996	)	
	)	

COMMENTS OF NEXTLINK COMMUNICATIONS, INC.

NEXTLINK Communications, Inc. ("NEXTLINK")[1] hereby submits its comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("Remand NPRM") in the above-captioned proceeding.[2] NEXTLINK is a national, facilities-based provider of competitive telecommunications services that currently operates twenty-two (22) high-capacity, fiber optic networks providing switched local and long-distance services in thirty-eight (38) markets in fourteen (14) states.[3] In many of its markets, NEXTLINK is the largest purchaser of unbundled network elements ("UNEs") from the incumbent local exchange carrier ("ILEC"). NEXTLINK, therefore, has substantial experience operating under the Commission's

[1] NEXTLINK Communications, Inc. provides local exchange, access and interexchange services through its affiliate companies: NEXTLINK California, Inc., NEXTLINK Colorado L.L.C, NEXTLINK Florida, Inc., NEXTLINK Georgia, Inc., NEXTLINK Illinois, Inc., NEXTLINK New Jersey, Inc., NEXTLINK New York, Inc., NEXTLINK Ohio, Inc., NEXTLINK Pennsylvania, L.P., NEXTLINK Tennessee, L.L.C., NEXTLINK Texas, Inc., NEXTLINK Utah, Inc., NEXTLINK Washington, Inc., and Telecommunications of Nevada, L.L.C. All references to NEXTLINK are to NEXTLINK Communications, Inc., and the operations of all its local exchange affiliate companies unless otherwise noted.

[2] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking (rel. April 16, 1999) ("Remand NPRM").

[3] NEXTLINK is also the largest holder of fixed wireless spectrum in North America, with LMDS licenses covering ninety-five (95) percent of the population in the top thirty (30) markets in the United States.

prior definitions and rulings of what constitutes an unbundled network element. Based on its experience and that of other carriers since the 1996 Act, NEXTLINK urges the Commission not only to respond to the Supreme Court's remand, but also to refine and clarify its definitions of network elements and rules regarding access to those elements.

I. THE COMMISSION SHOULD ADOPT RULES FOR NETWORK ELEMENTS THAT UNAMBIGUOUSLY REQUIRE ILECS TO PROVIDE A MINIMUM NATIONAL SET OF NETWORK ELEMENTS UNDER THE STANDARDS OF SECTION 251(d)(2) AND PROVIDE CLEAR AND SPECIFIC DEFINITIONS FOR REQUIRED NETWORK ELEMENTS.

NEXTLINK believes that for competition to grow it is imperative that the Commission adopt rules for access to network elements that address not only which network elements must be made available to competitive LECs ("CLECS"), but that clearly define those network elements and the manner in which CLECs may obtain access to them. The United States Supreme Court's decision in AT&T Corp v. Iowa Utils. Bd. broadly affirmed the Commission's plenary authority to promulgate rules to enforce the provisions of the Communications Act.[4] The Commission, therefore, has the necessary authority to identify and define individual network elements, so long as the Commission's definition complies with the Act's broad definition of a network element.[5] Once the Commission has determined that a network element must be made available under Section 251(d)(2), Section 251(c)(3) requires that ILECs provide those network elements on an unbundled basis[6] at any technically feasible point.[7] If the Commission fails to do so, ILECs will

[4] Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) ("Iowa Utils. Bd. v. FCC"), cert. granted sub nom., AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 879 (1998), aff'd in part, rev'd in part, 119 S.Ct. 721 (1999) ("AT&T v. Iowa Utils. Bd.").

[5] AT&T v. Iowa Utils Bd. at 733-34. See also Southwestern Bell Telephone Co., et al. v. FCC, et al., 1998 WL 45936 (8th Cir) (1998).

[6] Unbundling clearly refers only to an economic unbundling of the price for a specific network element from other facilities and services offered by the incumbent LEC. See AT&T v. Iowa (continued...)

continue to exploit every perceived ambiguity or loophole to increase the cost of entry of new competitors and delay competition.

A. National Uniform Minimum Standards for Unbundling of Network Elements are Essential to the Continued Development of Sustainable Local Competition.

NEXTLINK supports the Commission's tentative decision to identify a minimum set of network elements that must be unbundled on a nationwide basis.[8] In the First Local Competition Order, the Commission concluded that the pro-competitive goals of the 1996 Act would be best achieved through the adoption of a "minimum list of unbundled network elements that incumbent LECs must make available to new entrants upon request."[9] The Commission found that a list of network elements available on a national basis would allow: (1) requesting carriers to take advantage of the ILECs economies of scale; (2) provide financial markets greater certainty as to CLECs' business plans; (3) facilitate state commission's arbitration of interconnection disputes; and (4) reduce the level of litigation over the requirements of the Act.[10] In the three years since the Commission's initial implementation of the 1996 Act, the rationale for the adoption of a national list of network elements has not changed. Indeed, the need for

(...continued)
Utils Bd. at 737. The Supreme Court rejected the Eighth Circuit's erroneous interpretation that unbundling required the physical separation of piece-parts of the incumbent's network. Id.

[7] 47 U.S.C. § 251(c)(3). See AT&T v. Iowa Utils. Bd. at 736 ("Section 251(c)(3) indicates 'where unbundled access must occur, not which [network] elements must be unbundled.'" (citing Iowa Utils. Bd. v. FCC, at 810).

[8] Remand NPRM at para. 14.

[9] See Implementation of the Local Telecommunications Provisions of the 1996 Act, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("First Local Competition Order") at 15624.

[10] Id., 11 FCC Rcd at 15624- 27.

national standards is even greater now as both ILECs, through consolidation and merger, and CLECs, through expansion of competitive entry, provide service on an increasingly national basis. In fact, the Commission recently affirmed the necessity of a national approach in its Advanced Services Order by adopting nationwide rules to ensure the rapid deployment of advanced services was not impeded by unnecessary litigation and disputes over collocation arrangements.[11] The Commission, therefore, should adopt the tentative conclusion it reached in the Remand NPRM and establish nationwide minimum standards for network elements.[12]

In the Local Competition Order, the Commission agreed with the conclusions of the Department of Justice that there is "no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would be competitors, absent clear legal requirements to do so."[13] The experience of new entrants in the three years since the passage of the 1996 Act and the First Local Competition Order bears out the wisdom of the Commission's conclusion. Almost uniformly, competitive carriers have obtained those network elements that the Commission unambiguously required ILECs to provide to requesting carriers only after extraordinary effort.[14] It is therefore

---

[11] See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking (rel. March 31, 1999) ("First Advanced Services Order") at para. 23. The Commission noted that its new collocation rules apply to all telecommunications services, including advanced services and traditional voice services. Id. Not surprisingly, incumbent LECs were again uniformly opposed to national rules. Id. at n. 42.

[12] Remand NPRM at para. 14.

[13] See First Local Competition Order, 11 FCC Rcd at 15624 (citing Department of Justice Comments in CC Docket No 96-98 at 8-15.

[14] For example, NEXTLINK has had difficulties in obtaining loops port because ILECs have argued that they NEXTLINK was actually requesting combinations, i.e., a loop and a cross-connect. NEXTLINK has also had to engage in protracted negotiations and arbitrations in order to ensure through performance standards and remedies that its access to loops and other network elements is on a nondiscriminatory basis.

unsurprising that new entrants have had little success in reaching voluntary agreement with incumbents to obtain access to additional network elements. New entrants continue to suffer from a lack of bargaining power vis-a-vis ILECs and clear national rules identifying a minimum list of available network elements remains critical to reducing the amount of unnecessary litigation over access to those network elements.

The existence of national rules for network elements is necessary for the development of competition on a national basis, one of the key goals of the 1996 Act.[15] Because of the certainty and economies of scale provided by uniform nationwide availability of network elements, several new entrants, including NEXTLINK, have pursued a national entry strategy by building out facilities and competing in each region of the country in a manner that takes advantage of efficiencies in provisioning and operating new networks. NEXTLINK has encountered many difficulties in obtaining nondiscriminatory access to network elements on just and reasonable terms, but the Commission's initial decision to require ILECs to provide a minimum national list of network elements has helped minimize repetitive and unnecessary litigation over the availability of network elements critical to entry by NEXTLINK. NEXTLINK's experience thus confirms that the Commission was correct in concluding that "[n]ational requirements for unbundled elements will allow new entrants, including small entities, seeking to enter local markets on a national or regional scale to take advantage of economies of scale in network design."[16]

[15] S. Conf. Rep. No 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).
[16] See First Local Competition Order, 11 FCC Rcd at 15624.

Providing state commissions with authority under the Act to remove items from a national list of required network elements would severely undermine the value of a national minimum list of network elements.[17] NEXTLINK, therefore, is strongly opposed to providing state commissions the authority to eliminate ILEC obligations to provide those network elements that the Commission initially requires under Section 251(d)(2). Such state authority could further delay competitive entry by requiring CLECs to devise individual entry strategies to accommodate the lack of access to critical network elements in individual states. It would also subject CLECs to litigation in multiple states over access to network elements. The Commission, therefore, should not provide state commissions with the authority to lower the "floor" of available network elements.

In contrast, the Commission is correct in its tentative conclusion to continue to allow state commissions to require ILECs to provide additional network elements under the criteria and standards adopted by the Commission in this proceeding.[18] Allowing state commissions to raise the "ceiling" of network elements available in any state may serve individual state conditions and policies, and do so without disrupting CLECs' ability to gain access to the same network elements on a national basis. Further, as the Commission observed in its First Local Competition Order, and as the course of arbitration proceedings under the Act has demonstrated,[19] state

[17] State Commissions may have other authority under state law to impose additional obligations on incumbent LECs so as long as they are not inconsistent with the Act. A state commission, therefore, could impose under state law, additional obligations on an incumbent LEC to provide network elements. But a state commission could not relieve an incumbent LEC of its obligation to provide a network element the incumbent is required by the Commission to provide under Section 251(d)(2). See 47 USC § 251(d)(3).

[18] Remand NPRM at para. 14.

[19] For example, the Utah Public Service Commission recently required U S WEST to provide NEXTLINK with access to NEXTLINK's requested SS7 network configuration. See Petition of NEXTLINK OF Utah, Inc., for Arbitration of a Second Interconnection Agreement with US

(continued...)

commissions have made significant contributions to the development of local competition and their continued ability to require the provision of additional network elements as services and technologies change will protect their role as innovators in the development of local competition.[20]

B. The Commission Should Adopt Standards for "Necessary" and "Impair" That Provide Certainty to New Entrants and Maintains the Viability of Network Elements as a Method of Entry.

The Supreme Court vacated 47 C.F.R. §51.319 of the Commission's rules, finding that the Commission had not adequately considered the "necessary" and "impair" standards of Section 251(d)(2) in determining the network elements that must be provided by ILECs.[21] The Supreme Court also concluded that it was not reasonable for the Commission to interpret the standards in Section 251(d)(2) to exclude any comparison between incumbent facilities and the possibility for self-provision by the requesting carrier or the use of equivalent facilities from a third-party provider. On remand, the Court directed the Commission to determine "on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[22] The Commission, therefore, must provide a meaningful interpretation of the standards in Section

(...continued)
WEST Communications, Inc., pursuant to 47 U.S.C. э 252, Arbitration Award, Docket No. 98-2208-03 (March 23, 1999) ("NEXTLINK Utah Arbitration Award"). NEXTLINK has also had some success in obtaining favorable decision regarding access to extended loops. Petition of NEXTLINK Pennsylvania, L.L.P. for Arbitration of an Interconnection Agreement with Bell Atlantic-PA, Inc., Pursuant to the Telecommunications Act of 1996, Final Order, A-310260F0002 (July 15, 1998) ("NEXTLINK Pennsylvania Final Order"); NEXTLINK Utah Arbitration Award.

[20] See First Local Competition Order, 11 FCC Rcd at 15566-68.

[21] AT&T v. Iowa Utils. Bd., at 733-36.

[22] Id., at 734-35.

251(d)(2) that promotes the goals of the Act, i.e., to further full competition in local telecommunications markets. NEXTLINK agrees with the Commission's assessment that "[a]lthough the Supreme Court acknowledged arguments by incumbent LECs that section 251(d)(2) codifies 'something akin' to the essential facilities doctrine, the Court did not embrace that argument or find that section 251(d)(2) mandates that standard."[23] By using the words "necessary" and "impair," Congress employed its own distinct standards for unbundling, without reference to the essential facilities doctrine or its tenets. The Commission, therefore, has no obligation to consider and should not rely on essential facilities jurisprudence in implementing Section 251(d)(2) of the Act.

1. The Necessary Standard in Section 251(d)(2)(A).

NEXTLINK discusses below the factors the Commission should consider in implementing a standard for Section 251(d)(2)(A) that ensures facilities-based CLECs the access to network elements they need to compete with entrenched monopoly incumbent providers.

a. The Necessary Standard Applies Only with Respect to Proprietary Network Elements.

The plain language of Section 251(d)(2)(A) provides that the necessary standard must be considered only when "proprietary" network elements are at issue. The Commission correctly reached this conclusion in the First Local Competition Order analysis of the necessary and impair standards, the Eighth Circuit applied the same construction, and the Supreme Court's

[23] Remand NPRM at para. 21. In its Reply Brief filed with the Supreme Court in AT&T v. Iowa Utils. Bd., the Commission noted that "the antitrust term 'essential facilities' does not appear anywhere in this statute. Instead, Congress chose other words with quite different meanings." Reply Brief for the Federal Petitioners and Brief for the Federal Cross Respondents, AT&T v. Iowa Utils. Bd., at 43 (filed June 1998).

decision did not question this conclusion.[24] In the Remand NPRM, the Commission seeks comment on the meaning of the term "proprietary."[25] In the First Local Competition Order, the Commission referred to proprietary network elements as including, for example, "those elements with proprietary protocols or elements containing proprietary information."[26] The Commission also acknowledged that a meaningful distinction could be made on the basis of whether proprietary information would be revealed as a result of providing unbundled access to a particular element.[27]

In general, NEXTLINK supports the Commission's current approach to identifying as proprietary only those network elements that genuinely raise concerns that an ILEC's proprietary interest in a network element could be compromised, i.e., it would lose control over its intellectual property by mere virtue of the fact that it allowed access to an element. NEXTLINK also supports the comments of ALTS in this proceeding concerning additional rules the Commission should adopt to further clarify the parameters of what constitutes a "proprietary" interest for the purposes of Section 251(d)(2)(A).

The Commission should also make it clear that the term "proprietary" refers solely to the interests of the ILEC at issue. ILECs should not be able to claim third-party proprietary interests, such as those of vendors, as their own to assert that the ILEC provision of a network element is proprietary. Indeed, the Commission should make clear that ILECs must secure agreements with their vendors that conform with their statutory obligation to provide unbundled

[24] See Remand NPRM at para. 19; First Local Competition Order, 11 FCC Rcd at 15640-45; Iowa Utils. Bd. v. FCC, at 811 n.31; AT&T v. Iowa Utils. Bd., at 734-36.

[25] Remand NPRM at para. 15.

[26] First Local Competition Order 11 FCC Rcd at 15641-42.

[27] Id., 11 FCC Rcd at 15642, 15694.

access to network elements so that such agreements cannot be used by ILECs to avoid their unbundling obligations.

Furthermore, the necessary standard should be triggered only when proprietary aspects of a network element must be revealed when the particular element is unbundled.[28] If it is technically feasible to unbundle an element in a manner that does not require the ILEC to disclose information that an ILEC claims is proprietary, the element should not be considered "proprietary" for the purposes of Section 251(d)(2)(A).[29]

In general, NEXTLINK concurs with the parameters of the Commission's Local Competition Order and Remand NPRM limiting possible ILEC "proprietary" claims. Industry-wide protocols such as the signaling protocols that adhere to Telcordia (formerly Bellcore) standards are not proprietary in nature, and certainly ILECs do not have a proprietary interest in them to protect.[30] As suggested in the Remand NPRM, moreover, the same rationale should be extended to other industry-wide standards.[31]

[28] Remand NPRM at para. 15 ("If a network element contains what parties assert to be proprietary information, but access to that information is not accessible by third parties seeking access to a particular element, should the entire element be considered proprietary for the purposes of section 252(d)(2)(A)?").

[29] Id. at para.15 ("Commenters should discuss whether the term "proprietary" should be limited to information, software, or technology that can be protected by patents, copyrights, or trade secrecy laws, or whether it can also apply to materials that do not qualify for such legal protection.").

[30] First Local Competition Order, 11 FCC Rcd at 15739-40.

[31] Remand NPRM at para. 15.

b. Unbundled Access to a Proprietary Network Element Is Necessary if No Reasonable Substitute Is Available from the ILEC, through Self-Provisioning, or from Another Non-ILEC Source.

Only when a "proprietary" interest is implicated in the provision of access to a network element will the Commission have to determine whether in fact it is necessary for an incumbent LEC to provide the network element. Consistent with the Supreme Court's mandate that the Commission must give substance to the "necessary" requirement and, in so doing, cannot disregard the availability of elements outside the incumbents' network, NEXTLINK supports the proposed standard in ALTS's comments in this proceeding.

1) Factors.

In determining whether unbundling of a proprietary network element is necessary, the Commission must evaluate whether comparable functionality can be obtained through unbundled access to non-proprietary ILEC network elements, through self-provisioning, or from a another non-ILEC source. The Commission must not, however, stop its analysis there. To be an effective substitute, an alternative network element must be one that not only could but would be used by efficient competitors. The availability of any alternative does not act as a bar to meeting the statutory unbundling standard. Unless the alternative network element can be substituted in a way that results in no material decrease in quality, increase in cost, limitation in scope, or delay in bringing a competitive service offering to market, its availability is irrelevant to the statutory test, as it would not provide CLECs with an effective means to compete.

2) Sources.

The Supreme Court's opinion requires that the Commission, in applying the necessary standard, look to sources beyond the ILECs' networks. In determining whether the necessary

standard is met, therefore, the Commission should evaluate whether a reasonably substitutable non-proprietary network element is available from the ILEC, and whether substitute functionality can be obtained through non-ILEC sources, including self-provisioning and competitive vendors.

- ILEC alternatives. In examining potential substitutes that may be available from the incumbent, the Commission should limit its inquiry to network elements that are offered on an unbundled basis. The Commission should not consider resale of the same element to be a reasonable substitute. Such a standard would eviscerate the 1996 Act's "bright line" distinction between the resale and UNE methods of entry.
- Self-Provisioning. In its review of potential substitutes the Commission should take into account its rules omitting a facilities requirement for CLEC provision of service.[32] That rule was upheld by both the Eighth Circuit and the Supreme Court and allows CLECs to choose to do no self-provisioning at all. It would be anomalous to have that rule in place, while simultaneously requiring CLECs to self-provision a large number of elements.[33]
- Other Non-ILEC Sources. As required by the Supreme Court, NEXTLINK's "reasonable substitute" analysis contemplates, and in fact, focuses on the availability of alternatives from non-ILEC sources other than the requesting carrier. Unless the alternative offers comparable functionality, with no material decrease in quality, increase in cost, limitation in scope or delay in provisioning, unbundling of the proprietary ILEC network element will be necessary.

2. The "Impair" Standard In Section 251(d)(2) Must Be Defined in a Way that Requires Unbundling in the Absence of a Fully Functioning, Competitive, Wholesale Market for a Network Element.

The Supreme Court held that, in failing to consider alternative sources for network elements outside the ILECs' networks, and by regarding any increased cost or decreased service quality as meeting the standard, the Commission had failed to interpret reasonably the "impair" standard in Section 252(d)(2)(B).[34] On remand, the Commission is charged with giving

[32] First Local Competition Order, 11 FCC Rcd at 15666-71.

[33] Iowa Utils. Bd. v. FCC, at 816-17; AT&T v. Iowa Utils. Bd., at 736.

[34] AT&T v. Iowa Utils. Bd., at 734-36.

substance to the impair standard. In so doing, the Commission's focus must remain on new entrants' ability to enter markets and compete in the absence of an unbundling requirement.

NEXTLINK submits that the Commission must determine whether a fully functioning, competitive, wholesale market exists for a requested network element. If a wholesale market for a network element has developed sufficiently, carriers can obtain interchangeable elements from sources other than the ILECs. Network elements should be considered interchangeable if their use imposes on requesting carriers no material decrease in quality, increase in cost, limitation of scope, or delay in bringing a competitive service offering to market.[35]

NEXTLINK supports the ALTS proposed definition for determining when a fully functioning wholesale market has developed and believes it remains true to the 1996 Act's goal of transitioning local service markets from a monopoly to a competitive paradigm. Unless a fully functioning wholesale market for a particular element has developed, ILEC unbundling will remain the only means by which CLECs can obtain ubiquitous access to critical network functionalities at rates that approximate cost. Without such access, network elements will cease to be an effective method of entry for local service competition.

As required by the Supreme Court, this standard incorporates a meaningful limiting standard and requires an examination of sources outside the ILECs' networks. By incorporating a materiality test into the impair standard, NEXTLINK proposes a limiting standard that is qualitative and not trivial.[36] Rather than focusing on the extremes represented by any decrease in

[35] Remand NPRM at para. 25.

[36] NEXTLINK disagrees with any proposal that incorporates into the impair standard a quantitative aspect requiring a specific number of alternative wholesale vendors. Effective wholesale competition will require a number of network element vendors in a particular market and that the elements be practically available across the market.

quality or increase in cost or the availability of any substitute network element, NEXTLINK' proposal focuses on the availability of alternative network elements that are fully interchangeable.[37]

In addition, as required by the Supreme Court, under this standard the Commission would consider sources outside the ILECs' networks.

- ILEC Alternatives. As indicated above, resale should not factor into the Commission's decisions on which network elements should be made available on an unbundled basis.
- Self-Provisioning and Other Non-ILEC Sources. A requesting carrier's ability to self-provision a network element may factor into the existence of a competitive wholesale market for the particular network element. Likewise, other CLECs and non-carrier service providers may offer network elements that should be considered in the Commission's assessment of the impair standard. Taken together, the availability of network elements from all non-ILEC sources may demonstrate the presence of a fully functioning, competitive wholesale market.

II. APPLICATION OF THE NECESSARY AND IMPAIR STANDARDS.

Once the Commission adopts standards for Section 251(d)(2), it must determine which network elements ILECs must offer to CLECs. The Commission now also should refine its rules that define those network elements ILECs must offer and clarify that CLECs may obtain access to such elements at any technically feasible point.

[37] As demonstrated by its use of an example in which an entrant whose anticipated annual profits from a proposed service are reduced from 100 percent of investment to 99 percent, the Supreme Court rejected what it viewed to be an extreme reading of the impair test. AT&T v. Iowa Utils. Bd., at 735. This analysis, however, in no way suggests that the Commission should move to the other extreme characterized by those who may argue that the presence of any alternative network element vendor should serve to eliminate an ILEC's obligation to unbundle non-proprietary network elements. This opposite extreme would be satisfied, for instance, if one wholesale provider existed, even if that provider could not satisfy demand on a timely basis, or across the region.

In revisiting the definitions of network elements, the Commission should ensure that they reflect the practical experience of NEXTLINK and other carriers since the First Local Competition Order. This requires that the Commission review and incorporate in its rules, advances in technology as vendors and carriers introduce new advanced services and new equipment designed to support the network environment spurred by the entry of new competitors. As a facilities-based carrier, NEXTLINK has specific concerns regarding those network elements that NEXTLINK has had significant experience with during the last three years: loops, transport, inside wire, network interface device ("NID"), SS7 signaling, call-related databases and operation support systems ("OSS").[38] These network elements represent the essential connection between NEXTLINK's network and the vast majority of potential customers that cannot otherwise directly connect to NEXTLINK's network. NEXTLINK urges the Commission not only to mandate access to these elements, but to refine their definitions to address the many ways in which ILECs have sought to evade their unbundling duties over the past three years.

A. The Commission Must Revisit Its Rules Governing Network Element Definitions and Access on an Unbundled Basis.

The Commission must first identify the standards under Section 251(d)(2) for determining which network elements ILECs must provide. In order to promote the pro-competitive goals of the Act and to address the imbalance in bargaining power present between new entrants and entrenched incumbent LECs,[39] the Commission then should refine and

[38] In fact in many of its markets, (e.g., Columbus, Ohio, Nashville, Tennessee) NEXTLINK is the largest user of these unbundled network elements. As such NEXTLINK has spent enormous effort in working with incumbent LECs, state commissions and the Commission in order to improve (or even simply to obtain) ILECs' provision of network elements.

[39] See First Local Competition Order, 11 FCC Rcd at 15570-71, 15624.

strengthen its definitional rules for network elements and clarify that CLECs may obtain access to such elements at any technically feasible point.[40] The Supreme Court's vacation of Rule 319 in no way diminishes the Commission's authority to adopt rules that implement what is a network element and where the ILEC should provide access to it. Indeed, the Court's only concern was that the Commission did not properly use the standards of Section 251(d)(2) in deciding which network elements an ILEC must provide to a requesting CLEC.[41]

Based on the additional information it will receive in the record,[42] the Commission should adopt explicit and detailed rules that help redress the continuing imbalance of bargaining power between CLECs and ILECs and further reduce the level of litigation that will result from CLEC requests for access to network elements.[43] In addition, by adopting rules refining the definitions of network elements, the Commission will provide guidance to state commissions in their roles as arbitrators under Sections 251 and 252.[44]

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[40] 47 U.S.C. § 251(c)(3).

[41] AT&T v. Iowa Utils. Bd. at 734-36.

[42] The Commission should also rely on and incorporate into this proceeding the record in the Advanced Services docket because it contains specific, detailed information regarding steps the Commission can take to ensure that network elements necessary for the deployment of advanced services are readily available to CLECs. See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147. See also Comments of NEXTLINK Communications, Inc. in Deployment of Wireline Services Offering Advanced Telecommunications Capability (September 25, 1998).

[43] See e.g., First Local Competition Order, 11 FCC Rcd at 15528, 15624.

[44] As discussed above, state commissions may react to changing conditions or unique local issues by requiring ILECs to provide additional network elements, but state commissions should be barred from reducing an ILEC's obligation to provide necessary network elements.

1. Loops.

a. ILECs must Provide Loops Under the Section 251(d)(2) Standard.

The Commission's "strong expectation" that incumbent LECs should be required to provide access to loops under Section 251(d)(2) is well founded.[45] Prior to the Commission's adoption of the First Local Competition Order, ILECs agreed that the provision of loops was required by the Act.[46] NEXTLINK's experience since the adoption of that Order clearly demonstrates that access to loops is mandated by Section 251(d)(2).

As the Commission has previously concluded, there are no proprietary interests at stake in the provision of a loop by an ILEC to a requesting carrier.[47] Even where proprietary information conceivably might exist (e.g., in channel bank and remote terminal equipment), access to the loop need not reveal proprietary information to requesting carriers.[48]

The loop, a wireline connection between the network and the end-user, is the sin qua non of a bottleneck in the network of networks. The experience of new entrants, such as NEXTLINK, over the last three years overwhelmingly demonstrates the need to gain nondiscriminatory access to the loop, the "last mile" between competitor and customer, in order to provide a viable competitive alternative to existing ILEC services. New entrants have spent extraordinary resources deploying facilities, but even with the massive amount of investment made by CLECs, including NEXTLINK, CLEC networks still do not directly reach more than

[45] Remand NPRM at para. 32.

[46] Id. at para. 32, n. 27 (citing ILEC comments in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98).

[47] First Local Competition Order, 11 FCC Rcd at 15694.

[48] Id.

small fraction of the total number of customers.[49] Only the wireline loop in the ILEC network provides new entrants with the ability to provide competitive alternatives to the incumbent's service on a broad and immediate basis. Self-provisioning by CLECs themselves or obtaining access to loops from other carriers that are in the process of provisioning loops cannot provide CLECs with an adequate substitute for the broad-based competition envisioned under the Act.

As the Commission concluded in its First Local Competition Order:

> Without access to unbundled local loops, new entrants would need to invest immediately in duplicative facilities in order to compete for customers. Such investment and building would likely delay market entry and postpone the benefits of local telephone competition for consumers."[50]

Without access to the critical "last mile" provided by the loop, competitors such as NEXTLINK will be unable to provide a competitive alternative.

b. Definition of Loop Network Element.

In the First Local Competition Order, the Commission defined the loop as a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC

[49] See e.g., NEXTLINK Comments in Petition of the Bell Atlantic Telephone Companies for Forbearance from Regulation as a Dominant Carrier in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, DC; Vermont; And Virginia, CC Docket No. 99-24 (3/17/99) at 5-8. For example, although NEXTLINK has deployed fiber optic facilities in several markets, only ILEC facilities serve an overwhelming percentage of the high capacity transport and loop customers, even in those markets where ILECs have petitioned the Commission for pricing flexibility. See e.g., Petition of Ameritech for Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA, filed February 5, 1999; Petition of the SBC Companies for Forbearance, filed December 7, 1998 ("SBC Omnibus Petition"); Petition of Bell Atlantic For Forbearance, filed January 20, 1999 ("Bell Atlantic Petition"); Petition of the U S West Companies For Forbearance, filed December 7, 1998 ("U S West Seattle Petition"); and Petition of the U S West Companies For Forbearance, filed August 24, 1998 ("U S West Phoenix Petition").

[50] See Id., 11 FCC Rcd at 15690.

central office and the network interface device at the customer premises."[51] The Commission stated that competitors could request two-wire and four-wire loops, and loops conditioned to provide digital, higher bandwidth services, such as ISDN, ADSL, HDSL, and DS-1 level signals.[52] In addition, the Commission stated that ILECs must provide "cross-connect facilities" between a loop and a requesting carrier's collocated equipment to allow for the requesting carrier to gain access to the loop.[53]

The Commission indicated in the First Local Competition Order that it would periodically review and revise its rules regarding network elements.[54] The three years following the Act have been marked by a period of intense effort and investment by CLECs. They have also been marred by resistance and delay in the deployment of unbundled network elements by ILECs, and the costly and unnecessary litigation that has accompanied the ILECs' intransigence. It is, therefore, not enough for the Commission to simply reinstate its prior definitional rules for loops. The Commission should refine it network element definitions and strengthen the rules for access to the loop to allow the broadest flexibility of use for CLECs and to eliminate the ambiguities exploited by ILECs in the previous three years.

The Commission should make clear that regardless of underlying technologies or facilities, the loop is a single channel from an ILEC end office to a customer premises that must be made available to competitors. ILECs have tried to skirt the existing definition to avoid providing loops when integrated digital loop carrier ("IDLC") equipment or remote switching

[51] First Local Competition Order, 11 FCC Rcd at 15691. See 47 C.F.R. § 51.319.
[52] First Local Competition Order, 11 FCC Rcd at 15691.
[53] Id., 11 FCC Rcd at 15693.
[54] See e.g., Id., 11 FCC Rcd at 15694.

units are involved in the connection between the ILEC switch and the end-user.[55] The loop is ultimately the network element that provides a competing network with access to an end-user. The Commission, therefore, should carefully define the loop to ensure CLEC's access to the end-user through the use of a loop, regardless of the technology, current or future, that ILECs deploy in their networks.

1) Cross-Connects Must Be Included Within the Definition of Loops.

The Commission also should make clear that cross-connects are part of the loop in order to ensure that requesting carriers are ensured nondiscriminatory access to loops. A cross-connect is an integral part of the loop and unquestionably necessary to provide nondiscriminatory access on just and reasonable terms and conditions as required by the Act. Despite the Commission's clear directive in the First Local Competition Order that cross-connects must be provided to CLECs to access the loop,[56] ILECs have not always provided cross-connects as needed or at a cost-based rate that allows use of the requested loops.[57] NEXTLINK has expended unnecessary time and expense litigating ILECs' obligation to provide cross-connect facilities as part of the unbundled loop.[58] The Commission, therefore, should make explicit to the ILECs what is obvious to the rest of the industry by stating explicitly that cross-connect facilities are part of the

[55] See Section III.A.1.c.1. infra (for further discussion of IDLC).

[56] See First Local Competition Order 11 FCC Rcd at 15693-94. ("Incumbent LECs must provide cross-connect facilities, for example, between an unbundled loop and a requesting carrier's collocated equipment, in order to provide access to that loop.").

[57] For example, BellSouth has stated repeatedly to NEXTLINK that cross-connects are actually a separate network element. Petition of NEXTLINK TENNESSEE L.L.C. For Arbitration of an Interconnection Agreement With BellSouth Telecommunications, Inc, Arbitration Ruling, Docket No. 98-00123 (May 18, 1999) ("NEXTLINK Tennessee Arbitration Ruling") at 18-20.

[58] Id.

loop. The Commission should explicitly include cross-connect facilities in defining the loop element and prohibit ILECs from imposing additional charges for those facilities.

2) Conditioned Loops Must Be Provided Upon Request.

The Commission should clarify that CLECs may use loops for any telecommunications services that they seek to provide. Ultimately, many of the advanced services that CLECs seek to provide require higher bandwidth than existing voice grade (or DS-0) services. To ensure that CLECs can compete in the growing advanced services market, CLECs must rely on loops capable of supporting higher-bandwidth services. As the Commission previously determined, CLECs should be able to use loops to provide digital services and high bandwidth services.[59]

The Commission, nonetheless must clarify that ILECs should perform all actions necessary to condition loops to provide the service desired by the requesting carrier.[60] Not only would such a revised definition support the Commission's findings in the Advanced Services Order and promote competition in the rapidly growing market for advanced services, it would provide significant clarity to CLEC rights in an area that otherwise would be rich for potential ILEC obfuscation.

The Commission has already proposed requiring the availability of "clean copper" loops in its Advanced Services proceeding.[61] The provision of clean copper loops should be part of the provision of unbundled loops at TELRIC prices. Furthermore, the Commission should recognize

[59] See First Local Competition Order, 11 FCC Rcd at 15691-92.

[60] Conditioning involves removing bridge taps, loading coils and other electronic impediments on existing lines. See Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 (1998) ("Advanced Services MO&O") at 24037; First Local Competition Order, 11 FCC Rcd at 15692.

[61] See Advanced Services MO&O, 13 FCC Rcd at 24036-37.

that conditioning loops in order to support the desired CLEC service is a functionality inherent in the element and captured in the TELRIC prices. Loop conditioning is not an additional service the ILEC can charge for at above-cost rates or otherwise refuse to provide on a nondiscriminatory basis. Conditioned loops are often difficult for CLECs to obtain today, reflecting the ILECs refusal to provide higher bandwidth loops on a nondiscriminatory basis. Moreover, the current confusion over this issue is reflected in the variety of rate schemes associated with conditioned loops in different states. The Commission, therefore, should incorporate into the definition of a loop that loops must be capable of supporting desired CLEC services and that ILECs cannot block CLEC provision of innovative competitive services by failing to adequately condition the existing facilities.[62]

3) High-Capacity Loops Must Be Included Within the Definition of Loops.

The Commission has previously found that ILECs must provide a loop comprised of various underlying facilities in order to create a channel between the end office and the end-user. The Commission should further require that loops must be provided via two-wire, four-wire, fiber optics or other facilities present in the ILEC network.

Such a rule is necessary to ensure that CLECs receive access to the high capacity loops necessary to provide adequate bandwidth to their customers. CLECs should be able to request loop facilities at the DS1, DS3, and OC3, 12, and 48 level, as well as new loop capacities that are

[62] For many services, the standards for conditioning the loop should reflect industry and vendor specific terms and conditions. Where such conditions are not readily available, the ILEC should be required to work with the CLEC, in order for the CLEC to inform the ILEC of the conditioning necessary to support the desired telecommunications service.

created as advances in loop technology arise.[63] In addition, as advanced technologies allow higher bandwidth to be provided over electrical facilities and ILECs deploy additional fiber in their networks, CLECs should be able to access there facilities to provide a competitive service.

It is also important that the Commission clarify that ILECs may not impose unnecessary non-recurring charges if CLECs move current access arrangements to unbundled loops. Most ILECs' access charge tariffs do not provide cost-based rates. If all that is involved in transitioning access services to the use of a network element is a change in billing records, CLECs should not have to pay ILECs non-recurring charges for work the ILEC will not actually perform.

At a minimum, the Commission should affirm the conclusions reached in the Advanced Services MO&O that Sections 251 and 252 apply equally to traditional voice services and higher bandwidth advanced services, including packet-based services.[64] It would be contrary to Congressional and Commission intent for CLECs to be able to access network elements only to compete for lower bandwidth services.

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[63] Although NEXTLINK refers specifically to DS1, DS3, OC3, 12 and 48 services, ILECs should be required to unbundle all electrical and fiber optic loop facilities, including future advances in technology and facilities. While NEXTLINK has obtained high capacity loops from at least one ILEC there is significant disparity among incumbents across the country in their willingness to agree to unbundle high capacity loops. See Local Interconnection Agreement Between Pacific Bell and NEXTLINK, Amendment No. 3 (March 31, 1998) (providing for Pacific Bell provision of 4-Wire Digital Links).

[64] See e.g., Advanced Services MO&O, 13 FCC Rcd at 24036-37.