

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

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REPLY COMMENTS OF THE
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES

THE ASSOCIATION FOR LOCAL
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SUMMARY

After review of the initial comments in this UNE Remand proceeding, ALTS has begun to wonder whether GTE and the RBOCs are reading the same version of the 1996 Act that the competitive industry and the Commission have been working with for more than three years.

For example, BellSouth asserts:

Certainly the Commission's prior approach of requiring unbundling at cost-based prices in order to minimize CLEC investment in local facilities makes little policy sense. . . . By providing CLECs risk-free access to elements at TELRIC prices, the Commission's policy provides a substantial disincentive to CLEC investment in facilities.¹

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Ameritech contends:

*Unbundling of a nonproprietary network element is required if the lack of access to that element would prevent a reasonably efficient competitor from providing the services it seeks to offer within two years*²

GTE exclaims:

MANDATING ACCESS TO ADDITIONAL
UNBUNDLED NETWORK ELEMENTS WOULD
VIOLATE THE ACT.³

Bell Atlantic opines:

If incumbents were subject to overly broad unbundling requirements, particularly at TELRIC prices, they would never be able to realize the full benefit of their investment. As a result, there is little for incumbents to gain from placing their capital at risk.⁴

¹ BellSouth Comments at 10.

² Ameritech Comments at 5 (emphasis added).

³ GTE Comments at 72.

⁴ Bell Atlantic Comments at 11.

SBC explains:

[T]he availability of UNEs at TELRIC prices . . . ‘gives imitators an advantage over innovators,’ thereby putting CLECs that have made facilities-based investments at a disadvantage.⁵

And U S West instructs:

The competitive costs of mandatory sharing include diminished incentives for incumbents to invest in the maintenance and improvement of their facilities and inefficiencies and delays associated with having regulatory proceedings, rather than market forces, determine the terms on which facilities may be obtained.⁶

Each of these statements demonstrates that the incumbent LECs fail to see themselves for what they still are: monopolists. None of these statements can be squared with the plain language of Section 251 or the broad pro-competitive goals of the 1996 Act.

In their comments, the ILECs, with a skewed perspective, made various proposals that would foreclose UNEs as a viable method of entry. The Commission must reject each of them. The Section 252(d)(2) unbundling standards are not, as the ILECs contend, the equivalent of an “any potential substitute” standard. ILEC assertions that the Act codifies the “essential facilities” doctrine and that unbundling discourages facilities deployment are similarly unfounded.

Rather than applying the Section 251(d)(2) standards to individual network elements, the ILECs offered predetermined results designed to eliminate unbundling obligations wherever competitors are beginning to use UNEs. Rational application of the Section 251(d)(2) standards, however, does not yield the results suggested by the ILECs.

⁵ SBC Comments at 6 (quoting Hausman/Sidak Aff., ¶ 79).

⁶ U S West Comments at 3.

Thankfully, however, the record also contains much discussion that is useful for interpreting the provisions of Section 251 which are now before the Commission on remand. Indeed, the comments confirm that there is overwhelming support, including support from the state commissions, for maintaining the Commission's framework of national minimum unbundling requirements adopted in the *Local Competition First Report and Order* nearly three years ago. Commenters agree that premature movement away from national unbundling requirements dramatically would reduce the pace, scale and scope of local competition.

Significantly, the comments demonstrate widespread agreement on network elements that must remain on the Commission's national list. Loops, NIDs, dedicated transport, signaling/call-related databases, and OSS all meet the Act's unbundling standards and must remain on the Commission's national list. Commenters also agree that UNE definitions must be modified to ensure access to all kinds of loops – including conditioned, high capacity and dark fiber – and all kinds of dedicated transport.

The need for the Commission to identify several new UNEs also was confirmed in the record. Pursuant to Section 251(d)(2)'s "impair" standard, the extended link, intraMTE wiring, and multiplexing/aggregation/routing each should be defined as UNEs. Advanced services (including xDSL, ATM and frame relay) unbundling also should be required because the advantages of incumbency are not limited to POTS.

Finally, the comments also make clear that the Commission must take affirmative steps and provide explicit instruction, if combinations are to be made available and used in the manner intended by Congress.

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**REPLY COMMENTS OF THE
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Service (“ALTS”), by its attorneys, hereby submits these reply comments on the Commission’s *Second Further Notice of Proposed Rulemaking (“FNPRM”)* in the above-captioned proceeding.⁷ ALTS is the leading national trade association representing facilities-based competitive local exchange carriers (“CLECs”).

Introduction

The record reveals substantial support for the retention of the Commission’s practice of establishing national minimum unbundling standards and for ALTS’ proposals with regard to the proper interpretation of the Section 251(d)(2) “necessary” and “impair” standards. In these reply comments, ALTS responds to ILEC proposals which prematurely would dismantle the Commission’s national framework with wire center geographic unbundling designed to stifle competition in places where it is just beginning

⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking (rel. Apr. 16, 1999) (“FNPRM”).

to take hold. As ALTS explained in its initial comments and will reinforce below, competitive wholesale network element markets have yet to develop for loops, NIDs, dedicated transport, signaling/call-related databases, or OSS in any geographic area – no matter how disaggregated. The Commission expressly should decline the ILECs’ invitation to bolster their monopoly positions in the very first areas where the ILECs’ monopoly stranglehold appears to be loosening.

In these replies, ALTS also responds to the ILECs’ attempts to insert an “*any* potential substitute” standard in place of the “impair” standard and explains that the ILECs’ standard is inconsistent with the plain language of the statute and the broader purposes of the Act. Just as the Supreme Court concluded that the impair standard could not be interpreted to be met by the absence of a UNE substitute without *any* increase in cost or decrease in quality, surely meeting the standard cannot be barred by the presence of *any* potential substitute. In giving the terms of Section 251(d)(2) substance, the Commission ought not go to the extreme advocated by the ILECs – to do so, would read the unbundling standards and the UNE method of entry right out of the Act.

Although the Supreme Court made clear that (1) Section 251(d)(2) bears no evidence of an attempt by Congress to codify the essential facilities doctrine as part of its plan to impose market opening obligations on incumbent local telephone monopolies, and (2) the Commission is in no way compelled to eviscerate section 251 by adopting the essential facilities doctrine that the ILECs failed to sell to Congress in the first place, the ILECs continue to rely on the doctrine to support their “any potential substitute” interpretation of the Section 251(d)(2) standards. Both the “any potential substitute” standard and the ILECs’ attempt to prop it up with the inapplicable essential facilities

doctrine must be rejected outright, as neither would facilitate competitive entry as intended by Congress.

Once again, the ILECs' argued, to no avail, that "too much unbundling" removes incentives for CLEC facilities deployment and innovation. As ALTS explains below, this rationale is a classic example of economic theory developed in a vacuum without reference to reality. Congress established UNEs as one of three methods of entry into local telecommunications markets. With regard to the UNE method of entry in particular, the Commission reasonably and correctly has found – and the Supreme Court has affirmed – that facilities ownership is not a prerequisite to obtaining unbundled access to ILEC network elements.

Three years of experience have demonstrated the validity of the plan enacted by Congress and implemented by the Commission. CLECs have used UNEs as stepping stones that have enabled facilities deployment. CLECs will continue to need unbundled access to ILEC loops, NIDs, dedicated transport, signaling and call-related databases, and OSS. Some CLECs will rely on UNEs until other wholesale alternatives are available and others will rely on them until they are able to build a customer base, raise capital and deploy their own alternative facilities. Due to the magnitude of the task associated with duplicating the ILECs' ubiquitous network, many CLECs – and most, if not all ALTS members – have adopted a hybrid approach building some facilities and buying other network elements on a wholesale basis. Each of these business models is consistent with the unbundling provisions (the impair standard in particular) and the broader goals of the Act.

Finally, if not most importantly, ALTS responds to the ILECs' attempts to bargain away their unbundling obligations. To nobody's surprise, the ILECs generally made little attempt to apply the Section 251(d)(2) standards in a rational manner. Instead, relying on a "UNE Fact Report" that contains miraculously few facts about UNEs, the ILECs arrived at predetermined results (*e.g.*, no loop or transport unbundling in dense wire centers) designed to resurrect barriers to facilities and UNE-based competition in metropolitan markets where competitors have made substantial investments and have begun using the UNE method of entry as intended by Congress and the Commission. Below, ALTS responds to the ILECs' proposals to eliminate most UNEs and severely limit the functionality of virtually all others.

Indeed, marketplace reality and the comments filed by all types of competitors and the state commissions suggest markedly different conclusions from those proposed by the ILECs. Rather than being retired or maimed, the Commission's loop and transport definitions must be clarified and expanded. The NID, signaling/call-related databases and OSS UNEs also must remain in place, if the Commission intends for UNEs to remain a viable method of entry. New UNEs such as the extended link and inside wire also must be established so that competitors can compete on a level playing field. Multiplexing/aggregation/routing must be established as a UNE and the Commission must explicitly set forth the ILECs' obligations to provision UNE combinations. To fulfill its Section 706 mandate, the Commission also must establish data UNEs essential to the widespread delivery of *competitive* broadband services such as xDSL, ATM and frame relay.

I. NATIONAL, MINIMUM UNBUNDLING REQUIREMENTS ARE NEEDED TO PROMOTE WIDESPREAD COMPETITION

As ALTS and other members of the competitive community demonstrated in their initial comments, national, uniform, minimum unbundling standards remain essential to the development of local competition. The rationale in support of the Commission's national framework remains as valid today as it was three years ago. Even in those areas where local competition has advanced furthest, it still is in its nascent stages. Thus, national UNEs remain essential to: (1) allow requesting carriers, including small entities, to take advantage of economies of scale; (2) provide financial markets with greater certainty in assessing competitors' business plans; (3) facilitate the states' ability to conduct arbitrations; and (4) reduce the likelihood of unnecessary litigation, regarding the requirements of section 251(c)(3), that strains resources of CLECs and state commissions.⁸

Nevertheless, the ILECs, having lost roughly a three percent share of the total local market in the three years during which they continuously have battled to upend the Commission's national framework, now suggest that the Commission cannot or should not apply the Section 251(d)(2) standards on a national basis and should, at least for some UNEs, move to a wire center specific approach to unbundling. These contentions, however, lack legal, policy or practical justifications. Indeed, the Supreme Court affirmed the Commission's national approach to implementing the local competition provisions of the Act and in fact appeared to contemplate that the Commission on remand would reinstate national minimum unbundling requirements based on a new

⁸ *Local Competition First Report and Order*, ¶¶ 241-48.

interpretation of the Section 251(d)(2) unbundling standards that is founded on some limiting rationale.

Premature movement away from the Commission's national list would deny new entrants each of these benefits and dramatically would reduce the pace, scale and scope of local competition. Indeed, many commenters joined ALTS in suggesting that the Commission only should consider adopting a mechanism for state-by-state removal of UNEs from the national list after a two year period during which the Commission's unbundling rules are allowed to be given their full effect unimpeded by incessant ILEC litigation, strong-arm negotiations tactics and bully-minded end-runs.

A. The Record Reveals Substantial Support for the Commission's Tentative Conclusion in Favor of Maintaining National Minimum Unbundling Requirements

The record reveals substantial support for the Commission's tentative conclusion in favor of reaffirming its national minimum unbundling approach adopted in the *Local Competition First Report and Order* less than three years ago.⁹ State commissions, with

⁹ *E.g.*, AT&T Comments at 29-30 (GTE's argument against national analysis is simply admission that broad competitive access to markets is impossible), 40 (plain language of 252(d)(2) requires FCC to make determination); Cable & Wireless Comments at 22-28; CoreComm Comments at 11, 15; General Services Administration Comments at 3; Illinois CC Comments at 2; Joint Consumer Advocates Comments at 4; Level 3 Comments at 3; MCI WorldCom Comments at 4-5, 11 (modification of the uniform national list should not be done on a case-by-case or state-by-state basis); McLeod Comments at 2-3; MGC Comments at 2-3; Net2000 Comments at 3-4; Nextlink Comments at 3-5; NorthPoint Comments at 1-3; Kentucky PSC Comments at 2; New York DPS Comments at 4; Oregon PUC Comments at 1; Ohio PUC Comments at 4; Texas PUC Comments at 1, 4; Qwest Comments at 32; Washington UTC Comments at 3; Competitive Policy Institute Comments at 4; Connecticut DPUC Comments at 3-5; Iowa UB Comments at 2, 6; Covad Comments at 1-8; KMC Comments at 3-4, 16; *but see, e.g.*, Ameritech Comments at 5 (advocating the use of national standards but not a

one limited exception, strenuously supported the Commission's reestablishment of a national UNE list.¹⁰ As the Iowa Utilities Board argued, "[a] nationwide list is essential in making the unbundled network element entry strategy viable."¹¹ The California PUC aptly noted that "[s]uch a list would allow multi-state competitors to create a national business plan, with the certainty of knowing that a discrete set of network elements will be available in all states."¹² This observation is particularly poignant, in light of CLEC customers' growing demands for national service and the consolidation trend among tier-one ILECs.¹³ Finally, many state commissions joined the Illinois CC in observing that "a

national list of UNEs); GTE Comments at 21 (opposing the adoption of a uniform "one size fits all" national unbundling requirements that ignores the relevant market differences); SBC Comments at 15; BellSouth Comments at 29; Florida PSC Comments at 7-8 (proposes that the FCC consider that each of the network elements set forth in the checklist of section 271(c)(2)(B) be provided by ILECs, but treat such requirements as a rebuttable presumption); U S West Comments at 26, 29-30 (supports use of combination of national rules and presumptions that could be applied by state commissions in section 252 proceedings), 27 (nationwide unbundling requirements may be appropriate for network elements that do not vary by geography or market).

¹⁰ Iowa UB Comments at 2; *see also, e.g.*, Kentucky PSC Comments at 2; New York DPS Comments at 4; Ohio PUC at 4; Oregon PUC at 1; Texas PUC Comments at 2-3; but see Florida PSC Comments at 7 (suggesting that the Commission establish a "rebuttable presumption" in favor of unbundling network elements listed in Section 271 instead of adopting a national list).

¹¹ Iowa UB Comments at 2.

¹² California PUC Comments at 3; *see also, e.g.*, CoreComm Comments at 12 ("CoreComm's efforts to develop a national strategy for providing competitive choices to consumers could be significantly impaired if states impose different requirements with respect to UNEs."); Net2000 Comments at 4 ("Under a nationwide list of available UNEs, CLECs can formulate a single business plan that relies upon access to one or more of those UNEs, knowing that the plan can be implemented in a number of markets.").

¹³ Indeed, SBC contends that its urge to merge is driven by a need for a "national local" business strategy. While ALTS members do not necessarily need to swallow one-third of the nation's access lines to compete, they do concur with the California PUC's observation and note that, more and more, sophisticated end

national list would assist the states in conducting arbitrations under § 252(b) and reduce the likelihood of litigation regarding the requirements of § 251(c)(3).”¹⁴

Facilities-based competitors demonstrated unanimous support for national minimum unbundling requirements.¹⁵ For example, KMC and CoreComm echoed ALTS in explaining that national rules will promote local entry as intended by Congress.¹⁶ As Covad explained, “[u]nbundling was designed by Congress to lower . . . barriers to entry, by requiring incumbent LECs to share the economies of scale, scope and density in their local networks . . . the geographic breadth and product scope of a CLEC’s offerings . . . may be entirely dependent upon . . . regulatory factors including the pricing and availability of UNEs.”¹⁷ RCN and others offered another practical justification in support of national rules, noting that “[n]either technical nor market conditions vary between states to the extent that the need for state-specific minimum UNE standards would

users are demanding a national strategy and presence from facilities-based CLECs. For example, it was customer demand that led e.spire to enter tier-one markets such as Atlanta, New York and Philadelphia.

¹⁴ Illinois CC Comments at 2; *see also, e.g.*, Connecticut DPUC Comments at 3 (a national list would facilitate local entry and reduce the number of issues to be addressed in arbitrations).

¹⁵ *E.g.*, CoreComm Comments at 8-12; Covad Comments at 3-6; Choice One/Network Plus/GST/CTSI/Hyperion Comments at 2-3; KMC Comments at 3-4; Level 3 Comments at 2-4; McLeod Comments at 2-3; MGC Comments at 5-8; Net2000 Comments at 3-6; Nextlink Comments at 3-5; OpTel Comments at 2-39; Prism Comments at 9-10; RCN Comments at 3-5.

¹⁶ KMC Comments at 2 (“a national minimum list of UNEs would better facilitate the development of competition and promote the goals of the Act than permitting state-by-state unbundling”); CoreComm Comments at 8 (the Commission’s reasoning for adopting a minimum national list of UNEs in 1996 remains valid and consistent with the goals of the Act today).; *see also, e.g.*, McLeod Comments at 2-3.

¹⁷ Covad Comments at 4.

outweigh the burden placed upon competition by a mosaic of UNE requirements.”¹⁸

ALTS agrees with each of these observations and notes that even the ILECs themselves, and SBC in particular with its “national local” plan, appear to recognize the efficiencies associated with a national approach for competitive local entry.

The big IXCs also demonstrated uniform support for the Commission’s national list.¹⁹ AT&T, for example, noted that local competition will not continue to develop “if the most fundamental question of which incumbent LEC facilities would be available to new entrants had to be litigated and re-litigated on a state-by-state or locality-by-locality basis.”²⁰ As AT&T observed, the experiences of the last three years vividly confirm the effectiveness of ILEC litigation as a tool for foreclosing local entry and hobbling competitors – a state-by-state approach, or an even more disaggregated approach to unbundling, would spur interminable litigation.²¹ ALTS agrees and submits that the Commission, in choosing to adopt a national list, rationally cannot ignore the ILECs’ willingness to use litigation to stifle competitive entry and delay compliance with statutory and regulatory obligations and the degree to which the delay and uncertainty caused by litigation would be compounded in the absence of a uniform national list.

ALTS also agrees with MCI’s contention that support for the Commission’s national list can be found in the language of the statute which specifies that “the *Commission* shall . . . determine which network elements must be made available for the

¹⁸ RCN Comments at 4.

¹⁹ *E.g.*, AT&T Comments at 39-46; MCI Comments at 4-10; Sprint Comments at 9-10; CompTel Comments at 23-26.

²⁰ AT&T Comments at 41; *see also, e.g.*, MCI Comments at 6-7.

²¹ AT&T Comments at 41-42.

purposes of subsection (c)(3).”²² As ALTS noted in its initial comments, Section 251(d)(2) rationally may be interpreted and applied on a national basis. As MCI observes, the statutory language appears to contemplate just such an outcome.

B. Premature Movement Away from National Unbundling Requirements Dramatically Would Reduce the Pace, Scale and Scope of Local Competition

Despite the firm legal, policy and practical foundation underpinning the Commission’s proposal to reinstate its national list, the ILECs generally oppose the Commission’s adoption of a national list on grounds that, for certain elements, a narrower geographic approach is appropriate.²³ Ameritech, for example, while conceding that loop unbundling should be mandated on the national level, argues that, for loops, the Commission nominally must focus its Section 251(d)(2) inquiry on specific local markets (metropolitan markets in particular) in order to arrive at a general exception from unbundling for “dense wire centers” in which CLECs have deployed competitive facilities.²⁴ In other words, Ameritech asks the Commission to manipulate the Section 251(d)(2) standards to remove loops (and transport) from the national list in metropolitan end offices where it is now beginning to face competition from collocated facilities-based CLECs (even though those collocated CLECs may or may not be self-provisioning loops

²² MCI Comments at 5.

²³ *E.g.*, Ameritech Comments at 5, BellSouth Comments at 13-14 (FCC should use market definitions established in the Merger Guidelines), 31 (FCC must define specific geographic markets for UNEs), 65-66 (BellSouth prefers market definition by UNE rate zone); GTE Comments at 21; SBC Comments at 15-18; U S West Comments at 26-32.

²⁴ Ameritech Comments at 6.

or transport). Clearly, Congress did not intend for the statute to be manipulated in this manner.

Similarly, BellSouth asks the Commission to conduct its Section 251(d)(2) analysis on a geographic rate zone basis.²⁵ Although this might seem a somewhat surprising suggestion to come from an ILEC that thus far has refused to implement geographic rate zones for UNEs, the impetus behind BellSouth's proposal is starkly evident in its suggestion that loop unbundling be eliminated in all but the third, rural, rate zone. In spite of its lack of legal, policy or practical justifications, BellSouth's proposal, however, is a particularly good example of the duplicity with which the ILECs appeal to regulators in hopes of protecting their local service monopolies and upending the pro-competitive provisions of the 1996 Act.

In response to these and the various other geographic unbundling proposals proffered by the ILECs, ALTS notes that, as it and others demonstrated in their initial comments, the benefits of a uniform national list serving as a baseline for ILEC unbundling obligations far outweigh any "benefit" that could be realized by relieving ILECs of their unbundling obligations in those markets where competitors have collocated and may begin to seek unbundled access.²⁶ ALTS addresses additional shortcomings of the ILECs' specific anticompetitive unbundling proposals with respect to particular network elements below.

At this point, however, it bears noting that Congress did not adopt Section 251 to protect ILEC service monopolies from *too much* erosion by competition. Rather, Section

²⁵ BellSouth Comments at 65-66.

²⁶ ALTS Comments at 3-6; *see also, e.g.*, Covad Comments at 4-6.

251 was adopted as a means of undoing ILEC monopolies *thoroughly*. Congress did not intend to foreclose unbundling, as Bell Atlantic and others suggest, when CLECs deployed fiber passing 15 percent of the nation's commercial office buildings or when they achieved a double digit market share in a segment of a particular local services market.²⁷ Congress already decided that all consumers should reap the benefits associated with the ubiquitous networks they paid for during the past hundred years – unbundling is one of the means by which this is done. Until the ILEC monopoly and the associated incumbent advantages in provisioning network elements come undone by competition, Section 251 unbundling obligations must remain firmly in place.

Indeed, ALTS submits that Section 251(d)(2) does not include, as the ILECs' various geographic unbundling proposals suggest, a "bait and switch" standard designed to relieve ILECs of unbundling obligations once competitors request access to UNEs. Nor does Section 251(d)(2) contain an unbundling standard which denies new entrants unbundled access to network elements once the first competitor self-provisions a particular network element in a particular geographic market. Instead, as ALTS and many others explained in their initial comments, Section 251(d)(2) requires unbundling until a competitive wholesale market develops for a particular network element.²⁸ In cases where a competitive wholesale market for a particular network element develops, it will be in the ILECs' economic interest to continue to make available to their CLEC customers network elements at rates that are rationally related to cost. The vehement

²⁷ See Bell Atlantic Comments at 37 (citing UNE Fact Report at III-3); *see also*, *e.g.*, SBC Comments at 24 (also citing the UNE Fact Report).

²⁸ ALTS Comments at 25-26; *see also*, *e.g.*, Nextlink Comments at 12-14.

nature with which the ILECs seek to free themselves from the Commission's unbundling requirements underscores the very need to keep them in place.

Thus, ALTS reaffirms its commitment to the Commission's national list and submits that, in light of the current, nascent stage of development of local competition in *all* of the nation's local markets, nationwide application of the Section 251(d)(2) standards is the most rational way in which the statute can be interpreted and applied. The Commission's national list is not, as Ameritech suggests, inconsistent with the Supreme Court's opinion.²⁹ If anything, the Supreme Court's decision contemplates, if not compels, adoption of a national list. Addressing the state commissions' participation in the administration of a new *federal* regime created by the 1996 Act, the Court observed that "a federal program administered by 50 independent state agencies is surpassing strange."³⁰ Moreover, as the Texas PUC observed, "by reinstating the Commission's pricing rules, the Court has implicitly recognized the need for a measure of consistency through a national set of minimum unbundled elements."³¹ In addition, as AT&T explained, (1) by charging the Commission with responsibility for identifying network elements, the Act itself rejects Ameritech's contention, and (2) the Supreme Court did not accept the ILECs' contentions that the necessary and impair tests require localized determinations.³²

²⁹ Ameritech Comments at 53, 58-59; *see also* GTE Comments at 21 ("[T]he Commission may not adopt a single uniform 'one size fits all' national unbundling requirement that ignores relevant market differences").

³⁰ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 730 n.6 (1999) ("*AT&T*").

³¹ Texas PUC Comments at 3.

³² AT&T Comments at 42-43.

Nevertheless, should the Commission feel compelled to address geographic variations in the availability of wholesale network elements, it should consider doing so only after an initial two year gestation period during which UNEs must be available at TELRIC-based prices, in appropriate combinations, and free from the cloud of litigation and morass of provisioning difficulties which have stunted the effectiveness of mandatory ILEC unbundling to date. As ALTS explained in its initial comments, rather than retire UNEs from the national list entirely, the Commission, after such a period, might then consider adopting an approach whereby exceptions to national unbundling requirements could be made on a state-by-state basis. Such an approach would recognize the development of competitive wholesale network element markets in particular states, while preserving the benefits of national uniformity for all others. Under such a plan the Commission should consult with the relevant state commissions to ensure that unbundling obligations are not removed prematurely.³³ As the Commission has

³³ ALTS notes that there is widespread support in the comments for the Commission's proposal to continue to allow state commissions to add to its national minimum unbundling requirements baseline. ALTS Comments at 5; *see also, e.g.*, MGC Comments at 7. This approach allows states sufficient flexibility to take additional measures to spur competition and already has resulted in numerous "best practices," some of which recently were incorporated by this Commission into its national minimum collocation standards. ALTS Comments at 5-6; *see also, e.g.*, Covad Comments at 6-8. There also is widespread support against allowing state commissions to remove UNEs from the national list. *E.g.*, Illinois CC Comments at 3 ("if individual state commissions were allowed to delete items from the national UNE list during this crucial period of transition in the local exchange market, a competing LEC would be unable to obtain a standardized set of UNEs nationwide" and would "unduly hinder its ability to offer local exchange service in competition with the incumbent LEC"); Kentucky PSC Comments at 2 ("state commissions should evaluate issues involving UNEs not specifically prescribed by the FCC"); Vermont PSB Comments at 5 ("the framework devised by Congress prohibits States from restricting the set of unbundled elements required by the Act or Commission rule"); *but see, e.g.*, Iowa UB Comments at 2 ("Network elements should be added or removed by the state

recognized in its review of several Section 271 applications, premature removal of the ILECs' statutory obligations and restrictions dramatically could reduce the pace, scale and scope of local competition.³⁴

Finally, ALTS urges the Commission to dismiss categorically ILEC proposals for automatic sunseting of unbundling obligations.³⁵ For example, USTA inexplicably invites the Commission to rewrite the Act by adopting a two year sunset for all unbundling requirements.³⁶ Such proposals, however, inherently are inconsistent with the analysis required by Section 251(d)(2) – the necessary and impair standards are not obviated by the mere passage of time. Moreover, as is apparent by the sunset provisions incorporated into Sections 272, 273, 274 and 275, Congress plainly knew how to include sunset provisions and chose not to include them in Section 251. Indeed, Section 10's express limitation on the Commission's ability to forbear from enforcing the Section 251(c) unbundling requirements prior to determining that those requirements have been fully implemented, suggests that "sunsets" may not be applied to an ILEC's unbundling

commissions pursuant to the record made before the commissions in proceedings to arbitrate and modify interconnection agreements.”). As ALTS observed in its initial comments, such an approach would lead to the Balkanization of the national minimum unbundling standards, and therefore would eliminate most, if not all, of the benefits of having a national list in the first place. ALTS Comments at 6; *see also e.g.*, Net2000 Comments at 7.

³⁴ *See e.g. In re Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543, ¶¶ 16-23 (1997).

³⁵ GTE Comments at 92; SBC Comments at 18; USTA Comments Hausman Aff. at 116.

³⁶ USTA Comments Hausman Aff. At 116.

obligations. Thus, the Commission cannot accept the ILECs' invitation to prematurely retire Section 251 by inserting sunset provisions.

II. THE ILECS' "ANY POTENTIAL SUBSTITUTE," ESSENTIAL FACILITIES, AND "TOO MUCH UNBUNDLING" ARGUMENTS ARE UNFOUNDED AND SHOULD HAVE NO BEARING ON THE COMMISSION'S CHOICE OF A LIMITING STANDARD FOR THE SECTION 251(D)(2) TESTS

As expected, the ILECs devoted substantial resources to the development of theories and reports and to the hiring of economists to say things intended to nullify Congress' intent in including unbundling obligations and standards in Section 251 of the 1996 Act. Indeed, in its initial comments, GTE may well have spent more money on electronically-generated color graphics aimed at freeing itself from unbundling obligations than it has on electronic OSS necessary for it to comply with those obligations in the first place. Despite their substantial efforts, the ILECs' attempts to destroy the viability of the UNE method of entry must fail. The Section 251(d)(2) standards are not, as some ILECs suggest, the equivalent of an "any potential substitute" standard. Nor are they a codification of the essential facilities doctrine. ILEC warnings about the dangers of "too much unbundling" are similarly misguided. Below, ALTS responds briefly to each of these ILEC attempts to short-circuit Section 251 and to several other ILEC misconceptions designed to disable UNEs as a method of entry.

A. The Section 251(d)(2) Unbundling Standards Are Not the Equivalent of an "Any Potential Substitute" Standard

As ALTS and numerous other commenters demonstrated in their initial comments, the Section 251(d)(2) standards are intended to ensure the viability of UNEs

as a method of entry by leveling the advantages of incumbency.³⁷ Under the Section 251(d)(2) standards, a network element must be unbundled until the time at which a fully competitive wholesale market develops for the particular network element.³⁸ In a fully competitive wholesale network element market, non-ILEC alternatives to ILEC UNEs will be fully interchangeable and reasonably substitutable. As ALTS demonstrated in its initial comments, such substitutes must be available with no material decrease in quality, increase in cost, loss in ubiquity, or delay in time-to-market.³⁹ Indeed, when such market conditions prevail, it will be in the ILECs' interest to continue unbundling at cost-based rates that are competitive with those offered by non-ILEC sources.⁴⁰ In short, without wholesale access to network elements, competitors will not have "a meaningful opportunity to compete" and consumers will remain captives of stodgy ILEC monopolies who obviously like their chances better before regulators and judges than before consumers yearning for innovations and choices in a competitive marketplace.⁴¹

³⁷ ALTS Comments at 12; *see also, e.g.*, Nextlink Comments at 7.

³⁸ ALTS Comments at 25-26; *see also, e.g.*, Qwest Comments at 15.

³⁹ ALTS Comments at 28; *see also, e.g.*, CompTel Comments at 9.

⁴⁰ U S West recognizes that in a fully competitive market both ILECs and facilities-based CLECs will have an incentive to lease network elements. See U S West Comments at 12. U S West, however, does not recognize that in order to arrive at a fully competitive market, U S West's network element monopoly must be fully replaced by a competitive market with multiple network element sources capable of approximating U S West's UNE functionality, quality, cost, ubiquity and time-to-market. Until it does, "market-based" rates surely would outstrip TELRIC-based rates, because they would not be set by a competitive market, but instead would be set by U S West.

⁴¹ *Local Competition First Report and Order*, ¶ 315; Bell Atlantic Comments at 9 (quoting *Local Competition First Report and Order*); U S West Comments at 11 (quoting *Local Competition First Report and Order*).

To this end, Bell Atlantic and U S West both try to persuade the Commission that the Section 251(d)(2) standards, particularly the “impair” standard, rationally can be interpreted as an “*any potential substitute*” standard designed to protect monopolists at the very first sign that an alternative source for network elements may develop. Bell Atlantic, argues, that:

At a minimum, where competing carriers have already deployed a particular network element or can obtain it from other sources, incumbent carriers should not be required to unbundle that element. . . . The fact that at least one competitor is using its own element to provide competing telecommunications service is sufficient proof that it can be done and that competitors do not need that element from incumbents.⁴²

U S West echoed its behemoth Bell sibling:

Evidence that one or more CLECs are obtaining an element from non-ILEC sources conclusively demonstrates that mandatory unbundling of that element is not appropriate in that market: In such a case, lack of mandatory access to the element from the ILEC clearly does not preclude meaningful opportunities for competitive entry by one or more competitors.⁴³

These arguments, however, are completely without merit, and they do not, as both Bell Atlantic and U S West contend, give competitors “a meaningful opportunity to compete.”⁴⁴ A single carrier self-provisioning a network element or a single alternative non-ILEC source for a network element cannot be considered a reasonable substitute for an ILEC UNE. Even in cases where multiple alternatives exist, the Commission must

⁴² Bell Atlantic Comments at 14.

⁴³ U S West Comments at 12.

⁴⁴ Bell Atlantic Comments at 9 (citing *Local Competition First Report and Order*, ¶ 315); U S West Comments at 11.

consider various factors in order to ensure that new entrants' ability to compete will not be materially diminished, in the absence of an unbundling requirement. Unless substitutes are available with comparable ubiquity, functionality, quality, cost, and capacity/time to market, competitors will not have a meaningful opportunity to compete with incumbents.

Further, unbundling obligations cannot be eliminated, as Bell Atlantic and U S West suggest, on the basis that there is *potential* for interchangeable non-ILEC substitutes to develop.⁴⁵ The market-opening provisions of the Act, and the unbundling provisions in particular, are premised on the very assumption that there is *potential* for non-ILEC alternatives to develop. Until these non-ILEC alternatives do develop and reasonable substitutes for ILEC UNEs actually are available, ILECs must continue to share the advantages of the rate-payer financed network through unbundling.⁴⁶

The absurdity of the Bell Atlantic/U S West "any potential substitute" theory, is perhaps best exposed by the fact that, under the theory, there never would be a need for unbundling, as new entrants, at least theoretically, always would have the *potential* to self-provision substitutes for ILEC network elements. In theory, it may be possible for

⁴⁵ Bell Atlantic Comments at 14; BellSouth Comments at 15; U S West Comments at 13-14.

⁴⁶ Perhaps recognizing the absurdity of its suitor's proposal with respect to alternative sources that do not exist but have the potential to develop, Ameritech suggests a two year window in which the Commission should look into its crystal ball to predict what alternative sources for network elements will develop. Ameritech Comments at 2, 35. Clearly, Ameritech's proposed "impair for more than 2 years standard" is unsupported by the plain language of the statute. Congress established unbundling rules so that competitors could enter local markets today – not two years from now. Although BellSouth advocates a less outlandish one year time frame, the Act simply does not include a "potentially may not be impaired in a year" standard. BellSouth Comments at 15.

any CLEC with cash-flow equivalent to the GDP of France and a large army of construction workers and franchise lawyers to make a reasonable attempt at duplicating during the next few years large parts of what took the ILECs more than a hundred years to build. Congress, however, did not elect a plan that includes such singular hurdles. Instead, Congress provided that local telecommunications markets would be opened to new entrants with varying business plans and determined that new entrants would not be required to duplicate the rate-payer financed ILEC networks. Indeed, Congress provided three methods of entry – each of which, to varying degrees allows new entrants to share in the benefits resulting from the ubiquity and economies of the ILECs’ networks. Notably, the Commission also has rejected a facilities ownership requirement for competitors. Both the Eighth Circuit and the Supreme Court affirmed the Commission’s conclusion. In any event, as ALTS will explain further below, unbundling does not "disenchant" facilities deployment – rather, it encourages (particularly in the manner most ILECs currently provision UNEs) and enables (by functioning as a “stepping stone”) self-provisioning.

Likewise, the Section 251 unbundling obligations rationally cannot be said to disappear once *any* non-ILEC alternative other than self-provisioning appears. Under the Bell Atlantic/U S West theory, the first competitor (or ILEC affiliate) to self-provision a UNE could upend the business plans of all other competitors. Pure facilities-based entry by one carrier cannot displace UNE entry by others. If the Commission were to adopt such an absurd rule, every ILEC would have a CLEC affiliate self provisioning every UNE faster that most competitors can order an unbundled loop. At the very least, such a rule certainly would discourage self-provisioning by all but the two or three most well

heeled CLECs, and, possibly, ILEC-affiliates. Moreover, it is ridiculous to suggest, as Bell Atlantic and U S West do, that one non-ILEC loop or transport segment simply can take the place of millions of ILEC UNE loops and thousand of transport segments. Surely, this recipe for monopoly preservation is not what was contemplated by Congress when it enacted Section 251.

At bottom, the Bell Atlantic/U S West “*any* potential substitute” theory is rooted in the “essential facilities” antitrust doctrine and not in a reasonable interpretation of the Section 251(d)(2) designed to further the broad objectives Congress hoped to accomplish in enacting the 1996 Act. As ALTS explains below, the essential facilities doctrine simply is not the means Congress chose to undo ILEC monopolies and to bring competition to local telecommunications markets.

B. Congress’ Prescription for Local Competition Is Not Based on the Essential Facilities Doctrine

As ALTS submitted in its initial comments, ILEC arguments that Congress or, as several ILECs contend in their initial comments, the Supreme Court adopted key precepts of the “essential facilities” doctrine are unfounded.⁴⁷ In dismissing the ILECs’ “*any* potential substitute” rule, ALTS already has demonstrated the policy and practical flaws in the ILECs’ attempt to replace the Section 251(d)(2) unbundling standards with an essential facilities derivative. Now, once again, ALTS joins the many commenters who

⁴⁷ *E.g.*, Ameritech Comments at 15, 28-31, BellSouth Comments at 16, 73, GTE Comments at 15; USTA Comments Hausman Aff. at 63; U S West Comments at 6-7.

concur with the Commission's own previously issued assessment that the statute enacted by Congress does not codify the essential facilities doctrine.⁴⁸

As ALTS and numerous other commenters demonstrated in their comments, no support for the ILECs' contention can be found in the plain language of the statute.⁴⁹ Similarly, as AT&T notes, there are no references to the essential facilities doctrine in the legislative history.⁵⁰

The ILECs' contention that the Supreme Court adopted the essential facilities doctrine or suggested that the Commission should also are baseless.⁵¹ Indeed, ALTS agrees with AT&T and other commenters who accurately observe that the Supreme Court in no way determined that Section 251(d)(2) codifies the essential facilities doctrine.⁵² Instead, the Court merely instructed the Commission to apply "some limiting standard" in determining what unbundled network elements must be made available under Section 251(c)(3) and specifically declined to adopt the ILECs' "essential facilities" argument.⁵³

⁴⁸ ALTS Comments at 32-33; *see also, e.g.*, CoreComm Comments at 23-24; Choice One/Network Plus/GST/CTSI Comments at 8-11; KMC Comments at 8-11; Level 3 Comments at 11; NorthPoint Comments at 10-12; RCN Comments at 5-8; Texas PUC Comments at 9-11; Vermont PSB Comments at 6-7; Washington UTC Comments at 11-13; AT&T Comments at 46-52; MCI WorldCom Comments at 28-37; Sprint Comments at 15-18; Qwest Comments at 48-50.

⁴⁹ ALTS Comments at 32-33; *see also, e.g.*, CoreComm Comments at 23-24; Network Plus/GST/CTSI/Hyperion Comments at 9-10; KMC Comments at 8; RCN Comments at 5-7; AT&T Comments at 46-52; MCI WorldCom Comments at 28-37; Sprint Comments at 13-16.

⁵⁰ AT&T Comments at 48.

⁵¹ Notably, AT&T asserts that "the Supreme Court has never adopted the essential facilities doctrine even in the antitrust context." *Id.*, at 47, n.77.

⁵² AT&T Comments at 47.

⁵³ *AT&T*, 119 S.Ct. at 734.

Thus, the ILECs have ignored the Court's opinion and instead rely on Justice Breyer's partial dissent and partial concurrence.⁵⁴ As AT&T points out, this reliance is misplaced since no other Justice joined Justice Breyer, and Justice Breyer simply stated that he was of the opinion that Section 252(d)(2) required that the Commission give a "convincing explanation" of why unbundling should take place in those instances "where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available."⁵⁵

C. Unbundling Promotes and Enables Facilities Deployment by CLECs

Alongside their "any potential substitute" and essential facilities arguments, the ILECs also posted what were cast to be public interest-minded warnings on the dangers of "too much unbundling."⁵⁶ However, ILEC arguments that too much unbundling will have a negative impact on consumer welfare or CLEC incentives to deploy facilities are without legal, economic or sound public policy underpinnings – and, despite the contentions of BellSouth and others, the Supreme Court did not endorse such a theory or provide the Commission with a lesson on the effect unbundling might have on competitors' plans to deploy facilities.⁵⁷ Indeed, the plain experience of the past three

⁵⁴ *E.g.*, BellSouth Comments at 7-9; Bell Atlantic Comments at 10, 43.

⁵⁵ AT&T Comments at 47-48 (citing Breyer Concurring and Dissenting Statement).

⁵⁶ Ameritech Comments at 17-27; Bell Atlantic Comments at 10 (citing Breyer Dissent), GTE Comments at 16; SBC Comments at 6; USTA Comments at Hausman Aff. 55; U S West Comments at 6, 14.

⁵⁷ BellSouth at 7-9 (BellSouth mistakenly credits Justice Breyer for supplying the reasoning behind the Court's opinion. This is impossible because Justice Breyer did not join in the Court's opinion, but instead issued a separate opinion concurring in and dissenting from parts of the majority's opinion.); *see also e.g.*, Bell Atlantic at 10, 43-44 (Bell Atlantic fails to note in both instances that it is not quoting from the Court's opinion).

years demonstrates that the exact opposite of what the ILECs contend is true: unbundling promotes and enables facilities deployment by CLECs which already is beginning to translate into tangible benefits for consumers.

As envisioned by Congress and the Commission, UNEs have facilitated competitive entry by enabling new entrants to enter markets much faster than if they had to raise capital, secure permits and build their own facilities before starting. UNEs enable competitors to enter markets while building alternative facilities or while building a customer base to support and justify self-provisioning. Through the use of UNEs, facilities-based CLECs actually are able to meet financial build criteria for network deployment sooner than would be the case without them. The fact that UNEs are not free, but are priced at cost plus a profit which goes to the incumbent, provides a tremendous incentive for competitors to limit their reliance on UNEs and to move to self-provisioning or other non-ILEC sources wherever feasible. Once self-provisioning can be justified, CLECs have a very strong profit incentive to move away from UNEs.

Finally, three years of experience also has shown that two unintended factors now function to limit CLEC reliance on UNEs – in some cases, to the extent that there clearly is *too little unbundling*. The prevalence of ILEC UNE prices in excess of what the Commission's newly reinstated pricing rules permit and unlawfully restricted or poor ILEC UNE provisioning, for the time being, both serve to limit CLECs' use of and reliance on UNEs. For example, ALTS members report that requests for dedicated transport UNEs regularly are denied by GTE, BellSouth and others because, despite the fact that the Commission's *Local Competition First Report and Order* sets forth a clear obligation to do so, those carriers refuse to provision "entrance facilities" connecting

ILEC and CLEC end offices.⁵⁸ In these cases, CLECs are forced to order and pay inflated prices for special access facilities. In some cases, CLECs order special access facilities because it is often close to impossible to get an ILEC to process a local service request with anything close to the same accuracy and timeliness with which ILECs process access service requests. In either case, the result – uneconomic use of special access facilities for competitive local services – is not what was intended by Congress or contemplated by the Commission’s unbundling rules.

Thus, it appears that the Commission’s time would be better spent exploring the dangers of *too little* unbundling, rather than the dangers of there being too much. Notably, the ILECs’ “UNE Fact Report” bears no evidence of too much unbundling.⁵⁹ In fact, the UNE Fact Report hardly contains evidence of any unbundling at all, as it curiously and nearly completely fails to contain any information or facts about UNEs. Instead, the ILECs’ UNE Fact Report demonstrates the ILECs’ remarkable advantages in terms of access to information and sheer economies of scale, and reveals the tremendous, if not worrisome, ability of ILECs to track their competitors’ entry and deployment plans.

The ILECs’ comments also fail to present examples of too much unbundling. Indeed, GTE’s admission that it has provisioned unbundled transport in only one of 141

⁵⁸ *Local Competition First Report and Order*, ¶ 440; *see also* ALTS Comments at 53-54; Nextlink Comments at 33-34.

⁵⁹ USTA Comments at “UNE Fact Report” Attachment.

wire centers with operational collocation is a cry for Commission investigation – not into the dangers of too much unbundling – but rather, into what went wrong. ALTS will begin to help GTE solve its transport unbundling problem below in a section devoted to the transport UNE.

D. The Commission Must Reject Other ILEC Misconceptions Designed to Derail the UNE Method of Entry

In addition to their general misplaced reliance on the essential facilities doctrine, the ILECs make a number of more specific observations and suggestions which must be dismissed for being inconsistent with the statute. As is the case with their general and thematic misinterpretations of the Section 251(d)(2) standards, the particular ILEC missteps ALTS addresses below largely can be accredited to the ILECs' profound inability to accept that they maintain monopolies and Congress passed a statute designed to replace those monopolies with multiple competitive providers. By design, the Act requires ILECs to unbundle or share (in return for compensation for costs and a reasonable profit) the advantages amassed as a result of incumbency. The ILEC arguments discussed below ignore this reality, and as a result must be rejected.

1. Proprietary Interests of Third Parties Do Not Mitigate the ILECs' Unbundling Obligations

Although there appears to be widespread consensus on what network elements should be considered "proprietary in nature" for the purposes of Section 251(d)(2)(A) – *i.e.*, none – there are a few assertions made in this regard by the ILECs which are supported by neither the language of the statute nor the general goals of the Act and,

therefore, must be dismissed.⁶⁰ Among the most notable of these unfounded assertions is U S West's assertion that the term "proprietary" should be extended to include third-party proprietary interests.⁶¹ As ALTS and others explained in their initial comments, the term "proprietary" refers solely to proprietary interests the ILEC may have in an element, and does not refer to the proprietary interests of third parties, such as vendors or non-ILEC partners. In Section 251(d)(2), Congress established a standard for piercing the proprietary rights of those with unbundling obligations – the ILECs. The statute does not contemplate limiting an ILECs' unbundling obligation based on its use of proprietary *vendor* equipment, processes, or information. Indeed, the Commission should make clear that ILECs must secure agreements with their vendors that reflect their statutory obligation to provide unbundled access to certain network elements and that such agreements cannot, as Ameritech suggests, be used by ILECs in their efforts to stall competitive entry and end-run their unbundling obligations.⁶²

In addition, Ameritech's assertion that "unique or novel applications or methods of implementing industry standards" can in certain instances qualify as "proprietary" also should be approached with caution and probably rejected.⁶³ As ALTS and others submitted in their initial comments, network elements should be considered non-proprietary if the interfaces, functions, features and capabilities sought by the requesting carrier are defined by recognized industry standard-setting bodies (*e.g.*, ITU, ANSI, or

⁶⁰ See, *e.g.*, GTE Comments at 26 ("[f]ew, if any, network elements (and none of the original UNEs defined in Rule 319) are entirely proprietary in nature").

⁶¹ U S West Comments at 25.

⁶² See Ameritech Comments at 42-43.

⁶³ *Id.*, at 43.

IEEE), or are defined by Telcordia (Bellcore) general requirements.⁶⁴ In almost every instance, it seems ILECs would be capable of developing a “unique” application or method of implementing industry standards. Although there may be more to Ameritech’s rationale, the Commission should not confuse innovation with efforts to foreclose open access and avoid unbundling obligations.

2. The Commission Is Not Limited in the Factors It Should Consider In Applying the Necessary and Impair Standards

In its initial comments, ALTS listed several factors which must be considered in applying the materiality standard which ALTS submitted as a rational limiting standard for use in the Commission’s interpretation and application of the Section 251(d)(2) unbundling standards.⁶⁵ Indeed, the functionality, quality, cost, ubiquity and time-to-market factors included by ALTS in its proposed application of the Section 251(d)(2) standards must be considered under any rational interpretation of Section 251(d)(2). The comments, in fact, demonstrated widespread support for both the materiality standard suggested by the Commission and endorsed by ALTS and for consideration of those factors listed by ALTS as being critical to any proper assessment of the necessary and impair standards.⁶⁶

Nevertheless, several ILECs baldly and unconvincingly asserted that many of these criteria had no place in a Section 251(d)(2) unbundling assessment. Basing its arguments on the antitrust theories of Areeda and Hovenkamp and on the separate

⁶⁴ ALTS Comments at 17; *see also, e.g.*, CompTel Comments at 18.

⁶⁵ ALTS Comments at 20-23, 27-30.

⁶⁶ *E.g.*, CompTel Comments at 10; Nextlink Comments at 13; Qwest Comments at 34.