

DOCKET FILE COPY ORIGINAL

SIDLEY & AUSTIN

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO  
DALLAS  
LOS ANGELES

1722 EYE STREET, N.W.  
WASHINGTON, D.C. 20006  
TELEPHONE 202 736 8000  
FACSIMILE 202 736 8711

FOUNDED 1866

NEW YORK  
LONDON  
SINGAPORE  
TOKYO

WRITER'S DIRECT NUMBER  
(202) 736-8691

June 10, 1999

RECEIVED

JUN 10 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

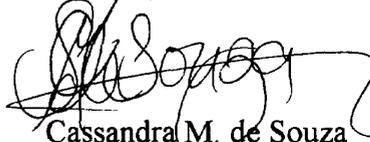
Ms. Magalie R. Salas, Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, SW  
Room TW-A325  
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions in the  
Telecommunications Act, CC Docket No. 96-98

Dear Ms. Salas:

Enclosed please find a diskette formatted in IBM-compatible format using Microsoft Word97, in a read-only mode, containing the Reply Comments of AT&T Corp. in Response to the Second Further Notice of Proposed Rulemaking in the above matter.

Sincerely,



Cassandra M. de Souza  
Legal Assistant

No. of Copies rec'd 04 12  
List ABCDE

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

RECEIVED

JUN 10 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

\_\_\_\_\_  
In the Matter of )  
)  
)

Implementation of the Local Competition )  
Provisions of the Telecommunications )  
Act of 1996 )  
\_\_\_\_\_ )

CC Docket No. 96-98

REPLY COMMENTS OF AT&T CORP. ON  
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

David W. Carpenter  
Mark E. Haddad  
Peter D. Keisler  
James P. Young  
Michael J. Hunseder  
Scott M. Bohannon  
Rudolph M. Kammerer  
SIDLEY & AUSTIN  
1722 I Street, N.W.  
Washington, D.C. 20006  
(202) 736-8000

Mark C. Rosenblum  
Roy E. Hoffinger  
Elaine McHale  
Stephen C. Garavito  
Richard H. Rubin  
AT&T CORP.  
295 North Maple Avenue  
Basking Ridge, New Jersey 07920  
(908) 221-3539

Attorneys for AT&T Corp.

June 10, 1999

## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY .....	1
DISCUSSION.....	15
I. THE RECORD CONFIRMS THAT THE WIDESPREAD AVAILABILITY OF UNBUNDLED NETWORK ELEMENTS IS IMPERATIVE IF THERE IS TO BE ANY MASS MARKET COMPETITION IN THE NEAR TERM. ....	15
II. THE INCUMBENT LECs' PROPOSED INTERPRETATIONS OF THE "IMPAIRMENT" STANDARD OF SECTION 251(d)(2)(B) IGNORE THE STATUTORY LANGUAGE AND WOULD DEFEAT THE ACT'S PURPOSES. ....	25
A. Application Of The Essential Facilities Doctrine Would Be Contrary To The Act's Terms And Purposes.....	28
B. The Incumbent LECs' Other Proposed Standards For "Impairment" Likewise Violate The Plain Language Of The Act And Its Purposes. ....	37
C. Contrary To The Incumbent LECs' Claims, The Act Expressly Does Not Require The Commission To Give The Section 251(d)(2) Factors Controlling Weight.....	47
D. There Is No Basis For An Automatic Sunset, But The Commission Should Periodically Review Its List Of Elements To Determine Whether Modifications Should Be Made. ....	50
III. THE COMMISSION SHOULD ADOPT A BINDING LIST OF MINIMUM NETWORK ELEMENTS THAT MUST BE MADE AVAILABLE ON A NATIONAL BASIS AND ALLOW STATES TO SUPPLEMENT THIS LIST WITH ADDITIONAL ELEMENTS AND SUBELEMENTS, BUT NOT TO REDUCE IT.....	52
A. The Commission Should Adopt A National List Of The Minimum Network Elements That Must Be Made Available Throughout The Nation <i>Without</i> Any Localized Determinations Of Necessity Or Impairment.....	52
1. There Is No Basis In Policy Or Law For The Rule Of "Presumptive Availability" Proposed By Some Of The State Commissions And Incumbent LECs.....	55

2.	There Is No Basis For The Proposal Of Some Incumbent LECs That This Commission Make Market-By-Market And Element-By-Element Determinations And Require Further State Commission Determinations Before Any Request For Elements Must Be Granted.	62
B.	The Incumbent LECs' Claims That States Are Prohibited From Adding To The National List Under State Law Are Meritless.	67
IV.	THE COMMENTS RESOUNDINGLY CONFIRM THAT THE COMMISSION SHOULD REQUIRE INCUMBENT LECs TO CONTINUE UNBUNDLING THE SEVEN NETWORK ELEMENTS IT IDENTIFIED IN THE FIRST REPORT AND ORDER.	73
A.	Local Loops	73
1.	CLECs Cannot Compete Broadly, Even For High Volume Business Customers, Without Access To Unbundled Loops.	76
a.	Contrary To The Incumbents' Assertions, The Presence Of One CLEC's Loops In A Building Does Not Establish That Other CLECs Would Not Be Impaired If They Were Denied Access To Unbundled Loops.	76
b.	The Incumbents' Proposed Restrictions On Loop Availability Are Not Supported By The Supreme Court's Analysis Or The Real-World Impact On CLECs.	77
c.	Building Access Limitations Create Even Greater Barriers For CLECs.	80
2.	The Comments Clearly Demonstrate The Need For The Commission To Clarify Its Loop Unbundling Requirements.	84
B.	Local Switching	90
1.	The Incumbent LECs Do Not Rebut The Evidence That The Higher Cost Of Extending Unbundled Loops To A CLEC's Own Switch Would Significantly Impair The CLECs' Ability To Offer Local Service, Especially To The Mass Market.	93
2.	The Incumbent LECs' Inability To Provision Unbundled Loops In The Timely And Reliable Manner Needed For Successful Mass Market Entry Independently Justifies The Need For Unbundled Local Switching.	105

3.	Actual Market Experience Confirms The Need For Unbundled Local Switching.....	108
C.	Signaling and Call-Related Databases .....	108
D.	Shared Transport .....	109
E.	Interoffice Dedicated Transport.....	119
1.	The Record Confirms That Self-Provision Is Not A Sufficient Alternative To Unbundled Dedicated Interoffice Transport.....	121
2.	The Record Confirms That Third-Party Vendors Are Not A Sufficient Alternative To Unbundled Dedicated Interoffice Transport.....	125
3.	The Record Confirms That Special Access Tariffs Are Not Material To The Section 251(d)(2) Analysis And, In Any Event, Are Not A Sufficient Alternative To Unbundled Dedicated Interoffice Transport.....	132
4.	The Record Confirms That Dark Fiber Should Be Unbundled. ....	134
F.	Operator Services, Directory Assistance, And Directory Listings.....	136
G.	Operations Support Systems .....	142
H.	Advanced Telecommunications Services.....	144
1.	Incumbent LECs Must Provide Nondiscriminatory Access To The xDSL Capable Loops Necessary To Provide Advanced Services.....	146
2.	Incumbent LECs Must Provide Nondiscriminatory Access To The xDSL Equipped Loops Necessary To Provide Advanced Services. ....	152
3.	Spectrum Unbundling Should Not Be Required. ....	156
V.	THE COMMISSION SHOULD REINSTATE RULES 315(c)-(f) ON NETWORK ELEMENT COMBINATIONS AND RULES 305(a)(4) AND 311(c) ON SUPERIOR QUALITY ACCESS AND INTERCONNECTION. ....	157
	CONCLUSION.....	160
APPENDIX A	List of Commenters	

**LIST OF EXHIBITS**

- Exhibit A      Affidavit of Michael R. Baranowski, John C. Klick, and Brian F. Pitkin
- Exhibit B      Affidavit of R. Glenn Hubbard, William H. Lehr, Janusz A. Ordover, and Robert  
D. Willig
- Exhibit C      Affidavit of Kevin Lynch



have been supported by GSA and other large business customers,<sup>3</sup> by representatives of residential and smaller business customers,<sup>4</sup> by state utility commissions,<sup>5</sup> and by representatives of the entire spectrum of CLECs, including CLECs who have established alternate networks to serve select large business customers, CLECs who aspire to establish alternate networks to provide mass market services, and CLECs who want to serve the entire local services market but have no plans to establish alternative networks.<sup>6</sup>

At the same time, two sets of commentors have opposed readoption of Rule 51.319. Foremost, the incumbent LECs claim that, with exceptions for certain categories of loops, transport facilities, and OSS, the Commission should not require incumbent LECs to provide access to any elements of their local networks. In addition, the incumbent LECs and some state commissions also make “procedural” proposals that would produce the same result, albeit less directly. In particular, while states almost uniformly urge the Commission to order the nationwide availability of the seven elements of Rule 51.319, some state commissions have urged that they be delegated authority to exempt incumbents from the requirements of the rule for particular carriers

---

<sup>3</sup> See Ad Hoc at 11-13; GSA at 4-6.

<sup>4</sup> See Joint Consumer Advocates at 3-5.

<sup>5</sup> See Illinois CC at 11-15; Washington UTC at 14; Kentucky PSC at 2-3; Iowa Utils. Bd. at 10; Connecticut DPUC at 4; Texas PUC at 14.

<sup>6</sup> See, e.g., Qwest at 56-91; KMC at 12-18; Net2000 at 10-17; Columbia at 7-9; Prism at 18; MCI WorldCom at 37-74; Choice One at 14-20; CompTel at 30-47; RCN at 13-20; TRA at 26-28; C&W at 29-44; Sprint at 28-34; CoreComm at 25-33; Excel at 11-12; McLeod at 6.

in particular markets. Incumbent LECs have also urged standards that would allow this same market-by-market and element-by-element litigation.

What is most striking about all the comments is that there is no substantial dispute over the facts that are critical under the terms of Section 251(d)(2) and *AT&T v. Iowa Utilities Board*: the conditions that exist in today's local telephone markets and the consequences that would ensue if the core network elements were not available throughout the nation. Most pertinently, all agree that there is now no mass market competition in the provision of exchange and exchange access services. All further agree that discernible local competition exists today only in the niches occupied by a few large business customers and other tenants of the office buildings to which CLECs have constructed their own fiber loops (an alleged 15% of certain of the nation's largest buildings)<sup>7</sup> or have used unbundled loops together with the CLECs' fiber rings and switches. In this regard, no commenter challenges the Common Carrier Bureau's recent determination that CLECs have captured only 1.2% of the local telephone business in the nation.<sup>8</sup>

Similarly, all agree that the adoption of the incumbent LECs' or states' proposals would radically reduce the competitive alternatives that can be established hereafter, for that would essentially continue the *status quo* that has existed since the 1996 Act was passed over three years ago. That is starkly the case with the incumbent LECs' proposal to bar nationwide access to each

---

<sup>7</sup> See P. Huber & E. Leo, *UNE Fact Report* at II-6, III-3 (appended to USTA Comments) ("*Huber Submission*"). As described below, even this figure likely is overstated. See *infra* p. 76 n.165.

<sup>8</sup> See *Local Competition*, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission (December 1998) at 10. ("*FCC Local Competition Report*")

of the seven elements. If these restrictive proposals were adopted, it would mean that there will be no mass market competition during the multi-year periods it would take for CLECs to construct alternative networks capable of serving all residential and most business customers in a community – and that CLECs would then be forced to make investment decisions and enter these markets without any base of exchange and exchange access customers and without any direct experience in or knowledge about these businesses. It would further mean that there will be no competition today for the large business customers who occupy at least 85% of the nation's office buildings. Indeed, alternatives for even these large business customers would develop in the future only as it gradually becomes economically and commercially possible to obtain rights of way, and to establish a physical presence in, and extend loops to, additional office buildings – on a building-by-building basis. Further, even if and when alternative facilities are built, the provision of local services to individual residential and business customers would merely be transformed from a monopoly to a duopoly.

Similarly, no one disputes that adoption of the “procedural” proposals of the incumbent LECs and some states would have these same effects. It would enable incumbent LECs to impose litigation costs, delay, and uncertainty that would assuredly impair – and often altogether preclude – the ability of CLECs to offer service through even the network elements that are “presumptively” available.

What is dispositive, moreover, is that the incumbent LECs do not deny that the unconditional nationwide availability of the core network elements of Rule 51.319 will assure that competitive exchange and exchange access services will be offered more quickly, more broadly,

or more effectively than they would be if access to these elements were restricted or denied. To the contrary, the incumbent LECs candidly acknowledge that they are opposing the readoption of this rule because they want to prevent the exchange and exchange access competition that would now otherwise be provided only through network elements. The incumbent LECs even contend that the existence of widespread competition through network elements violates the 1996 Act and is socially and economically harmful. These contentions are a collateral attack on the Act and its provision of “multiple paths of entry.”<sup>9</sup> And the incumbent LECs’ claims are squarely foreclosed by the terms of the Act, its objectives, the Supreme Court’s decision, and basic economics. They establish that nationwide access to network elements should be ordered precisely because – as the incumbent LECs’ admissions establish – it will lead to faster, broader, and more effective competition.

First, the only way the incumbent LECs can even advance their proposal is to ignore the law. They argue that Section 251(d)(2) requires an essential facilities test in which the Commission is barred from ordering access to an incumbent LEC element unless the Commission finds that there is not a single CLEC that could provide service to some customers without access to the element. Incumbent LECs admit that adoption of this position would mean only that their monopolies would be transformed into duopolies, and contend that this would satisfy the Act’s objectives. These claims are simply wrong. Section 251(d)(2) requires a comparative analysis

---

<sup>9</sup> See First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ¶ 12 (“*First Report and Order*”); see also *id.* (“Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy”).

that focuses on the effect of a denial of access to an incumbent LEC element on *any* CLEC that requests it. The Commission is to find “impairment” if there are CLECs who might provide service less quickly or broadly if the requested element is unavailable than the CLECs could if incumbent LECs afforded access to it in accord with the requirements of Section 251(c)(3). Thus, the Supreme Court rejected the incumbent LECs’ claim. It expressly refused to hold that Section 251(d)(2) requires the Commission to apply the “essential facilities” doctrine of the antitrust laws,<sup>10</sup> and the Court stated that the objective of the 1996 Act is to create “competition among *multiple* providers of local service,”<sup>11</sup> not merely duopolies. The Court vacated Rule 51.319 only because the comparative analysis in the *First Report and Order* had ignored the existence of alternatives outside the incumbent LEC network, had not expressly made determinations that the incumbent LECs’ imposition of higher costs on CLECs impairs their “ability” to provide service, and had presumed that elements must be made available whenever that was technically possible. As explained in detail below, a comparative analysis that adheres to the Supreme Court’s construction of the 1996 Act requires the readoption of all or virtually all of the original Rule 51.319.

Incumbent LECs also argue that application of the essential facilities doctrine will advance a supposed statutory policy of fostering innovation by reducing the sharing of facilities at cost based rates. But this claim is wrong, both factually and legally. Because of all the other

---

<sup>10</sup> See *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721, 734 (1999).

<sup>11</sup> See *id.* at 726 (emphasis added).

disadvantages that network element purchasers encounter, the availability of network elements at TELRIC (or any other cost-based rates) will not remotely diminish – but will enhance – the incentives and ability of CLECs to deploy alternate networks as soon as that is possible while providing some constraints on incumbent LECs’ monopoly prices in the interim.<sup>12</sup>

Nor will it adversely affect incumbent LECs’ incentives to innovate. Although local exchanges have been monopolies for over a century, there has always been innovation, albeit not as much as would take place in a competitive market. That has be so because (1) even monopolists have incentives to reduce their operating and capital costs and to introduce new services that will increase the overall levels of usage of their networks and (2) the “just and reasonable” rates that incumbent LECs are statutorily allowed to charge included recovery of all the incumbent LECs’ efficient ongoing R&D expenses. The existence of competitors who offer competing services through combinations of incumbent LEC network elements cannot adversely affect this innovation. To the extent that incumbent LECs have monopolies over facilities required to serve customers, the effect of the network element competition will only be to introduce marketplace forces that drive incumbent LECs’ prices closer to their economic cost and better achieve the historic objectives of the rate regulation of incumbent LEC monopolies. But that will not affect incumbent LEC incentives to innovate, for the rates incumbent LECs will charge for network elements include all the efficient forward looking research and development costs associated with each element. And to the extent alternative networks are built that offer

---

<sup>12</sup> See Hubbard/Lehr/Willig Aff. (appended to AT&T’s Comments) at ¶¶ 27-36; Hubbard/Lehr/Ordovery/Willig Reply Aff. at ¶¶ 24-38.

physical alternatives for an incumbent LEC's exchange, exchange access, or network element customers, it will *enhance* the incumbent LECs' incentives to innovate, for they will not want to lose any of that business to facilities-based competitors.

The incumbent LECs' claims are also baseless as a matter of law. The Act protects the societal interest in fostering innovation by mandating only that the Commission "consider" whether CLECs satisfy a higher standard of need for those incumbent LEC network elements that are "proprietary," *not* by requiring that an essential facilities showing be made for those elements, much less for the nonproprietary elements of Rule 51.319. Beyond that, rather than prohibit "sharing" of the fruits of incumbent LEC innovations, the other provisions of the Communications Act require it. The provisions of the Act enacted in 1934 require all common carriers to "share" services and facilities with any customer (be it an end user or a competing carrier) at "just and reasonable" rates that have always been intended to replicate the rates that would be charged in a competitive market. The 1996 amendments imposed a series of additional sharing requirements in order to override state law and allow new forms of local competition to develop before multiple alternate networks are established. Indeed, it is ironic that the incumbent LECs have objections only to the "sharing" of their innovations that is mandated by network element provisions – and not to the sharing required by Section 251(c)(4) or other provisions of the Act. In contrast to the resale of finished LEC services, network element competition authorizes "innovation [i]n . . . supplying existing products and services and in developing new product and service offerings"

and thus constitutes, in Professor Kahn's words, the "most creative and productive form of competition."<sup>13</sup>

Second, the incumbent LECs' claims are baseless as a matter of fact even under the incumbent LECs' erroneous view of the applicable legal standards. The incumbent LECs' principal claim is that in view of the *AT&T Nondominance Order* and the "marketplace evidence," incumbent LECs will not be able to exercise market power over the provision of exchange and exchange access services to any customers – despite the incumbent LECs' existing 98% share of local telephone business. But the "marketplace evidence" on which the incumbent LECs rely is simply the fact that some CLECs are today serving a fraction of the nation's commercial buildings through switches, signaling, and some transport and loop facilities that have been obtained from sources other than incumbent LECs. Although the incumbent LECs acknowledge that no CLEC is now using these non-incumbent LEC facilities to offer mass market services, the incumbent LECs rely on a "fact" report written by their principal outside law firm to contend that CLECs are nonetheless "poised" to use unbundled loops to hook up those residential and business customers that are within several thousand feet of existing CLEC switches or fiber rings and to deploy those additional non-incumbent LEC switching and transmission facilities required to reach the nation as a whole.

These predictions have no support outside of the imagination and rhetoric of these incumbent LEC lawyers (whose prior 1993 "fact" report had categorically announced that local

---

<sup>13</sup> See GTE at 14 (quoting Kahn Aff. at 4).

services would imminently become more competitive than long distance services and that the market opening provisions of the 1996 Act were unnecessary). The reality is that, in contrast to the detailed evidentiary showings made in the *AT&T Nondominance Order*, the incumbent LECs have not offered any evidence that existing non-incumbent LEC switches and transmission facilities could be used to offer mass market services at all, much less that they could do so now or in the near future at costs and prices competitive with the incumbent LECs'.

And this showing cannot be made. Even if it were the case that CLECs could purchase scalable switching machines at the same unit costs incumbent LECs incur, a CLEC that generally offered service through unbundled loops and its own switches would incur radically higher costs for the "physical and logical connection[s]"<sup>14</sup> to its switches than would the incumbent LEC. CLECs would thus be impaired in their ability to provide service if they were denied access to the incumbent LEC's local switching element. Similarly, while it is the case that fiber, transmission equipment, and conduit can sometimes be purchased by CLECs at prices similar to those that the incumbent LECs pay, these facilities cannot be deployed to serve even large business customers who demand DS1 facilities unless CLECs obtain rights of way and access to commercial buildings – which requires CLECs to incur delays and costs that do not apply to the incumbent LEC even apart from the time required to construct the loops and transport facilities. Even more fundamentally, these facilities are characterized by enormous economies of scale, so that CLECs must be assured of substantial traffic volumes before they can otherwise achieve unit costs that are close to the incumbent LECs' and there will be many instances where it is uneconomic (or

---

<sup>14</sup> See *First Report and Order* ¶ 312.

commercially impossible) for individual CLECs to obtain transport or loop facilities from sources other than the incumbent LEC.

In short, the incumbent LECs have offered no support for their claims that CLECs will have a “meaningful opportunity to compete” for all local service customers so long as they can obtain access to residential and other loops at speeds lower than 1.5 kps and certain limited transport facilities. In all events, the incumbent LECs’ “marketplace evidence” would be patently insufficient to rebut the detailed showings of AT&T and others (1) that there are no alternative facilities in place today that can be used to offer mass market services to residential and small business customers, (2) that there are no alternative facilities in place today that can be used competitively to provide service to the large business customers located in the vast majority of the nation’s commercial buildings, (3) that it will take months, years, or in some cases decades to establish alternative networks capable of providing service to all the nation’s residential, small business, and large business customers, and (4) that even then, the unavailability of network elements will often mean small and large customers alike will obtain local services in a duopoly.

Third, the adoption of the “procedural” claims advanced by the incumbent LECs’ and certain state commissions would impair or effectively preclude the ability of CLECs to provide services broadly. Although these states’ proposed rule would provide that the seven elements set forth in Rule 51.319 are “presumptively available,” that would be the equivalent of adopting no rule at all. It would assure that incumbent LECs could and would litigate whether any individual network element should be available to allow individual carriers to serve specific customers or areas of the state. These issue would be litigated first in proceedings before 50 different state

commissions and thereafter would be litigated in 50 different federal district courts and all the nation's federal courts of appeals. That would destroy the certainty that the Commission has recognized is necessary to the efficient use of network elements,<sup>15</sup> and would be in the Supreme Court's words a "surpassing strange" way to effectuate a federal policy.<sup>16</sup> It would further impose immense litigation costs and delays on the CLECs who would otherwise use network elements. That is why the *First Report and Order* both had concluded that minimum national unbundling rules were essential to advancing the objectives of the 1996 Act and had made determinations of "impairment" and "necessity" based on conditions in the nation as a whole.

There is no basis for the claims that Section 251(d)(2) or the Supreme Court's decision permit, much less require, localized market-by-market determinations of whether the ability of CLECs to provide service would be impaired by denials of access to particular elements. The Supreme Court upheld the Commission's authority to implement the Act by adopting national rules based on conditions in the nation as a whole. And although Rule 51.319 was vacated, the Supreme Court did not hold that it was improper for the Commission to make its nationwide findings under Section 251(d)(2) or that the Act required (or permitted) localized findings of impairment or necessity. To the contrary, the Court held only that the nationwide findings had been made and the national rules adopted on the basis of a definition of impairment and necessity that failed to consider whether elements were available outside the incumbent LECs' networks

---

<sup>15</sup> See *First Report and Order* ¶¶ 241-48

<sup>16</sup> See *Iowa Utils. Bd.*, 119 S.Ct. at 730 n.6.

and whether the “ability” of incumbent LECs to provide service would be impaired if access to a particular element were denied. Thus, the sole reason for this remand is to apply broader standards of necessity and impairment to conditions in the nation as a whole, not to make market-by-market and element-by-element determination.

Finally, because the incumbent LECs’ proposals would, at the least, substantially extend the time it will take before other carriers are in a position to place “serious competitive pressure” on their monopolies,<sup>17</sup> adoption of those proposals would have far reaching implications for other Commission policies that were premised on the very different understanding that competition would be able to proceed rapidly because of the widespread availability of network elements. If the Commission were now to reverse course, it would be foregoing what Ameritech calls the “immediate gratification” of “the fastest possible entry by the maximum number of competitors” in favor of a slower-paced strategy of merely “laying the groundwork” for competition in the future.<sup>18</sup> In that event, any grants of Section 271 relief or any use of a market-based approach to access reform would be absent and such actions likewise have to be deferred until there is, or imminently can be, ubiquitous economic alternatives to incumbent LECs’ exchange and exchange access services.<sup>19</sup>

---

<sup>17</sup> See Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543 ¶ 18 (1997).

<sup>18</sup> See Ameritech at 4.

<sup>19</sup> See AT&T at 31-35.

The rest of these Reply Comments is divided into five parts. Part I demonstrates that the data and “marketplace evidence” relied upon by the incumbent LECs show that the competition that has developed in the three years since the 1996 Act was enacted exists only in niches occupied by a few large business customers and other tenants in a small fraction (an alleged 15%) of the nation’s office buildings. Conversely, it confirms that the widespread availability of the core elements of Rule 51.319 is necessary if there is to be (1) mass market competition today, (2) competition for the large business and other tenants in the vast majority of the nation’s office buildings, and (3) the development of competition by multiple firms in even those niches that have some competition today.

Part II refutes the incumbent LECs’ arguments that the Commission can or should apply an “essential facilities” test or any other comparably restrictive test. It demonstrates that Section 251(d)(2) requires the application of a comparative standard in which impairment must be found whenever some CLEC can provide service more quickly, more broadly, or more effectively if an element is available under Section 251(c)(3) than the CLEC could if the incumbent LEC denied this access. It further refutes the incumbent LECs’ claim that the availability of access for elements that meet this standard would undermine a statutory policy fostering innovation or have any material effect on the incentives of incumbent LECs and CLECs to innovate.

Part III demonstrates that the terms and purposes of the Act require the nationwide availability of elements if they satisfy the impair standard (or the necessity standard in the case of proprietary elements) or if their availability would otherwise advance the Act’s objectives of

promoting competition by multiple providers. It further refutes the incumbent LECs' claim that state commissions cannot order the availability of additional network elements under state law.

Part IV demonstrates that even the application of the LECs' restrictive standards would require access to all the elements defined in the original Rule 51.319, with possible exceptions only for the provision of stand-alone signaling and directory assistance and operator services (once customized routing is broadly deployed and directory listings are available as network elements).

Finally, Part V demonstrates that the Commission should reinstate its rules regarding network element combinations and superior quality access and interconnection.

## DISCUSSION

### **I. THE RECORD CONFIRMS THAT THE WIDESPREAD AVAILABILITY OF UNBUNDLED NETWORK ELEMENTS IS IMPERATIVE IF THERE IS TO BE ANY MASS MARKET COMPETITION IN THE NEAR TERM.**

The record in this proceeding provides abundant and uncontradicted evidence regarding the stark choice the Commission faces and the consequences of its decision. For the last three years, critical unbundled network elements have been effectively unavailable because of the Eighth Circuit's decision on Rule 315(b). As a result, competition has existed only at the margins and has been limited to portions of the highest-volume niche markets. The Order in this docket will determine whether that *status quo* is maintained or upset.

Alone among the commenters, the incumbent LECs pronounce themselves satisfied with the current pace and scope of local entry. GTE credits itself with bringing this asserted progress

about by securing the very holdings from the Eighth Circuit that the Supreme Court reversed as erroneous constructions of congressional intent.<sup>20</sup> U S WEST similarly observes that, in its view, the fact that access to network elements has been effectively unavailable has had no ill effects – indeed, to the contrary, “competitive entry into local exchange markets is generally not being impaired by the absence of mandatory access to incumbent LEC network elements and CLECs have been consistently able and willing to provision their own network elements.”<sup>21</sup>

Indeed, in the incumbent LECs’ view, the successful use of litigation to block the availability of network elements has somehow produced a “competitive firestorm”<sup>22</sup> that has in turn led to an “explosion of facilities-based competition.”<sup>23</sup> But the only thing that has been fired up is their imagination. The Commission’s *Local Competition Report*, prepared by the Industry Analysis Division and released in December 1998, tells a far different and more dispassionate story. It reported that CLECs and other local competitors were providing “only about 1.2% of total local service to end users.”<sup>24</sup> Moreover, 1.2% is an average. Because those CLECs were providing a higher percentage of “special access type services to business customers,” their

---

<sup>20</sup> See GTE at 6 (existing competition has occurred “because the Commission’s UNE platform and recombination requirements have been stayed by the Eighth Circuit and because there has been uncertainty over whether ILECs will be required to provide elements at TELRIC prices”).

<sup>21</sup> See U S WEST at 34.

<sup>22</sup> See Bell Atlantic at 5.

<sup>23</sup> See GTE at 31.

<sup>24</sup> See *Local Competition Report* at 10 (“*FCC Local Competition Report*”).

portion, if any, of services devoted to mass market or other residential services was even smaller than 1.2%.<sup>25</sup>

Any suggestion that broad-based competition could soon emerge without the broad availability of network elements is thus demonstrably wrong. As SBC points out, “the best evidence of what an efficient competitor *could* do is what actual competitors *are* doing.”<sup>26</sup> The other incumbent LECs likewise urge the Commission to focus on “actual market experience” in deciding whether network elements should be unbundled.<sup>27</sup> And actual market experience establishes what Congress and the Commission recognized from the outset: the local exchange networks reflect enormous economies of scale, scope, density, and connectivity, and unless those economies are “shared with entrants,”<sup>28</sup> the only market segment today in which competition can possibly emerge is in the provision of service to those high volume urban business customers where competitive carriers can come sufficiently close to achieving such economies on their own.<sup>29</sup> Indeed, insofar as any lesson can be learned from actual market experience to date, it is

---

<sup>25</sup> See *id.*; see also MCI WorldCom at 3 (“serious competition has developed at a snail’s pace, and only in a very few business markets”); Qwest at 7-8 (“without access to the full complement of UNEs, including unbundled local switching, few CLECs have been able to justify serving residential and small business customers even though a number of CLECs have invested in local switching themselves in business districts”).

<sup>26</sup> See SBC at 21 (emphasis in original).

<sup>27</sup> See, e.g., GTE at 5, 23; U S WEST at 7; Ameritech at 69.

<sup>28</sup> See *First Report and Order* ¶ 11.

<sup>29</sup> See MCI WorldCom at iii; Qwest at 8.

how small CLEC market penetration has been *even in* that high-volume market segment – as the LECs’ own asserted data confirms.

Consequently, while the incumbent LECs have filed a voluminous amount of affidavits, “studies,” and “reports” in this proceeding that describe, stretch, and spin hundreds of asserted “facts,” not even their submissions claim that there has been, or will soon be, mass market competition without the widespread availability of network elements. In particular, the Bell Companies’ principal outside law firm has prepared an ambitiously-titled “UNE Fact Report” that collects press clippings, maps, reports, and unsworn and assertedly confidential data from the incumbent LECs combined into unsourced aggregate form, and weaves in the attorneys’ many speculations about the future direction of the market.<sup>30</sup> But even if all the supposedly factual information in that report were accurate, it would not support the incumbent LECs’ case. At most, it provides a chatty inventory of existing CLEC facilities. It does not ask, much less answer, whether or how those facilities could actually be *used* to provide the mass market competitive services that CLECs seek to offer and that Congress sought to foster.

For example, in an effort to suggest that CLECs have amassed a substantial competitive presence, the *Huber Submission* asserts that “CLECs are already using their own switches to serve over one third of BOC and GTE rate exchange areas.”<sup>31</sup> In that regard, it states that “14 CLECs operate 23 switches in the Washington, D.C. MSA,” and it notes that “[f]ifty percent of

---

<sup>30</sup> See *Huber Submission*.

<sup>31</sup> See *id.* at I-10.

the rate exchange areas in th[at] MSA are served by at least one CLEC switch; 43 percent are served by two or more; 36 percent by three or more; and 34 percent by four or more.”<sup>32</sup> But what does the *Huber Submission* mean when it states that a switch “serve[s]” an “area?” As any resident of Washington, D.C. is aware, there are no meaningful choices here for consumers other than Bell Atlantic’s monopoly. The *Huber Submission* is either misstating the facts, or using words differently from the rest of us.

AT&T cannot verify the accuracy of the *Huber Submission*’s claims regarding other CLECs. But it is clear from its references to AT&T why there is such a fundamental disconnect between the world described by the *Huber Submission* and the world actually experienced by consumers. For example, in discussing the switches CLECs use to “serve” Washington, D.C., the *Huber Submission* notes that “AT&T operates a Nortel DMS 100 to serve 37 rate exchange areas, and two Lucent 4ESSs to serve 21 more.”<sup>33</sup> The 4ESS switches are long distance switches that are useless in providing residential local service and most business local services, because they cannot terminate analog lines. Those switches are used to interconnect other AT&T switches, and so their ports can only be used for trunks. As a consequence, they can be used to provide local service only to business customers who can run a T.1 line or higher from their premises to interconnect with the switch.<sup>34</sup> Similarly, the Nortel switch can profitably be used, for

---

<sup>32</sup> *See id.* at I-12.

<sup>33</sup> *See id.*

<sup>34</sup> Even in those circumstances, the 4ESS cannot provide certain essential services like emergency 911, operator services, and directory assistance. Accordingly, even for the limited customer base it can serve, the 4ESS cannot fully replace the incumbent local carrier.

the reasons explained in AT&T's Comments and these Reply Comments, only for business customers of sufficient size. *See infra* pp. 95-97. AT&T has not provided, and currently cannot provide, mass market local service in Washington, D.C.

The *Huber Submission*'s treatment of fiber deployment is equally revealing. In discussing interoffice transport, for example, it emphasizes that CLECs have deployed 30,000 miles of fiber within the top 50 MSAs.<sup>35</sup> But interoffice transmission is a point-to-point service. The existence of so-called "competitive fiber" is irrelevant to a carrier unless that fiber travels to and from the particular points between which the CLEC needs transport – and most of the time the CLECs' fiber does *not* match the necessary routes, and competitive carriers must instead depend on the incumbent LECs' facilities if they are to offer service. *See infra* pp. 129-31. The *Huber Submission* also repeatedly claims that CLECs "serve nearly 15 percent of all commercial office buildings in the country."<sup>36</sup> But that figure is grossly overstated (*see infra* p. 76 n.165), and, even if valid, would merely confirm that, even after three years under the 1996 Act, CLECs have been unable to build facilities to *more than 85%* of the nation's office buildings. That is vivid confirmation of the present-day economic and operational obstacles to providing facilities-based service that AT&T's Comments, and those of the other CLEC commenters, have described.

Moreover, much of the *Huber Submission* consists not of factual data but of the attorneys' extrapolations from those data to predict likely near-term competitive developments

---

<sup>35</sup> *See Huber Submission* at II-6.

<sup>36</sup> *See id.* at II-6, III-3.

and CLEC capabilities. In this respect and others, this *Huber Submission* reads very much like the last such work Huber co-authored – *The Geodesic Network II: 1993 Report on Competition in the Telephone Industry* (“1993 Huber”).<sup>37</sup> There – three years before passage of the 1996 Act – he insisted that local exchange competition was “developing very fast,”<sup>38</sup> that local exchange markets were already “riddled with competition,”<sup>39</sup> and that the local exchange would soon become “the most competitive” part of the telecommunications network.<sup>40</sup> He predicted that “[t]he increase in available spectrum and the outpouring of new competitors will place tremendous pressure on the local copper loop,”<sup>41</sup> and asserted that “[c]able-CAP-radio companies are now poised to offer house-to-house phone service in direct competition with local telcos”<sup>42</sup> and “will soon be presenting themselves to customers as fully competitive local exchange carriers offering universal switched service and a full panoply of competitive enhancements.”<sup>43</sup> Indeed,

---

<sup>37</sup> See P. Huber, M. Kellogg, & J. Thorne, *The Geodesic Network II: 1993 Report on Competition in the Telephone Industry* (1992).

<sup>38</sup> See *id.* at 1.28.

<sup>39</sup> See *id.* at 2.73.

<sup>40</sup> See *id.* at 1.44; see also *id.* at 2.1 (local competition is “imminent”); *id.* at 1.42 (“market forces are now being unleashed in the local exchange”); *id.* at 2.80 (“these developments herald the imminent end of the local exchange monopoly”). Indeed, even six years *earlier*, in the original 1987 *Geodesic Network*, Huber had asserted that “the building blocks for competition at the local level of the exchange are falling into place.” See P. Huber, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry* at 2.25.

<sup>41</sup> See *1993 Huber* at 1.10.

<sup>42</sup> See *id.* at 2.12.

<sup>43</sup> See *id.* at 2.11.

1993 *Huber* went so far as to “question whether the local telcos can survive in the long term.”<sup>44</sup>

The present *Huber Submission* follows the same line of argument as its predecessor: all the pieces for local competition are now in place, choice for consumers is imminent, and the government should immediately lift regulatory obligations and prohibitions on incumbent LECs in anticipation of that development. The poor track record of previous such predictions is one of many reasons not to base public policy on them here.

GTE’s sweeping claims about the breadth and significance of CLEC facilities-based entry likewise evaporate upon the slightest scrutiny. For example, GTE displays a variety of tables and matrices in asserting that AT&T, and other CLECs, cumulatively are self-providing or acquiring from non-incumbent LEC sources switches, transport, loops, OSS, signaling, and OS/DA in eight selected GTE markets.<sup>45</sup> But the one statistic that any analyst would ask for first in investigating whether CLECs have been able to establish a significant competitive presence – GTE’s and CLECs’ respective market shares – is missing from GTE’s otherwise lengthy presentation. And that is undoubtedly because the CLEC facilities that GTE identifies provide service only in narrow and high-volume niche markets, and have not otherwise laid a glove on GTE’s monopoly. That is certainly the case with respect to the listed facilities of AT&T.

GTE implicitly acknowledges as much. For although it elsewhere urges the Commission to rely on “actual market experience” (*see supra* p. 17), GTE’s description of CLEC activity

---

<sup>44</sup> *See id.* at 2.76.

<sup>45</sup> *See* GTE at 7-8, 35-36.

almost immediately abandons any discussion of that “actual experience,” which would require use of the present or past tense, and, like the *Huber Submission*, shifts instead to the future tense. It asserts that CLECs are “poised” to win over GTE’s customers<sup>46</sup> and that competition soon will “get more fierce.”<sup>47</sup>

But those predictions are based entirely on GTE’s claim that many of GTE’s customers are potentially “addressable” (as opposed to actually addressed) by existing CLEC facilities. And that claim, in turn, is entirely based on the false and facile assumption that any customer within 1,000 feet of CLEC fiber or 18,000 feet of a CLEC switch could “readily” and “immediately” be served by that CLEC. Even if that claim were true, the numbers GTE displays are remarkably unimpressive: according to GTE, in Fort Wayne 75% of customers are not within 1,000 feet of *any* CLEC’s fiber; in Los Angeles, the number is 82%; and in Tampa, 84% likewise are, even in GTE’s terms, “unaddressable.” Even more fundamentally, however, GTE’s concept of “addressable” customers is nonsense. As AT&T shows in its Comments and in these Reply Comments, there are numerous and massive operational and economic obstacles to extending existing facilities in the way GTE posits – from obtaining access to buildings for loops (*see infra* pp. 80-84), to obtaining rights of way and franchise agreements for any form of transport (*see infra* pp. 122-23), to obtaining the collocation space and “hot cuts” necessary to connect unbundled loops to CLEC switches (*see infra* pp. 90-108). Thus, it should not be surprising that,

---

<sup>46</sup> *See id.* at 36.

<sup>47</sup> *See id.* at 38.

in fact, AT&T serves only about 170 buildings in Dallas/Fort Worth with its own loop facilities, 123 buildings in Los Angeles, and 0 buildings in Tampa.<sup>48</sup> GTE's "addressable markets" predictions simply ignore all of these (and many other) real-world barriers.

In similar fashion, and without a hint of self-consciousness, GTE emphasizes that the CLECs in its region "*uniformly* depend on self-provided switching"<sup>49</sup> and "[f]acilities based carriers . . . dominate the CLEC market."<sup>50</sup> But of course that is the case. As a result of the short-term success of GTE's and the other incumbent LECs' litigation efforts in the Eighth Circuit, unbundled switching could not be ordered in conjunction with unbundled loops. Because any CLEC with its own loop would almost certainly have its own switch, virtually no unbundled switching was ordered by any CLEC. Further, because, as both CLECs and the incumbent LECs have acknowledged (*see* AT&T at 57), resale has proven uneconomic, facilities-based CLECs necessarily "predominate" in what little remains of the "CLEC market." The relevant question here, however, is whether those remaining CLECs have been able to serve significant numbers of customers across market segments and place competitive pressures on GTE to lower its prices and improve its service quality. The answer is well-known: GTE remains the unchallenged monopolist in its regions, with market share greater than 98%.<sup>51</sup>

---

<sup>48</sup> *See* Lynch Aff. ¶ 10.

<sup>49</sup> *See* GTE at 35 (emphasis in original); *see also* Ohio PUC at 7.

<sup>50</sup> *See* GTE at 33.

<sup>51</sup> For example, based upon the data in the *FCC Local Competition Report*, AT&T calculates that GTE's market share in its regions is 98.36% in Florida, 98.54% in Texas, and 98.81% in California. AT&T calculated these shares by relying on Tables 3.4 and 3.5 of that Report, which show GTE's total switched lines, resold lines, and unbundled loops for each state, and assuming  
(continued . . .)