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

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

REPLY COMMENTS OF EXCEL COMMUNICATIONS, INC.

Excel Communications, Inc. ("Excel"), by its attorneys, hereby submits these reply comments regarding the *Second Further Notice of Proposed Rulemaking* (FCC 99-70) released by the FCC in the above-captioned proceeding on April 16, 1999. These reply comments do not address all the issues raised in the comments, but focus on showing how the comments have narrowed the issues that the Commission must address. In addition, Excel supports those comments seeking a wider array of mandatory unbundled network elements ("UNEs") to ensure that consumers realize the benefits of competitive choices and prices for advanced telecommunications and information services.

The Commission faces a fundamental choice in this proceeding. Does the Commission want to ensure that all types of subscribers in all regions of the country see the benefits of local competition, or does it desire to limit local competition to a gradual ramp-up for selected customers in high-density urban areas? If the Commission desires the former, it must affirm its current list of mandatory UNEs as well as the legal entitlement of all carriers to obtain and use any technically-feasible combination of UNEs from incumbent local exchange carriers ("ILECs") to provide services to end-user subscribers. Excel is the fourth largest U.S. long distance carrier in terms of presubscribed lines, serving a primarily residential customer base that

is widely dispersed among all types of regions (urban, suburban and rural) throughout the country. Excel can provide local services to its entire customer base only through ILEC-supplied UNE combinations (loops, switches, transport) at cost-based rates. If Excel has the ability to provide local services to its customers through UNE combinations, the Commission can rest assured that it will do so. As Excel has stated previously, "[i]f the FCC adopts rules that enable Excel to provide local services entirely through ILEC-supplied UNE combinations, Excel has established a business plan and organizational infrastructure to proceed rapidly to introduce local competition broadly throughout the United States to serve its current (and prospective) customer base." *See* Dance Affidavit at ¶ 8 (Attachment to Excel Comments).

I. THE "NECESSARY" STANDARD IN SECTION 251(D)(2)(A) DOES NOT APPLY TO THE LIST OF MANDATORY UNBUNDLED NETWORK ELEMENTS

The "necessary" standard in Section 251(d)(2)(A) applies only to UNEs that are "proprietary in nature." 47 U.S.C. § 251(d)(2)(A). As Excel demonstrated in its comments (at 4-5), this standard applies only when the functionality itself is proprietary. If an ILEC can choose to provide a UNE in a non-proprietary manner, then the UNE is not "proprietary in nature" and the "necessary" standard does not apply. That interpretation is mandated by the statutory language as well as Congress' pro-competitive objectives.

Although the ILECs claim that various UNEs have proprietary aspects, they have not presented any evidence that even one of the seven UNEs on the mandatory list is "proprietary in nature." As one example, Ameritech claims that the routing tables inside its switches are proprietary, yet it acknowledges that competing carriers and even large end users can design their own routing tables. *See* Ameritech Comments at 44-45 & 84-85. Therefore, the routing

table *functionality* is not "proprietary in nature" and the "necessary" standard does not apply. All of the ILECs made the same mistake – confusing the method or technology chosen by the ILEC to provide a functionality with the nature of the functionality itself.

When an ILEC uses a proprietary method to provide a UNE that is not "proprietary in nature," the question arises whether the ILEC must provide the UNE using its proprietary technology or whether it has the option of furnishing the UNE to requesting carriers through a different, non-proprietary technology. Excel submits that the ILEC must provide the functionality of the UNE in the same way to requesting carriers as to itself. As the Supreme Court emphasized in *AT&T Corp. v. Iowa Utilities Board,* 119 S. Ct. 721, 736-37 (1999). Section 251(c)(3) requires ILECs to provide "non-discriminatory access" to UNEs. Therefore, if an ILEC chooses to use a proprietary technology to provide a particular functionality, it cannot discriminate against requesting carriers by using a different, non-proprietary technology when providing that functionality as a UNE.

II. ALL SEVEN ELEMENTS ON THE MANDATORY UNE LIST SATISFY THE "IMPAIR" STANDARD IN SECTION 251(D)(2)(B)

As expected, competitive carriers and ILECs differ sharply over the extent and nature of developing local competition across the country. However, the Commission need not resolve that dispute in order to find that all seven UNEs satisfy the "impair" standard in Section 251(d)(2)(B). Fundamentally, the ILECs and competitive carriers disagree over the factors the Commission should use in applying the "impair" standard. Once the Commission adopts the factors proffered by competitive carriers (as Excel believes it should do), the ILECs cannot and do not seriously dispute that the "impair" standard is fully satisfied for all seven UNEs.

First, Excel and others showed that the "impair" test is satisfied unless and until an entrant can use a non-ILEC supplied functionality interchangeably and seamlessly with ILEC-supplied functionalities to provide services to end-user subscribers. *E.g.*, Excel Comments at 9; Cable & Wireless Comments at 9-10; CompTel Comments at 14-16; Qwest Comments at 22-27. Even if an entrant in theory can obtain a functionality from a party other than the ILEC,[1] that option is negated in reality if the entrant cannot use the functionality without penalty to provide services to end-user subscribers. Excel submitted evidence on the record that "no CLECs anywhere offer Excel the ability to bypass ILEC-supplied functionalities altogether, and the systems necessary to permit Excel to meld ILEC-supplied and CLEC-supplied functionalities interchangeably into retail service offerings without paying penalties (*e.g.*, cost, quality, or time-to-market) do not yet exist anywhere." *See* C. Dance Affidavit at ¶ 5 (Attachment to Excel Comments). The ILECs do not dispute that entrants lack the ability today to use external functionalities seamlessly and interchangeably with ILEC-supplied UNEs.

Second, Excel and others demonstrated that the "impair" standard is satisfied unless and until the industry develops a fully competitive wholesale market for functionalities that are commercially available in sufficient quantities to serve as direct competitive substitutes for ILEC-supplied UNEs. *E.g.*, Excel Comments at 9; Cable & Wireless Comments at 9-10; CompTel Comments at 15-16; Qwest Comments at 27-29. The mere existence of alternative facilities does not mean that such facilities are being offered commercially to new entrants. While the ILECs and their industry organizations make a great show of identifying in detail the alternative facilities built by CLECs, they have conspicuously failed to show that CLECs are

[1] Excel would reiterate that it does not even have a theoretical ability to obtain any necessary functionalities from non-ILEC suppliers for the vast majority of its customers. Excel Comments at 11.

offering functionalities in sufficient quantities over those facilities to serve as substitutes for UNEs anywhere in the country, or that a wholesale market for functionalities exists today in any region of the country.

Third, Excel and others identified the length of the time-to-market period as an important factor in determining whether denial of access to mandatory UNEs would impair their ability to provide services. *E.g.*, Excel Comments at 7; Cable & Wireless Comments at 32-33; CompTel Comments at 12. The ILECs make no effort to hide the fact that using non-ILEC supplied functionalities would lengthen the time-to-market period. Incredibly, Ameritech goes so far as to argue that an entrant is impaired only if it has to wait *more than two years* to provide service. *See* Ameritech Comments at 5, 35.[2] The Commission should not tolerate the ILECs' attempts to use the "impair" standard to slow down competitive entry. Congress adopted the UNE provisions in Sections 251(c)(3) to spur competitive entry immediately, not after two years. Time-to-market obviously is integral to an entrant's "ability . . . to provide that services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B).

Fourth, there is a fundamental dispute over the type of entrant to which the "impair" standard should apply. Excel showed that the Commission should determine whether an ILEC-supplied UNE makes a material difference from the vantage point of a carrier desiring to provide local services broadly throughout the United States as a new entrant to all types of customers in both high-density and sparsely-populated regions. Excel Comments at 6-7; *see also* Cable & Wireless Comments at 28-29; CompTel Comments at 26-30. By contrast, the ILECs

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[2] *See also* BellSouth Comments at 15-16 & 70-71 (arguing that "impair" standard is not satisfied if entrant could obtain functionalities within one to two years from a potential entrant or through self-provisioning); U S West Comments at 13-14 (arguing that "impair" standard is not satisfied if substitute functionalities could be obtained through "potential competition").

focus on the mere possibility that some entrant could provide service to some customer base through non-ILEC supplied functionalities, even if it meant using a narrow market strategy. *E.g.,* Ameritech Comments at 17-21; U S West Comments at 14. If adopted, the ILECs' approach would ensure that residential subscribers, and customers in rural areas, never see the benefits of local competition. That is plainly contrary to what Congress intended. Once the Commission adopts the perspective of a new entrant seeking to serve all types of customers in all regions of the United States, there is no dispute on the record in this proceeding that all seven mandatory UNEs satisfy the "impair" standard.

Fifth, Excel showed that the "impair" standard will be satisfied if an entrant faces greater business or operational risks when it obtains network functionalities from non-ILEC suppliers rather than from the ILECs. *See* Excel Comments at 10. Due to the lack of an established track record and other reasons, alternative suppliers today cannot provide a new entrant with the same level of business certainty as the ILEC. Based on the record in this proceeding, the ILECs cannot and do not dispute that new entrants face greater business risks when purchasing network functionalities from alternative suppliers. Particularly given the Supreme Court's instructions that the Commission examine the real-world context in which entrants obtain network functionalities, the higher level of risk posed by alternative suppliers entails that the "impair" standard is satisfied for all seven UNEs.

The dispute between the ILECs and competitive carriers regarding the "impair" standard is not just over how to apply the relevant factors based on the record evidence, but which factors are relevant. Once the Commission concludes that even one of the above-listed factors is relevant, then the "impair" standard is satisfied for the entire UNE list and the Commission need not undertake an intensive examination of the ILECs' submissions on

alternative facilities. As Excel showed in its comments, the proper inquiry, from both a statutory and a regulatory perspective, is whether an ILEC's refusal to provide a UNE (or a UNE combination) would affect an entrant's market decisions – what market to enter, the length of the time-to-market period, what services and service packages to provide, what prices to charge, what region to serve, whether to employ redundant facilities, what type of customers to serve, and so on. *See* Excel Comments at 7-8. Because no one disputes that an entrant's market decisions are heavily dependent upon the ability to obtain UNEs (and UNE combinations) from the ILECs at cost-based rates, the "impair" standard is satified for all UNEs on the mandatory list nationwide.

III. ENTRANTS ARE ENTITLED TO ALL TECHNICALLY FEASIBLE UNE COMBINATIONS

In its comments, Excel showed that most Americans – and residential and rural subscribers in particular – will never benefit from local competition unless the Commission confirms that entrants may obtain and use UNEs from ILECs in any technically feasible combination to provide telecommunications services to end-user subscribers. *See* Excel Comments at 12-16. The ILECs make two principal arguments in response. Each may be rebutted briefly.

First, the ILECs contend that UNE combinations are unwise public policy because they create a disincentive for entrants to build alternative networks. *E.g.*, Ameritech Comments at 24-26; Bell Atlantic Comments at 1-2, 10, 17-18. That weather-beaten argument is wrong legally and factually. The Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), has removed any possible doubt that Section 251(c)(3) entitles all requesting carriers to obtain and use UNEs in any technically-feasible combinations to provide

services to subscribers. *See* Excel Comments at 13. That legal entitlement cannot be rescinded by the Commission,[3] much less by the ILECs' self-serving views of what constitutes wise public policy. Further, the ability to provide services through UNE combinations will enhance rather than diminish the long-term investment in alternative facilities by competing carriers. UNE combinations will facilitate immediate competitive entry, thereby giving carriers the breathing space necessary to migrate their services and customers to their own facilities when and where it is efficient to do so. Provided that it is able to enter the local market broadly and rapidly through UNE combinations, Excel expects ultimately that it will be more efficient to build its own local facilities to serve a sizeable portion of its customer base. Excel has followed the same strategy in the long distance market, where over time it has increased the amount of traffic it carries over its own facilities.

Second, the ILECs contend that that a UNE combination is legally unavailable unless all UNEs in the combination satisfy the "impair" test. *E.g.*, Bell Atlantic Comments at 16; BellSouth Comments at 81. Initially, this is, from Excel's view, a moot point since all UNEs on the current list plainly satisfy the "impair" test. However, even if that were not true, the ILECs have it backwards. So long as one UNE in the combination satisfies the "impair" test, the ILECs must provide the entire UNE combination pursuant to Section 251(c)(3) at cost-based rates. When a new entrant provides local services through a combination of UNEs, the entrant is dependent upon the ILEC for the *combination*, not merely for each UNE *individually*. *See* Excel Comments at 16. Therefore, if even one UNE in a combination satisfies the "impair" standard,

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[3] The Commission's forbearance authority does not apply to Section 251(c) until that provision has been "fully implemented." 47 U.S.C. § 160(d). There is no dispute that Section 251(c) has yet to be "fully implemented."

the entire UNE combination must be offered by ILECs on a mandatory basis under Section 251(c)(3).

IV. THE COMMISSION SHOULD ADOPT A WIDER RANGE OF UNES AND UNE DEFINITIONS FOR ADVANCED TELECOMMUNICATIONS SERVICES

Numerous parties submitted proposals that the Commission modify and augment its current UNE definitions to ensure that new entrants can use UNEs and UNE combinations to offer advanced telecommunications and information services to consumers. Excel strongly supports those proposals. In particular, Excel urges the Commission to adopt rules requiring ILECs to offer dark fiber, DSL-equipped and capable loops, data switching, data transport, and DSLAMs and other processing functionalities as mandatory UNEs to any requesting carriers at cost-based rates. *E.g.*, CompTel Comments at 30-46; ALTS Comments at 41-48, 55-56 & 61-77; Cable & Wireless Comments at 33-38; Qwest Comments at 58-59, 72-73, 80-81, 88-91. It is especially important that the Commission modify its loop definition to ensure that an entrant can obtain a loop in any technically feasible transmission medium, that the loop includes all necessary electronics, and that CLECs can designate the termination point of the loop at any technically feasible point. *See* CompTel Comments at 31-33. Expanding the list of mandatory

UNEs, and modifying the UNE definitions where appropriate, will promote Congress pro-competitive objective by ensuring that all consumers have competitive choices and prices for advanced services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that on this 10th day of June, 1999, a copy of the foregoing **REPLY COMMENTS OF EXCEL COMMUNICATIONS, INC.** was delivered by hand to the following:

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