

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

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

**Reply Comments by the
Public Service Commission of Wisconsin**

On April 16, 1999, the Federal Communications Commission (FCC) issued its Second Further Notice of Proposed Rulemaking (FNPRM) in the above-captioned proceeding. The FNPRM seeks comment on the issues of: (1) how the FCC should interpret the standards set forth in 47 U.S.C. § 251(d)(2), in light of the Supreme Court ruling in *AT&T Corp. v. Iowa Utilities Bd. (IUB)*;¹ and (2) which specific network elements the FCC should require incumbent LECs to unbundle under § 251(c)(3). Initial comments were due on May 27, 1999. In response to the FNPRM and the comments filed, the Public Service Commission of Wisconsin (PSCW) respectfully submits the following reply comments.

“Necessary” and “Impair”

Pursuant to ¶ 20 of the FNPRM, the FCC seeks input regarding the factors or criteria to use to determine the applicability of the “necessary” and “impair” standards given in 47 U.S.C. § 251(d)(2). Like the other state commissions that commented in this proceeding, the PSCW has experience in this area, although it relied on the FCC’s *Local Competition First Report and*

¹ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. ___, 119 S.Ct. 721, 142 L. Ed.2d 884 (1999) (*IUB*).

*Order*² in performing its responsibilities under the Telecommunications Act of 1996 (the Act).³ In that order, the FCC identified and defined the seven network elements subject to the unbundling obligations of 47 U.S.C. § 251(c)(3).⁴ The PSCW has ruled regarding the adequacy of Ameritech Wisconsin's UNEs under its proposed Statement of Generally Available Terms (SGAT)⁵ and on numerous UNE issues that have arisen in arbitration proceedings under 47 U.S.C. § 252(c).⁶ In such proceedings, the PSCW made determinations regarding the need to unbundle additional network elements or further unbundle those already established, and regarding the rates, terms and conditions of access to UNEs. These determinations were made pursuant to the individual circumstances of the cases before the PSCW, without established factors or criteria for application of the statutory "proprietary," "necessary," and "impair" standards. From this experience, the PSCW and other state commissions have developed some concepts for the FCC to consider in delimiting such factors and criteria.

The PSCW concurs with the comments of the Public Utility Commission of Texas (Texas PUC) with regard to the interpretation of the "proprietary," "necessary," and "impair" standards.⁷ As the Texas PUC points out, the FCC's conclusions in the *Local Competition First Report and Order* adequately addressed the definition of "proprietary" as "those elements with proprietary protocols or elements containing proprietary information."⁸ Further, the PSCW concurs with the Texas PUC position that with the added evaluation of the availability of

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499 (1996).

³ Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

⁴ Those seven nationally required unbundled network elements (UNEs) are codified in 47 C.F.R. § 51.319.

⁵ Findings of Fact, Conclusions of Law and Order and Findings of Fact, Conclusions of Law and Second Order, *Matters Relating to Satisfaction of Conditions for Offering InterLATA Service (Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin)*, Docket 6720-TI-120, December 12, 1996, and May 29, 1997, respectively.

⁶ In Wisconsin, 110 voluntary interconnection agreements have been approved; 7 agreements have been set through arbitration.

⁷ Further, the comments of Public Utilities Commission of Ohio (Ohio PUC) at Section C provide valuable practical examples of how the Ohio PUC applies the "necessary" and "impair" standards in Ohio.

⁸ Comments of the Texas PUC at ¶10 and quoting from the *Local Competition First Report and Order* at ¶ 282.

non-incumbent local exchange carrier (ILEC) sources for a network element, we can generally agree with the FCC’s interpretation of a “necessary” network element as one that is prerequisite to competition.⁹

In *IUB* the Court invalidated a simple standard which would only say that any increase in cost or decrease in service quality establishes a “necessity” and an “impairment” of the ability to provide the services a competitor seeks to offer. As the Texas PUC points out, this ruling does not negate cost and quality as valid factors or criteria for determinations of “necessity” and “impairment.”¹⁰

Required Unbundled Elements

With regard to the specific network elements the FCC should require ILECs to unbundle, the PSCW agrees that the “meaningful opportunity to compete” standard put forth by the Texas PUC is more applicable than the “essential facilities doctrine” to the transition of the local telecommunications markets from monopoly to competitive structure.¹¹ Application of that standard underscores the “necessity” of the seven UNEs previously required under 47 C.F.R. § 51.319 for the local service offerings of competitive local exchange carriers (CLECs).¹² Further, access to additional UNEs, or redefining those offered by an ILEC, can be justified under a “meaningful opportunity to compete” test.¹³ For example, in particular, the PSCW has

⁹ Comments of the Texas PUC at ¶11 and quoting from the Local Competition First Report and Order at ¶ 282.

¹⁰ Comments of the Texas PUC at ¶13.

¹¹ Comments of the Texas PUC at ¶¶ 16-19.

¹² FNPRM ¶ 33.

¹³ FNPRM ¶ 34.

previously required that Ameritech make dark fiber available as a UNE under its SGAT.¹⁴ The Texas PUC endorses the addition of dark fiber to the national list of UNEs as well.¹⁵

States generally endorse the original seven UNEs the FCC set forth under the *Local Competition First Report and Order*. Various states have identified several other possible UNEs for addition to the national unbundling requirements. Although there is not consensus on these items, the type of market analysis done by the Ohio PUC provides a good template for other states to use in making a review of changes to network element unbundling requirements.¹⁶ The PSCW recommends that the FCC follow this approach in making its decisions regarding the national UNE additions and deletions recommended by the state commissions and other parties. In this review however, the PSCW concurs with the comments of both the Texas PUC and the Illinois Commerce Commission that the burden of proof for elimination of a UNE should be borne by the ILEC and the burden of proof for requiring additional UNEs should be placed upon the CLEC.¹⁷

The fact that issues of UNE adequacy arise most conspicuously in 47 U.S.C. § 271 and arbitration proceedings conducted by the state commissions is justification for the FCC to continue its policy of granting those commissions authority to impose additional unbundling requirements.¹⁸ In Wisconsin, the PSCW is given specific statutory authority, in Wis. Stat.

¹⁴ Findings of Fact, Conclusions of Law and Second Order, *Matters Relating to Satisfaction of Conditions for Offering InterLATA Service (Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin)*, Docket 6720-TI-120, May 29, 1997, pp. 42-43.

¹⁵ Comments of the Texas PUC at ¶¶ 31-36.

¹⁶ In Wisconsin, the PSCW has certified 46 CLECs. Many of those have started to serve customers; however, their entry is generally in the early stages, and this commission does not have a full market analysis (like that of Ohio) to make specific findings on UNE needs at this point.

¹⁷ Comments of the Illinois Commerce Commission, Section D.2 and Texas PUC at ¶ 7.

¹⁸ FNPRM ¶ 14.

§ 196.219(3),¹⁹ to impose unbundling requirements in addition to those imposed by the FCC.

Further, it is this “front line” role of state commissions under the Act that makes it reasonable for them to also address the elimination of a UNE in a market area.²⁰ The pattern of state actions regarding a UNE would be a good indicator for the FCC of whether the market or other circumstances have generally changed regarding any particular mandatory UNE, given competitive facility-based entry across various market areas over time with respect to that element.

Loop Conditioning for Advanced Services

The topic of loop conditioning and unbundling for the offering of advanced services is of considerable interest to the PSCW. These are issues in an open proceeding before the PSCW, however, so it may not be appropriate to comment in detail regarding these matters at this time.

Conclusion

The PSCW asks that the FCC consider the rationale and justification state commissions have used in setting additional UNE requirements as the basis for a more general set of factors and criteria for implementing the “necessary” and “impair” standards. The PSCW believes the Texas PUC’s “meaningful opportunity to compete” test encompasses a good share of the

¹⁹ **196.219 Protection of telecommunications consumers.**

(3) PROHIBITED PRACTICES. A telecommunications utility may not do any of the following with respect to regulated services:

(f) Refuse to provide basic local exchange service, business access line service and usage service within a local calling area and access service on an unbundled basis to the same extent that the federal communications commission requires the telecommunications utility to unbundle the same services provided under its jurisdiction. The public service commission may require additional unbundling of intrastate telecommunications services based on a determination, following notice and opportunity for hearing, that additional unbundling is required in the public interest and is consistent with the factors under s. 196.03(6). The public service commission may order unbundling by a small telecommunications utility.

²⁰ FNPRM ¶ 38.

principles that states use to justify requiring additional or alternatively defined UNEs. The FCC should consider those additional or alternatively defined UNEs for inclusion in its decisions in this docket. Further, the unique state commission roles under the Act make them best situated to identify UNEs that may be eliminated in an area. State actions would indicate to the FCC when UNEs should be reviewed for elimination on a national basis.

Dated at Madison, Wisconsin, June 10, 1999.

By the Commission:

/s/ Lynda L. Dorr

Lynda L. Dorr
Secretary to the Commission

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