

a new building wants to continue to purchase service from the CLEC, the Commission should require the ILEC to build a loop to that building *just so the CLEC can use it to serve its customer. Id.* at 82. But developers routinely seek competitive bids from ILECs *and* CLECs to provide service to new businesses and residential tracts, and GTE frequently has lost out to CLECs in such competitions. ILECs have no inherent advantage over CLECs in providing service to new developments, and therefore any loop facilities put in place to serve new developments are not critical to CLECs' ability to compete. There is therefore no rational basis for distinguishing ILEC and CLEC facilities in this context. Murphy Reply Declaration at 36.

Ultimately, the Big Three and other commenters have done nothing to rebut GTE's factual presentation that numerous CLECs are using their own wireline and fixed wireless loops to serve business and MDU customers with more than 20 lines. Likewise, the Big Three have not offered the Commission any reason to press ILECs into service building new loops for CLECs when CLECs have proven themselves quite capable of deploying their own facilities. The Commission should therefore conclude that CLECs are not "impaired" within the meaning of section 251(d)(2) without access to unbundled ILEC loops serving customers with 20 or more lines, and without access to ILEC-built loops serving new commercial and residential developments.

IV. THE RECORD CONFIRMS THAT CLECs REQUIRE ACCESS TO ILEC OPERATIONS SUPPORT SYSTEMS ONLY WHEN CLECs PURCHASE ILEC UNES OR RESOLD SERVICES.

There is general agreement among the commenters that CLECs require access to ILEC operations supports systems only when they use ILEC network elements or resold services. For

example, Level 3 states that operations support systems “comprise the mechanisms by which competitive LECs obtain pre-ordering, ordering, provisioning, maintenance and repair, and billing functions *associated with obtaining UNEs and services from incumbent LECs.*” Level 3 Communications Comments at 16 (emphasis added). Similarly, AT&T confirms that “[a]ccess to OSS is complementary to all other unbundled network elements.” AT&T Comments at 134; *see also* NorthPoint Comments at 20.

No commenter has suggested that CLECs require access to ILEC OSS when they do not use any ILEC facilities or services. As GTE explained in its Comments, there is a competitive market for CLEC internal OSS, so access to ILEC OSS for the purpose of storing information is unnecessary.³³ Therefore, the Commission should only require ILECs to unbundle OSS where the CLEC uses ILEC UNEs or resold services.

On a different issue, ALTS argues “that the Commission should affirm and clarify that nondiscriminatory access to loop information regarding physical specifications, including loop type, length, conditioning and electronics already in place, is required,” and that CLECs should have access to any electronic systems the ILEC has that provide loop qualification information. ALTS Comments at 60-61. However, many ILECs, including GTE, do not have these types of systems. In addition, even when there are loop inventory systems, they are not 100 percent accurate. To meet its nondiscrimination obligation, an ILEC can only be required to provide CLECs with the same access to information as the ILEC itself uses. To the extent that ILECs

³³ GTE Comments at 71-72.

engage in a manual physical inspection of loops to determine qualification information, CLECs have no right to demand the use of any electronic process.

V. NO ADDITIONAL UNEs MEET THE SECTION 251(d)(2) STANDARD.

In the Notice of Proposed Rulemaking, the Commission asked whether certain equipment and facilities beyond those originally identified in Rule 319 should be unbundled. As GTE showed in its Comments, none of the facilities cited by the Commission satisfies the Act's requirements. Some are not even network elements and all fail to meet the "impair" standard in section 251(d)(2). Although numerous CLECs advocate a broad expansion of the UNE "list," these requests are entirely inconsistent with the Act's requirements and sound competition policy.

A. The Comments Confirm that ILECs Have No Legacy Advantage in the Deployment of Advanced Services Network Elements.

In its Comments, GTE demonstrated that ILECs are not dominant in the advanced services market and that cable companies and CLECs lead ILECs by a wide margin in the deployment of these services. Advanced services equipment is readily available in the marketplace from major manufacturers, and, in fact, CLECs have purchased more of this equipment than ILECs have. DSLAMs and packet switches are scalable and cost-effective, making them easily within reach of large and small CLECs. The fact that advanced services are provided in a new market with no dominant incumbent, combined with the wide availability of advanced services equipment, demonstrates conclusively that CLECs are not impaired in their ability to offer these services without access to ILEC equipment. GTE Comments at 74-80.

The recognition that CLECs do not need access to ILEC advanced services equipment is shared by non-ILEC commenters. For example, the Information Technology Industry Council (“ITIC”) confirms that “ILECs have no legacy advantage with respect to the installation and use of advanced services electronics such as Digital Subscriber Line Access Multiplexers (‘DSLAMs’).” ITIC Comments at 6. ITIC also agrees that “the ILECs’ competitors can acquire and install equipment for advanced services on a relatively equal footing with the ILECs. The relevant electronic equipment is produced by numerous vendors, establishing a competitive equipment market that can effectively discipline prices, provisioning, and other service terms for the foreseeable future.” *Id.* at 7. Likewise, WinStar acknowledges that fixed wireless technology -- widely deployed by CLECs -- is better suited than the embedded wireline network to provide advanced services. WinStar Comments at 4.

Even CLECs acknowledge that advanced services equipment is available in the open market from a variety of commercial vendors. For example, Rhythms NetConnections admits that:

There are various other elements however, that while important to the provision of competitive telecommunications services, including advanced services, probably do not satisfy the necessary and impair standard. For example, because they can be self-supplied digital subscriber line access multiplexers (“DSLAMs”) need not, with a few limited exceptions, be provided on an unbundled basis. Likewise, switching may now be sufficiently available on wholesale basis, for many if not most applications, that it may not be necessary to require incumbent LECs to provide this functionality on an unbundled basis.

Rhythms NetConnections Comments at 12. NorthPoint, another major player in the advanced services market, also concludes that “[w]here competitive LECs enjoy access to loops and

collocation, any competitive LEC can provide the necessary infrastructure (DSLAMs and packet switches) required to provide advanced services.” NorthPoint Communications Comments at 18.

Against this background, there is no basis to the claims of parties such as Sprint, CompTel, and e.spire that advanced services elements, including DSLAMs and packet switching, should be unbundled.³⁴ Advanced services equipment is available to ILECs and CLECs on the same commercial terms. Under no reasonable definition of the “necessary” and “impair” standard will CLECs suffer without access to these elements.³⁵ In fact, no commenter has provided any evidence that this equipment is available to CLECs on less favorable terms than it is to ILECs or that CLECs are impaired in the deployment of advanced services without access to ILEC equipment.³⁶ In addition, as GTE explained in its Comments, requiring ILECs to

³⁴ Sprint Comments at 35; Competitive Telecommunications Association Comments at 38 (“CompTel Comments”); e.spire Communications and Intermedia Communication Comments at 31-32 (“e.spire *et al.* Comments”).

³⁵ Some commenters attempt to avoid the required section 251(d)(2) “impair” analysis by claiming that the loop should be defined to include all transmission-enhancing equipment attached to the loop, such as DSLAMs and multiplexing equipment. *See* MCI WorldCom Comments at 45; AT&T Comments at 78; CompTel Comments at 32. DSLAMs and other equipment attached to the loop, however, are not part of the “raw material” loop facility. For example, a DSLAM is deployed together with a conditioned loop in order to produce xDSL service. Each element must meet the “impair” standard; an element that does not meet the standard cannot be “bootstrapped” to another so that CLECs can claim access to both.

³⁶ e.spire suggests that ILECs be required to provide CLECs with connectivity between ports on data switches at 8, 16, 32, 56, and 64 kbps, every increment of 56 or 64 kbps through 1.544 Mbps, and at intermediate increments through the DS3 level. *e.spire et al.* Comments at 31-32. Since CLECs can acquire, and have acquired, packet switches on the same terms as ILECs, CLECs do not need access to ILEC switches and or connectivity between ports. Even if CLECs were entitled to such connectivity, they would not be entitled to custom order every possible speed and increment of transport. *See also* NorthPoint Comments at 18-19 (requesting a CLEC-specified amount of capacity between the DSLAM and the CLEC’s network).

unbundle advanced services equipment would reduce the incentive of both ILECs and CLECs to invest in these new services. GTE Comments at 79-80.

Some parties nonetheless argue that where loops and collocation are unavailable, CLECs cannot provide advanced services to customers without access to the ILEC's advanced services equipment.³⁷ However, it is unlikely that this situation will ever occur. First, in every case in which it is technically feasible, GTE provides access to conditioned loops in those central offices in which it provides conditioned loops for itself. Second, even in those areas where it does not offer advanced services, GTE will provide conditioned loops to CLECs via a *bona fide* request process.³⁸ Third, the Commission's recently adopted collocation rules, though overly intrusive, guarantee that CLECs will be able to collocate advanced services equipment in or immediately next to ILEC central offices (or, failing that, to take advantage of virtual collocation).

Finally, a number of parties argue that when DLCs are used, there is often insufficient collocation space so CLECs must have access to ILEC DSLAMs and packet switches.³⁹ However, alternatives to unbundling ILEC equipment do exist. GTE does not use DLCs integrated with DSLAMs, but instead has chosen an architecture in which remotely located

³⁷ See, e.g., Rhythms NetConnections Comments at 12; NorthPoint Communications Comments at 18-19.

³⁸ In its Comments, GTE stated that it provided access to conditioned loops via tariff in those areas in which GTE does not condition loops for its own use. Although GTE may tariff this offering in the future if it receives a large volume of requests, it currently offers conditioned loops through a *bona fide* request process.

³⁹ See, e.g., MCI WorldCom Comments at 55; Rhythms NetConnections Comments at 12-13, 16; NorthPoint Comments at 18-19; Covad Comments at 39-41.

DSLAMs are situated separate from, but adjacent to, the DLC. This option is available to CLECs on a *bona fide* request basis and allows them to provide advanced services in the same way as GTE, without accessing GTE DSLAMs and packet switches.⁴⁰ When a CLEC remotely deploys a DSLAM in this manner, there are tariffed special access options available to the CLEC to connect its equipment to its switch.

B. Dark Fiber Does Not Meet the Definition of an Unbundled Element, But, Even if it Did, it is Readily Available in the Marketplace.

1. No Commenter Has Shown that Dark Fiber Meets the Definition of a Network Element.

The Act defines a “network element” as a “facility or equipment used in the provision of a telecommunications service.” 47 U.S.C. § 153(29). Because dark fiber, by its nature, is not and cannot be used to provide any service, it does not meet this definition. Claims to the contrary cannot withstand scrutiny.

For example, the Iowa Utilities Board states (without supporting arguments) that dark fiber meets the definition of a network element, but concedes that “it is a stretch to label it a loop or a trunk while it is unlit.” Iowa Utils. Bd. Comments at 9. For this very reason, however, dark fiber is not a network element. Until dark fiber is used in some way, it does not meet the statutory definition. Similarly, ALTS asserts that “[u]nlit or dark fiber is clearly the type of equipment that can be used in provisioning a telecommunications service. Otherwise, ILECs would not own it and CLECs would not want unbundled access to it.” ALTS Comments at 56.

⁴⁰ CLECs also always have the option of purchasing ADSL as a service through GTE’s interstate access tariff.

This argument, however, subtly alters the definition of network element -- from “is used” to “can be used” -- in a manner that dramatically and improperly expands the scope of potential unbundling. Moreover, many things owned by ILECs, from office buildings to paper clips, might be helpful to CLECs, but that does not make them network elements. Finally, although the Texas PUC claims that dark fiber is no different than the unused wires within a telephone cable, this is not the case. Copper cables and fiber optic cables are deployed in fundamentally different ways. Copper cable is installed to provide optimum flexibility. For example, a 600-pair cable may have 100 vacant pairs at any point in time. Although some pairs may be idle at one particular moment, all pairs are used to provide service. In contrast, dark fiber is unused inventory. These fibers remain dark until they are needed. They are not used in a mix-and-match fashion in the same way as copper feeder and distribution pairs. Since dark fiber is not used to provide service, it does not meet the statutory definition.⁴¹

2. In Any Event, Because There is Ample Dark Fiber Available in the Market, No Impairment Finding Can Be Made.

Even if dark fiber were a network element, it would not meet the section 251(d)(2) standard. Numerous commenters have shown that dark fiber is readily available in the marketplace from both telecommunications carriers and independent companies. In its

⁴¹ CO Space Services notes that some federal courts have determined that dark fiber meets the definition of a network element. CO Space Services Comments at 2-3. However, at least one federal court has determined that dark fiber does not meet the statutory definition. *See MCI Telecommunications Corp., v. Pacific Bell*, 1998 U.S. Dist. LEXIS 17556 (N.D. Cal. Sept. 29, 1998). GTE submits that the cases cited by CO Space Services were wrongly decided; in any event, they do not bind the Commission.

Comments, GTE explained that many firms, including GST and Metropolitan Fiber Networks (“MFN”), have installed extensive fiber networks and lease their excess capacity. GTE Comments at 82-84. Indeed, MFN states in its comments that “[u]pon completion, MFN’s network is expected to consist of approximately 1.1 million fiber miles covering approximately 8,930 route miles.” MFN Comments at 2. Notably, these networks include both transport and loop fiber. Likewise, UTC states that utilities have installed over 750,000 fiber miles. UTC Comments at 3. In a survey of UTC’s over 1,000 members, 19 percent of those responding stated that they leased dark fiber to third parties. *Id.*

Despite the substantial evidence that dark fiber is readily available, Qwest claims that “[i]t is clear that without access to dark fiber, competitors would be impaired in their ability to provide advanced services. The deployment of fiber optic facilities imposes substantial costs, delays, and difficulties on competitors.” Qwest Comments at 89. However, Qwest provides no evidence that dark fiber is not available in the market. Indeed, Qwest acknowledges that it leases the excess capacity on its inter-city fiber network to other carriers and gives no reason why CLECs with local fiber would not do the same.

Choice One and other CLECs assert that “dark fiber is not available from third parties in the small portions of capacity that many competitive LECs would need to provide service.”⁴² However, it is GTE’s experience that fiber is available in both small and large amounts. Therefore, CLECs of all sizes should not be impaired in any way without access to ILEC fiber.

⁴² Choice One, Network Plus, GST Telecom, CTSI, and Hyperion Comments at 25 (“Choice One *et al.* Comments”).

CO Space claims that ILEC transport is not an adequate substitute for dark fiber because ILECs use the SONET protocol while CO Space customers use the Fiber Channel protocol. CO Space Services Comments at 9-10. However, CO Space can purchase special access from the ILEC or buy fiber transport from alternative providers, such as MFN. Thus, it is not impaired by lack of access to dark fiber. In addition, CO Space asserts that transport includes unneeded services, which raise the costs to CLECs. *Id.* This is not the case. ILEC transport offerings are reasonably priced and, as the Supreme Court noted, a small increase in cost (assuming there is any difference between transport rates and cost-based dark fiber rates) does not “impair” CLECs from competing in the market.

CO Space’s request that the Commission require ILECs to install dark fiber on behalf of CLECs is unsupported by the Act and inconsistent with sound policy. *Id.* at 16. First, ILECs are required under section 251(c) to provide CLECs with access to existing network elements; the Act simply does not compel ILECs to act as construction companies for CLECs. Such a requirement would also be in direct conflict with the Eighth Circuit’s determination regarding better-than-parity services. Second, ILECs have no advantage *vis-à-vis* other carriers or firms in the deployment of dark fiber. If GTE had such advantages, it would not lease fiber but would always install its own facilities. As Qwest acknowledged in its comments, GTE does in fact lease fiber from other sources. Qwest Comments at 90. Third, forcing ILECs to construct facilities at every CLEC’s whim would require ILECs to invest huge amounts of resources in accommodating CLEC requests rather than serving ILEC customers. This would give CLECs

a significant, unjustified advantage over ILECs and would not be consistent with promoting fair competition.⁴³

Finally, forcing ILECs to unbundle dark fiber would make it more difficult for them to meet their carrier-of-last-resort obligations and discourage long-term planning. ILECs are required to provide service to all customers in their franchise areas within a reasonable time. Compelled unbundling of dark fiber thus could jeopardize service to consumers and undermine the express objectives of section 254.

C. The Act Does Not Require an ILEC To Provide CLECs with Combinations of Elements that it Does Not Provide for Itself or its Customers.

1. The Eighth Circuit's Determinations Regarding Combinations and Better-Than-Parity Service Are Correct and Are Still Controlling.

ILECs are not required to provide CLECs with combinations of UNEs that they do not provide to themselves or their customers. Section 251(c)(3) clearly states that CLECs must combine unbundled elements and the Eighth Circuit confirmed this conclusion:

As the Eighth Circuit noted, "the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves." *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753,813 (8th Cir. 1997). The Commission did not appeal that ruling and the Supreme Court's decision in *Iowa Utilities Board* did not affect the Eighth Circuit's determination. While the Court stated that ILECs may not disassemble elements that already are combined, it neither expressly nor implicitly suggested that ILECs have an affirmative duty to combine unbundled network elements at a CLEC's behest. *Iowa Utils. Bd.*, 119 S. Ct. at 736-38.⁴⁴

⁴³ MFN requests that the Commission require ILECs to provide Competitive Alternate Transport Terminal ("CATT") connectivity. MFN Comments at 7. Although GTE agrees that CATT connectivity may prove to have benefits, there is no basis in the Act upon which require it. CATT is not a UNE, a form of interconnection, or a method of collocation.

⁴⁴ GTE Comments at 84.

In addition, section 251(c)(3) does not compel an ILEC to provide better service to CLECs than it provides to itself. This interpretation was also confirmed by the Eighth Circuit's decision and left undisturbed by the Supreme Court.⁴⁵

ALTS nonetheless claims that the Supreme Court's reinstatement of Rule 315(b) allows the Commission to require that "ILECs provide UNEs in any technically feasible combination." ALTS Comments at 80. Specifically, ALTS argues that the Supreme Court's rejection of the Eighth Circuit's reasoning on Rule 315(b) "suggests" that the Eighth Circuit also erred in vacating Rules 315(c)-(f) and that the Supreme Court did not reinstate those rules only because they were not on appeal. *Id.* After noting that the Commission and other parties have requested that the Eighth Circuit remand or reinstate those Rules and that this request is still pending, *id.*, ALTS somehow concludes that the Commission should ignore the Eighth Circuit's holding and require ILECs to combine UNEs in any technically feasible combination.

ALTS essentially asks the Commission to violate the law. First, the fact that the Eighth Circuit's invalidation of Rules 315(c)-(f) was not appealed means that the Eighth Circuit's decision is still good law. The Commission chose not to appeal those rules. That choice does not then confer on the Commission or any CLEC the right to ignore the Eighth Circuit's decision. Second, and in any event, the reinstatement of Rule 315(b) in no way suggests that the Eighth Circuit's holding regarding Rules 315(c)-(f) was incorrect. Those rules required ILECs to combine UNEs for CLECs, even though section 251(c)(3) clearly states that ILECs shall

⁴⁵ *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

provide UNEs “in a manner that *allows requesting carriers* to combine such elements.” 47 U.S.C. § 251(c)(3) (emphasis added). In contrast, Rule 315(b) simply requires ILECs to leave elements that are already combined as they are. Therefore, the Commission has no authority to readopt Rules 315(c)-(f).

AT&T uses similarly misguided arguments to support its conclusion that the Commission must reinstate Rules 315(c)-(f). AT&T Comments at 136. AT&T contends that the Eighth Circuit supported its invalidation of Rules 315(b) and 315(c)-(f) with the same “three interrelated grounds that have all been fatally undermined” by the Supreme Court’s decision “and other subsequent events.” *Id.* at 138. There is no basis for this claim.

The first ground cited by AT&T is the Supreme Court’s determination that the Eighth Circuit used too restrictive a standard of review. AT&T states that:

had it [the Eighth Circuit] recognized the Commission’s general rulemaking authority under Section 201(b) and applied the standard of review employed in *Southwestern Cable* and other pertinent cases, it would have asked whether the Commission’s rules requiring incumbent LECs to combine network elements reasonably implemented the Act’s objectives and were not inconsistent with the Act’s terms – a standard of review under which the rules would have easily been upheld.⁴⁶

This is not the case. As explained above, section 251(c)(3) specifically requires that CLECs combine elements themselves – no “interpretation” of the Act is necessary. As the Supreme Court stated in *Chevron*, when interpreting legislation “[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear,

⁴⁶ AT&T Comments at 140.

that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁴⁷ Thus, the standard of review is irrelevant; Rules 315(c)-(f) are inconsistent with the Act.

AT&T further argues that the Commission can ignore the Eighth Circuit’s decision because “the Supreme Court reinstated Rule 315(b) on the ground that ‘unbundling’ was a pricing term, not a requirement of physical separation, and held that the rule was ‘entirely rational, finding its basis in § 251(c)(3)’s nondiscrimination requirement.” AT&T Comments at 141 (footnote omitted). However, all the Supreme Court decided was that “it is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice [disassembling network elements].” *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 738. The Court did not hold that the nondiscrimination requirement allowed the Commission to ignore the precise language of the section 251(c)(3).

Finally, AT&T argues that the Eighth Circuit assumed that ILECs would permit CLECs to combine elements themselves, but that ILECs have not allowed this. AT&T Comments at 139, 141-42. If AT&T believes that some ILECs are not fulfilling their obligations, AT&T may file a complaint. However, mere allegations that some ILECs are not complying with the statute’s requirements do not give the Commission leave to ignore the Eighth Circuit’s decision.⁴⁸

⁴⁷ *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 842-43 (1984).

⁴⁸ AT&T also urges the Commission to readopt Rules 305(a)(4) and 311(c), which required that ILECs provide CLECs with better-than-parity access and interconnection. AT&T Comments at 144. AT&T argues that, since these rules stemmed from the same “considerations”

2. ILECs Cannot Be Required To Provide CLECs With Extended Loops.

A number of commenters suggest the Commission should require ILECs to provide the extended link (loop plus transport) and the enhanced extended loop (loop to the central office plus dedicated transport from the central office to the office in which the CLEC is collocated plus access to multiplexing and concentration equipment) as unbundled network elements.⁴⁹ As noted above, ILECs are not required to combine elements for CLECs or to provide combinations to CLECs that they do not provide to themselves. Moreover, the extended loop does not meet the “impair” standard. As explained in Section III.A above, CLECs can obtain this functionality in several ways other than as a UNE. They can self-provision the needed facilities through collocation, they can purchase the transport needed from third parties, they can obtain the loop-transport combination through ILEC special access tariffs, and they can buy dedicated transport. Since all of these methods will provide the CLECs with the same functionality, CLECs cannot be impaired by a lack of access to the extended loop or the enhanced extended loop.

D. ILECs Are Only Required to Provide Conditioned Loops To CLECs Where ILECs Provide Such Loops To Themselves and Loops Are Considered Subject to an Unbundling Obligation.

The Eighth Circuit’s decision confirmed that ILECs do not have to provide CLECs with better service or facilities than ILECs provide to themselves. GTE Comments at 86-87. As

as Rules 315(c)-(f) and the Eighth Circuit supported its decision on the same (now allegedly untenable) bases, the Commission can therefore readopt them. However, for the reasons noted above, none of the grounds cited by AT&T give the Commission authority to overrule the Eighth Circuit’s determinations. Once again, therefore, the unbundling rules that AT&T and the Commission elected not to challenge before the Supreme Court cannot now be reinstated.

⁴⁹ See, e.g., ALTS Comments at 62-69; AT&T Comments at 137-138.

explained above, despite AT&T's claims to the contrary, the Supreme Court's decision in *Iowa Utilities Board* did not undermine this determination. Therefore, ILECs must provide CLECs with conditioned loops as UNEs only where ILECs themselves offer services that require such loops. Nevertheless, AT&T argues that:

The Commission has correctly found -- and the Eighth Circuit has affirmed -- that the kind of loop conditioning required to provide xDSL capable loops (which involves removing all passive or active electronics such as bridge taps, low pass filters, and range extenders) constitutes a "modification" necessary for incumbents to meet their obligations to provide nondiscriminatory access.⁵⁰

This is not correct. As AT&T acknowledges, the Eighth Circuit actually stated: "we endorse the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.'"⁵¹ Conditioned loops do not "accommodate interconnection or access to network elements." AT&T Comments at 76 (footnote omitted). Rather, they are a wholesale change to an existing element -- a loop -- to allow that loop to support new services. As long as ILECs provide CLECs with access to conditioned loops on the same basis as ILECs provide such loops to themselves and their customers, ILECs have met their nondiscrimination obligation. Providing conditioned loops wherever the CLEC requests them would be giving CLECs better-than-parity service.

NorthPoint suggests that ILECs find alternative "home run" copper loops by moving a customer served by copper onto fiber. NorthPoint Comments at 16. However, GTE does not

⁵⁰ AT&T Comments at 76 (footnote omitted).

⁵¹ *Id.* at 76 n. 166 quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813, n.33.

disrupt one customer's service by moving him or her off of copper pairs to make that facility available for some other potential GTE ADSL customer. Therefore, GTE should not be required to move customers for CLECs.

GTE provides CLECs with conditioned loops as UNEs in those central offices in which GTE conditions loops for its own use. This ensures that CLECs are not at a disadvantage *vis-à-vis* GTE in the deployment of advanced services. In addition, GTE provides conditioned loops via a *bona fide* request process in those areas in which it does not provide conditioned loops to itself.

E. Inside Wire on the Customer's Side of the Demarcation Point Is Not a Network Element, and ILECs Have No Right of Access To that Wire.

Inside wire on the customer's side of the demarcation point is, by definition, not part of the ILEC network and therefore cannot be a network element. Even if it were part of the ILEC network, it does not meet the "impair" standard because there is substantial competition to install such wiring. In addition, the Commission has already determined that ILECs cannot exercise any residual rights they may have in inside wire on the customer's side of the demarcation point and that customers have complete control over that wiring. GTE Comments at 89-90.

Despite the Commission's definitive decisions in this area, some commenters state that "the Commission should make clear that all wiring owned by the incumbent LEC will be a UNE even if it is on the customer side of the demarcation point."⁵² This request is nonsensical. The definition of the demarcation point is "the point at which the telephone company's facilities and

⁵² Choice One *et al.* Comments at 24-25; *see also* Level 3 Comments at 21.

responsibilities end and customer-controlled wiring begins.”⁵³ ILECs cannot grant CLECs access to inside wiring on the customer’s side of the demarcation point because ILECs have no right of access to grant.⁵⁴ If CLECs need access to a customer’s inside wire, they will have to request access directly from the customer in the same way as do ILECs. If CLECs encounter difficulties with individual building owners, those problems should be dealt with directly, not by attempting to put additional burdens on ILECs.

Teligent suggests that the Commission require ILECs to move the demarcation point to the minimum point of entry (“MPOE”). Teligent Comments at 2. However, this is already a Commission requirement for wire installed after August 13, 1990. *See* 47 C.F.R. § 68.3. Requiring ILECs to move the demarcation point in older buildings could impose significant costs on building owners. First, owners would be required to bear the costs of moving any ILEC equipment from the demarcation point to the MPOE. Second, contrary to claims of Choice One, ILECs have not depreciated the costs of all in-premises cable. Choice One *et al.* Comments at 24-25. If the demarcation point is moved, owners would have to compensate ILECs for the value of any cable between the old demarcation point and the new demarcation point. Therefore, mandating relocation of the demarcation point would impose additional costs on building owners rather than benefitting MDU tenants.

⁵³ *Review of Sections 68.104 and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 12 FCC Rcd 11897, 11899 (1997).

⁵⁴ At most, ILECs have a residual ownership interest in some inside wire, but no right to access such wire.

As GTE noted in its Comments, in-premises wiring located on the ILEC's side of the demarcation point is actually an issue of sub-loop unbundling since all facilities up to the demarcation point are part of the loop. These issues are addressed below.

F. Sub-Loop Unbundling Must Be Addressed on a Case-By-Case Basis.

In its comments, GTE explained that mandatory, nationwide sub-loop unbundling would be neither consistent with section 251(d) of the Act nor practical from a technical or administrative perspective. First, sub-loop unbundling does not fall within section 251(d)(2)'s "impair" standard and would not be necessary in any event because CLECs can always take the whole loop to provide service. GTE Comments at 87. Second, sub-loop unbundling continues to raise complex technical, administrative, and operational issues given varying loop configurations and loop technologies. *Id.* As such, sub-loop unbundling should not be addressed through nationwide rules; rather, it should be provided, where feasible, through a *bona fide* request process. The Ohio PUC agrees that "[t]o date, in Ohio we have not seen evidence to suggest that cooper loops can be unbundled in a technically feasible manner. . . . It appears impossible to have a 'one-size-fits-all' approach [to sub-loop unbundling] in Ohio. As a result, the [Ohio PUC] fails to see how a one-size-fits-all approach [could] possibly be implemented at the national level." Ohio PUC Comments at 17.

Contrary to the suggestions of ALTS and many CLECs, mandatory sub-loop unbundling does not fall within the section 251(d)(2) statutory standard.⁵⁵ As pointed out in its comments,

⁵⁵ See ALTS Comments at 47-48; AT&T Comments at 85; Level 3 Comments at 18.

GTE offers sub-loop unbundling on a *bona fide* request basis in approximately 172 interconnection agreements, but has yet to receive a firm request from a CLEC in response to this option.⁵⁶ This fact strongly indicates that sub-loop unbundling is not viewed by CLECs as essential or even useful.

Moreover, the record underscores GTE's concern that an across-the-board sub-loop unbundling requirement is not feasible from either a technical or administrative standpoint. For example, CLECs suggested a wide range of unbundling configurations and different views on precisely where such unbundling must occur in an ILEC's network. These proposals included the placement of cards in digital loop carrier equipment,⁵⁷ access to multiplexing equipment (regardless of where the equipment is attached to the loop),⁵⁸ and "copper wire from the customer's premises to the remote terminal."⁵⁹ These proposals explicitly (or at least implicitly) acknowledge that the feasibility of sub-loop unbundling solutions will vary with the CLEC's network requirements and the type of ILEC network configuration.⁶⁰

For example, providing unbundled access to GTE multiplexing/concentration equipment would be difficult. DS1s are hard-wired into the equipment, so there is no cross-connect access

⁵⁶ GTE Comments at 89 & n.73. The Ohio PUC similarly confirms that despite a *bona fide* request process in Ohio, "there have been no sub-loop BFRs." Ohio PUC Comments at 18.

⁵⁷ NorthPoint Communications Comments at 17-18.

⁵⁸ AT&T Comments at 84-85.

⁵⁹ Covad Comments at 40.

⁶⁰ *See, e.g.*, NorthPoint Communications at 17 (proposing different sub-loop unbundling requirements for copper versus fiber feeder systems).

available to accommodate another carrier's DS1. Similarly, access to equipment within the remote terminal would also be problematic. The DLC remote terminal cabinets deployed by GTE are designed to house specific electronic components. There is seldom sufficient space in the cabinet for additional cabling or electronic components. If GTE or a CLEC were to attempt to add additional cabling within the ILEC's remote terminal cabinet, the manufacturer's warranty could be voided, leaving GTE responsible for the costs of any malfunction or damage to the equipment.

In addition, GTE strongly disagrees with Level 3 and others who suggest that the Commission should designate "premises and building entrance facilities such as junction and utility boxes, house and riser cable, and horizontal distribution plant" as unbundled network elements.⁶¹ Unbundling of these facilities would prove nearly impossible as an administrative matter because ILECs in virtually all cases do not control access to the conduit and equipment rooms where this cable is located. Rather, these facilities are located on private property and are controlled by the building owner, and ILECs are not immune from many of the same access issues in multiple dwelling unit buildings and other settings noted by CLECs. Therefore, access to building facilities and the placement of in-premises wire are properly left to private negotiations between the CLEC and property owner.

⁶¹ Level 3 Comments at 21; *see also* AT&T Comments at 85, MCI WorldCom Comments at 47; MGC Communications Comments at 29-30; Teligent Comments at 4 n.4; WinStar Communications Comments at 7.

G. None of the Miscellaneous Additional Facilities Identified as UNEs By Commenters Meets the Statutory Requirements.

Several parties asked for unbundling of facilities even beyond those cited in the Notice of Proposed Rulemaking. None of these meets the requirements of the Act, and thus none must be made available as a UNE.

For example, ALTS requests that the Commission require ILECs to unbundle ports on their data switches or routers and to provide a virtual circuit at a series of pre-defined bit rates between ports. ALTS Comments at 72-75. The asserted (but erroneous) justification for this UNE is that, without such access, CLECs are unable to terminate CLEC data traffic on the ILEC data network. *Id.* ALTS is actually requesting that ILECs be required to interconnect with CLEC networks in order to facilitate the mutual exchange of traffic. ILECs are required to provide interconnection under section 251(c)(2), and GTE has entered into hundreds of interconnection agreements with CLECs. Further, access to ports and data routers is not needed for CLECs to terminate Internet Protocol (“IP”) traffic, contrary to ALTS’s claims. IP-based traffic is predominantly routed to and from the Internet through ISPs which interconnect with ILECs. Thus, CLECs are currently terminating their data traffic on ILEC networks and will be able to continue to do so.

Covad suggests that ILECs be required to provide DS3 links between a customer’s premises and the serving wire center. Covad Comments at 50-53. GTE already provides these links to CLECs as UNEs where they are available. However, ILECs cannot be required to

provide DS3 links to CLECs where ILECs do not provide such links for themselves, since this would give CLECs better-than-parity service.

Some commenters have also raised the issue of spectrum unbundling.⁶² This issue is being dealt with in CC Docket No. 98-147 and is not properly raised here. In any event, as GTE will explain in its comments in that proceeding, loop spectrum neither meets the statutory definition of network element nor passes the “necessary” and “impair” test. Moreover, even if it did, forcing ILECs to provide unbundled spectrum would undermine their incentives to deploy advanced services.

VI. THE COMMISSION SHOULD SUNSET AND REVISIT ITS UNBUNDLING REQUIREMENTS IN TWO YEARS TO ENSURE THAT THEY CONTINUE TO COMPLY WITH THE COMMANDS OF SECTION 251(d)(2).

In the *First Report and Order*, the Commission underscored the “vital” need to “reexamine [its] rules over time in order to reflect developments in the dynamic telecommunications industry.” *Id.* ¶ 246. As Chairman Kennard stated in his testimony before the Senate Commerce Committee, “[t]raditional industry boundaries are rapidly disappearing, and the communications world is converging. Already, we are seeing glimpses of a future in which phone lines will deliver movies, cable lines will carry phone calls, and the airwaves will carry both.”⁶³ The Supreme Court’s instructions on remand render even more acute the need for the Commission to reconsider its unbundling rules within a reasonable time. Because the Court

⁶² See NorthPoint Comments at 15-16; Rhythms NetConnections Comments at 17-18.

⁶³ Oral Testimony of William E. Kennard Before the Senate Commerce Committee, at 2 (May 26, 1999).

made clear that the Commission's unbundling rules could not satisfy the requirements of section 251(d)(2) unless they were based on the "availability of elements outside the incumbent's network," *Iowa Utils. Bd.*, 119 S. Ct. at 735, and because the Commission can predict with complete certainty that the landscape of elements available outside ILEC networks will change dramatically in the next two years, the Commission must revisit its unbundling rules to assure that they continue to comport with the letter and purpose of the Act.

Few commenters oppose a sunset of the Commission's unbundling rules when coupled with Commission reconsideration of the marketplace evidence concerning the availability of substitute elements. Nevertheless, AT&T argues that the Commission should not reexamine its unbundling obligations because the Commission "would have no way at this time of knowing whether market conditions would actually support elimination of the unbundling requirement for a particular UNE at the sunset date." AT&T Comments at 58. But in its own comments, AT&T concedes that the "general availability of cable telephony" will "gain momentum . . . after 2000." *Id.* at 71. Indeed, in the eight representative GTE markets studied by PNR, at least four different companies -- AT&T, Cox Communications, MediaOne (planning to merge with AT&T), and Time Warner Telecom -- plan to roll out cable-based local service within the next two years. PNR Report at 29, 31, 75. Even Congress concluded when adopting the Act that cable-based local service will create "meaningful facilities based competition" for ILEC service, "given that cable services are available to more than 95% of United States homes." H.R. Conf. Rep. No. 104-230, at 148 (1996). AT&T's opposition to a sunset of the Commission's

unbundling rules -- like its comments generally -- therefore cannot be squared with its own behavior in the marketplace.

AT&T further claims that the Commission should not set a certain sunset date because doing so “would encourage the incumbent LECs to withhold and slow-roll access to UNEs in anticipation of the obligation being eliminated.” AT&T Comments at 58. But the Commission has numerous enforcement mechanisms in place to police any real (as opposed to imagined) abuses and the vague assertion that ILECs have an incentive to “slow-roll access” cannot overcome the Commission’s obligation to ensure that its unbundling rules do not become so stale as to injure competition. Thus, commenters of every stripe -- from IXCs to CLECs and CLEC trade associations, to state commissions -- uniformly agree that the Commission must revisit its unbundling requirements within a reasonable time to account for changes in technology and the availability of substitutes to ILEC elements.

Contrary to AT&T’s position, MCI WorldCom agrees that “the Commission itself should, after a fixed period of time, review its decisions to require particular elements to be unbundled nationwide.” MCI WorldCom Comments at 11. This conclusion is echoed by CLECs like Cox Communications, whose comments recognize that as “third-party vendors . . . continue to increase the variety, quality and efficiency of the[ir] services and equipment,” the “gap between the network elements available from these parties and those that CLECs can only now obtain from ILECs will steadily narrow.” Cox Comments at 37-38. Similarly, Rhythms Netconnections concludes that the Commission cannot “maintain the integrity” of section 251(d)(2)’s standards unless it recognizes “when unbundled access to an ILEC network

element is either no longer required for a CLEC to offer its services or a comparable element becomes available on the wholesale market.” Rhythms Comments at 27.

For this same reason, ALTS likewise agrees that the Commission should review its unbundling requirements every two years “in response to changes in technology and the development of competitive wholesale markets for network elements.” ALTS Comments at 6. This two-year proposal is echoed by the Florida PSC, whose comments underscore the risk that the Commission’s unbundling requirements will quickly be rendered “obsolete” by the growth in “availability of UNEs from sources other than ILECs.” Florida PSC Comments at 8.

The Commission has therefore been presented with a near-consensus among commenters that a sunset is essential to the success of the Act’s pro-competitive enterprise. As Cox Communications concludes, maintaining “network elements on the UNE list” beyond the point where substitutes are unavailable in the marketplace “will further reduce the incentive for CLECs and third-party vendors to develop their own facilities.” Cox Comments at 38. To guarantee that its unbundling rules do not dilute these critical incentives to compete -- a result fundamentally at odds within the plain command of section 251(d)(2) and the Act’s pro-competitive purpose -- the Commission should sunset and revisit within two years any unbundling obligations it imposes.

CONCLUSION

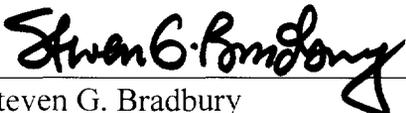
For the foregoing reasons, the Commission should adopt the proposed rules submitted by GTE in its Comments.

Dated: June 10, 1999

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