

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In Matter of)	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
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Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers)	CC Docket No. 95-185
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**REPLY COMMENTS OF THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**I.
INTRODUCTION**

The Washington Utilities and Transportation Commission (WUTC) files these reply comments on only two issues. First, we respond to the comments of various incumbent local exchange companies (ILECs), primarily GTE Service Corporation and its Affiliated Domestic Telephone Operating Companies (GTE), describing what GTE terms A the wealth of actual market evidence now available to the Commission concerning the availability of substitute facilities and the ability of CLECs to compete using those substitutes.≡ GTE Comments at 4.

Second, we respond to various comments which argue that states may not add or subtract elements from any national list of elements that must be made available to competitive local exchange companies (CLECs) by the ILECs.

II.
REPLY COMMENTS

A. The Commission Should Reject Assertions that There Are Available to CLECs Substitute Facilities That Will Allow Such CLECs to Compete Meaningfully.

Some ILECs contend that the Commission should limit its list of elements that must be made available, either with respect to specific elements or on some generic basis. They reason that there are available to CLECs substitute facilities that obviate the need to require the ILECs to provide such facilities. This argument seems to follow the ILECs' arguments that the Commission should incorporate into its rule the essence of the essential facilities doctrine, which would consider the availability of substitute facilities.

However, as argued by us and by others, the essential facilities doctrine should not be the doctrinal template for Commission action in adopting this rule.¹ Further, the assertions, based on contracted-for studies of the market, that CLECs have available such substitutes are unsupported. GTE puts forth a study that there exists such substitutes from CLECs in eight GTE markets of various sizes that are representative of GTE's local service territories. GTE Comments at 7. This study is irrelevant for at least three reasons.

First, the presence of CLECs and CLEC facilities in a given geographic area does not mean that these facilities are available for purchase by other CLECs in those geographic areas. Along the same line, US West asks the Commission to adopt a presumption that the existence of a CLEC switch within 50 miles of an ILEC switch means that the ILEC switch need not be unbundled. US West Comments at 42. There is no basis for assuming that a potential competitor's access to the ILEC's switch is not necessary because of the uncertain availability of

¹Eng. W. J. C. Comments at 9-11. Notice of Proposed Rulemaking
Reply Comments of the W. J. C. Comments at 9-11.
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another switch 50 miles away. Indeed, one can envision the adoption of such a presumption creating considerable litigation before state commissions (and the federal courts on review) where ILECs seek to apply such a regulatory presumption. The Commission should reject any contention that the mere existence of substitute facilities minimizes the need to proceed with the unbundling obligations set forth in the federal Telecommunications Act of 1996 (federal Act), 47 U.S.C. §251(c)(3).

Second, even if there exist CLECs with facilities in such places as Oxford Junction, Iowa, and Myrtle Beach, South Carolina, see GTE Comments at 7, that fact does not speak to the status of competition in other areas. Indeed, though we have not conducted studies in such places as Copalis Crossing, Washington, or Maple Beach, Washington, we can represent to the Commission based on data and anecdotal evidence available to us that competition is not the norm in Washington, and certainly not in small-town or rural Washington. This is true despite the fact that it is relatively easy for CLECs to operate in Washington.² A WUTC survey based on end-of-year 1997 data revealed that CLECs served only approximately two percent of all residential and business lines, not counting centrex lines. Most of those were in the Seattle area. We do not have any evidence that these percentages have changed dramatically in recent months.

²See RCW 80.36.350 (registration of new telecommunications companies); RCW 80.36.310-320 (competitive classification of companies and services).
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US West attempts to make a case for the existence of facilities-based competition in its service territory. It cites the porting of approximately 300,000 telephone numbers, but the purchase of fewer than 15,000 loops, as evidence of such competition. US West Comments at 37. However, this is evidence of just the opposite. The 300,000 number represents only approximately one percent of its total access lines, hardly evidence of robust competition that obviates the need for providing access to network elements. Further, the purchase of only 15,000 loops likely reveals the trouble CLECs have had obtaining them. The uncertainties surrounding the massive litigation of every arbitrated interconnection agreement in Washington certainly frustrates the CLECs willingness to obtain loops.³ This US West data simply reinforces the need for this Commission and state commissions to renew their efforts to implement the unbundled access requirements of the Act.

³The Commission is aware of the magnitude of litigation in the federal courts arising out of the obligations imposed by the federal Act.
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Third, anecdotal evidence of competition, as presented by GTE, reveals that there is much work remaining for the Commission and the state commissions under the federal Act. Neither the Act nor the preexisting policies of the WUTC and other state commissions contemplated that competition benefit only a few. Congress intended that the benefits of competition be widespread. Even if GTE had submitted evidence of competition in hundreds of markets and even if that evidence actually showed that there were substitute facilities available, our arguments to the Commission would be the same. The Commission must develop a national list of elements available to requesting telecommunications carriers, and that list should be designed to bring the benefits of competition to everyone. A waiver process could be implemented to the extent that in given geographic areas competition progresses so that there are substitute facilities available in sufficient quality and quantity that access to ILEC facilities no longer is necessary or failure to provide such access will not impair the ability of CLECs to compete.⁴ However, despite the alleged robust competition available to the 592 residents of Oxford Junction, Iowa,⁵ the great majority of other residents of the United States are not so fortunate. So any Commission decision on waiving access requirements in selected areas should be deferred.⁶

⁴See WUTC Comments 7-8.

⁵This figure is based on 1996 data from the census bureau.

⁶US West and GTE both take the approach that the burden of proof to establish a need for access to various elements rests with the CLECs. GTE Comments at 4-5; US West Comments at 32. That analysis is not appropriate in this rulemaking proceeding. Congress has told the Commission what to consider in developing the list of elements that must be made available. 47 U.S.C. §252(d)(2). Congress did not establish an adjudicative-type mechanism in which the concept of burden of proof may be relevant. Indeed, if there are any presumptions the Commission should employ in developing its rules, they should be based on the policies of the

B. The Commission Should Not Act to Restrict the Ability of States to Add Elements to the List of Those Which Must Be Available.

The majority of commenters agreed with the Commission's earlier conclusion that states could add elements to the list of elements which must be made available. In our opening comments, we, along with many other commenters, stated the legal basis for this conclusion was 47 U.S.C. §251(d)(3). WUTC Comments at 6. However, there were a few dissenters on this point. For example, SBC Communications, Inc. (SBC) argued that because section 251(d)(3) preserved state authority only if such state requirements are consistent with the requirements of [section 251], and because additional state requirements would necessarily be inconsistent with section 251, states lacked authority to add elements to the list. SBC Comments at 19.

Act and Commission's mandate to fulfill the Act's unfulfilled promises. The unfilled promise of competition suggests that the Commission should err on the side of making more elements

The Commission should reject this argument. It would read out of section 251(d)(3) a clear intent to preserve state authority extant prior to the federal Act and turn that section into a somewhat verbose preemption of any state independent authority whatsoever. Essentially, SBC argues that a state can impose no interconnection obligations whatsoever unless they are congruent with those imposed by the Commission under the 1996 Act. If Congress had been so certain that the Commission would have all the answers for all parts of the country, it certainly could have said so by simply stating that states may not impose any obligations in addition to those imposed by the Commission. But section 251(d)(3) says quite the opposite. It recognizes that prior to the 1996 Act, states were imposing interconnection obligations on incumbent local exchange companies (ILECs). Indeed, that was true in Washington.⁷ The language in section 251(d)(3) cannot be construed to be anything other than deferential to state authority in this area.

The fact that this could lead to somewhat different requirements in different states makes no difference. Our federal system is replete with differing state standards superimposed over some basic national standards. This allows various states to manage the introduction of

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⁷See WUTC v. US West Communications, Inc., WUTC Nos. UT-941464, -941465, 950146, 950365 (with Supp. Order, Oct. 3, 1995), Reply Comments of the AT&T Supp. Order, Oct. 3, 1995, Proposed Rulemaking CC Docket Nos. 96-98, 95-185, FCC 99-70, June 10, 1999 - 7

competition to meet local conditions and can provide the Commission with further evidence informing subsequent revisions to the national standards.

DATED this 10th day of June, 1999, at Olympia, Washington.

MARILYN SHOWALTER, Chairwoman
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RICHARD HEMSTAD, Commissioner
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