

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

REPLY COMMENTS OF PRISM COMMUNICATION SERVICES, INC.

Prism Communication Services, Inc. (“Prism”), by and through its attorneys, hereby submits its reply comments on the Commission’s *Second Further Notice of Proposed Rulemaking* in the above-captioned proceeding.¹

Introduction

The central goal of the Telecommunications Act of 1996 (“1996 Act” or “Act”)² is to establish competitive options for providers of local telecommunications services.³ As the Commission has acknowledged repeatedly, the Act explicitly mandates three market-entry strategies—service resale, use of UNEs (wholesale entry), and facilities-based provision of service—to be available.⁴ These options replicate market-entry strategies available to carriers in already competitive telecommunications markets, such as long distance.

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking (released April 16, 1999).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

³ *See* S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996) (explaining that the 1996 Act erects a “procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition”).

⁴ *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 12 (1996) (“*Local Competition Order*”).

The Act “neither explicitly nor implicitly expresses a preference for one particular entry strategy.”⁵ Instead, its goal is to eliminate all barriers to entry and to lower entry costs wherever possible, in order to maximize the potential competitive benefits to telecommunications subscribers. In short, the principal goal of the Act—and therefore, the Commission’s primary obligation in implementing the Act—is to “ensure that *all* pro-competitive entry strategies may be explored.”⁶ Indeed, the Commission has confirmed that its role “is not to pick winners or losers, or select the ‘best’ technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers.”⁷

In this proceeding, the Commission is afforded a unique opportunity to confirm its commitment to fulfilling the principal goal of the Act. In so doing, it must not fall prey to the anti-competitive arguments posited by many of the nation’s incumbent local exchange carriers (“ILECs”). Many of these carriers would have the Commission believe that the principal goal of the Act has been accomplished, that facilities-based competition is flourishing in all parts of the country. With all due respect, their statistics do not square with consumer and economic reality. Accordingly, the Commission should act promptly to reinstate minimum national unbundling requirements based on an interpretation of the Section 251(d)(2) “necessary” and “impair” standards that will promote the 1996 Act’s goal of widespread facilities-based competition.

In passing the 1996 Act, Congress demonstrated its recognition that until there exist broad-based alternative networks, network elements are the only possible form of competition in

⁵ *Id.*

⁶ *Id.*

⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket 98-147, FCC 98-188 (released August 7, 1998), at ¶ 2. In addition, Commissioner Ness recently testified that one of her guiding principles is that “[c]onsumer interests, not those of any industry player should be paramount. The Commission should not try to pick winners or losers, either individually or by industry segment. Nor should we be tempted by short-term ‘fixes’ that impede long-term objectives.” Statement of Commission Susan Ness before the House Subcommittee on Telecommunications, Trade and Consumer Protection, March 17, 1999, at 6.

exchange and exchange access services. The only other form of competition that is feasible during these periods is the service resale authorized by section 251(c)(4), which does not even approximate the same competitive benefits. Resale, however, places no real competitive constraints on incumbents and no downward pressure on their retail prices. Indeed, customers lost to resale have little effect, if any, on ILEC profits, because the Act's "avoided cost" resale pricing methodology assures that the ILECs' margins of profit remain unchanged regardless of whether a customer switches to a reseller or stays with the incumbent.

In the *Local Competition Order* and a series of subsequent orders in this docket and elsewhere, the Commission recognized these realities and established a regulatory structure that—with few exceptions—maximizes the possibility that the principal goals of the 1996 Act will be fully realized both in the short and long term. It is a framework that is designed to allow substantial constraints to be imposed on supracompetitive prices charged by incumbents within the years immediately following the passage of the 1996 Act and to foster deployment of alternative facilities to serve large business, small business, and residential customers in all cases in which it is technically and economically feasible to do so. However, this regulatory framework and its attendant benefits depend critically on a single premise: the ILECs' provision of network elements on rates, terms, and conditions that are just, reasonable and nondiscriminatory.

In direct contrast to resale, network elements permit entry into the entire telecommunications market, for they may be used to provide exchange and exchange access services alike. Network elements also involve substantially less "sharing" of the ILECs' operations by new entrants insofar as they permit entrants to use the ILECs' network capabilities to differentiate themselves through service definition and pricing in ways that resale does not permit. In addition, network elements provide a critical transition to facilities-based competition, for, unlike resale, they allow entrants to learn aspects of the business, such as calling volumes

and traffic patterns, that will be instrumental in their subsequent decisions whether and where to deploy additional facilities and to build out their network as conditions allow. It is because access to LEC network elements can only advance and never retard the 1996 Act's objectives in both the short and long terms that Congress declined to impose any of the "extrastatutory restrictions" on the availability of network elements that the ILECs have proposed.⁸

In the time that has passed since the adoption of the *Local Competition Order*, this fundamental understanding of the role of network elements and the assumption that they will be widely available has been the basis for numerous other Commission decisions implementing other provision of the Act. The Commission has, for example, deemed unbundled network elements ("UNEs") to be an equivalent to an entrant's "own" facilities in applying the facilities-based competitor requirement of section 271(c)(1)(A) and has concluded that there will be no possibility that entrants would be able to offer "one-stop shopping" for local and long distance service in competition with the BOCs unless and until the framework of the competitive checklist is fully implemented.⁹

Clearly, the broad availability of network elements and network element combinations is an essential precondition to any mass market competition in the near term. The Commission further recognized, however, that the long-term significance of network elements is quite different. In the long term, while network elements will continue to be indispensable to permit competition in those areas of the country where alternative facilities will never be feasible, their

⁸ See Brief of *Amici Curiae* The Honorable Thomas J. Bliley, Jr., The Honorable Ernest F. Hollings, The Honorable Ted Stevens, The Honorable Daniel K. Inouye, The Honorable Trent Lott, and The Honorable Edward J. Markey, at 5, *Iowa Utils. Bd. v. FCC* (filed December 23, 1996).

⁹ See *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, ¶¶ 86-101 (1997); *AT&T v. Ameritech*, Memorandum Opinion and Order, 13 FCC Rcd 21438, ¶¶ 7, 39 (1998).

principal value will be to enable a transition to facilities based competition in all other areas of the country.¹⁰

The overriding reality is that competition through the exclusive use of the ILECs' network elements is neither attractive nor viable as a long-term strategy for any CLEC. Any CLEC relying upon network elements faces inherent cost disadvantages relative to the incumbent that will preclude long-term success in the market *unless* the CLEC uses the leasing of network elements as a means of transitioning to its own facilities. In particular, CLECs relying on network elements face higher costs than the incumbent because of the incumbent's lack of any incentive to cooperate and ability and incentive to discriminate against them. CLECs have higher marketing costs and tighter margins, because they must pry customers from the incumbent LEC and price below the incumbent in order to do so. CLECs further face the substantial risk that, if they ever show signs of making substantial progress in realizing that goal, the ILEC will assert its cost advantage and price its exchange and exchange access services at levels that will limit or altogether preclude effective mass market entry by CLECs.¹¹

The incumbent LECs' basic position is thus exactly backwards. The incumbents assert that the Commission should restrict CLECs' access to network elements and forego the immediate competitive benefits that would follow in order to create incentives that will force CLECs to build facilities and thereby foster more desirable facilities-based competition in the future.¹² The incumbents' version of "tough love" for CLECs would foster competition neither in the short nor the long term. CLECs have powerful incentives to cease leasing network

¹⁰ See Comments of Ameritech at 16-17.

¹¹ See Comments of AT&T, Affidavit of Hubbard, Lehr and Willig, at ¶¶ 30-32.

¹² See Comments of Ameritech at 27 (describing the Commission's *Local Competition Order* as "promot[ing] fast and easy entry, rather than . . . meaningful competition, investment and innovation"); Comments of Bell Atlantic at 9-16; Comments of BellSouth at 6-12

elements and to build their own facilities instead in every situation where the economic case for doing so is even close. CLECs must free themselves from these tortured business relationships with their monopoly competitors and must establish a different and superior cost structure under which a long-term competitive position can be successfully maintained.¹³ CLECs need no additional, artificial incentives to drive them toward that goal. Conversely, it is plain that the last thing the incumbent LECs desire is robust facilities-based competition against their monopolies, their blustery rhetoric notwithstanding.¹⁴ The ILECs' positions on network elements would instead foreclose that result by knocking the "ladder" out from under the 1996 Act.¹⁵

In essence, the Supreme Court's decision, which serves as the springboard for this proceeding, called into question, as a primary matter, the fact that the Commission failed to give sufficient substance to the "necessary" and "impair" standards compelled by section 252(d)(2) of the Act.¹⁶ The Court neither questioned nor condemned the Commission's reasoned policy analysis underlying its implementation of the local competition provisions in the 1996 Act. Accordingly, contrary to the assertions of the ILECs, this proceeding should not be seen as an opportunity to reinvent the wheel but rather to shore up the well-wrought foundation already laid by the Commission.¹⁷

In this vein, Prism supports the positions taken by other companies born of the promises contained in the 1996 Act. Prism urges the Commission to disregard the ILECs' pleas to employ

¹³ See Comments of AT&T, Affidavit of Hubbard, Lehr and Willig, at ¶¶ 33-34.

¹⁴ See Comments of Ameritech at 20; Comments of GTE at 1-2.

¹⁵ See *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct 721, 735. In its opinion, the Court addressed the example of a ladder that might be needed to change a light bulb. If, with a slightly shorter ladder, the person changing the bulb can still do the same job—but will merely have to stretch his or her arm further—the ability to change the bulb is not impaired. Accordingly, the longer ladder cannot be said to be necessary. *Id.*

¹⁶ *Id.* at 736 (calling on 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").

¹⁷ See Comments of GTE at 3.

the “essential facilities doctrine” of antitrust law to identify network elements that should be subject to unbundling requirements.¹⁸ These ILECs argue that unless a potential UNE would be an “essential facility” under the doctrine, it should be exempt from the unbundling requirements. These arguments must be seen for what they are: attempts to limit implementation of the pro-competitive policies adopted by Congress.

In contrast, Prism urges the Commission to employ its own competitive market analysis to determine whether a UNE satisfies the “necessary” and “impair” standards of section 252(d)(2). As it has several times in recent years,¹⁹ the Commission should use its competitive analysis to satisfy the public interest mandate of the 1996 Act. The Commission should carefully *define the relevant markets* in order to properly identify reasonable substitutes for the requested element.²⁰ For example, in considering possible substitutes for interoffice transport, the Commission must not only look to see if comparable bandwidth is available from alternative sources, but also look to see if that alternative is available on the particular point-to-point route. In addition, the Commission should consider *supply elasticity* and *ease of entry*. Even assuming alternative facilities are available, in order to ensure a truly competitive market, those alternative sources of supply must possess the capacity to supply the entire wholesale market if the ILEC were to cease providing the particular UNE. Along these same lines, the Commission must assess whether, in fact, a *wholesale market* exists. Finally, the Commission should consider seriously both the *number of alternative suppliers* and attendant *price issues*. As the Commission has recognized, it is well-accepted that the existence of only one other provider

¹⁸ See Comments of Ameritech at 15; Comments of GTE at 14-19.

¹⁹ See, e.g., *BA/NYNEX Merger Order*, 12 FCC Rcd 19985 (1997); *SBC/SNET Merger Order*, 13 FCC Rcd 21292 (1998); *AT&T/TCI Merger Order*, 12 Comm. Reg. (P&F) 29 (1998); *MCI/WorldCom Merger Order*, 13 FCC Rcd 18025 (1998); *ILEC In-Region Interexchange Order*, 12 FCC Rcd 15756 (1997); *LMDS Eligibility Order*, 12 FCC Rcd 12545 (1997).

²⁰ See Comments of Covad Communications at 15-18.

does not establish a competitive market price for a service.²¹ The absence of multiple, similarly situated wholesale suppliers causes restrictions in output and increases in prices in a market.²² Notwithstanding the ILECs' protestations to the contrary,²³ at this point in the evolution of the telecommunications markets, it cannot be argued reasonably that a truly competitive market exists with respect to most of the network elements identified in former Rule 319.²⁴

Accordingly, as stated in its earlier comments in this proceeding, Prism urges the Commission to once again promulgate a minimum national set of network elements subject to the unbundling requirements contemplated by section 252(d)(2). At minimum, the Commission should ensure that the elements identified in the section 271 competitive checklist remain available to new entrants on an unbundled basis. It is difficult to conceive of a rationale under which Congress would have placed such importance on those elements to opening markets to competition and yet not intended that they be made available to the new entrants who in fact are the competition contemplated by the Act.

²¹ See *LMDS Eligibility Order*, 12 FCC Rcd 12545 (declaring incumbent LECs and incumbent cable providers ineligible to acquire in-region LMDS licenses because an independently owned potential entrant into local voice, video, and data markets was in the public interest).

²² Cournot's model of competition demonstrates that the competitiveness of an industry is directly related to the number of firms supplying the market. JAMES FRIEDMAN, *OLIGOPOLY THEORY* ch. 2 (1982).

²³ See Comments of GTE at 7-8, 39-56; Comments of Ameritech at 69; Comments of Bell Atlantic at 4-7.

²⁴ 47 C.F.R. § 51.319 (1998).

Conclusion

For all the foregoing reasons, the Commission should act promptly to reinstate minimum national unbundling requirements based on an interpretation of the section 252(d)(2) “necessary” and “impair” standards that will promote the widespread facilities-based competition contemplated by the 1996 Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Reply Comments of Prism Communication Services, Inc. was sent via hand-delivery to the individuals on the attached service list, this 10th day of June, 1999.

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