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May 27, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY MESSENGER

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Salas:

Enclosed herewith are 13 corrected copies of the comments filed by Bell Atlantic in the above-captioned proceeding. We discovered last evening that the exhibits to the copies filed with the Commission yesterday were not properly collated. Please substitute these corrected copies for the ones filed yesterday. We apologize for any inconvenience caused by this incident.

If you have any questions, please call me or Jennifer Hoh at (703) 974-7699.

Sincerely,

James G. Pachulski

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Federal Communications Commission
Office of Secretary

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

COMMENTS OF BELL ATLANTIC

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Dated: May 26, 1999

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COMMENTS OF BELL ATLANTIC

I. Introduction and Summary

A lot has changed during the three years since the Commission first created a list of network elements to be unbundled by incumbent carriers. Competing carriers have invested tens of billions of dollars to deploy their own facilities. In the words of their own trade association, these companies have deployed literally "hundred of switches" – so many, in fact, that competitors now have multiple switches in every major metropolitan area of the country. And competing carriers are serving an ever increasing number of customers entirely over their own facilities – including nearly a million entirely facilities-based lines in the Bell Atlantic region alone, based on the most conservative of estimates.

Given these facts, a balanced approach is needed to promote, rather than undermine, continued investment in competing facilities by new entrants and incumbents alike. While competing carriers are entitled under the Act to obtain access to network elements that they truly need to get into the local market and compete, they do not need access to individual elements where competitors already have deployed their own. Nor

do they need access to combinations that include those elements, particularly the so-called "UNE Platform" of all the elements that make up local telephone service.

In contrast, requiring access to these elements, and especially to the UNE Platform, would undermine the enormous investments that have been made in competing facilities in the absence of a platform requirement, and deter future investments in competing facilities as well. As Professor Kahn explained, "[m]uch more important, from the standpoint of the public interest, is to avoid the anti-competitive consequences of a looser definition [of what should be unbundled], which would discourage new, risky investment--not only by the incumbents but also, by *existing* facilities-based CLECs, which have already invested billions of dollars of their own capital in challenging the historical monopolists and are investing billions more each year, and by new would-be entrants, by offering them the opportunity instead to free ride on the facilities of others." Kahn Declaration at 8. It is for these very reasons that competing facilities-based carriers and their trade associations have opposed the imposition of a UNE Platform requirement.

II. Local Competition Has Increased Dramatically Since The Commission First Issued Its Unbundling Rules.

The Chairman of the Commission has already acknowledged the growth in local competition and the significant investments that are being made in local competitors. In his testimony more than a year ago, the Chairman said:

We see growing competition in the hundreds of state-approved interconnection agreements between incumbents and competitive local exchange carriers ("CLECs") entering the local telephone market. The top 10 CLECs have switches in 132 cities spanning 33 states and the District of Columbia. . . . And over the past two years, \$14 billion has been invested in CLECS, and their combined market capitalization has risen to over \$20 billion.

Statement of William E. Kennard, Chairman, FCC, before the Subcommittee on Commerce and the Judiciary Committee on Appropriations, U.S. House of Representatives, 1998 FCC LEXIS 1775 (Mar. 25, 1998). In fact, the Commission has itself refuted arguments that the Act is not working by pointing to a Merrill Lynch report that shows *competition is growing faster for local than it did for long distance*:

Not true counters the FCC. Competition in the local calling market is moving *faster* than the 1980's battle over long distance. Two years after the Act, rivals have captured 3.5% of local phone revenues from the Baby Bells, says Merrill. In contrast, two years after the 1979 court decision letting MCI sell long distance services, carriers had won only 1.4% of that market from AT&T, the FCC notes.

For next year, the third since deregulation, Merrill predicts that local competitors will control 6% of the market

Catherine Yang, *Yes, Virginia, There is Phone Competition*, BUSINESS WEEK, Sept. 28, 1998, at 6 (emphasis added). Other analysts have reached the same conclusion about the pace of local competition:

[T]he combination of access to low cost capital coupled with a clear regulatory and public policy initiative toward opening up local markets has allowed the CLECs as a group to achieve in less than 2 years after the Telecom Act, what it took MCI and other alternative long distance carriers over 10 years to achieve during the 1970s and 1980s. If one takes the obvious logical extension of this, this means that the 50% loss of market share that AT&T saw from 1986 through 1996 could be replicated in the local market in a much quicker time period.

Salomon Smith Barney, *CLECs Surpass Bells in Net Business Line Additions For First Time* (May 6, 1998). And the most recent Merrill Lynch report indicates that competing carriers are growing their businesses even faster than analysts had expected:

Overall, 4Q98 results for the CLEC group were highlighted by stronger than expected growth in revenues and local access lines

At December 31, 1998, new entrants' (CLECs and the local efforts of the large LD companies) revenue share of the estimated \$105B US local telecom market stood at 5.0%, up 64 basis points from the Sept. 30 share of 4.3% and up 130

basis points from the June 30 share of 3.7%, in line with our expectations. On an annualized basis, all new entrants gained market share at an annualized rate of 2.5% during 4Q98, up 40 basis points vs. the 2.1% annualized rate during 3Q98.

During 4Q98, new entrants added an estimated 794,000 net local access lines, 9% above our estimate of 726,000.

Daniel Reingold and Mark Kastan, Merrill Lynch, *Telecom Services – Local*, March 11, 1998.

The growth of local competition and the pace of investment in local competitors and network facilities shows no signs of slowing down. Investors have poured over \$30 billion dollars into companies providing competitive local services. Council of Economic Advisers, *Progress Report: Growth and Competition in U.S. Telecommunications 1993-1998* at 2, Feb. 8, 1999. And the major long distance companies are not only investing their capital in their own facilities, they are also acquiring companies that have already built substantial local networks.

AT&T, for one, has already acquired Teleport Communications Group – the first competitive local service provider – TeleCommunications, Inc. – the second largest cable company in the United States – and is now acquiring Media One, the fourth largest cable company in the country. Through these acquisitions and partnerships with Time Warner, Comcast and others, AT&T has direct access to cable network facilities into more than 50 percent of homes in the United States and fiber networks in all of the major cities in the Bell Atlantic region that pass at least 13,500 buildings, with nearly 5,000 buildings on net and more than 300,000 access lines served.¹

¹ Bell Atlantic CLEC Networks and IXC Local Plans, New York, Fourth Quarter, 1997, *Quality Strategies*, Feb. 3, 1998, at 10, 65-66. AT&T also has substantial interests

MCI WorldCom, for another, has already acquired Brooks Fiber Properties, Metropolitan Fiber Systems, UUNET and MCI. Through these acquisitions, MCI WorldCom gained an impressive collection of local network facilities, including a 250 mile fiber network in the New York City metropolitan area with approximately half a million people living along that network, a 542 mile "infothruway" along the New York State Thruway, and a \$20 million digital fiber optic network in Westchester county of New York.

The impact of this competitive firestorm is clearly evident in the Bell Atlantic region. Competitive carriers have already deployed at least 180 of their own local switches in the Bell Atlantic region. UNE Fact Report at Appendix A. Bell Atlantic currently has more than 655,200 interconnection trunks running between Bell Atlantic's switches and its competitors' switches. These interconnection trunks carried over 31.2 billion minutes of traffic last year and are now averaging over 4.3 billion minutes of traffic each month. Local competitors are also occupying more than 1,667 physical and virtual collocation nodes in Bell Atlantic's central offices, giving them access to most of the access lines served by Bell Atlantic.

in the following cable companies: Cablevision, Bresnan Communications, Falcon Cable, Kansas City Cable, Peak Cablevision, Adelphia and Century Communications. AT&T's acquisition of Media One will also give AT&T an 18 percent interest in Time Warner Telecom, another major competing local carrier. Moreover, AT&T already owns 72 percent of @Home and 50 percent of the voting rights of Road Runner, which will be the exclusive Internet access provider for cable systems passing almost 80 percent of U.S. homes. AT&T also has its own Internet backbone network to serve existing AT&T WorldNet and business customers, and recently bought the IBM Global Networks backbone network for \$5 billion. Bell Atlantic Petition for Forbearance at Appendix 1, CC Docket No. 99-24 (filed Jan. 20, 1999) ("Bell Atlantic Petition for Forbearance").

Competing carriers also have extensive transmission facilities in place, including over 725,000 fiber miles in the Bell Atlantic region. Bell Atlantic Petition for Forbearance at Attachment A. They are serving at least 900,000 lines entirely over their own facilities. UNE Fact Report at III-16 (Submitted with the Comments of the United States Telephone Association, May 26, 1999). They are also serving approximately 100,000 lines using unbundled loops and other network elements and another 700,000 through resale.

In fact, competitors are now serving between 10 and 19 percent of the business lines in Bell Atlantic's major metropolitan areas -- i.e., in areas served by Bell Atlantic's wire centers with at least 20,000 lines and at least one collocating carrier. UNE Fact Report at III-16. This is consistent with the Chairman's recent observation that "in a city like Nashville, . . . large businesses have choice in local phone service." Speech of William E. Kennard, Chairman, FCC, "A Competitive Call to Arms," Association of Local Telecommunications Services (ALTS) Convention, Nashville, TN (May 3, 1999). It is also consistent with the observations of industry analysts: "when market share is measured to categories of customers CLECs are targeting, in areas of specific metropolitan markets where they have networks in place, competitive players often have double-digit shares (and sometimes high double-digit shares)." Steve Koppman, Gartner Group, *Local Competition and the CLECs: Growing with the Force of Gravity* (March 8, 1999).

This substantial investment in local network facilities has dramatically changed the landscape since the Commission first promulgated unbundling rules. The Commission must bear these investments in mind as it considers what network elements

should be unbundled by incumbent carriers and where those elements should be unbundled.

III. The Commission Should Take a Balanced Approach to Its Unbundling Rules.

The Telecommunications Act only requires unbundling of the incumbents' network elements that competitors truly need in order to provide competitive telecommunications services. The Commission cannot apply this statutory unbundling standard in a vacuum. The Commission instead should collect and carefully consider the evidence of competitors using their own facilities to provide local services on a competitive basis. Taking this balanced approach will not only place the Commission on solid legal ground, it also makes good policy sense because too much unbundling can be just as harmful to competition as too little unbundling.

A. The Commission Should Not Require Incumbents to Unbundle Network Elements That Competitors Have Already Deployed or That Are Available From Other Sources.

The Supreme Court ruled that section 251(d)(2) requires the Commission to apply "some limiting standard, rationally related to the goals of the Act." *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 at 734 (1999) ("Iowa Utils.Bd."). To comply with the Court's ruling, the Commission must consider "the *availability of elements outside the incumbent's network*," *id.* at 735 (emphasis supplied), and may not indulge in an "assumption that any increase in cost (or decrease in quality) imposed by denial of a network element" requires unbundling. *Id.*; see also *id.* at 736. The Court found that a competing carrier is not

"impaired" simply because it earns less profit when it does not have access to a network element. *Id.* at 735, n.11.

In applying this standard, the Commission, at a minimum, must consider evidence that competitors *are already providing* telecommunications services on a competitive basis by using their own network elements or by obtaining elements from another source.

As Commissioner Powell explained:

[U]nder the Court's interpretation, the Act requires that the Commission, at a minimum, examine the extent to which elements are available from sources other than the incumbent.

The availability of elements outside the incumbent's network could potentially turn on many factors, such as the existence of vendors and distribution channels, the presence of competing facilities-based LECs and the price of non-incumbent elements relative to the requesting competitor's ability to pay. These factors are likely to vary significantly from one market to the next. . . . It follows directly, then, that assessments of whether an element is necessary to provide service or whether failing to mandate access to that element would impair a new entrant's ability to provide service will vary significantly among different markets, states, and regions.

Separate Statement of Michael K. Powell, *Second FNPRM*. In fact, if even one carrier is competing without using the incumbent's network elements, it proves that *it can be done*.

This is not to suggest that the Commission should consider the identity of the requesting carrier when applying the unbundling standard. As Professor Kahn explains, "the Commission must be guided above all other considerations by the goal of promoting efficient and dynamic competition in the service of the consuming public, rather than the fostering or protecting of individual competitors, as such." Kahn Declaration at 3. *See also* Philip E. Areeda & Herbert Hovencamp, *Antitrust Law* ¶¶ 771-777 (rev. ed. 1996); *see also* 142 Cong. Rec. S712 (Comments of Sen. Moynihan) (supporting the Act

because it will "increase competition" and "lead[] to greater economic efficiency") (emphasis added). As the Commission itself recognized, section 251 is properly focused on what is needed to "provide an efficient competitor with a meaningful opportunity to compete." *Local Competition Order* 11 FCC Rcd 15499 at ¶ 315 (1996) (emphasis added). If efficient competitors can, and do, provide service without access to a particular network element, it is irrelevant whether a less efficient competitor might claim that – due to size, cash flow, network configuration, or other considerations – it needs access to that element in order to compete.

Nor should the Commission consider the current business plans of individual CLECs. For example, the fact that a new entrant has decided to defer deploying its own switch to serve an area where several other competing carriers have already deployed their own switch does not mean the new entrant is entitled to purchase unbundled local switching from the incumbent carrier. The fact that other carriers have already deployed their own switches and are using them to provide service proves that the new entrant does not need access to the incumbent's switch on an unbundled basis in order to provide telecommunications service on a competitive basis.

B. The Commission Would Discourage Investment and Innovation in Local Network Facilities If It Required Incumbent Carriers To Unbundle Network Elements That Competitors Already Have Deployed.

In light of the substantial investments that have already been made in competing local networks, the Commission needs to have a balanced approach. Requiring incumbents to unbundle elements that competitors don't need can be just as damaging to local competition as too little unbundling.

First, the availability of network elements at TELRIC prices where competitors don't need those elements will discourage new entrants from investing in their own facilities and retard innovation. This is particularly important in light of "the superiority of facilities-based competition over competition based on using the facilities of the incumbent firm." Kahn Declaration at 3. As Justice Breyer explained,

Increased sharing by itself does not automatically mean increased competition. It is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share every resource or element of a business would create, not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.

Iowa Utils. Bd., concurring opinion of Justice Breyer. As a result, "[t]he Commission should be particularly concerned that its unbundling rules not discourage investment in new network facilities because facilities-based competition is likely to be the most intense and long-lasting form of competition." Crandall Declaration at 2.

One of the driving forces behind competition is the opportunity for an entrepreneur to enjoy the full fruits of his investment and innovation, if only on a transient basis. But there is virtually nothing for new entrants to gain by placing their capital at risk if other companies can provide the same services without making their own investment. As Professor Kahn explained, "[I]f rivals can share use of whatever ILEC facilities they ask for – with their mere asking constituting sufficient demonstration that access is 'necessary' to them – at prices explicitly intended to recover only the minimum cost of supply, employing the most modern technology, it cannot but have a fatally discouraging effect on their own imitative and innovative efforts: when every applicant can be a free rider, at such minimum prices, who is going to build the vehicle?" Kahn Declaration at 17.

Professors Areeda and Hovenkamp have likewise concluded that when the government forces a company to "provide [a] facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether." Areeda & Hovenkamp, ¶ 771b, at 175.

Industry analysts have also observed that the unbundling provisions of Section 251(c) have discouraged investments, particularly in new technology:

By forcing deep discounts of incumbents' networks not based on actual costs but on the forward-looking costs regulators want them to be, regulators powerfully discourage deployment of new technologies by everyone concerned. Why should a competitor invest capital if they can lease the incumbents' network without risk at a lower cost than even the competitor could build it for? Why should an incumbent invest to upgrade its plant if it will be forced to resell it for less than it costs to provide it?

Scott Cleland, Testimony before the Senate Antitrust Subcommittee (May 19, 1998) at 4.

Even key Congressional leaders have acknowledged the danger of too much unbundling: "[a]s long as they can accumulate risk free profits with minimal investment, competitors will not build their own networks to provide competing services." Brief Of Amici Curiae The Hon. John D. Dingell, et al., *AT&T v. Iowa Utils. Bd.* (US Supreme Ct. Nov. 15, 1996).

Second, the requirement to make network elements available at TELRIC prices will discourage incumbent carriers from investing in and upgrading their existing networks. If incumbents were subject to overly broad unbundling requirements, particularly at TELRIC prices, they would never be able to realize the full benefit of their investment. As a result, there is little for incumbents to gain from placing their capital at risk.

This point was driven home quite succinctly by the chairman of AT&T. He explained that there would be no incentive for an incumbent to build a broadband network if competitors could use that network without placing their own capital at risk.

Now some narrowband ISPs want the government to give them a free ride on those broadband pipes. Their idea is to allow these narrowband companies to provide broadband access service to their customers over facilities that someone else's private investment built.

If those companies want to move up into broadband, terrific. But getting a free ride on someone else's investment and risk is not the way to do it.

It's not fair. It's not right. Worse, it would inhibit industry growth and competition. No company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others.

C. Michael Armstrong, *Telecom and Cable TV: Shared Prospects for the Communications Future*, speech delivered to Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998). Mr. Armstrong's assessment is well grounded in economics: "as long as the incumbent knows that it must lease its facilities at forward-looking economic cost, its incentive to invest in network upgrades or expansions is severely attenuated." Crandall Declaration at 7.

Even where the incumbent still wants to invest in the facilities that it must unbundle, it may be thwarted in its efforts to do so. The competitors using those network elements may oppose the incumbents' efforts to develop and offer new services by upgrading those facilities. As Dr. Crandall explains

Any decision by an ILEC to modify its network to provide new or better services or to deliver them more efficiently is likely to have an impact on the CLECs leasing pieces of its network. These CLECs will surely have every incentive to complain to regulators that network changes are designed to disadvantage them

(the CLECs) and thereby to block or delay their rivals' attempts to develop more attractive services. If every innovation in network design must first be scrutinized by rival CLECs who are lessees of network elements, surely the pace of innovation will slow substantially. For instance, ILECs might be forced to delay the substitution of fiber for copper or the substitution of packet switching for circuit switching technologies by CLEC complaints that they are disadvantaged by such technical progress.

Crandall Declaration at 8-9.

Third, requiring incumbents to unbundle network elements that competitors have already deployed will undermine those competitors' ability to compete. Having invested billions of dollars in their own facilities, they will not be able to compete effectively against other competitors that simply lease the same facilities from incumbent carriers at TELRIC prices. As Professor Kahn explains, "[t]he discouraging effect of the Commission's prescription for pricing UNEs is not confined to risk-taking innovations by the ILECs; it is equally destructive of the other part of the process of competitive innovation – the efforts of rivals of the successful innovator, by their own efforts, to invent around and surpass the initiator and achieve the market's reward for those efforts."

Kahn Declaration at 17.

As a result, the Commission only should require unbundling of elements that competitors truly need in order to compete; it should not require unbundling of network elements that competitors don't need. In the words of Professor Kahn, "the element in question must be one without which it is not feasible for the would-be competitor to obtain from any source other than the ILEC, whether by purchase or by constructing its own facility. The ILEC, in other words, must enjoy a monopoly in its supply, in the simple and original meaning of that term." Kahn Declaration at 7.

At a minimum, where competing carriers have already deployed a particular network element or can obtain it from other sources, incumbent carriers should not be required to unbundle that element. And where elements are already deployed by competing carriers, they should not be unbundled either individually or in combination with other elements (particularly as part of a so-called UNE-Platform).

The fact that at least one competitor is using its own element to provide competing telecommunications service is sufficient proof that it can be done and that competitors do not need that element from incumbents. As Professor Kahn explained, “if, *within the relevant market* . . . competitors – indeed, a single competitor – are demonstrably acquiring that element from some source other than the ILEC, whether by purchase, lease or direct investment, that fact demonstrates that obtaining it from the incumbent is not ‘essential’ in the most elementary meaning of the term and sharing of that element should not be required.” Kahn Declaration at 7. Dr. Crandall echoes this fundamental economic principle: “[i]f other CLECs are building networks with comparable functionality or if the entrant could build facilities that are similar to the ILEC facilities, competition could not possibly be impaired by a prospective entrant’s inability to use an ILEC’s particular functionality in the form of an unbundled network element.” Crandall Declaration at 5. The FCC’s unbundling rules should therefore not be based on some arbitrary number of competitors that has deployed that element.

Nor does the FCC need to look at whether the incumbent has a particular cost advantage for a specific element. The real issue is whether the competitor can offer a competitive service using its own element. “[T]he actual deployment of network facilities by CLECs, taking advantage of whatever economies of scale or scope may be

available to them, is of much greater competitive significance than necessarily imprecise estimations of cost advantages or disadvantages to which they might be subject if they could not acquire particular network elements from an ILEC.” Kahn Declaration at 14-15. The business decisions that investors have already made in competing network facilities, and the fact that one or more competitors already are providing service using an element that they have deployed themselves or obtained from another source, clearly demonstrates that competitors can use that element to provide competing local services. There is no reason for the Commission to try and second guess these business decisions.

Moreover, the fact that a competitor has deployed its own network element also demonstrates that a wholesale market can develop for that element. For example, Metromedia Fiber Network (“MFN”) is now bringing fiber into central offices in order to offer interoffice transport in competition with the incumbents’ interoffice transport services.

MFN is a competitive optical provider (“COP”) of interoffice facilities/services to telecommunications carriers. MFN is currently competing with BA through the provision of COP services in New York and Philadelphia. MFN expects to begin competing with BA in the near future with similar networks in New Jersey, Massachusetts and Washington, DC.

Letter from Robert Riordan, Director of MFN, to Lawrence G. Malone, General Counsel of the New York State Public Service Commission, dated April 2, 1999. Likewise, Hyperion Communications recently entered into agreements with five telecommunications carriers – NorthEast Optic Network, Inc., Metromedia Fiber Network, Inc., e.spire Communications, Inc., Telergy, Inc. and Interpath Communications – to provide Hyperion with local fiber optic routes for entry into several key markets in the eastern United States. Hyperion Press Release, February 11, 1999.

In addition, many companies, such as Metro One, Excell Agent Services, Teltrust, Frontier Communications, Qwest411, Experian's TEC Group, CenturyTel Telecommunications, Inc., Consolidated Communications and HebCom, are providing directory assistance and/or operator services on a wholesale basis to competing carriers. UNE Fact Report at IV-5.

The Commission cannot ignore this evidence of substantial investments by competitors in their own network elements. For these reasons, the Commission should not require incumbents to unbundle network elements that have already been deployed by competing carriers or that are available from alternative sources. And since competitors will continue to deploy more of their own network elements, the Commission should reevaluate any unbundling obligations imposed in this proceeding within two years.

C. The Commission Would Exacerbate The Investment and Innovation Dampening Effects of Unbundling By Requiring Incumbent Carriers to Provide the UNE Platform.

If a network element does not meet the statutory standard for unbundling, the Commission cannot require incumbents unbundle that element either individually or in combination with other network elements, such as the UNE Platform. As the Supreme Court explained, the whole question of the so-called "UNE platform" is likely to become "academic" once the Commission properly applies section 251(d)(2). *Iowa Utils. Bd.*, 119 S. Ct. at 736; *id.* at 737. Each and every element of the UNE Platform must independently satisfy section 251(d)(2), and "[i]f the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network." *Id.*

The mere fact that it might be less expensive and more convenient to get a network element from the incumbent in combination with another element is not a sufficient basis to put it on the list of unbundled network elements that must be provided in the first place. Where a network element, judged in isolation, does not meet the section 251(d)(2) test, the Commission cannot order that element to be provided, regardless of whether or not it is already combined in the incumbent carrier's network.

Requiring incumbent carriers to unbundle elements that don't meet the statutory standard as part of a UNE Platform would be especially harmful to competition. According to Dr. Crandall, "if the Commission requires the provision of an entire UNE platform at TELRIC rates, CLECs may avoid investments in entire new technologies for delivering local service and simply pursue the less innovative and lower-risk strategy of simply leasing the entire UNE platform." Crandall Declaration at ¶ 20. And the competing carriers' own trade association, ALTS, told the Supreme Court, "the availability of [UNE Platform] at the lower prices usually generated by section 251(c)(3)'s pricing standard would lessen the incentive for new entrants to build their own facilities." Brief of ALTS, Case No. 97-286, p. 8 (May 18, 1998).

Individual members of ALTS have also demonstrated how the UNE Platform discourages investment. Intermedia explained that "[i]f a competing carrier can obtain an entire platform [of preassembled network elements] at incremental cost that effectively replaces a tariffed service, it will have no incentive to invest in deploying its own facilities in the local network." Reply Comments of Intermedia Communications, Case No. 97-C-1963, at 5 (N.Y. P.S.C. Dec. 12, 1997). Likewise, Time Warner opposed a recommended state commission decision because "the ALJ failed to address adequately

the negative impact on investment in new facilities that would result if a rebundling platform, priced at TELRIC prices, is made available to new entrants.” Brief on Exceptions of Time Warner Communications Holdings, Inc., Case No. 98-C-0690, at 4 (N.Y.P.S.C. Aug. 18, 1998).

Moreover, requiring incumbent carriers to provide the UNE Platform would be particularly damaging to their investment incentives. Where the Commission requires an incumbent to unbundle an element that competitors don't need, the incumbent carriers will have little incentive to invest in that element. But as Professor Kahn Explains, “[t]he mandatory offer of an entire ‘platform’ deters facilities-based competition across the board.” Kahn Declaration at p. 8.

D. Nothing in Section 271 Changes the Standard for Determining What Network Elements Should Be Unbundled.

Congress directed the Commission to apply the standards in section 251(d)(2) before requiring that any network element be unbundled. Nothing in Section 271 overrides the requirement for the Commission to apply these statutory standards before imposing any unbundling requirements under Section 251.²

² The Act, in checklist item (ii), requires a Bell Operating Company to provide nondiscriminatory access to network elements in accordance with the requirements of sections 251 ©(3) and 252(d)(1) before it can provide long distance service. Thus, under checklist item (ii), before the FCC grants BA-NJ long distance relief, BA-NJ must provide the UNEs set out by the FCC. The Act then lists additional checklist items that BA-NJ must also provide. Although several of those additional checklist items are similar to the UNEs contained in the FCC's now vacated Rule 319, the Act does not say that those additional checklist items are UNEs. In fact, if they were UNEs, there would be no reason to list them separately and these provisions would be entirely duplicative of checklist item (ii).

Moreover, Section 271 does not create a minimum list of network elements to be unbundled under Section 251. If Congress had wanted to create such a list, it could have and would have so provided in section 251, which applies to all incumbent carriers, and not in Section 271, which applies only to Bell companies applying for long distance authority. Accordingly, section 271(c)(2)(B) does not relieve the Commission of its independent duty to apply the standards of section 251(d)(2) before imposing any unbundling requirement.

This is not just an academic distinction. The network elements that must be unbundled under Section 251 are subject to the rate standard of Section 252(d)(1). That rate standard does not apply to the unbundling requirements of Section 271(c)(2)(b)(iv), (v) and (vi). Likewise, the network elements that must be unbundled under Section 251 are subject to the requirement that they be provided "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3). No such requirement applies to the unbundling provisions of Section 271.

IV. The Widespread Deployment and Use of Network Elements by Local Competitors Demonstrates That These Elements Do Not Meet The "Necessary" or "Impair" Tests.

The fundamental question the Commission must address in determining which elements must be unbundled is "whether competition *in any market* or class of markets can proceed absent the availability of particular unbundled elements from the ILECs. That is, (1) do firms need particular elements that they can obtain only from an ILEC *and* (2) are there no other ways to produce the products in question." Kahn Declaration at 14.

Accordingly, "a particular element is essential to the development of competition only if (1) it cannot be obtained from another source, including self-supply and (2) there are no other firms offering the services without using the network elements of the ILEC in question." *Id.*

In this section, we document the extensive deployment of network elements by competing carriers, particularly in the major metropolitan areas, and their use of those elements to provide competitive telecommunications services, particularly to business customers. We also document how competitors can serve adjacent areas with their existing network facilities or by deploying additional network facilities. This evidence shows that competitors do not need access to all of the unbundled elements first proposed by the Commission in all geographic areas of the country for all classes of customers. At a minimum, the Commission should not require unbundling of network elements in any area where competitors have already deployed those elements or can obtain them from other sources.

A. Local Switching.

By all accounts, competing carriers have deployed hundreds of their own switches during the last few years. The trade association ALTS reported that CLECs had deployed 667 new switches by the end of last year. The Council of Economic Advisors, National Telecommunications and Information Administration, *Progress Report: Growth and Competition in U.S. Telecommunications 1993-1998*, Feb. 8, 1999. The industry's Local Exchange Routing Guide database lists 724 CLEC switches as of March 1999. And

AT&T has already announced plans to add another 33 Nortel switches in its network for its aggressive local service expansion. *Communications Daily*, May 17, 1999.

These numbers are very conservative because they include only traditional landline local switches and the relatively few long distance switches that interexchange carriers have adapted to provide local service. They do not include the majority of long distance switches that have not yet been adapted for local service. They do not include the thousands of wireless switches that have been deployed throughout the country and are perfectly capable of providing local telephone service. And they do not include any of the packet data switches that can provide local voice telephone service through Internet Protocol.

In the Bell Atlantic region, competing carriers have already installed at least 180 local switches. See Exhibit 2. AT&T, for example, has 24 local switches in the Bell Atlantic region, and MCI WorldCom has another 34 local switches. UNE Fact Report at Appendix A.

Competing carriers have strategically placed their switches in and around all of the major metropolitan areas. In the Bell Atlantic region, they have placed at least 40 local switches in the New York City metropolitan area, 23 local switches in the Washington, DC metropolitan area, 18 local switches in the Boston area, 19 local switches in the Philadelphia area, 6 local switches in the North Jersey area, and 10 in the Baltimore area. UNE Fact Report at I-22.

These switches are not limited to providing local service only to customers in the metropolitan area where they are located. As Dr. Jackson explains, "modern telecommunications switches [have] the capability to serve terminals located at long

distances--many hundreds of miles--from the switch.” Jackson Declaration at ¶3. For example, Nortel’s Remote Switching Center-S (RSC-S) “[e]xtends a full complement of host switch features to subscribers up to 650 miles from a DMS-100 or DMS-500 host, [and] up to 100 miles from a DMS-10 host.” Nortel Networks, *Remote Switching Center-S*. Lucent’s 5ESS “enables a remote switching module to be located in a different Local Access Transport Area (LATA) and up to 600 miles from the host.” Lucent, *The 5ESS-2000 Switch Product Family*. This means that a competing carrier with a switch in New York City could use that switch to begin serving local customers (and establish a customer base) in Boston, North Jersey, Philadelphia, Pittsburgh, Wilmington, Baltimore, Washington and Richmond before deploying a switch in those distant markets.

Even without adding a remote switching module, a single switch can serve a very large area. According to AT&T, a single switch using digital loop carrier can readily serve customers within a 125-mile radius. Petition of AT&T Corp. to Deny Application at 24. GTE Corp. Transferor, and Bell Atlantic Corp. Transferee, For Consent to Transfer of Control, CC Docket No. 98-184 (filed Nov. 23, 1998)

Given the widespread dispersion of competing carriers’ switches across the country and the ability of those switches to serve customers hundreds of miles away, the Commission cannot impose a national unbundling requirement for local switching. Competing carriers have already demonstrated that they are capable of providing their own local switching virtually everywhere, and they unquestionably are capable of providing their own switching in every major metropolitan area for one simple reason -- they have already done it! They cannot claim that their ability to provide competing service is impaired by their inability to obtain unbundled local switching from incumbent

carriers. At a minimum, the Commission should not require incumbent carriers to unbundle local switching in any geographic area that already is being served by at least one competing carrier using its own switch.

It is relatively easy to determine the location of competitors' switches that are already in service and the geographic areas that are now or will soon be served by those switches. First, when a competing carrier begins providing service with its own switch, it starts exchanging traffic with Bell Atlantic over interconnection trunks. Bell Atlantic is now exchanging billions of minutes of traffic with these competitors' switches, and that is proof that these switches are now providing service.

Second, the areas that are now or will soon be served by these switches can readily be determined from the blocks of 10,000 telephone numbers ("NXX codes") that have been assigned to them for use with their switches. A local service competitor that owns a telephone switch must acquire blocks of telephone numbers for that switch in order to provide local telephone service. The NXX codes that are assigned to a local competitor with its own switch are published in an industry document called the Local Exchange Routing Guide ("LERG").

The LERG provides the routing information for all other carriers to deliver calls to numbers that have been assigned to any competing carrier for use with its own local switch. For example, if the NXX code 418 in the 202 area code were assigned to CLEC A, the LERG would disclose that fact and provide information on how to interconnect with CLEC A's switch that serves the 418 NXX code. If a customer of CLEC B dials the number 202-418-1000, CLEC B will use the information in the LERG to determine that

the call must be delivered to CLEC A's switch, the interconnection location of CLEC A's switch, and how CLEC B should route the call to reach CLEC A's switch.

The North American Numbering Plan administrator assigns telephone numbers to local exchange carriers in blocks of 10,000 for use with lines within geographically-defined rate exchange areas. A rate exchange area is generally a local calling area, but sometimes local calls can be made between several rate exchange areas.

As of March 1999, 4,601 NXX codes were assigned to competing carriers for use in Bell Atlantic's rate exchange areas. Even though a carrier does not have to start using an NXX code as soon as it is assigned, a carrier must return the code if it is not activated to provide service within 6 months. Central Office Code (NXX) Assignment Guidelines at 17, §6.3.3 (Apr. 26, 1999). Hence, in the rate exchange areas where NXX codes have been assigned to competing carriers, those carriers are either now providing local service or will be doing so in the very near future.

In the Bell Atlantic region, nearly 60 percent of rate exchange areas have at least one competing carrier with its own switch and NXX code. UNE Fact Report at I-7. And at least 38 percent of Bell Atlantic's rate exchange areas have at least two carriers with their own switch and NXX codes. *Id.*

In major metropolitan areas, the competitive picture is even more dramatic. For example, there are at least 40 competing carrier switches in the New York metropolitan area. See Exhibit 1. Every Manhattan rate exchange area has at least four carriers with their own switch and NXX codes. All of these carriers are either now providing local service through their own switch or will begin providing service very shortly.

The situation is nearly the same in the DC area. There are currently at least 23 competing carrier switches in the Washington, DC metropolitan area. UNE Fact Report at I-22. Twelve of these carriers already have NXX codes for the DC rate exchange area and are either now providing local service or will start to do so soon.

The deployment and use of local switches by numerous local carriers in major metropolitan areas is compelling evidence that competitors do not need unbundled switching from Bell Atlantic. Under no circumstances should the Commission adopt a national rule that requires incumbent carriers to unbundle local switching everywhere, including those areas where competing carriers already have their own switches. Such a rule would seriously damage local competition and incentives for investment.

The investments facilities-based carriers have made in switches would be severely undermined if they were forced to compete against carriers that could lease switching capacity from incumbent carriers at TELRIC prices without putting their own capital at risk. This problem would be even more severe if competitors could obtain unbundled local switching from incumbent carriers as part of a combination of network elements or the UNE Platform. The UNE-Platform would give carriers the ability to purchase retail local services for resale at a much steeper discount than prescribed by Congress in the Telecom Act. These steeper discounts would severely diminish the ability of facilities-based carriers to recover and earn on their investment in local switches.

There would also be little incentive for new entrants to deploy switches in areas where they do not serve if they can simply lease switching capacity from incumbent carriers at TELRIC prices without putting their own capital at risk. As Dr. Crandall explains, "allowing firms to lease unbundled elements at regulated prices based on