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FEDERAL COMMUNICATIONS COMMISSION
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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
	)	

JOINT REPLY COMMENTS OF AMERITECH, BELLSOUTH, SBC COMMUNICATIONS INC., AND THE UNITED STATES TELEPHONE ASSOCIATION ON THE LIMITING STANDARDS OF SECTION 251(d)(2)

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

A number of CLEC commenters ask the Commission to ignore congressional intent, the plain language of section 251(d)(2), and the Supreme Court's opinion. These commenters would have the Commission readopt – and even expand – its prior list of UNEs without engaging in the careful analysis that, as the Supreme Court expressly held, section 251(d)(2) requires. They would have the Commission ignore the overwhelming evidence of available alternatives to the ILEC network – even though the Court commanded the Commission to consider these options. And they would even have the Commission accept *any* increase in cost or decrease in quality as satisfying section 251(d)(2) – despite the fact that the Court expressly condemned this approach.

It should go without saying that the Commission cannot abdicate its responsibility to comply with the Supreme Court's mandate. The Commission must adopt a meaningful limiting standard that comports with the Court's opinion and furthers the goals of the 1996 Act. The Commission must then reevaluate *each* network element individually in light of that standard as applied to current market facts.

Ameritech Corporation, BellSouth Corporation, SBC Communications Inc., and the United States Telephone Association ("USTA") submit these joint reply comments to discuss seven limiting principles that the Commission must follow in articulating the standard for unbundling under section 251(d)(2). Each of the companies will also file separate reply comments on the application of section 251(d)(2) to individual network elements.

First, and most importantly, the proper focus of the Commission's inquiry must be on consumer welfare. The preamble to the 1996 Act states that any regulation promulgated under the Act must "promote competition and reduce regulation to secure lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, at Preamble, *codified at* 47 U.S.C. §§ 151 *et seq.*

To further Congress's goal, then, the Commission must apply a limiting standard that advances consumer welfare, not the welfare of individual competitors. Despite this clear edict, several CLEC commenters ask the Commission to unbundle network elements to maximize the number of competitors, regardless of how inefficient they are or how eccentric their business plans. In the natural course of a competitive market, however, inefficient carriers will lose business to efficient carriers and eventually drop out of the market. Allowing inefficient carriers to set the benchmark for unbundling will distort this process. Under the CLECs' approach, the most inefficient carrier in existence can set the pace by which an entire market is unbundled; an inefficient carrier, which should otherwise be driven from the market, may obtain unbundled access if it would be impaired without it, even though the impairment is caused by the carrier's own inefficiencies. To state the theory is to dismiss it; section 251(d)(2) is hardly a limit if it can be distorted in this fashion.

Congress's stated purpose also requires the Commission to consider the costs of excessive unbundling, particularly in terms of its effect on "the rapid deployment of new telecommunications technologies." An excessive unbundling requirement will chill all carriers' incentives to invest and innovate. A CLEC will not risk a large investment in facilities when it can instead free-ride on the investments of ILECs. And ILECs themselves will lack the incentive to innovate and upgrade their networks because the fruits of that effort must be shared. This chilling effect is particularly severe when applied to new technologies, which involve greater risk. There are also administrative costs associated with unbundling, including the costs of establishing and overseeing the unbundling requirements. Because of these costs, more unbundling does not mean more competition; in fact, it means just the opposite. If investment and innovation are hampered, consumers suffer with fewer choices, higher prices, and inferior quality.

These two incontrovertible and fundamental principles require the Commission to implement an unbundling requirement based on the needs of efficient competitors. The Commission has used this benchmark in the past – in devising its nondiscrimination standards and adopting the TELRIC pricing requirement – and it must do so again here to adhere to the 1996 Act and its stated purposes. Focusing on what efficient competitors need to compete is a surrogate for focusing on consumer welfare because competition among efficient competitors drives down prices, improves quality and service, and introduces new and innovative products. This approach also yields the optimal amount of unbundling, which further benefits consumers. An unbundling requirement that looks to what efficient competitors need in order to have a meaningful opportunity to compete will encourage facilities-based investment and innovation where alternatives to entry exist, while at the same time allowing access to network elements where they do not.

Second, and in the same vein, the Commission must reject the attempts by CLECs to compel the unbundling of UNEs even in areas and for services where alternatives are clearly available to efficient competitors. Several commenters ask the Commission to require UNEs ubiquitously as long as they are needed by any CLEC, in any area of the country, for any class of customers. To accept the proposition that UNEs must be available *everywhere*, the Commission must adopt the counterfactual view that there are no efficient providers of non-ILEC network elements *anywhere*. The Commission would therefore have to turn a blind eye to the competitive viability of a multitude of CLECs throughout the country that are successfully self-providing network elements or obtaining them from non-ILEC third parties. The Commission cannot, of course, ignore this factual record. To do so would violate the fundamental tenets of administrative law. It would also flout the Supreme Court's opinion and congressional intent. Actual CLEC success using non-ILEC network elements is conclusive proof that an alternative is viable; to mandate unbundling in these markets would flatly violate section 251(d)(2) and thwart the purposes of the Act. Mandating unbundling where it is not necessary will stifle innovation and investment, and consumers will pay the price for the regulatory excess.

Third, the Commission should reject attempts to bootstrap elements on the 319 list based on the alleged desirability of the UNE platform or other combinations. The Supreme Court opinion requires the Commission to evaluate elements for compliance with section 251(d)(2) on an element-by-element basis. Commenters that ask the Commission to evaluate elements in combination with other network elements mock the Court's opinion and the purposes of the Act. Taken to its ultimate conclusion, this approach would impede the evolution of a competitive market for *any* network element until *all* network elements are competitively provided. Thus, even when an element can be self-provided or obtained from non-ILEC sources, these commenters would insist on unbundling as long as some other network element must be unbundled. Under this methodology, competition will never develop because the entire ILEC network will be shared and no carrier (ILEC or CLEC) will have the incentive to innovate and invest. Section 251(d)(2) and the 1996 Act will not condone such a result.

Fourth, the section 271 checklist is irrelevant to the section 251(d)(2) inquiry. Nothing in section 271 absolves the FCC of its responsibility to implement the section 251(d)(2) standard. Indeed, reading section 251 to require unbundling for the same elements listed in section 271 would render the list in section 271 itself meaningless because section 271(c)(2)(B)(ii) already requires that section 251(c)(3) UNEs must be provided under UNE terms.

Fifth, section 251(d)(2) is a minimum threshold that must be met before any network element is unbundled; "other considerations" may not override this plain language or the Court's interpretation of it. The Supreme Court held that section 251(d)(2) applies a limiting standard, and the Court's holding makes no sense if this limit can be trumped by other factors. Moreover, the purposes of the Act would be undermined by such an approach. Section 251(d)(2) assures that unbundling is required only when doing so advances, not retards, consumer welfare. Debilitating this screening function by allowing other considerations to override it would inhibit innovation and harm consumers. Accordingly, this interpretation must be rejected as inconsistent with the language and purpose of the Act.

Sixth, the Commission must reject commenters' efforts to undercut Congress's special protection of proprietary elements. Although many CLECs campaign for an unbundling rule that would provide access to proprietary elements anytime the proprietary element is not disclosed, section 251(d)(2) says nothing about disclosure. It speaks to "access" and allows that access only when "necessary." To force sharing under the loose standard advocated by CLECs would not only contradict this plain language, it would destroy the incentives of ILECs to develop proprietary elements in the first place, which is certainly at odds with Congress's intent.

Seventh, the Commission cannot reinstate its rules on new network element combinations and/or its rules regarding superior quality interconnection and access. To do so would violate the Eighth Circuit's holding in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), and that holding remains the law. Neither the Commission nor any other party sought review of the Eighth Circuit's holding in the Supreme Court, and the Supreme Court properly declined to consider a challenge to these rules. And nothing in Supreme Court's ruling calls the Eighth Circuit's decision into question.

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The Supreme Court's decision requires the Commission, in implementing section 251(d)(2), to establish meaningful limitations on unbundling that are "rationally related to the goals of the Act." *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734 (1999). Despite the importance and clarity of the Court's holding, several commenters have tried to trivialize it. *See, e.g.,* AT&T at 4-6 (characterizing the Court's opinion as "extremely narrow" and "technical"); Sprint at 5 (Court remanded the UNE issue on "very narrow grounds"); MCI WorldCom ("MCI") at i (Commission has a "very narrow task"); *id.* at 2 (Commission's order was vacated on a "narrow ground").

These commenters urge the Commission to reestablish, and even expand, its prior list of UNEs without engaging in any of the analysis that, as the Court expressly held, section 251(d)(2) requires. Thus, AT&T wants the Commission to adopt the very *de minimis* test for unbundling *rejected* by the Supreme Court. *See* AT&T at 9 ("in these industry conditions, *any* increase in the cost of service or decrease in its quality or scope that results from a LECs' denial of access would defeat the objectives of the Act, even if it were certain that CLECs would nonetheless enter on the same scale and at the same time") (emphasis added). Sprint, without bothering with any test, simply claims that the Court assumed that network elements would be "unconditionally available." Sprint at 7. Other CLECs' comments are to the same effect. *See, e.g.,* GSA at 3-5; KMC at 3-5; Prism at 2-4. They all want the prior list of UNEs readopted, along with a wish list of additional items, but without any serious analysis by the Commission of competitive alternatives.

This way lies reversal. However beguiling, the Commission must stop its ears to the Sirens' song of those who would purport to absolve the Commission of its responsibility to grapple seriously both with the need for a limiting standard and with the application of that standard to complex market facts. The Commission *must* establish a limiting standard that comports with the purposes of the Act and that requires something more than "*any* increase in cost (or decrease in quality)" as a condition of unbundling.[1] And the Commission *must* consider "the availability of elements outside the incumbent's network." 119 S. Ct. at 735. That means, at a minimum, that the Commission must look at the ability of efficient CLECs to compete either through self-provision or by obtaining the required element from a third-party.

It follows that facts are critical to the Commission's remand inquiry. Yet facts are precisely what most CLEC commenters so steadfastly ignore. The ILECs and USTA have

[1] Commenters that simply insert the word "material" before the Commission's prior standard (*i.e.,* a "material increase in cost" or a "material decrease in quality"), *see, e.g.,* CompTel at 2, 9-13; MCI at 4, 23-26; Cable & Wireless at 10-16; Focal at 4, but ask the Commission reflexively to readopt its prior list of UNEs miss the point of the meaningful review the Supreme Court's opinion requires. Whether a decrease in quality or increase is cost is "material" depends on whether an efficient competitor is denied a meaningful opportunity to compete. As discussed *infra*, the efficient competitor must be the benchmark for any standard pursuant to section 251(d)(2) – including a "materiality" standard – because allowing an analysis to be based on any one carrier's impairment would render section 251(d)(2) meaningless. That is, section 251(d)(2) would impose no meaningful limit if it is satisfied as long as one carrier somewhere in the country, no matter how inefficient or idiosyncratic its business practices, is impaired (materially or not). Obviously, at least one such carrier exists in every market, making such a standard as meaningless as the one the Court rejected.

submitted a detailed factual report that looks at every proposed network element and attempts to show where CLECs are already self-provisioning that element and where they are obtaining it from third parties. The CLECs have not presented anything remotely comparable. Because these very facts are best known to the CLECs themselves, who are actually using these alternative sources of supply, their silence speaks volumes.

The CLECs know that many network elements are freely available from sources other than ILECs, particularly in urban areas. Yet they want the benefits of the UNE platform at TELRIC pricing. So they have ignored the facts and urged upon the Commission a "least common denominator" approach that would mandate unbundling everywhere simply because some CLEC somewhere conceivably might need the element in question. They have also attempted to establish an alleged need for the UNE-platform as a way of bootstrapping all the individual elements within it. Neither approach is sustainable. The Commission, like all agencies, must consider the factual record before it. And those facts unmistakably require the Commission to reject the CLECs' attempts to undermine the Court's opinion.

The Commission must establish a meaningful limiting standard on unbundling that comports with the Act and the Court's opinion. The Commission must then reevaluate *each* network element individually in light of that standard as applied to current market facts. There is no shortcut.

I. The Proper Focus of the Commission's Inquiry Must Be on Consumer Welfare

The Commission must begin its inquiry under section 251(d)(2) by considering the goals of the 1996 Act. *See* 119 S. Ct. at 734 (the FCC must apply a limiting standard "rationally related to the goals of the Act").[2] Those goals are plainly stated in the Act's preamble: to

[2] *See also Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995) ("Every statute proposes, not only to achieve certain ends, but also to

"promote competition and reduce regulation to secure lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, at Preamble, *codified at* 47 U.S.C. §§ 151 *et seq.* Congress's express statement of purpose has two implications for a proper interpretation of section 251(d)(2).

First, the Preamble to the 1996 Act makes clear that Congress's goal is to benefit "American telecommunications consumers," not individual competitors. Consumers benefit from competition, which leads to lower prices and more innovation. But the interests of consumers cannot be equated with those of individual competitors, and consumers certainly do not benefit when inefficient competitors are subsidized at the expense of true competition. The focus of the Commission's inquiry has to be on the needs of efficient competitors (who promote competition), not inefficient competitors (who should not be in the market because they cannot offer the same quality, service, or prices as efficient competitors).

Despite this clear purpose, several commenters ask the Commission to interpret section 251(d)(2) to maximize the number of individual competitors, regardless of how inefficient they are or how idiosyncratic their business plans. *See, e.g.,* AT&T at 6-7 (emphasizing that, while elements would only be "required . . . to fill in gaps in [the] networks" of major CLECs, elements would also be necessary "for any other CLECs who wish to offer comparable service"); ALTS at 34 (arguing that "251(d)(2) standards must be applied in a manner that considers and makes possible UNE entry by large and small competitors alike and does not close the door on

achieve them by particular means."); *Holloway v. United States*, 119 S. Ct. 966, 975 (1999) (Scalia, J., dissenting) ("[E]very statute intends not only to achieve certain policy objectives, but to achieve them by the means specified. Limitations upon the means employed to achieve the policy goal are no less a 'purpose' of the statute than the policy goal itself.").

new local entrants"). Sprint baldly suggests that unbundling should be required as long as *any* carrier (efficient or inefficient) would be impaired without it. Sprint at 22, 25.

Yet, in the natural course of a competitive market, inefficient carriers will lose business to efficient carriers and eventually drop out of the market. Allowing inefficient carriers to set the benchmark for unbundling will distort this process. Under the CLECs' approach, the most inefficient carrier in existence can set the pace by which an entire market is unbundled. That is, an inefficient carrier, which should otherwise be driven from the market, may obtain unbundled access if it would be impaired without it, even though the impairment is caused by the carrier's own inefficiencies. To state the theory is to dismiss it; section 251(d)(2) is hardly a limit if it can be distorted in this fashion. It is hard to imagine a market that does not have at least one inefficient competitor, on the brink of exit because of that inefficiency, that could last a little longer with unbundled access at TELRIC prices.

Such an approach, while helpful to the inefficient competitor, would be harmful to competition and consumers. Because they are inefficient, these competitors are unable to self-provide network elements at TELRIC, which – by definition – is the price at which an ILEC's network could be replicated using its wire center locations and the most *efficient* technology available. Thus, allowing inefficient competitors unbundled access at TELRIC is a form of subsidy that props up an inefficient CLEC that should not be in the market at all because it cannot offer the same quality, prices, or services as efficient competitors. Such subsidies, therefore, extend the market life of these inefficient carriers, which harms consumers by preventing true, efficient competition from developing. *See Marrese v. American Academy of Orthopedic Surgeons*, 706 F.2d 1488, 1497 (7th Cir. 1983) (Posner, J.) ("The policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors"); 119 S. Ct. at 754 (Breyer, J., concurring in relevant part) ("Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risks costs that in terms of the Act's objectives, may make the game not worth the candle"); Bell Atlantic Kahn Decl. at 3 [¶ 5] ("[T]he Commission must be guided above all other considerations by the goal of promoting efficient and dynamic competition in the service of the consuming public, rather than the fostering or protecting of individual competitors, as such. There is no economic principle, or principle of antitrust policy, more fundamental than the distinction between these two goals, whenever the two conflict.").[3]

Several commenters ask the Commission to "jumpstart" competition and encourage "rapid" entry of competitors. *See, e.g.,* MCI at 24 ("[i]n unbundling network elements, the Commission should also consider whether unbundling will help CLECs jumpstart local competition"); AT&T at 59 (the Commission must advance the Act's objective of "rapidly" fostering competition); CompTel at 1-2 ("The central question for the Commission in determining whether to mandate the availability of a UNE should be whether the UNE will promote the rapid development of competition by a multitude of providers."); Covad at iii (the Commission should promote "the rapid deployment of competitive telecommunications services").

These requests – which the CLECs seek to ground in the goals of the Act – are nothing but a smokescreen. CLECs' desire for "rapid" entry of as many CLECs as possible is simply another way of asking for the advancement of individual competitors, no matter how inefficient they may be. Rapid entry, on its own, does nothing to advance competition. If all the

[3] *See also* USTA Hausman & Sidak Aff. at 44-45, 51 [¶¶ 56-57, 66] (discussing consumer welfare versus competitor welfare).

competitors entering the market are inefficient and lack the incentive to deploy their own facilities and innovate, consumers will not benefit from the influx of carriers. The purpose of the Act is not simply to increase the number of competitors – it is to lower entry barriers and advance competition. This does not take place overnight, but it will take place in short order if the Commission allows the market to operate.[4] Indeed, local competition is already advancing faster than long distance competition. *See* UNE Fact Report at III-17. And no CLEC has demonstrated that it is would expand more rapidly but for UNE availability. Artificially flooding the market with new entrants – no matter how inefficient – does nothing to advance competition or benefit consumers. Instead, it distorts incentives and slows true competition from emerging.

Second, Congress's stated purpose requires the Commission to consider the costs of excessive unbundling, particular in terms of its effect on "the rapid deployment of new telecommunications technologies."

The biggest danger posed by too much unbundling is the chilling effect it has on *all carriers'* incentives to invest and innovate.[5] A CLEC will not risk a large investment in facilities when it can free-ride on the investments of others. *See* 3A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773c at 209 (1996) (unbundling will reduce an entrant's incentives to enter the market by other means); *id.* ¶ 771b, at 175 (when the government forces a company to "provide [a] facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether"); Brief of *Amici*

[4] Moreover, lowering entry barriers – even without entry itself – constrains incumbents because the threat of entry prevents the exercise of market power. The Commission has already recognized that an incumbent is constrained by market entry that is likely to occur within two years. Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for the Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18084-85 [¶ 105] (1998). And MCI's expert economist cites with approval the Department of Justice establishing this same benchmark. MCI Kwoka Decl. at 4 [¶ 10].

[5] *See also* USTA Jorde, Sidak, & Teece Aff. at 35-36 [¶¶ 50-53].

Curiae The Hon. John D. Dingell, *et al.* at 16, *AT&T v. Iowa Utils. Bd.* (filed S. Ct. Nov. 15, 1996) ("As long as they can accumulate risk-free profits with minimal investment, competitors will not build their own networks to provide competing services."). CLECs that have already deployed their own facilities – and there are a multitude of such companies – will be at a competitive disadvantage because other CLECs can secure the same facilities from ILECs at lower regulated prices. Thus, as one such company, Cox, explains, "the Commission should be careful to avoid policies that unintentionally encourage the use of UNEs, which could distort economic incentives and discourage beneficial facilities-based competition." Cox at ii.

And ILECs themselves will lack the incentive to innovate because the fruits of that effort must be shared. 119 S. Ct. at 754 (Breyer, J., concurring in relevant part) ("A sharing requirement may diminish an original owner's incentive to keep up or to improve the property by depriving the owner the fruits of value-creating investment, research, or labor"); Bell Atlantic Kahn Decl. at 3 [¶ 6] (noting that it is an "elementary fact that the more liberal" the definition of unbundling, "both in scope and in time (and the lower the mandated price), the less the incentive for facilities-based entry *and* for creative investment by incumbents and entrants alike").

The potential social costs of unbundling are particularly severe when applied to new technologies, such as broadband facilities. Because the deployment of new technology is inherently more risky, CLECs will have an even greater disincentive to incur the risk of such deployment when they can instead free-ride off ILECs. And the flip-side is that ILECs will lack the incentive to take a risk because they will bear the full brunt of all failures while reaping little, if any, of the reward for their successes. Thus, excessive unbundling of new technologies and facilities plainly conflicts with Congress's intent "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies."[6] It is for this reason that the Commission has pursued a consistent policy of *not* regulating innovative services offered in competitive markets.

Indeed, AT&T itself has recognized these economic forces. Its own CEO fiercely objected to a cable unbundling requirement on the ground that "[n]o company will invest billions of dollars to become a facilities-based . . . services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others."[7] And the company's actions speak even louder than its words. It recently announced that it will not provide its @Home Internet service or other advanced services over its cables in Portland, Oregon because a judge there recently ordered open access to AT&T's cable platform.[8]

The disincentive effect of a forced sharing rule is firmly grounded in economic theory, law, and common sense. Yet some commenters dispute it. For example, AT&T, in flat contradiction to its own behavior and admissions, claims that "the availability of network elements will have *no effect on any CLEC's incentives* to deploy alternative facilities as soon [as] it is technically and economically possible to do so at a cost that is at all close to the LECs' prices for network elements." AT&T at 11-12 (emphasis added). AT&T further believes that "access to [the incumbent] LEC network element can *only* advance and *never retard* the 1996 Act's objectives." *Id.* at 21 (emphasis added). These observations are impossible to square with

[6] H.R. Conf. Rep. No. 104-458, at 1 (1996).

[7] *Telecom and Cable TV: Shared Prospects for the Communications Future*, Remarks of C. Michael Armstrong, Chairman and CEO, AT&T, delivered to Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998) (emphasis added).

[8] *Other Cities May Impose Open Access After Portland Decision*, Communications Daily, June 8, 1999, at 3.

economic theory, actual market practice, and AT&T's actions. It may well be that, *all things being equal*, a new entrant would prefer to use its own facilities, but other factors enter the CLEC's calculus. One such factor, as the CLECs themselves admit, is the desire to avoid committing sunk costs. *See* MCI Kwoka Decl. at 4 [¶ 11] (noting that sunk costs present a risk to the CLEC because, "[i]f entry fails, there is no opportunity to deploy such assets usefully elsewhere and thus to cushion the financial loss"). A second factor, as discussed above, is risk. With excessive unbundling, an entrant has the incentive to free-ride on its competitors' facilities, letting its competitor bear the risk of investment, while the entrant sits on the sidelines and waits for one technology or facility to emerge as the winner. Under these circumstances, the entrant will not invest in new facilities and innovation, and the incumbent will lack the incentive to make improvements because it will not reap the rewards. Thus, competition will be hampered and technological innovation will be stifled. Yet another critical factor is cost. Irrespective of whether a CLEC can make a profit with its own facilities, it will not use them if it can make a higher profit with the facilities of its competitors.

The disincentive effect on innovation and investment is not the only cost associated with unbundling. There are administrative costs as well, including the costs of establishing and overseeing the unbundling requirements. *See* 119 S. Ct. at 753-54 (Breyer J., concurring in relevant part) ("Even the simplest kind of compelled sharing . . . means that someone must oversee the terms and conditions of that sharing."). The greater the unbundling, the greater the regulatory oversight that is required to set the terms.

The costs of excessive unbundling, moreover, will not be outweighed by increased competition. "Increased sharing by itself does not automatically mean increased competition. It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share *every* resource or element of a business would create, not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms." *Id.* at 754 (Breyer, J., concurring in relevant part). CLEC requests for access to the entire ILEC network in order to be as "ubiquitous" as the ILEC, *see, e.g.,* CompTel at 30; Ad Hoc Telecommunications Users Committee at iii, 3; Net2000 at 17, 22, are nothing more than requests to ingrain regulation and stall competition indefinitely.

To be sure, not all unbundling leads to deleterious consequences. Limited unbundling is appropriate when there are no other options for market entry. The point, however, is that *more* unbundling does not mean *more* competition. "A totally unbundled world – a world in which competitors share every part of an incumbent's existing system . . . – is a world in which competitors would have little, if anything, to compete about." 119 S. Ct. at 754 (Breyer, J., concurring in relevant part).

Some commenters seek to dismiss Justice Breyer's discussion of the costs of excessive unbundling because it is contained within a separate opinion. *See, e.g.,* AT&T at 47. But Justice Breyer was not disagreeing with the Court; quite the contrary, he was explaining the rationale behind that portion of the majority's opinion that he joined. A majority of the Court – not just Justice Breyer – interpreted section 251(d)(2) to impose a limiting principle that is consistent with the Act's pro-competitive goals, which include the advancement of consumer welfare and the promotion of innovation. Thus, the effect of unbundling on those goals must – to be consistent with the Court's opinion and the Act – be considered. And while commenters seek to dismiss the messenger, they have no response to his message: excessive unbundling harms competition. This proposition is irrefutable. Indeed, the leading treatise on competition and antitrust law expressly endorses Justice Breyer's opinion and the "inescapable" logic underlying it: "Competition requires that inputs economically capable of being supplied competitively – that is, by numerous independent sources – be supplied in that manner. Forced sharing of such inputs acts as a disincentive to producing them competitively in the first place and exacerbates and prolongs agency supervision." Areeda & Hovenkamp, *supra*, ¶ 787, at 247 (Supp. 1999).

The Commission's task, then, is to avoid excessive unbundling rules that buttress inefficient carriers and create disincentives to innovation and investment because such results are flatly at odds with the language and purpose of the 1996 Act. *See* Telecommunications Act of 1996, *supra*, at Preamble. Indeed, that is the whole point of section 251(d)(2) – to insure that unbundling is ordered only when "necessary" and/or when competition would be "impair[ed]" without it. Section 251(d)(2) imposes a limit on unbundling because unlimited unbundling would frustrate, not further, competition.

Accordingly, as even some CLECs acknowledge (*see, e.g.,* ALTS at 20), the Commission should, as it has done before, focus on what an *efficient* competitor truly needs in order to compete. The Commission properly focused on the efficient competitor in devising its nondiscrimination standard under section 251.[9] Similarly, it rejected a pricing methodology, in adopting TELRIC, that would have allowed ILECs to recover the cost of network elements based upon their existing network design and technology. According to the Commission, this would result in prices "that reflect *inefficient* or obsolete network design and technology."[10] Instead, by definition, any network element that is priced at TELRIC should be available at that same price from other, efficient sources. The Commission set its sights on the *efficient* competitor

[9] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15660 [¶ 315] ("*Local Competition Order*"), *modified on reconsideration*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

[10] *Id.* at 15848 [¶ 684].

because those competitors spur price decreases and innovation, improve quality and services, and increase consumer choice.

The same impetus that drove the Commission to its prior conclusions applies here as well. Focusing on the efficient competitor will yield the optimal result for consumers because it will encourage facilities-based investment where alternatives to entry exist, while at the same time allowing access to network elements where alternatives do not exist, as determined by the capabilities of efficient CLECs. This will promote competition and lead to lower prices, better products, and more efficient service and production. *See* Bell Atlantic Kahn Decl. at 4 [¶ 7a] (explaining that the public benefits from the quest of efficient competitors to achieve "differential advantage, whether because of the achievement of superior efficiencies or in the offer of superior goods and services to the public"). Thus, this approach strikes the appropriate balance and furthers the goals of the 1996 Act.[11]

II. The Commission Should Reject the Least Common Denominator Approach Advocated by the CLECs

Because the Commission must avoid excessive unbundling rules that hinder the fulfillment of the Act's objectives, the Commission must reject the attempts by CLECs to compel the unbundling of UNEs even in areas and for services where alternatives are clearly available to efficient competitors. For example, MCI WorldCom claims that a UNE must be provided ubiquitously if it is needed by any CLEC, in any area of the country, for any class of

[11] Many CLECs, while not explicitly adopting the "any carrier (efficient or inefficient)" standard, nevertheless propose standards that cannot be reconciled with the Act. For example, CompTel claims that the Commission must apply section 251(d)(2) to aid a hypothetical carrier with various attributes. CompTel at 26-27; *see also* Excel Communications at 6-7. This approach, however, would have the Commission set its policy based on the least efficient carrier with the most ambitious plans – a carrier with no facilities that seeks to serve all customers, everywhere, with no delay. The list of traits provided by CompTel has no basis in competition or the advancement of consumer welfare. Rather, it is a poorly disguised attempt to advance individual competitors at the expense of real competition. A focus on *efficient* competitors, in contrast, is directly linked to competition and consumer welfare.

customers. MCI at I, 18. AT&T makes the same claim by emphasizing the "vast areas of the country" (*i.e.*, less populated rural areas) where elements are not available competitively to provide "mass market" (*i.e.,* residential) services. AT&T at 6.

But these same CLECs implicitly or even explicitly acknowledge that there are alternatives to ILEC network elements in many other areas and for other classes of customers. Even AT&T concedes, for example, that "alternatives now exist" for loops used by large business customers. *Id.* at 15. And AT&T and other CLECs concede, as they must, that CLECs have deployed numerous switches in urban areas and have access to alternative transport in urban areas. *See e.g.,* MCI at 64 ("[W]e can self-provision transport to just over 400 ILEC end offices."); *id.* ("We also can purchase transport from other CLECs and CAPS to reach approximately 1,200 additional ILEC end offices, again often requiring ALEC multiplexing."); MCI Bryant Decl. at 11 [¶ 24] ("MCI WorldCom and other carriers are actively deploying switches in local markets across the country."); AT&T at 122 (conceding that AT&T gets 18 percent of its transport from competitive providers); Sprint Runke Decl. at 3 [¶ 8] (noting that 43% of Sprint LDD's DS3 dedicated access customers, who are able to choose their access provider, have selected a CAP). CLECs obviously do not need ubiquitous facilities to compete in these markets.[12]

What the CLECs are trying to do is deeply cynical. They cite a need for unbundling of elements to serve residential customers in rural areas so that they can obtain those elements, not to serve the rural residential customers, but to serve more lucrative urban business customers. MCI of course does not say anywhere that *it* will serve rural markets, and indeed MCI's own

[12] Indeed, as AT&T has elsewhere observed, "[a]ll firms do not need to be equal in size, quality, and number of customers for a market to be competitive." Reply Comments of AT&T at 22, *Competition in the Interstate, Interexchange Marketplace*, CC Docket No. 90-132 (FCC filed Sept. 20, 1990). The greater size of the ILEC network has no bearing on competition in a particular market.

chairman has on numerous occasions made clear his company's intent to concentrate on high-end business customers and to red-line rural markets.[13] In fact, MCI WorldCom is committed to staying *out* of residential markets. "Our strategy is not in the consumer business," the company flatly declares.[14] Most other CLECs intend to pursue similar strategies.[15] But the answer to the alleged lack of competition in the residential market or select areas of the country is not to implement a national list of UNEs that applies even in markets where there are alternatives. This defies the Supreme Court's requirement of a meaningful limiting standard and leads to excessive unbundling.

To accept the proposition that UNEs must be available *everywhere*, the Commission must adopt the counterfactual view that there are no efficient providers of non-ILEC network elements

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[13] "[N]ot AT&T, not MFS or anyone else, is going to build local telephone facilities to residential customers. Nobody ever will, in my opinion." M. Mills, *Hanging Up on Competition?*, Washington Post, June 1, 1997, at H1 (quoting Bernard Ebbers). "[O]ur focus is primarily on business customers." K. Russell, *Ebbers: WorldCom, Mississippi Paired for the Future*, Mississippi Business Journal, May 12, 1997, at 13 (quoting Ebbers).

[14]M. Mills, *WorldCom Would Shift MCI's Focus, Bidder Plans to Shed Residential Service*, Wash. Post, Oct. 3, 1997, at A1 (quoting John Sidgmore, WorldCom Vice Chairman); G.W. Woodlief, et al., Prudential Securities Inc., Co. Rpt. No. 2539124, WorldCom Inc., at 1 (Mar. 10, 1997). *See also* K. Russell, *supra*, at 13 (quoting Bernard Ebbers: "[O]ur focus is primarily on business customers."); T. J. Mullaney, *Competition Calling: Anyone There?*, Baltimore Sun, Apr. 6, 1997, at 1D (quoting Ron Vidal, WorldCom vice president for new ventures, "We don't play in residential.").

[15] "This relationship [TCG and AT&T] is primarily focused on the business market." Zach Schiller, *TCG Begins Phone Service For Cleveland Business Customers*, The Plain Dealer, Jan. 13, 1998, at 10C (quoting AT&T Chairman Michael Armstrong). "Our targets are the medium and small businesses. Why are we targeting them? Because it turns out a lot of those businesses tend to be in those 97 percent of the buildings or two-thirds of the business lines, where fiber is not there yet. We are price competitive and service competitive with fiber. But clearly we're even more competitive price-wise and service-wise in those areas where there's not fiber today. . . . It is clearly an emphasis. We will compete downtown, and we will go to business buildings downtown. It's a question of emphasis. I mean, you clearly want to go after customers first where you have the best comparative advantage." *Teligent Inc.'s Alex Mandl*, Wash. Post, Feb. 2, 1998, at F10 (quoting Mandl). WinStar's service is "tailored to the needs of business." WinStar, The Business, http://www.winstar.com/indexTheBuiss.htm. "[Intermedia] believes that business and government customers will continue to account for a substantial share of its revenue over the next several years, because of Intermedia's ability to offer such customers integrated, cost-effective telecommunications solutions." New Paradigm Resources Group, 1998 Annual Report on Local Telecommunications Competition, at Intermedia – 3 of 12.

anywhere. The Commission would therefore have to turn a blind eye to the competitive viability of AT&T, MCI WorldCom, Intermedia, McLeod, ICG, Time Warner, Cablevision, GST, Level 3, Qwest, e.spire, Nextlink, WinStar, Teligent, Hyperion, and over 100 other CLECs. But these competitors do exist – and they show what efficient CLECs are capable of doing. The Commission cannot succumb to the unsupported rhetoric of AT&T and MCI about the lack of competition when all of the factual evidence in the record shows conclusively that efficient competitors are competing without the use of ILEC network elements. Indeed, these CLECs are not just competing, they are thriving. That is why industry giants have invested billions of dollars to gain a stake in these CLECs – and why companies like AT&T and MCI have purchased them outright.[16] A national list of UNEs would be squarely at odds with the competitive reality of the marketplace.

Despite the widespread existence of self-provision, several commenters seek to dismiss it as an inadequate option; they contend that a widespread wholesale market is the only workable alternative to ILEC network elements. *See, e.g.,* CompTel at 15; Allegiance at 8; Covad at 13-18. In fact, as described in the UNE Fact Report, wholesale markets do exist for several of the UNEs, including interoffice transport, signaling, operator services and directory assistance.

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[16] *See, e.g.,* AT&T News Release, *AT&T Completes TCG Merger*, July 23, 1998 (explaining that AT&T merged with TCG "for growth and undisputed leadership in three of the fastest growing segments of the communications industry – consumer, business and wholesale networking services," according to its CEO C. Michael Armstrong). As a result of its $48 billion merger with TCI, AT&T plans to "weav[e] TCI's powerful, broadband cable network with AT&T's Worldwide Intelligent Network . . . to deliver integrated telephony, entertainment and high-speed Internet access services and a host of new communications capabilities to customers." AT&T News Release, *AT&T and TCI Complete Merger*, Mar. 9, 1999. In December of 1996, WorldCom completed its merger with MFS, an acquisition valued at $14.4 billion dollars. MCI WorldCom, Corporate Overview, MCI WorldCom: A New Era Communications Company (visited June 10, 1999) <http://www.wcom.com/pdf/wcom_history.pdf>. Brooks Fiber, CNS, and ANS were acquired by WorldCom to "further enhanc[e WorldCom's] growth in the fastest growing segments of the market with strong year-over-year performance." MCI WorldCom Press Release, WorldCom Reports First Quarter 1998 Results, April 28, 1998, <http://www.wcom.com/about_the_company/press_releases/archive/1998/980423.shtml>.

Other elements do not lend themselves to wholesale markets because they are scalable and modular. For example, even the smallest CLEC can deploy a switch to serve only a minimal number of customers (*e.g.,* less than 1000 lines). For such elements, there is no reason to expect a widespread wholesale market to develop (and the availability of UNEs at TELRIC would have deterred such a market from emerging). But the lack of a widespread wholesale market does not mean that CLECs will not trade capacity with each other on a contractual basis where it is efficient to do so. In fact, CLECs jointly deploy facilities and swap capacity on each other's networks all the time. *See, e.g.,* UNE Fact Report at II-5 (listing CLECs purchasing dark fiber from other CLECs); *id.* at VI-24 (describing CLECs provisioning of DSL to other CLECs). Most importantly, however, the Supreme Court's opinion expressly conceives of self-provision as a viable option.[17] The Court held that the Commission must consider *all* alternatives to the ILEC network, including "self-provision" and a CLEC's ability to "purchas[e] from another provider." 119 S. Ct. at 735. Thus, commenters' claims that impairment exists without a wholesale market – regardless of other viable alternatives such as self-provision – must be rejected. The Commission must consider all available alternatives – wholesale and self-provision included – and that requires an analysis that recognizes market variation.

Accordingly, the proper – indeed, the only – course is to implement national standards that account for market differences. The ILECs have proposed such standards. For example, the ILECs have proposed a standard for loop unbundling that recognizes that what is economical for an efficient competitor to serve larger business customers in dense wire centers may not be economical to serve single line residential customers in rural areas. These standards recognize that *local* service is not provided on a national basis and that the relevant market for most

[17] Moreover, self-provision is assuredly entry into the market, and the FCC, the Department of Justice, and antitrust law all place great weight on entry in the competitive analysis.

elements (with the exception of signaling and operator services and directory assistance) is not national.

In proposing national standards that reflect market variation, the ILECs heed the words of the Commission, which has already expressed its desire to "move away from 'one size fits all' regulation and reduce the regulatory requirements on incumbent carriers as competition develops in discrete geographic areas." *Local Competition Survey* at 4. Chairman Kennard recently reiterated the same point: "The telecom market is a diverse one. It has different players in different places operating in different environments. *We cannot have a one-size-fits-all solution to a multi-faceted problem.*"[18] Focusing on the relevant market is also the same approach taken by the Commission in its merger reviews.[19] The Commission has similarly focused on the necessity of distinguishing among zones with different cost characteristics.[20] It is also the same approach taken in every antitrust case that requires an evaluation of market substitutes.[21]

The ILEC approach, moreover, is necessitated by the Supreme Court's opinion. To mandate unbundling where alternatives exist defies the Supreme Court's admonition that the

[18] "*A Networked Future for all Americans,*" Address of FCC Chairman William E. Kennard at National Telephone Cooperative Association Annual Meeting, Feb. 10, 1999, at 3 (emphasis added).

[19] *See, e.g.,* Memorandum Opinion and Order, *The Merger of MCI Communication Corp. and British Telecomm plc*, 12 FCC Rcd 15351, 15369 [¶ 35] (1997); Memorandum Opinion and Order, *Applications of Teleport Communications Group Inc. and AT&T Corp. for Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, 13 FCC Rcd 15236, 15247-48 [¶¶ 20-22] (1998); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp., Transferor, to SBC Communications Inc., Transferee*, 13 FCC Rcd 21292, 21299-300 [¶¶ 15-17] (1998).

[20] *See* Report and Order, *Federal State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8912-16 [¶ 250] (1997); *see also Expanded Interconnection with Local Telephone Company Facilities and Amendment of Part 69 Allocation of General Support Facility Costs*, 7 FCC Rcd 7369, 7451-55 [¶¶ 172-79] (1992); Second Report and Order and Third Notice of Proposed Rulemaking, *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7374, 7423-25 [¶¶ 90-94] (1993).

[21] *See* SBC at 16-17.

Commission must consider the availability of alternatives to the ILEC network to comply with section 251(d)(2). Alternatives only have meaning once the relevant market is defined. To be sure, the relevant market for some elements (such as operator services and directory assistance) is national. But the appropriate market for other elements (such as loops and transport) is much narrower. For these elements, there are significant differences among markets in terms of the alternatives that are available to efficient CLECs. Indeed, the very same commenters that push for a national list recognize that the markets for these services are not uniform. AT&T at 91 ("[CLECs'] switches are located largely in selected urban areas with a high concentration of businesses" (citing Pfau Aff.)); MCI at 54, 64 & Levine/McMurtrie Decl. at 4 [¶ 10] ("MCI WorldCom's local services to date are predominantly offered to high-volume business customers in dense urban areas, where the company can profitably build-out its own facilities . . . [MCI WorldCom] self-provision[s] loops to its major business customers"). To give effect to the Supreme Court's opinion, the Commission must account for these differences in alternatives.

The ILEC approach is just as easily administered as the one-size-fits-all list. National standards that reflect market variations will not promote "case-by-case litigation" or otherwise increase transaction costs as some commenters claim. *See, e.g.,* MCI at 5; AT&T at 42, 44; Prism at 9. The same standard will apply throughout the country; it is only the application of the standard to the facts that will vary. And the delay that AT&T and others fear will not materialize because states will merely make factual findings. There is obviously little room to dispute the states' conclusions on this score: for example, whether a CLEC has collocated or whether a CLEC switch serves a rate center is basically incontrovertible. In fact, the approach endorsed by AT&T is likely to involve more administrative costs and inconvenience, because the Commission will face an onslaught of waiver petitions from ILECs in all the markets where the conditions for unbundling are not satisfied. *See* AT&T at 45 n.70. And, because the standards proposed by the ILECs and their application are straightforward, CLECs and ILECs alike can formulate and execute business plans knowing in advance the standards that apply to each market.

The ILEC approach has the further advantage of setting a sunset based on market realities. The standards proposed by the ILECs are grounded in particular market conditions that genuinely reflect the evolution of competition. And because these sunsets are directly tied to competition, ILECs will have the incentive to encourage the development of competition to lessen their unbundling obligations. Moreover, these self-executing sunsets eliminate the need for follow-up regulatory proceedings by the Commission, which further reduces administrative costs and uncertainty.

III. The Commission Should Reject Attempts to Bootstrap Elements into Rule 319 Based on the Alleged Desirability of the UNE-P or Other Combinations

Several commenters urge the Commission to evaluate whether a network element satisfies section 251(d)(2) not on its own, but in combination with other network elements, and in particular, as part of the end-to-end combinations of UNEs that would replicate the ILECs' retail services. That is, these commenters seek to bootstrap elements onto the list of UNEs even though those elements do not, independently, meet the section 251(d)(2) threshold.

This approach is completely backwards. The Supreme Court stated that the ILECs' challenges to the "'all elements' rule" and Rule 315(b) may both be "academic" in light of the Court's remand of Rule 319. 119 S. Ct. at 736. In other words, the "UNE platform" may be unavailable because one or more of its constituent parts fails the "necessary" and "impair" tests. The Court, therefore, necessarily assumed that the Commission on remand would evaluate each element independently under section 251(d)(2). If one element fails to satisfy section 251(d)(2) on its own, that element may not be unbundled – alone or in combination with other elements.

Section 251(c)(3) further undermines the CLEC claims. Under section 251(c)(3), if a network element satisfies section 251(d)(2) and must be unbundled, the ILEC must provide that element "in a manner that allows requesting carriers to combine [that] element[] in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). Thus, it is only *after* an element has satisfied the section 251(d)(2) threshold that the issue of combination comes into play. And, pursuant to section 251(c)(3), a CLEC must be able to combine an element it obtains from an ILEC with elements that it self-provides or obtains from other non-ILEC sources.

Moreover, judging each element independently is the only approach that yields a rational and pro-competitive result. For example, if the Commission concludes that CLECs have no alternatives to residential loops but have many alternatives to ILEC switching, switching cannot be bootstrapped onto the UNE list – as several commenters suggest – by virtue of the fact that it is cheaper or more convenient for CLECs that obtain loops from ILECs to obtain switching from ILECs as well. This method of analysis would impede the growth of the competitive market for switching until there was a competitive market for residential loops. Indeed, taken to its ultimate conclusion, this approach would impede the growth of a competitive market for *any* network element until *all* network elements are competitively provided *everywhere*. In short, this methodology would create a vicious circle whereby the ILEC network would be perpetually unbundled and facilities-based competition would never emerge. Congress intended the 1996 Act to be de-regulatory, not to supplant competition in favor of regulation. *See* Telecommunications Act of 1996, *supra*, at Preamble.

IV. Section 271's Checklist Is Irrelevant to the Section 251(d)(2) Inquiry

Various commenters rely on section 271 to support their argument that the Commission should readopt the same list of unbundled network elements. AT&T at 14, 31-33; MCI at 23; Sprint at 27.

These commenters have offered no explanation, however, for why Congress did not simply list the 271 checklist network elements in section 251 if the standards require the same thing. *See Bates v. United States*, 118 S. Ct. 285, 290 (1997) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotation marks omitted). The fact that the checklist is only in section 271 – a provision that applies exclusively to BOCs – demonstrates that the checklist is solely a prerequisite to long-distance entry by a BOC, not an unbundling obligation under section 251, which applies to *all* ILECs (including non-BOCs).

The point of including the specific network elements, such as loops, transport, and switching, on the section 271 list was to cover situations, contemplated by Congress, in which a BOC sought 271 relief prior to completion of the Commission's rulemaking on the section 251 UNEs.[22] It does not relieve the Commission of its independent duty – as mandated by the Supreme Court – to make its own determination pursuant to the standards of section 251(d)(2).

Moreover, the reading advanced by these CLECs would render provisions of the Act superfluous. Under Section 271(c)(2)(B)(ii), all the section 251(c)(3) UNEs must be provided under the UNE terms. If Congress intended all the items listed separately in section 271(c)(2)(B) to apply to section 251, there would have been no need for Congress to include the list at all

[22] In that regard, it is noteworthy that the Commission is still in the process of meeting the requirements for UNE implementing rules, after ruling on five section 271 petitions.

because section 271(c)(2)(B)(ii) would have already done the job. It is a well-settled canon of construction that a statute should be construed to give meaning to all its provisions, and readings that render portions of a statute meaningless should be avoided. *See Ratzlaf v. United States,* 510 U.S. 135, 140-41 (1994).

Finally, it is worth noting that if an element does not need to be provided under section 251 but is required pursuant to section 271, market-based prices (and not TELRIC) apply. This reading of the Act – which is the only reading the plain language permits – is consistent with the Act's goal to further competition, not regulation. If unbundling under section 251 is not required, competitive substitutes for that element are, by definition, available to efficient CLECs in the marketplace. TELRIC is nothing more than the price of an element using the most efficient technology available; thus, if efficient competitors have a meaningful opportunity to compete without the ILEC network element, they must have access to the element at the equivalent of TELRIC prices in the market. The market-based price of an element is obviously a better indicator of its true price than the Commission's best guess under TELRIC. Thus, it is entirely consistent for market-based prices to apply under these circumstances.

V. Section 251(d)(2) Is a Minimum Threshold; If an Element Fails That Test, It Cannot Be a UNE Based on "Other Considerations"

The Supreme Court expressly concluded that section 251(d)(2) imposes "a *limiting* standard." 119 S. Ct. at 734 (emphasis added); *id.* at 738 (noting that section 251(d)(2) establishes "clear limits"). Obviously, a limiting standard must impose a limit. It could hardly be said that section 251(d)(2) is a "limit" if the Commission could ignore it and order unbundling even if it is not satisfied. Thus, the Commission must reject the claims by various commenters that, even if section 251(d)(2) is not satisfied, unbundling can be ordered. *See, e.g.,* MCI at 22 ("lack of impairment (or necessity in the case of proprietary elements) does not automatically mean that ILECs have a right to deny access"); AT&T at 37 (the Commission is not required to give the section 251(d)(2) standards "any weight at all"); Sprint at 26 (the Commission need not attach "any specific weight" to the necessary and impair requirements); ALTS at 32 (arguing that the Commission can require unbundling "even if the necessary or impair standards have not been met or are no longer satisfied"); CompTel at 21 ("it may be necessary for the Commission to require the unbundling of an element even if the necessary and impair standards are not met").

If section 251(d)(2) does not place a limit on the Commission, there is no point in its inclusion in the statute. As the Court held: "We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all." 119 S. Ct. at 735. This analysis applies with equal force to a reading of section 251(d)(2) that makes it nothing more than advisory if the Commission wants to unbundle elements for other reasons. Congress mandated that the Commission "shall consider, *at a minimum*" the section 251(d)(2) requirements. Thus, section 251(d)(2) is the minimum threshold all network elements must satisfy for unbundling to be ordered. Even if this minimum standard is satisfied, unbundling may still not be required for other reasons (such as a concern with disincentive effects on innovation and investment) that are consistent with the Act.

In addition, if the Commission could simply ignore section 251(d)(2), the Court's entire holding makes no sense. If the "necessary" and "impair" standards can be trumped by other considerations, the Court could have simply affirmed the Commission's prior order, which considered precisely the sorts of things AT&T, MCI, and others raise in their comments as weightier factors. The Court did not do so, however, because section 251(d)(2) is a real limit –

not superfluous statutory language. It establishes a "minimum" threshold, 47 U.S.C. § 251(d)(2), that every element must satisfy. That is why the Court went to great lengths to discuss its scope.

Indeed, that is why Congress included section 251(d)(2) in the statute. To require unbundling when section 251(2)(d)'s standards are not satisfied would violate the objectives of the 1996 Act. *See* 119 S. Ct. at 736. Congress placed a "limitation upon network-element availability," *id.* at 734, to further the goals of the Act – *i.e.,* to encourage efficient, facilities-based competition that improves consumer welfare and spurs innovation.[23] If Congress wanted unfettered unbundling, it would have commanded it. But Congress recognized the harmful side-effects of excessive unbundling and therefore passed section 251(d)(2) so that new entrants would not have a mandatory right of access to the incumbent's network when they are able to compete without such access. Thus, any attempt to evade this statutory limitation hinders the achievement of the Act's goals.

VI. The Commission Can Only Require Unbundling of Proprietary Elements if *Access* to Them Is *Necessary*

Several commenters ask the Commission to require the unbundling of proprietary elements as long as the proprietary element is not "disclosed" to the UNE buyer. *See, e.g.,* CompTel at 18-19; Cable & Wireless at 18. This request cannot be squared with the plain language of the Act. The Act speaks in terms of "access" to network elements – not disclosure; and access is required only when "necessary." *See* 47 U.S.C. § 251(d)(2)(A).

[23] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. at 753 (Breyer, J., concurring in part, dissenting in part) ("[t]he unbundling requirement seeks to facilitate the introduction of competition where practical, *i.e.,* without inordinate waste"); S. Conf. Rep. No. 104-230, at 1 (1996) (Act "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies"); *id.* at 148 (drafters contemplated that Act would promote facilities-based, "local residential competition"); Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, *Amendment of the Comm'n's Rules to Establish Competitive Serv. Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Servs.*, 11 FCC Rcd 16639, 16678-79 [¶ 80] (1996) ("[t]he interconnection provisions of the Act, Sections 251 and 252, are designed to promote facilities-based local exchange competition").

In addition to the textual infirmity of these CLECs' arguments under section 251(d)(2), these claims are further unsupportable when the goals of the Act are taken into account. Allowing access to proprietary elements as long as they are not "disclosed" is completely out of step with intellectual property law (the body of law that shares the same goals as the proprietary requirement). If competitors can obtain access to proprietary elements under such a flimsy standard, ILECs will lack the incentive to innovate and develop such elements. But that is the whole goal of patent and copyright laws – to protect an inventor's right to an idea so that he will have the incentive to pursue it. *See SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1203 (2d Cir. 1981) ("The patent laws reward the inventor with the power to exclude others . . . [and in] return, the public benefits from the disclosure of inventions . . . and the increased competition the patented product creates in the marketplace"), *cert. denied*, 455 U.S. 1016 (1982).[24]

VII. The Commission Cannot Re-adopt Rules 51.315(c)-(f), or Its Rules Regarding Superior Quality Interconnection and Access, All of Which Were Struck Down by the Eighth Circuit and Not Raised in the Supreme Court

AT&T and other commenters ask the Commission to reinstate its rules on new network element combinations (Rules 315(c)-(f)) and its rules regarding superior quality interconnection and access (Rules 305(a)(4) and 311(c)). AT&T at 17, 136-45; *see also* CompTel at 48 n.110; ALTS at 80.

This request directly conflicts with the Eighth Circuit's holding in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), and that holding remains the law. *See MCI Telecommunications Corp. v. GTE Northwest, Inc.*, No. 97-1687-JE, at 49 (D. Or. Mar. 17,

[24] NorthPoint argues that the proprietary standard should only apply to what is already protected by patent or similar laws. NorthPoint at 3-5. This argument ignores the fact that it often takes years to get a patent approved. And if, in the meantime, the invention must be disclosed, the very purpose of the patent laws is undermined. The Act cannot be interpreted to yield such an absurd result – and a result so plainly at odds with Congress's desire to encourage innovation.

1999) ("the Eighth Circuit's decision vacating paragraphs (c) through (f) of Rule 315 was not appealed, hence those paragraphs continue to be void"); *U S WEST Communications, Inc. v. Garvey*, No. 97-2179 ADM/AJB, at 23 (D. Minn. Mar. 31, 1999) ("[a]lthough the Supreme Court expressly reinstated § 315(b), it did not directly do so with respect to § 315(c)-(f). . . . [A]bsent a clear mandate this Court declines to extend the Supreme Court decision that far." Therefore, "§ 315(c) and (d) remain vacated").

Neither the Commission nor any other party sought review of the Eighth Circuit's holding in its petition for certiorari, and the Supreme Court – in keeping with its well-established procedure of confining itself to matters properly raised in the "questions presented" portion of a party's petition for certiorari, *see* Sup. Ct. R. 24(a)(1); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) – properly declined to consider a challenge to Rules 305(a)(4), 311(c), and 315(c)-(f). In fact, the Supreme Court did not even *allude* to these rules in its opinion.

Nothing in the Supreme Court's jurisdictional ruling called the Eighth Circuit's decision into question; the Eighth Circuit vacated the disputed rules not because of any jurisdictional theory concerning the agency's interpretive authority, but because it determined that each rule violated the plain language and structure of the Act. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997) (presumption that incumbents must provide access to network elements to the extent technically feasible is "contrary to the plain meaning of the Act"), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *id.* at 813 (FCC's "superior quality" rules "cannot stand in light of the plain terms of the Act"); *id.* (FCC's rules on combining elements not currently linked in the incumbent's network conflicts with the statute's plain meaning).

Nor is the Eighth Circuit's vacatur of these rules affected by the Supreme Court's determination regarding 47 C.F.R. § 51.315(b). The Supreme Court upheld section 51.315(b) based on its view that, in light of section 251(c)(3)'s nondiscrimination requirements, the FCC could rationally prohibit incumbents from "'disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." 119 S. Ct. at 737 (quoting Reply Br. for Federal Petrs. at 23). This conclusion – that under section 251(c)(3) the FCC may rationally prohibit incumbents from disconnecting *already connected* network elements – says nothing about the FCC's rules that had addressed combining ILECs' network elements in new ways or with elements provided by the requesting carriers. Nor does the Supreme Court's endorsement of section 51.315(b) in any way relate to the Eighth Circuit's invalidation of the Commission's "superior quality" rules, which was based on the Eighth Circuit's recognition that section 251(c)(3) "implicitly requires unbundled access only to an incumbent LEC's existing network – not to a yet unbuilt *superior* one." 120 F.3d at 813 (emphasis added and omitted). Thus, this aspect of the Eighth Circuit's holding assuredly remains the law, and its mandate on this issue still governs the Commission.

In any event, however, the effect of the Supreme Court's decision on its holding is strictly for the Eighth Circuit to determine. Indeed, that is why the Commission, AT&T, and others are currently seeking relief in the Eighth Circuit. The Commission – like all other parties in that proceeding – must await the Eighth Circuit's ruling.

CONCLUSION

The Commission should interpret section 251(d)(2) to further the goals of the 1996 Act and should reject requests by commenters that would lead to excessive unbundling in violation of congressional intent, the Supreme Court's holding, and the text of section 251(d)(2).

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