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THE LAWLER GROUP, LLC

GREGORY E. LAWLER
A. RICHARD METZGER JR
RUTH M. MILKMAN

1909 K STREET, NW
SUITE 820
WASHINGTON, D.C. 20006
PHONE (202) 777-7700
FACSIMILE (202) 777-7763

SANTE J. ESPOSITO
ROBERT L. FOOSE II
DANIEL N. SEGAL

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

95-185

June 10, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Second Further Notice of Proposed Rulemaking Concerning Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98.

Dear Ms. Salas:

Attached are the original and twelve copies of the reply comments of NorthPoint Communications, Inc. regarding the Commission's Second Further Notice of Proposed Rulemaking Concerning Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98.

Sincerely,

Ruth Milkman

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

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

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REPLY COMMENTS OF
NORTHPOINT COMMUNICATIONS, INC.

Ruth Milkman
The Lawler Group, LLC
1909 K Street, NW
Suite 820
Washington, D.C. 20006
(202) 777-7700

Steven Gorosh
Kevin Cameron
NorthPoint Communications, Inc.
222 Sutter Street, Suite 700
San Francisco, CA 94108
(415) 403-4003

June 10, 1999

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SUMMARY

The comments of NorthPoint and other parties demonstrate that access to unbundled network elements, including loops, interoffice transport and operations support systems (OSS) is necessary for competition to grow and flourish. The incumbent Local Exchange Carriers (LECs) seek to use this proceeding to change fundamentally the direction of the competition policy adopted by Congress in the 1996 Act and implemented by the Commission in its orders in this docket. Granting the incumbent LECs' broad request to limit access to unbundled network elements would effectively halt the progress that competitive LECs have made toward introducing competition in local markets. That result is neither mandated nor implied by the Court's decision, and would plainly violate the procompetitive intent of the Act.

The incumbent LECs seek to limit the access of competitive LECs to unbundled network elements by: (1) opposing nationwide unbundling requirements; (2) seeking to interpret the term "necessary" in a way that would significantly reduce the usefulness of proprietary elements to requesting carriers; and (3) advocating the denial of access to a network element if a single competitive LEC is able by itself to provide the element. The Commission should reject these contrived attempts to restrict the availability of network elements to competitive LECs. The record shows that national minimum unbundling requirements are essential to the development of competition on a nationwide basis. The Commission should interpret Section 251(d) in a manner that serves the Congressional goal of ensuring that unbundled network elements are an effective means of entering local telecommunications markets.

In particular, this Commission should affirm that at a minimum, local loops, operations support systems, and interoffice transport must be unbundled. As NorthPoint and other commenters have indicated, there currently is no wholesale market for these elements, without which NorthPoint and other competitive LECs will be materially impaired from providing the services they seek to offer. All parties have conceded as much and thus national unbundling of these elements

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REPLY COMMENTS OF NORTHPOINT COMMUNICATIONS, INC.

NorthPoint Communications, Inc. (NorthPoint) submits these comments in reply to the comments on the Second Further Notice of Proposed Rulemaking issued in this proceeding. The initial comments reflect broad support for the Commission to adopt again national minimum unbundling requirements. The comments also show widespread support among competitive local exchange carriers (LECs) and others for requiring incumbent LECs to offer access to unbundled loops, interoffice transport and operations support systems (OSS). Incumbent LECs, by contrast, seek to use this proceeding to change fundamentally the direction of the competition policy adopted by Congress in the 1996 Act and implemented by the Commission in its orders in this docket.

The issue before the Commission in this proceeding is narrow and straight-forward. The Supreme Court directed the agency 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."[1] The Court did not suggest that this Commission should not adopt a national list of elements to be

[1] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 736 (1999) (*Iowa Utils. Bd.*).

unbundled. Nor did it preclude the agency from deciding, on remand, to require the incumbent LECs to provide access to any or all of the network elements identified in the *Local Competition Order*.[2]

Ignoring this narrow mandate, the incumbent LECs seek to use this proceeding to implement basic changes to the Commission's competition policy generally and its approach to the provision of unbundled network elements in particular. While conceding that access to unbundled loops in most cases and to operations support systems (OSS) should be required, they advance a series of arguments to justify denying competitive LECs access to virtually all of the other unbundled network elements that the Commission identified in its original order in this docket.

The comments of NorthPoint and other parties demonstrate access to unbundled network elements is necessary for competition to survive and flourish. Granting the incumbent LECs' broad request to limit access to unbundled network elements would effectively halt the progress that competitive LECs have made toward introducing competition in local markets. That result is neither mandated nor implied by the Court's decision and would plainly violate the procompetitive intent of the Act.

I. THE RECORD SHOWS THAT NATIONAL MINIMUM UNBUNDLING REQUIREMENTS ARE ESSENTIAL TO THE DEVELOPMENT OF COMPETITION ON A NATIONWIDE BASIS

NorthPoint and other competitive LECs showed in their initial comments that the Commission has the authority and obligation under the 1996 Act to adopt a national list of the network elements that at a minimum must be unbundled by the incumbent LECs.[3]

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[2] *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (*Local Competition Order*).

[3] *See, e.g.*, NorthPoint Comments at 2-3: Allegiance Comments at 2-4; AT&T Comments at 39-46; Covad Comments at 4-6; Nextlink Comments at 3-5.

NorthPoint, Covad and Allegiance, for example, described specifically the importance of a national set of requirements to their ability to begin offering their services quickly in markets in different states and regions of the country.[4] The experience of these and other new entrants into local telecommunications markets shows that over the past three years, the national unbundling requirements have reduced significantly the litigation burden on these parties, permitted the development of meaningful business plans that depended on the availability of specific network elements from incumbent LECs, and enhanced their ability to attract the capital necessary to finance their entry into local markets. In addition to this concrete evidence of the benefits of national requirements, the record also demonstrates that on a nationwide basis, there are not effective substitutes, available from competing wholesale providers, for loops, interoffice transport, OSS and other network elements that the incumbent LECs were required to unbundle by the *Local Competition Order*.

Incumbent LECs, in contrast, contend that the statute bars the Commission from establishing nationwide unbundling requirements for all of the elements identified in the *Local Competition Order*.[5] SBC, for example, claims that identification of a national list of network elements to be unbundled would be inconsistent with the Court's directive that the FCC consider the availability of alternatives outside of the incumbent LECs' network.[6] SBC contends that such determinations under section 251(d)(2) in most cases must be made on a very localized basis, such as end office by end office. SBC, among

[4] *See* NorthPoint Comments at 2-3; Covad Comments at 4-6; Allegiance Comments at 2-4.
[5] *See*, e.g., Ameritech Comments at 53-54; BellSouth Comments at 31; GTE Comments at 21.
[6] SBC Comments at 15.

others, proposes that the Commission adopt national "standards" that would be applied by state commissions.[7]

This view of the scope of the Commission's authority finds no support in the Act. Contrary to the assertions of the incumbent LECs, consideration of the availability of network elements outside the incumbent LECs' networks does not preclude the Commission from identifying a minimum list of network elements that must be unbundled on a nationwide basis. The Supreme Court itself implicitly recognized this when it noted that several of the network elements that the Commission originally required to be unbundled on a nationwide basis might satisfy the requirements of section 251(d)(2).[8]

The Commission clearly has authority under the statute to carry out its responsibilities under section 251(d)(2) in a manner that in its judgment will advance effectively the pro-competitive, deregulatory objectives of the Act. Consequently, the Commission reasonably can conclude that a national minimum set of unbundling requirements at this time is needed to foster the prompt development of competition in markets throughout the country. Specifically, the Commission can and should find that the experience of the past three years has proven that national minimum requirements provide the certainty needed for competitive LEC business plans and capital markets and reduce administrative burdens. Further, given the limited emergence of competitive wholesale markets for network elements, the Commission reasonably can and should make unbundling determinations on a nationwide basis.

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[7] *See* SBC Comments at 18; Ameritech Comments at 67.

[8] *See Iowa Utils. Bd.* at 736. The Court, nevertheless, remanded those elements as well on the grounds that the Commission had not applied a consistent standard.

The approach advocated by the incumbent LECs would have a severe adverse impact on the development of local competition. As we show below, incumbent LECs seek to deny competitive LECs access to a network element if a single competitive LEC decided to self-provide an element. Consequently, carriers such as NorthPoint that need access to unbundled network elements, such as transport, to offer service would be faced with the choice of either radically altering their entry strategy or litigating whether the standard has been applied properly in proceedings before various state commissions. Competitive LECs, moreover, could offer no assurances to the capital markets that they would be able to obtain access to specific unbundled network elements that they need to provide their services.

The incumbent LECs rely heavily on data in a report on the availability of network elements from non-incumbent LEC services submitted by the United States Telephone Association to support their assertion that the Commission should not adopt minimum national unbundling requirements.[9] That contention is meritless. As we show below, in many cases, the data do not support the inference the incumbent LECs seek to draw. Further, evidence of the recent development of a wholesale market for particular elements in particular markets does not justify the premature removal of the incumbent LECs' unbundling obligations.

Moreover, even if the Commission were to attach some weight to the incumbent LECs' data, it still has authority to mandate national unbundling requirements. Section 251(d)(2) by its terms only requires the Commission to "consider" whether denial of access to an element would impair the ability of a requesting carrier to provide service.

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[9] *See* Comments of United States Telephone Association, UNE Fact Report.

Thus, the statute clearly grants to the Commission, in the exercise of its expert knowledge, the discretion to adopt national unbundling requirements, notwithstanding its findings of "impairment," based on other considerations. The Commission could reasonably conclude, for example, that an office-by-office or other localized approach would impose unreasonable cost burdens on competitive LECs, requiring them to expend substantial resources on litigation, instead of investing those resources in plant and equipment needed to begin offering service in local markets. Further, there is ample evidence on which the Commission could rely to find that such an approach would undermine the efforts of competitive LECs to develop and implement nationwide plans for entry. In short, the Commission has both the legal authority and the record evidence to support a finding that the benefits of identifying a national list of minimum unbundling requirements to the overriding statutory goal of promoting local competition far outweigh the asserted benefits of an office-by-office approach to unbundling.

II. THE COMMISSION MUST INTERPRET AND APPLY SECTION 251(d)(2) IN A MANNER THAT SERVES THE CONGRESSIONAL GOAL OF ENSURING THAT UNBUNDLED NETWORK ELEMENTS ARE AN EFFECTIVE MEANS OF ENTERING LOCAL TELECOMMUNICATIONS MARKETS

The comments of NorthPoint and other competitive LECs in this proceeding urge the Commission to define the material terms of section 251(d)(2) in a manner that preserves access to unbundled network elements as an efficient, effective means for such carriers to enter local markets.[10] As we show below, the incumbent LECs erroneously contend that the Commission should interpret this provision in a way that would deny

[10] *See, e.g.,* NorthPoint Comments at 6-7; Allegiance Comments at 7-8; AT&T Comments at 27-38; ALTS Comments at 12.

competitive LECs access to virtually all of the network elements identified in the *Local Competition Order*. The Commission should reject this latest effort by the incumbent LECs to convert the pro-competitive 1996 Act into a tool for protecting entrenched monopolies.

A. Interpretation of the Term "Necessary"

NorthPoint contended in its comments that the Commission should interpret the term "necessary" to mean that, without access to the network element in question, the competitive LEC will be unable to offer the service it seeks to provide.[11] Other commenting parties proposed similar, common sense definitions of this statutory term. ALTS, for example, suggests that access to a proprietary network element is necessary if no non-proprietary substitute is offered by the incumbent LEC or another source and if "failure to provide unbundled access would materially diminish the requesting carrier's ability to offer a competing service offering comparable functionality.[12]

Incumbent LECs, by contrast, propose interpretations of section 251(d)(2)(A) that likely would greatly expand the scope of its application and significantly reduce the usefulness of such proprietary elements to requesting carriers. Ameritech, for example, suggests that this provision applies to all network elements that contain proprietary information that is used to furnish the element and its functionality, regardless of whether access to the element requires access to the protected information.[13] Moreover, the incumbent LECs contend that the Commission should find that access to such elements is

[11] *See* NorthPoint Comments at 6.
[12] *See, e.g.,* ALTS Comments at 19; Allegiance Comments at 6.
[13] *See* Ameritech Comments at 44.

necessary only in instances where the assertedly proprietary aspects cannot be removed prior to providing access to the elements.[14]

In NorthPoint's view, these strained interpretations of section 251(d)(2)(A) represent another effort to erect a barrier to competition where Congress plainly intended to remove one. Most importantly, there is no reason to trigger the application of this statutory provision in cases where access to the network element does not involve access to or disclosure of protected information. The Commission correctly concluded in the *Local Competition Order* that the initial issue in applying this provision is whether "the element is proprietary or contains proprietary information that will be revealed if the element is provided on an unbundled basis."[15] Access in such instances does not compromise an incumbent LEC's statutory protection.

Further, the incumbent LECs' proposed definition finds no support in the statute. Section 251(d)(2)(A) requires the Commission to determine whether "access to elements as are proprietary in nature is necessary." Thus, the issue is whether a competitive LEC can offer the service it seeks to provide absent access to an element that is "proprietary in nature." Under the incumbent LECs' interpretation, they would be permitted to remove the proprietary features and functions from a network element, even if they are an integral part of the service the competitive LEC seeks to provide. Indeed, the interpretation advanced by the incumbent LECs is reminiscent of their previous attempt to interpret the 1996 Act to permit them to separate already bundled elements for no purpose other than to delay and raise the costs of their potential rivals. In both cases, the purpose and effect of their statutory interpretation is to foreclose competitive LECs from the use of

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[14] *See* SBC Comments at 13; Ameritech Comments at 39-40.
[15] *See Local Competition Order* at para. 283.

unbundled network elements that they need, and are entitled to, in order to compete with the incumbent LECs' service offerings.

The incumbent LECs seek in vain to justify this distorted reading of section 251(d)(2)(A) on the ground that it is required to preserve the incentives of the incumbents to invest in proprietary protocols and network functions.[16] That rationale is unpersuasive for several reasons. As MCI pointed out in its comments, most of the innovation and risky investment in new network technology is underwritten by equipment manufacturers, not their customers, the incumbent LECs.[17] Moreover, the network elements at issue in this proceeding do not involve particularly innovative or sophisticated technology. Rather, they represent the basic building blocks, such as interoffice transport, that new entrants need to offer telecommunications services in the incumbent LECs' markets. In addition, the Commission expressly noted in the *Local Competition Order* that state commissions have the authority to set the rate of return for a particular element at a level that properly takes account of the risk associated with the investment.[18]

B. Interpretation of the Term "Impair"

NorthPoint recommended in its initial comments that the Commission interpret section 251(d)(2) to require access to an unbundled network element unless it is demonstrated that an effectively competitive wholesale market for the provision of that element exists.[19] Other parties proposed in their comments substantially similar definitions of that term.[20] The common denominator of these various formulations is that

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[16] *See, e.g.,* SBC Comments at 14-15; GTE Comments at 27.
[17] *See* MCI Comments at 9.
[18] *See Local Competition Order* at para. 702.
[19] *See* NorthPoint Comments at 6-10.
[20] *See, e.g.,* ALTS Comments at 25-26; Nextlink Comments at 12-14.

they would require an incumbent LEC to provide access to an unbundled network element unless a competitive LEC could obtain access to such an element at competitive rates, terms, and conditions in a wholesale market.

The incumbent LECs propose interpretations of the term "impair" that would substantially restrict access to most of the network elements identified by the Commission in the *Local Competition Order*. Some incumbent LECs, for example, would deny access to a network element if a single competitive LEC is able by itself to provide the element.[21] The effect of this interpretation would be to require all competitive LECs to provide service on a vertically integrated basis. That is, a competitive LEC itself would be required to purchase and install the network element. Indeed, Ameritech takes an even more extreme position by claiming that "impair" should be interpreted to mean that a reasonably efficient competitive LEC would be prevented from providing the services it seeks to offer within two years without access to network elements furnished by incumbent LECs.[22] The Commission should reject these contrived attempts to restrict the availability of network elements to competitive LECs.

NorthPoint and other parties stressed in their initial comments that the Commission should require incumbent LECs to provide access to a particular unbundled network element so long as there is no competitive wholesale market for that element.[23] The fact that a single competitive LEC is able to provide a service by self-provisioning a network element clearly does not establish that a competitive wholesale market exists for that element. More generally, the fact that some competitive LECs choose to provide

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[21] *See* Bell Atlantic Comments at 8; GTE Comments at 22; SBC Comments at 21.
[22] *See* Ameritech Comments at 36.
[23] *See* NorthPoint Comments at 6-7; ALTS Comments at 31 and n.52; Allegiance Comments at 8.

service on a vertically integrated basis does not mean either that other competitive LECs are required to follow the same entry strategy or that other entry strategies are inefficient. One of the key aspects of the 1996 Act is that it enables competitive LECs to develop and pursue very different strategies for entering local markets.[24] The interpretation of "impair" advocated by some incumbent LECs would radically alter this statutory scheme and essentially require new firms to enter either by purchasing and deploying all of its facilities or by reselling the incumbent LECs' services. Congress's obvious objective in creating the "unbundled network element option" was to enable competitive LECs to enter local markets without either having to undertake the enormous cost of duplicating the incumbent LECs' networks or being limited to the resale of the incumbent LECs' existing service offerings. But, that would be the likely effect of adopting the incumbent LECs' interpretation of "impair."

The incumbent LECs' reading of section 251(d)(2) is also inconsistent with the text of that provision. The statute expressly refers to the impairment of the "ability of the telecommunications carrier seeking access to provide the services it seeks to offer." The incumbent LECs would deny access to network elements based on a showing that another competitive LEC was able to offer service by self-providing the element. That interpretation would ignore the statute's explicit reference to the "ability of the telecommunications carrier seeking access."

Requiring all competitive LECs to self-provide a network element once one has decided to do so as part of its individual business plan amounts to a "one size fits all" approach to local competition. That approach would assist incumbent LECs in their efforts to protect their local monopolies against competitive entry, but it is plainly

[24] *See Local Competition Order* at para. 12.

inconsistent with the local entry plan Congress adopted in the 1996 Act, which specifically contemplated that competitive LECs would pursue different entry strategies. Further, that approach will not serve the interests of consumers who will reap the benefits of competition provided by new entrants, like NorthPoint, that need access to unbundled network elements to offer their services in local markets quickly.

Some incumbent LECs propose a variation on this theme by suggesting that the Commission should ignore the business plans of competitive LECs.[25] What they really mean is that the Commission should only pay attention to competitive LECs that choose to enter by self-providing elements, rather than obtaining them, at least initially, from incumbent LECs. As discussed above, the claim that the Commission should base its determinations under section 251(d)(2) on one particular entry strategy finds no support in the statute and is directly contrary to the goals of Congress and the FCC in giving competitive LECs the tools to follow very different entry strategies.

US West proposes that the Commission essentially should ignore the scale economy advantages that incumbent LECs enjoy in providing network elements.[26] It suggests that the Court barred the Commission from considering under section 251(d)(2) whether competitive LECs would incur higher costs if they were denied access to incumbent LEC unbundled network elements. What the Court actually said was that a competitive LEC would not be impaired in its ability to compete if denying access to an unbundled network element would reduce its profitability by 1 percent.[27] Nowhere did the Court suggest that an incumbent LEC's scale and scope advantages in local markets

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[25] SBC Comments at 7; Bell Atlantic Comments at 9.
[26] *See* US West Comments at 17-18.
[27] *See Iowa Utils. Bd.* at 735.

are not one of the most formidable barriers confronting new entrants. Further, nothing in that decision is inconsistent with the Commission's finding in the *Local Competition Order* that one of the most important aspects of the 1996 Act is that it required incumbent LECs to share their economies of density, connectivity and scope with new entrants.[28] Clearly, one consequence of the Commission's adoption of the incumbent LECs' interpretation, like their "one size fits all" principle, is that it could be used to justify a broad denial of access to almost all of the network elements that the Commission ordered unbundled in 1996.

Several incumbent LECs claim that excessive unbundling requirements will discourage competitive LECs from investing in their own facilities.[29] The actual experience of the last three years refutes this baseless claim. Although incumbent LECs have been required to offer unbundled access to the network elements identified in the *Local Competition Order*, NorthPoint and other competitive LECs have invested millions of dollars in new facilities that have been deployed throughout the United States. Those actions demonstrate in a concrete manner that competitive LECs are willing and able to purchase and deploy their own facilities whenever it is economically feasible for them to do so.

SBC also seeks to prevent state commissions from ordering access to additional unbundled network elements.[30] SBC asserts that the statute mandates that only the FCC

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[28] *See Local Competition Order* at para. 11.
[29] *See* SBC Comments at 6; Bell Atlantic Comments at 10; GTE Comments at 16.
[30] *See* SBC Comments at 19.

make the determinations required by section 251(d)(2) and that section 251(d)(3) does not empower the states to order additional unbundling.[31]

Section 251(d)(3) grants states authority to adopt requirements that establish "access and interconnection obligations of local exchange carriers," provided that such requirements are not inconsistent with the FCC's rules and do not substantially interfere with the implementation of the Commission's rules.[32] SBC's assertion that a state commission may not order the unbundling of additional elements absent an FCC finding under section 251(d)(2), in effect, would remove from state commissions the authority that section 251(d)(3) expressly grants.[33]

Finally, GTE suggests that the Commission adopt an automatic two-year sunset of the incumbent LECs' unbundling obligations.[34] Such an arbitrary rule would clearly violate section 251 (d)(2), since it would relieve incumbent LECs of their duty to offer access to unbundled elements without regard to whether that would impair the ability of competitive LECs to offer service. There is no basis for the Commission to assume at this time that competitive wholesale markets will develop for all of the unbundled network elements in one year or two years or any other period.

III. THERE IS NO WHOLESALE MARKET FOR UNBUNDLED NETWORK ELEMENTS

For the most part, the comments submitted in this proceeding agree that, at a

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[31] *See* id. Ameritech, on the other hand, argues that state commissions do have authority to order additional unbundling. Ameritech Comments at 47.
[32] *See* 47 U.S.C. § 251(d)(3).
[33] The Commission also has held that "states may impose additional unbundling requirements pursuant to section 252(d)(3), as long as such requirements are consistent with the 1996 Act and all regulations." *Local Competition Order* at para. 244.
[34] *See* GTE Comments at 92.

minimum, local loops, operations support systems, and interoffice transport must be unbundled. As NorthPoint and other commenters indicated, there currently is no wholesale market for these elements, without which NorthPoint and other CLECs will be materially impaired from providing the services they seek to offer. Notwithstanding this general consensus, several incumbent LECs have alleged that a competitive market for these elements exists in some limited instances and may expand in the future. This report, however, is predicated on a series of unfounded guesses about the possible evolution of technology and singularly fails to demonstrate that a wholesale market for local loops, OSS or interoffice transport exists or is likely to emerge any time soon.

A. There is no Competitive Wholesale Market for Local Loops or OSS Access

All parties, including the incumbent LECs, agree that "ILECs should provide access to all the ILEC OSS functions that [ILEC] systems are capable of providing to enable the CLEC nondiscriminatory access to interconnection, resold services, and other ILEC network elements."[35] Likewise, all parties, including the incumbent LECs, agree that local loops should be subject to the unbundling requirements of section 251(d)(2).[36] Nonetheless, these parties suggest that "CLECs have alternatives to ILEC loops to reach all large business customers (those with 20 lines or more) in wire centers serving 40,000

[35] SBC Comments at 56. As this Commission has noted, OSS access includes all of the components of a BOC's provision of access to OSS functions, including the 'point of interface (or 'gateway') for the competing carrier's own internal operations support systems to interconnect with the BOC; any electronic or manual processing link between that interface and the BOC's internal operations support systems (including all necessary back office systems and personnel); and all of the internal operations support systems (or 'legacy systems') that a BOC uses in providing network elements and resale services to a competing carrier. 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, 20615 (1997).

[36] *See* SBC Comments at 23, Ameritech Comments at 100.

or more access lines ('Dense Wire Centers') in which CLECs have collocated."[37] This is simply wrong.

In the first instance, the incumbent LECs ignore the fact that DSL competitive LECs like NorthPoint require access to copper loops in order to provide the DSL services they seek to offer. The incumbent LECs have presented absolutely no evidence that such loops can be obtained from anyone other than the incumbent LEC.

Moreover, the incumbent LECs' position implies that if a single competitive LEC is collocated and could hypothetically deploy loops of any type to a particular type or to particular classes of customers, the incumbent should not have to offer local loops as a UNE to any other competitive LEC. However, the mere existence of a collocated competitive LEC does not provide evidence that there is a competitive market for local loops (let alone a competitive market for copper loops capable of supporting the DSL services NorthPoint offers). For instance, NorthPoint has secured collocation space in more than 750 central offices and anticipates that it will be collocated in more than 900 central offices by the end of 1999. NorthPoint anticipates that many of these offices will be "Dense Wire Centers" and that NorthPoint will be the first or one of the first to collocate in those central offices. Contrary to the incumbent LECs' contentions, however,[38] in order to provide DSL services NorthPoint requires access to unbundled loops to serve customers within that central office. Since there is no wholesale market for these loops (whether for large or small business customers), NorthPoint's ability to provide the DSL services it seeks to offer will be materially impaired if it cannot obtain unbundled loops from the incumbent LEC.

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[37] SBC comments at 23.
[38] *See, e.g., id.*

Claims that cable and wireless alternatives will soon make the market for local loops competitive are equally far-fetched. As the incumbent LECs themselves concede, wireless and cable currently offer only the *promise* of becoming an alternative to the local loop.[39] To date, however, neither technology is a competitive alternative to the local loop. Accordingly, NorthPoint urges the Commission to require the unbundling of local loops in all central offices regardless of their density.

B. Incumbent LEC Claims of a Competitive Transport Market are Unfounded

Incumbent LEC arguments that a single collocated carrier in a Dense Wire Center provides evidence of a competitive transport market are equally misplaced.[40] As explained above, NorthPoint is currently in the process of collocating in more than 900 incumbent LEC central offices nationwide and anticipates that it will be collocating in hundreds of additional central offices in the future. NorthPoint, however, does not provide transport service and thus NorthPoint's collocation in a given central office in no way indicates that there is a competitive provider of transport in that central office. In fact, in more than 80 percent of the offices where NorthPoint eventually intends to collocate, the incumbent LEC is the sole provider of transport. As a consequence, in those central offices, NorthPoint has no alternative but to buy interoffice transport from the incumbent LEC itself.

Moreover, even in the limited number of central offices depicted in the UNE fact report where there are competitive providers of transport, the incumbent LEC is often the

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[39] *See* SBC Comments at 26 (Wireless services "are *increasingly* becoming an economic substitute to wireline connections....[C]able is *poised* to compete directly against the ILEC network." (emphasis added)).

[40] Ameritech Comments at 86-94, SBC Comments at 45-51.

only provider of transport capable of providing service to NorthPoint. This can be for any one of a number of reasons - competitive providers may lack capacity, or they may be reserving all the capacity for themselves. The incumbent LECs proposal to eliminate the unbundling requirement in all dense wire centers with a collocated carrier, or, in the alternative, any central office with a collocated carrier and where any competitive interoffice transport services exist, thus finds no support in the facts. Accordingly, this Commission should conclude that interoffice transport is an unbundled network element.

Conclusion

This Commission should adopt a "material" impairment standard and order the unbundling of copper loops, interoffice transport and operations support systems. Pursuant to section 251(c)(3) of the Act, moreover, each of these elements must be unbundled until a party demonstrates through clear and compelling evidence that there is a competitive wholesale market for a specific network element.

Respectfully submitted,

Ruth Milkman
The Lawler Group, LLC
1909 K Street, NW
Suite 820
Washington, D.C. 20006
(202) 777-7700

Steven Gorosh
Kevin Cameron
NorthPoint Communications, Inc.
222 Sutter Street, Suite 700
San Francisco, CA 94108
(415) 403-4003

CERTIFICATE OF SERVICE

I, Ruth M. Milkman, do hereby certify that on this 10th day of June, 1999, I caused a copy of the foregoing Reply Comments of NorthPoint Communications, Inc. to be served upon each of the parties listed on the attached Service List.

Ruth M. Milkman

* By messenger

SERVICE LIST

*Magalie Roman Salas (Orig. & 12 copies)
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TWB-204
Washington, D.C. 20554

*International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20554

*Kyle D. Dixon
Legal Adviser
Office of Commissioner Powell
Federal Communications Commission
445 12th Street, S.W.
Suite 8-A204
Washington, D.C. 20554

*Kevin J. Martin
Legal Adviser
Officer of Commissioner Furchtgott-Roth
Federal Communications Commission
445 12th Street, S.W.
Suite-A302
Washington, D.C. 20554

*Robert Atkinson
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Suite 5-B303
Washington, D.C. 20554

*Michael Pryor
Deputy Chief, Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Suite 5-C320
Washington, D.C. 20554

*Janice M. Myles (1 copy & 1 disk)
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

*Jordon Goldstein
Legal Counsel
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Suite 5-B303
Washington, D.C. 20554

*Linda Kinney
Legal Adviser
Office of Commissioner Ness
Federal Communications Commission
445 12th Street, S.W.
Suite 8-B115
Washington, D.C. 20554

*Carol Mattey
Chief, Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Suite 5-C320
Washington, D.C. 20554

*Dorothy Atwood
Legal Adviser
Office of Chairman Kennard
Federal Communications Commission
445 12th Street, S.W.
Suite 8-B201
Washington, D.C. 20554

*Larry Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Suite 5-B303
Washington, D.C. 20554

*Sarah Whitesell
Legal Adviser
Office of Commissioner Tristani
Federal Communications Commission
445 12th Street, S.W.
Suite 8-C302
Washington, D.C. 20554

Rachel J. Rothstein
Brent M. Olson
Cable and Wireless USA, Inc.
8219 Leesburg Pike
Vienna, VA 22182

Donald B. Verrilli, Jr.
Mark D. Schmeider
Maureen F. Del Duca
Douglas H. Hisiao
Thomas D. Armine
Jeffrey I. Ryen
Jenner & Block
601 13th Street, NW
Washington, D.C. 20005

Thomas M. Koutsky
James D. Earl
Covad Communications Company
700 13th Street, NW
Suite 950
Washington, D.C. 20005

Randall B. Lowe
Julie A. Kaminski
Renee Roland Crittendon
J. Todd Metcalf
Piper & Marbury
1200 Nineteenth Street, NW
Suite 700
Washington, D.C. 20036

Ron Eachus
Joan H. Smith
Roger Hamilton
Oregon Public Utility Commission
550 Capitol Street N.E.
Salem, Oregon 97310-1380

Danny E. Adams
Rebekah J. Kinnett
Brian D. Hughes
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Lisa B. Smith
Charles Goldfarb
MCI WorldCom, Inc.
1801 Pennsylvania Ave, NW
Washington, D.C. 20006

Eric J. Branfman
Michael R. Romano
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, D.C. 20007

Karlyn D. Stanley
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, D.C. 20006

Mark Burzych
Foster, Swift, Collins & Smith, PC
313 South Washington Square
Lansing, MI 48933-2193

Lourdes Lucas, Esquire
Centennial Cellular Corp.
Director of Legal Affairs
1305 Campus Parkway
Neptune, NJ 07753

Kenneth E. Hardman
Moir & Hardman
1828 L Street, NW
Suite 901
Washington, D.C. 20036-5104

Margot Smiley Humphrey
Koteen & Naftalin, LLP
1150 Connecticut Avenue, NW
Suite 1000
Washington, D.C. 20036

Steven T. Nourse
Assistant Attorney General
Public Utilities Commission Of Ohio
180 E. Broad Street, 7th Floor
Columbus, Ohio 43215

Kathleen A. Kaercher
Stuart Polikoff
21 Dupont Circle, NW
Suite 700
Washington, D.C. 20036

Robert J. Aamoth
Kelly Drye & Warren LLP
1200 19th Street, NW
Suite 500
Washington, D.C. 20036

David C. Farnsworth, Esq.
Vermont Public Service Board
Drawer 20
Montpelier, Vermont 05620-2701

David Bergmann
Ohio Consumers' Counsel
77 South High Street
15th Floor
Columbus, Ohio 43266-0550

Richard Metzger
Focal Communications Company
1120 Vermont Avenue, NW
Washington, D.C. 20005

Peter Arth, Jr.
Lionel Wilson
Ellen S. Levine
Attorneys for the People of California
and the California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

David R. Conn
McLeodUSA Telecommunications
Services, Inc.
McLeodUSA Technology Park
6400 C Street, SW
Cedar Rapids, IA 52406-3177

L. Marie Guillory
Jill Canfield
4121 Wilson Blvd.
Tenth Floor
Arlington, VA 22203

Ronald Binz
Debra Berlyn
Competition Policy Institute
1156 15th Street, NW
Suite 520
Washington, D.C. 20005

Kirsten M. Pehrsson
Strategic Policy Research
7979 Old Georgetown Road
Suite 700
Bethesda, MD 20814-2429

Theresa V. Czarski
Office of People's Counsel
6 St. Paul Street
Suite 2102
Baltimore, MD 21202

Fiona J. Branton
Information Technology Industry Council
1250 Eye Street, NW
Suite 200
Washington, D.C. 20005

Lee Selwyn
Economics and Technology, Inc.
One Washington Mall
Boston, MA 02108-2617

Michelle W. Cohen
Paul, Hastings, Janofsky & Walker LLP
1299 Pennsylvania Ave, NW
Washington, D.C. 20004

Lonn Beedy
Metro One Telecommunications, Inc.
8405 SW Nimbus Avenue
Beaverton, OH 97008-7159

Glenn B. Manishin
Elise P. Kiely
Frank V. Paganelli
Lisa N. Anderson
Blumenfeld & Cohen –
Technology Law Group
1615 M Street, NW
Suite 700
Washington, D.C. 20036

Lowell Feldman
Bill Magness
Waller Creek Communications, Inc.
1801 N. Lamar
Suite M
Austin, TX 78701

Pat Wood, III
Judy Walsh
Brett A. Perlman
Public Utility Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, TX 78711-3326

William L. Wills
Deborah T. Eversole
Amy E. Dougherty
730 Schenkel Lane
P.O. Box 615
Frankfort, KY 40602

Philip F. McClelland
Joel H. Cheskis
Office of Consumer Advocate
555 Walnut Street
5th Floor
Forum Place
Harrisburg, PA 17101-1923

William Vallee, Jr.
Connecticut Office of Consumer Counsel
10 Franklin Square
New Britain, Connecticut 06051-2605

Colleen Boothby
Andrew M. Brown
Levine, Blaszak, Block & Boothby LLP
220 L Street, NW
Suite 900
Washington, D.C. 20036

James S. Blaszak
Colleen Boothby
Andrew Brown
Levine, Blaszak, Block & Boothby LLP
220 L Street, NW
Suite 900
Washington, D.C. 20036

William P. Hunt, III
Regulatory Counsel
Level 3 Communications, Inc.
1450 Infinite Drive
Louisville, Colorado 80027

Mary C. Albert
Regulatory Counsel
Allegiance Telecom. Inc.
1100 15th Street, NW
Suite 200
Washington, DC 20005

Laura H. Phillips
J.G. Harrington
Barbara S. Esbin
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, D.C. 20036

Russell M. Blau
William L. Fishman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington D.C. 20007

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, NW
Suite 701
Washington, D.C. 20006

Andrew D. Lipman
James M. Moskowitz
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, D.C. 20007

Cynthia B. Miller
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Kenneth Ferree
Goldberg, Godles, Wiener & Wright
1229 19th Street, NW
Washington, D.C. 20036

Robert W. McCausland
Vice President, Regulatory and Interconnection
Allegiance Telecom, Inc.
1950 Stemmons Freeway
Suite 3026
Dallas, Texas 75207

Robert Berger
Russell Merbeth
Barry Ohlson
WinStar Communications, Inc.
1146 19th Street, NW
Suite 200
Washington, D.C. 20036

Charles D. Gray
James Bradford Ramsay
National Association of
Regulatory Commissioners
1100 Pennsylvania Avenue
Suite 603
P.O. Box 684
Washington, D.C. 20044-0684

Susan M. Eid
Tina S. Pyle
Richard A. Karre
1919 Pennsylvania Avenue, NW
Suite 610
Washington, D.C. 20006

Kenneth E. Hardman
Moir & Hardman
1828 L Street, NW
Suite 901
Washington, D.C. 20036-5104

Kent F. Heyman
Scott A. Sarem
Richard E. Heatter
MGC Communications, Inc.
3301 N. Buffalo Drive
Las Vegas, NV 89129

Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
Ross A. Buntrok
Michael B. Hazzard
Kelley Drye & Warren LLP
1200 Nineteenth Street, NW
Fifth Floor
Washington, D.C. 20036

Alan G. Fishel
Arent Fox Kinter Plotkin & Kahn
1050 Connecticut Avenue, NW
Washington, D.C. 20036-5339

Susan W. Smith
Centrytel Wireless, Inc.
3505 Summerhill Road
No. 4 Summer Place
Texarkana, TX 75501

Lawrence E. Sargent
Linda Kent
Keith Townsend
John W. Hunter
Julie E. Rones
USTA
1401 H Street NW, Suite 600
Washington, DC 20005

Steven P. Goldman
Deborah M. Barrett
Teltrust, Inc.
6322 South 3000 East
Salt Lake City, Utah 84121

Robert B. McKenna
U.S. West, Inc.
1020 19th Street, NW
Washington, DC 20036

Robert M. Lynch
Roger K. Toppins
Michael J. Zpevak
Kathleen E. Palter
SBC Communications, Inc.
One Bell Plaza, Room 3703
Dallas, Texas 75202

Ward W. Wueste. Jr.
Thomas R. Parker
GTE Service Corporation
1255 Corporate Drive
Irving, Texas 75038

Jonathan Askin
Vice President – Law
ALTS
888 17th Street, NW
Suite 900
Washington, DC 20006

George N. Barclay
Associate General Counsel
Michael J. Ettner
Senior Assistant General Counsel
General Service Administration
1800 F Street, NW
Room 4002
Washington, DC 20405

William P. Barr
M. Edward Whelan
GTE Service Corporation
1850 M Street, NW
Suite 1200
Washington, DC 20026

Jospeh A. Kahl
Director of Regulatory Affairs
RCN Telecom Services, Inc.
105 Carnegie Center
Princeton, NJ 08540

Scott England
Vice President, Regulatory
New England Voice & Data, LLC
222 Richmond Street
Suite 206
Providence, RI 02903

Russell M. Blau
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
Sprint Corporation
1850 M Street, NW, 11th Floor
Washington, DC 20036

M. Robert Sutherland
Jonathan B. Banks
BellSouth Corporation
Suite 1800
1155 Peachtree Street, NE
Atlanta, GA 30309-3619

Michael E. Glover
James G. Pachulski
Bell Atlantic
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

Carol Ann Bischoff
Executive Vice President and General Counsel
Competitive Telecommunications Association
1900 M Street, NW
Suite 800
Washington, DC 20036

Robert J. Aamoth
Steven A. Augustino
Melissa M. Smith
Kelley Drye & Warren LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Genevieve Morelli
Paul F. Gallant
Qwest Communications Corporation
4250 North Fairfax Drive
Arlington, VA 22203

Linda L. Oliver
Jennifer A. Purvis
Yaron Dori
Hogan & Hartson LLP
555 13th Street, NW
Washington, DC 20004

Michael K. Kellogg
Rachel E. Selinfreund
Kellogg, Huber, Hansen, Todd, & Evans, PLLC
1301 K Street, NW
Suite 1000 West
Washington, DC 20005

Philip L. Verveer
Gunnar D. Halley
Wilkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036

Lawrence G. Malone
General Counsel
New York State Department
of Public Service
3 Empire State Plaza
Albany, NY 12223

Jonathan E. Canis
John J. Heitmann
Kelley Drye & Warren LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Mark C. Rosenblum
Roy E. Hoffinger
Elaine McHale
Stephen C. Garavito
Richard H. Rubin
AT&T Corporation
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Steven G. Bradbury
Paul T. Cappuccio
Patrick F. Philbin
John P. Frantz
Kirkland & Ellis
655 15th Street, NW
Washington, DC 20005

Patrick J. Donovan
James N. Moskowitz
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007

Leonard J. Kennedy
Loretta J. Garcia
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20036

James M. Tennant
President
Low Tech Designs, INC.
1204 Saville Street
Georgetown, SC 29440

Jonathan E. Canis
Edward A Yorkgitis, Jr.
Michael B. Hazzard
Kelley Drye & Warren LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

William T. Lake
William R. Richardson, Jr.
Samir Jain
David M. Sohn
Todd Zubler
Wilmer, Cutler & Pickering
2445 M Srteet, NW
Washington, DC 20037

Jeffrey S. Linder
Suzanne Yelen
Wiley, Rein & Fielding
1717 K Street, NW
Washington, DC 20006

Dana Frix
Patrick J. Donovan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007

Glenn B. Manishin
Blumenfeld & Cohen – Technology Law Group
1615 M Street, NW
Suite 700
Washington, DC 20036

Walter Steimel, Jr., Esq.
Marjorie K. Conner, Esq.
Edwin G. Kichline, Esq.
Hunton & Williams
1900 K Street
Washington, DC 20006

Michael E. Katzenstein
Vice-President and General Counsel
OpTel, Inc.
1111 W. Mockingbird Lane
Dallas, Texas 75247

Stephen Davis
Chief, Office of Policy Development
Public Utilities Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711

Laurence E. Harris
David S. Turetsky
Terri B. Natoli
Carolyn K. Stup
Teligent, Inc.
Suite 400
8065 Leesburg Pike
Vienna, Virginia 22182

David W. Carpenter
Mark E. Haddad
Peter D. Keisler
Michael J. Hunseder
Scott M. Bohannon
Rudolph M. Kammerer
Sidley & Austin
1722 I Street, NW
Washington, DC 20006

Donald W. Downes
Glenn Arthur
Jack R. Golberg
John W. Betkoski
Linda Kelly Arnold
Connecticut Department of
Public Utility Control
Ten Franklin Square
New Britain, CT 06051

Diane C. Munns
General Counsel
William H. Smith, Jr.
Federal and Legislative Programs Coordinator
Joanna Benson
Iowa Utilities Board
350 Maple Street
Des Moines, Iowa 50319