

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

In the Matter of)
)
Implementation of the Local)
Competition Provisions in the)
Telecommunications Act of 1996)

CC Docket No. 96-98

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**REPLY COMMENTS
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June 10, 1999

No. of Copies rec'd 0712
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Summary

The RBOCs and GTE (collectively, “RBOCs”), predictably enough, have taken the opportunity afforded by this proceeding to attempt yet again to eviscerate the unbundling requirements of Section 251(c)(3). Despite overwhelming evidence to the contrary, the RBOCs assert that the local services market is competitive and that alternative facilities to the currently mandated list of UNEs are readily available. Thus, they urge that the Commission (1) adopt national standards, rather than a national list, to govern availability of UNEs; (2) allow mandatory unbundling requirements to expire automatically once certain trigger points are met; and (3) adopt the RBOCs’ excessively stringent interpretations of the necessary and impair standards.

The RBOCs’ analysis of the need for network element unbundling is flawed in several respects, and their recommendations here accordingly should be rejected. First, the record in this and other proceedings clearly proves that competition in the local market is at best nascent, and that there is currently no wholesale market for unbundled network elements. Second, contrary to the RBOCs’ assertions, unbundling of network elements does not discourage either facilities-based competition or innovation by ILECs and CLECs. Third, making UNEs available on a market-by-market basis rather than on a uniform nationwide basis will strangle the development of local competition through litigation and market uncertainties. Fourth, the necessary and impair standards recommended by the RBOCs are excessively stringent, borrow too much from the essential facilities doctrine, and would virtually eliminate ILECs’ statutory obligation to provide unbundled network elements. In order to foster the development of local competition, the Commission must adopt an “impair” standard which reflects the inability

of a competitor to offer service as quickly, as broadly, as effectively, and of comparable quality, using alternative network elements rather than ILEC-provided UNEs.

Finally, Sprint points out the inconsistencies in the RBOCs' comments in this proceeding with positions taken in their various merger proceedings. For example, although SBC here seeks to sharply limit its unbundling obligation, in its merger application filings, SBC emphasized that it planned to offer local service outside its franchise territory through a combination of new facilities construction, resale, and UNEs and UNE platform.

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REPLY COMMENTS

Sprint Corporation hereby respectfully submits its reply to comments filed on May 26, 1999 in the above-captioned proceeding.

I. INTRODUCTION.

The instant proceeding was intended to address one very important, but fairly narrow aspect of the Commission's *Local Competition Order*¹: how the Commission is to determine which network elements ILECs must make available to new entrants on an unbundled basis, taking into consideration the "necessary" and "impair" standards of section 251(d)(2) of the Act and the availability of network elements from non-ILEC sources. The Supreme Court resoundingly affirmed the balance of the *Local Competition Order*.²

Predictably, the RBOCs and GTE (collectively, "RBOCs") have taken the opportunity afforded by this proceeding to attempt yet again to eviscerate the unbundling requirements of Section 251(c)(3). And, predictably, the RBOCs rely upon their own version of reality in making their case. Among other things, they claim that the local market is competitive, that alternative facilities to all of the currently mandated unbundled network elements are readily available,

¹ *First Report and Order*, 11 FCC Rcd 15499 (1996) (subsequent history omitted).

² *AT&T Corp. et al. v. Iowa Utilities Board et al.*, 119 S.Ct. 721 (1999).

and that the Act incorporates extremely high hurdles in the form of the “necessary” and “impair” standards which must be met before unbundling by ILECs is required. The RBOCs argue that, given these circumstances, there is really no need to unbundle any network elements except in a few, targeted markets, and that even in those markets, availability of the UNEs should no longer be mandated after certain predefined trigger points are met. Indeed, the RBOCs even go so far as to assert that mandatory unbundling of network elements is contrary to the public interest because it discourages *real* (that is, facilities-based) competition.

The record in this proceeding as well as others (such as the Section 271 applications filed by various of the RBOCs, the various ILEC merger applications, and the advanced services proceeding (CC Docket No. 98-147)) would seem to be sufficiently complete as to allow the Commission to conclude that competition in the local market is nascent at best, and that non-discriminatory access to certain ILEC network elements on an unbundled basis is critical to the development of a competitive local market. Nonetheless, Sprint addresses below the RBOCs’ assertions regarding the state of local competition and demonstrates why their proposed restrictions on the availability of UNEs will deter the development of local competition. Sprint also contrasts the RBOCs’ reluctance to make UNEs available to CLECs expressed in the instant proceeding, with comments these ILECs have made in their merger applications, confirming the apparent RBOC view that “the easiest path to *entering* the local market is by *merging* with the incumbent” (Qwest, p. 9).

II. THE RBOCs’ VIEW THAT UNBUNDLING IS GENERALLY UNNECESSARY AND SHOULD BE MINIMIZED IS WITHOUT MERIT.

The RBOCs offer several reasons why extensive unbundling of network elements is unnecessary: the local market is already competitive because there are alternatives to ILEC-supplied network elements readily available; unbundling discourages facilities-based competition;

and unbundling discourages ILECs from innovating. As discussed below, each of these rationales is unsupported by the facts or rational analysis.

A. Competition in the Local Market Is At Best Nascent and There Is Currently No Wholesale Market for Unbundled Network Elements.

It is by now well established that competition in the local services market is nascent at best:

- CLECs have deployed far, far fewer network facilities (loops, switches, interoffice transport facilities) than have the ILECs. For example, at end of year 1998, there were approximately 23,000 ILEC end office voice switches, compared to 579 switches deployed by CLECs (MCI Worldcom, p. 53; AT&T, p. 90). Ameritech trumpets (p. 3) that there were over 700,000 CLEC self-provisioned loops in its territory; however, according to the 1998 *Statistics of Common Carriers* (Table 2.10), Ameritech had 20,510,770 switched access loops. Obviously, any CLEC that wants to provide broad-based local service will be forced to rely upon facilities obtained from the ILEC. Even in New York City, which has one of the highest concentrations of CLEC facilities in the country, the CLECs' lack of ubiquitous facilities forces them to rely upon the ILEC to originate and terminate calls, including to the business market where CLECs are most competitive.
- CLEC revenues are only a tiny fraction of those earned by ILECs. In 1997, for example, CLEC and CAP revenues were estimated at \$1.919 billion, compared to \$105.154 billion for the ILECs.³

³"Telecommunications Industry Revenue: 1997," Table 3, Industry Analysis Division, CCB, released October 1998.

- The Commission has rejected each of the Section 271 applications filed by the RBOCs, finding among other things that the applicant RBOC had failed to meet all of the “critical, market-opening” competitive checklist items contained in Section 271.⁴ For example, the Commission found that BellSouth’s failure to offer nondiscriminatory access to its operations support systems, its failure to offer nondiscriminatory access to UNEs in a manner that permits competing carriers to combine them, and its failure to offer certain retail services at discounted rates as required by the Act, “are likely to frustrate competitors’ ability to pursue entry through the use of unbundled network elements or resale, the two methods of entry that promise the most rapid introduction of competition” (*BellSouth-South Carolina Order* at para. 14).

Furthermore, there is no evidence of the existence of a wholesale market for the provision of any of the network elements included on the Commission’s original UNE list.⁵ Although various CLECs have made major investments in wireless and cable companies whose networks are to be used (eventually) as alternatives to ILEC wireline facilities in the provision of local service, these wireless and cable networks are not yet adequate economic or technical substitutes for the ILEC network. For example, even where wireless facilities are used to provide local service, propagation characteristics and terrain considerations make it impossible to reach all homes. Sprint estimates that it will be able to reach no more than 80% of the homes passed by

⁴ See, e.g., *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in South Carolina, Memorandum Opinion and Order* released December 24, 1997; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order* released August 19, 1997; *Application of SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Oklahoma, Memorandum Opinion and Order* released June 26, 1997.

⁵ See, e.g., Sprint, p. 24 and Appendix B (p. 59); ALTS, pp. 35 (no wholesale market for loops), 49 (no wholesale market for interoffice transport facilities); AT&T, pp. 15, 59; MCI Worldcom, p. 10; Qwest, p. 32.

wireless cable providers Sprint is in the process of acquiring; and, neither Sprint nor any other carrier has obtained wireless licenses that would enable it to serve all, or even most of, the country. Similarly, AT&T, whose announced purchase prices for two cable entities (TCI and MediaOne) total approximately \$100 billion, and who expects to spend an additional \$2 billion by the end of 2000 on cable network upgrades, states (pp. 70-71) that “widespread availability of [cable telephony] technology is a few years away. Most of the cable infrastructure today supports one-way communications, not the two-way communications that telephony requires.” Even when the cable network is upgraded to accommodate two-way communications, there is no assurance that it will be available for use by unaffiliated entities, as AT&T has thus far refused to open up its cable network for wholesale use.

Even where CLECs can obtain network elements from sources other than the ILECs (either through self-provisioning or through a non-ILEC wholesale provider), there is no assurance that the alternative will be equivalent to that associated with ILEC-provided network elements in terms of cost, quality (grade of service, reliability, repair times, etc.), geographic scope, available capacity, or timeliness of provisioning.⁶ And, even where these factors may be roughly equivalent, there are significant difficulties associated with integrating elements from multiple suppliers (*id.*). Because of the ILECs’ ubiquity and economies of scale, in many cases it simply is not feasible at this time to use non-ILEC-provided network elements.

⁶ See, e.g., Sprint, p. 22, Appendices B, D and E; ALTS, p. 13; AT&T, p. 28; MCI Worldcom, pp. 10, 16; Qwest, p. 22.

Finally, complete duplication of the ILECs' network, particularly in less densely populated areas, may never be economic. The ILECs have had some 100 years to deploy their networks, with the cost of such deployment financed by a monopoly rate base. Further, in the rural and high cost areas of the nation, the telecommunications industry has employed a well recognized and deliberately orchestrated cross-subsidization scheme that was designed to promote universal service by funding ILEC network deployment in areas that would otherwise prove to be uneconomic. Notwithstanding the RBOCs' blithe comments about the ease with which CLECs can expand their facilities,⁷ it is unrealistic to assume that competitive service providers will be able to duplicate fully the ILECs' network deployment at all, much less in only a few years. Besides the obvious constraints associated with financial (capital and cash flow) and workforce limitations, a CLEC's ability to self-provision is constrained by a still-small customer base over which to amortize its costs (CLECs remain at a significant scale disadvantage compared to the ILEC) as well as a lack of market information which would enable it to deploy its equipment to generate the maximum benefit. In some sparsely populated markets, CLECs may well find it uneconomic to deploy their own facilities at all for the foreseeable future; the primary way customers in such markets can benefit from competition is through the ready availability of resold and unbundled ILEC facilities.

⁷ BellSouth, for example, asserts (pp. 57-58) that CLECs can purchase switches "for as little as \$100,000"; that CLECs can install new switches "in weeks or months"; and that CLECs can extend the geographic reach of their switches "by using simple digital loop carrier technology."

B. Unbundling of Network Elements Does Not Discourage Facilities-Based Competition.

Several RBOCs assert that unbundling of network elements should be minimized because it provides CLECs “risk free access at TELRIC prices” and thus discourages CLECs from investing in their own facilities.⁸ As Ameritech states (p. 4), the Commission’s initial unbundling rules were flawed because they encouraged entry “by as many entities as quickly as possible”; it recommends instead that the Commission adopt new unbundling rules which focus on facilities-based entry.

The RBOCs’ reasoning here is flawed in several respects. First, as the Commission emphasized in the *Local Competition Order*, the Act explicitly mandates three ways in which competitors may provide local service: through resale of ILEC retail services provided to CLECs at wholesale rates; through unbundled access; and through facilities provided entirely by the CLECs. Each of these entry strategies is a legitimate form of competition,⁹ and the statute does not permit the adoption of rules which promote one form of competition at the expense of any other form. The policy arguments raised by the RBOCs are not only incorrect as a factual matter; they are also largely irrelevant since they seek a result which the statute does not permit. In the near term, resale and UNEs may be the only (certainly the fastest) way certain market segments can enjoy the benefits of local competition.¹⁰ It is more than passing strange that the RBOCs, whose historic monopoly status is one of the Act’s pro-competitive targets, should take it upon themselves to decree the “proper” form of competition.

Second, it is simply not the case that all CLECs will choose to use UNEs whenever possible because this is a “risk free” way to provide service. As Sprint and other major CLECs explain, self-provisioning is their preferred long-term strategy, and their business plans and

⁸ See, e.g., BellSouth, p. 10; Ameritech, p. 5; SBC, p. 5.

⁹ See, e.g., Comptel, p. 4.

¹⁰ An internal analysis performed by Sprint found that in 24 residential markets analyzed, our CLEC operation was more profitable using resale in 13 of those markets; in the other 11 markets, UNE platforms were the more

recent investments reflect this strategy.¹¹ Reliance upon the ILEC – a CLEC’s prime competitor – for facilities entails such serious business risks in terms of possible pricing fluctuations, quality control, and changes in business strategy that CLECs have “an overwhelming incentive” to avoid reliance on ILEC facilities whenever possible (MCI Worldcom, p. 8).¹² Indeed, use of UNEs in many cases is an interim step towards self-provisioning: it allows a CLEC to provide local service in markets where self-provisioning is not yet economically feasible, enabling the CLEC to build up its customer base to the point where build out of its own network is justified, and providing the CLEC with valuable market data (*e.g.*, on traffic volumes and patterns) which enable it to make rational decisions about optimal facility deployment.

Moreover, no entity has the resources to begin to compete for local traffic in all, or even most, major markets at the same time. If a carrier wants to obtain the scale advantages of entering the local market on a nationwide basis, it has no realistic choice but to rely, at least for an initial period, on the facilities of the RBOCs. As time passes and the new entrant’s service grows, it can undertake the process of replacing leased or resold facilities of the dominant carrier with its own facilities. This is certainly the path of competitive development followed in the

profitable strategy. In each of the 24 business markets analyzed, the UNE platform was always the more profitable local entry strategy.

¹¹ *See, e.g.*, Sprint, p. 21 and Appendix B; MCI Worldcom, p. 8, 26-27; AT&T, p. 8; Qwest, p. 6 (it is constructing its own facilities “in a number of markets”). Of course, as was anticipated by and provided for in the Act, other CLECs have different strategies for providing local service in the near and long-term.

¹² The 8th Circuit Court of Appeals noted that because of the risks faced by CLECs who choose to provide finished services through unbundled access, CLECs are unlikely to rely entirely upon UNEs to provide local service:

A carrier providing services through unbundled access...must make an up-front investment that is large enough to pay for the cost of acquiring access to all of the unbundled elements of an incumbent LEC’s network that are necessary to provide local telecommunications services without knowing whether consumer demand will be sufficient to cover such expenditures. Moreover, our decision requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access as a method of entering the local telecommunications industry....

interexchange market. All IXCs initially leased dedicated facilities from the dominant provider (AT&T) for a transitional period. However, over time, as their customer base increased, these IXCs deployed more of their own facilities and relied less and less upon AT&T for facilities. The interexchange market today now has several carriers who have their own nationwide networks, as well as dozens of smaller carriers who provide long distance service using a combination of their own and leased facilities. It is reasonable to assume that a similar transition to facilities-based competition will occur in the local market over a several year period.

Third, the RBOCs make no attempt to reconcile their assertion that UNEs discourage facilities-based competition, with their allegations that alternatives to ILEC-provided network elements are today readily and widely available. The RBOCs quote extensively from a study which they commissioned¹³ which purports to demonstrate the robust competition in the local market, citing the dramatic increase in the number of CLEC switches, fiber miles, and local loops. While CLECs have made progress in deploying their own facilities (significant progress, given their starting point), CLEC investment in every network element (loops, switches, fiber miles) remains dwarfed by the ILEC's monopoly-endowed facilities investment, and there is no evidence of the existence of a wholesale market for unbundled network elements (see Section II.A. above).

¹³ Huber and Leo, *UNE Fact Report*, attached to comments of USTA.

C. Unbundling Does Not Discourage Innovation.

Some RBOCs assert that they will have no incentive to invest in innovative research and development activities if they are required to simply “give away” the fruits of their labor to CLECs at TELRIC prices.¹⁴ The RBOCs’ reasoning here reflects their monopoly mindset¹⁵ and their lack of understanding of the workings of a competitive marketplace. Carriers innovate in order to meet (or stimulate) customer demand, and to improve their margins by increasing the efficiency of their operations. Any carrier which refuses to invest to meet these goals doubtless will experience a degradation in its competitive and financial positions. On the other hand, innovations which meet customer demand or which improve margins can still be profitable to the innovator, even if the innovation is required to be made available to other carriers (and clearly, not all innovations will have to be made available). Besides the revenues generated by an ILEC’s own customers and the internal savings experienced by the ILEC, the ILEC is assured of a return on its investment even when an innovation must be made available to CLECs because TELRIC prices include the ILECs’ cost of capital.¹⁶

¹⁴ *See, e.g., Ameritech, p. 25; BellSouth, p. 26; SBC, p. 5*

¹⁵ The RBOCs point out that AT&T has made this same argument in refusing to make its cable network available for use by competing Internet service providers (*see, e.g., Ameritech, p. 26*). As is true for the RBOCs’ unbundling of their network elements, AT&T should be required to provide access to its cable network because such access promotes competition.

¹⁶ Sprint believes that TELRIC prices do allow ILECs to recover their economic costs of providing the UNE. However, it is not necessarily the case that the TELRIC price of a UNE will be identical in each jurisdiction or for each ILEC. Because there may be legitimate reasons for price disparities (and of course the ILEC is still obliged to demonstrate that its proposed rates are just and reasonable), the Commission should reject ALTS’ recommendation (p. 88) that any difference in TELRIC prices which exceeds a certain percentage be considered presumptively unreasonable. Furthermore, ALTS’ recommendation that UNEs must be made available at volume and term discounts (p. 89) is beyond the scope of this proceeding and also should not be adopted here.

The RBOCs' arguments that unbundling will discourage CLEC innovations are similarly without merit. CLECs will be hard pressed to be successful long-term players in the local services market if they rely solely upon the innovativeness of the underlying facilities provider. In order to attract customers, CLECs must offer service which is better than that available from the incumbent, in terms of price, quality of service, and/or technical innovations.

III. THE RBOCs' PROPOSED RESTRICTIONS ON THE AVAILABILITY OF UNBUNDLED NETWORK ELEMENTS ARE EXCESSIVE, ANTI-COMPETITIVE, AND SHOULD NOT BE ADOPTED.

The RBOCs offer several proposals that, if adopted, would require them to make available the fewest possible number of network elements to the smallest possible audience in the fewest possible markets for the shortest possible period of time. These proposals include adoption of national standards (rather than a national list) to govern the availability of UNEs; automatic sunset dates for UNE availability; and excessively rigid interpretations of the "necessary" and "impair" standards. As discussed briefly below, the RBOCs' proposals are so restrictive that they will do little to promote local service competition. To the contrary, these proposals are merely a thinly disguised continuation of their strategy of litigating their competitors to death and creating market uncertainties -- a strategy which has to date been quite successful at impeding the development of competition. These proposals should accordingly be rejected.

A. National Standards and Market-by-Market Availability

The ILECs state that implementation of a national list of UNEs is inappropriate, given differences in local conditions. Instead, they recommend that network elements be unbundled on a market-by-market basis, geographically (*e.g.*, large cities/smaller urban areas/rural areas), by rate or wire center density, and by service type (business versus residential customers).¹⁷ At

¹⁷ See, *e.g.*, BellSouth, p. 2; SBC, p. 17; Ameritech, p. 69; US West, p. 26; Cincinnati Bell, p. 3

least one ILEC, Cincinnati Bell, even proposes that UNE availability be determined on a company-specific basis.

The RBOCs' attempts to limit availability of UNEs on a market-by-market basis should be rejected. As Sprint and others emphasized, the Commission was entirely correct in concluding that identifying UNEs on a nationwide basis would best promote local service competition – a conclusion undisputed by the Supreme Court.¹⁸ From a practical standpoint, without a minimum national set of UNEs, there will be a massive delay in UNE availability, and protracted, costly, and repetitive litigation (with inconsistent results) over UNE availability, with the end result being that CLECs will be unable to offer competitive local service to all customers; the prospect of endless litigation may even discourage some CLECs from entering the market altogether. While strangulation of competition by litigation may serve the goals of the RBOCs, it does not serve the public interest, and should be avoided (or at least minimized) through adoption by the FCC, pursuant to its statutory mandate, of a nationwide minimum set of UNEs.

B. Sunset Date

The RBOCs urge adoption of an automatic sunset provision for UNEs, either after 2 years or after certain trigger points are met.¹⁹ These proposals should be rejected. As Sprint explained (p. 42), it is premature at this time to attempt to decide when a UNE should be

¹⁸ See, e.g., Sprint, p. 9; ALTS, p. 5; AT&T, p. 3; MCI Worldcom, p. 4. In the *Local Competition Order* (11 FCC Rcd at 15616-27), the Commission concluded that a national UNE list would allow requesting carriers to take advantage of economies of scale; provide financial markets with greater certainty in assessing requesting carriers' business plans; facilitate the states' ability to conduct arbitrations; and reduce the likelihood of litigation regarding the requirements of section 251(c)(3).

¹⁹ See, e.g., USTA, p. 45 (2-year sunset); Ameritech (for switching, when at least one CLEC voice switch is available in any rate center; for interoffice transport, in any wire center serving at least 40,000 access lines where collocation arrangements are available or in any central office where competitive transport facilities are already deployed), pp. 69, 86; SBC (for loops to business end users, in wire centers serving at least 40,000 access lines in which CLECs have collocated), p. 23.

removed from the mandatory list.²⁰ At this point, it is impossible to predict how rapidly a competitive wholesale market for a particular UNE will develop, or the point at which a CLEC's ability to provide service will no longer be impaired by removal of a UNE from the mandatory list. As explained further in Section III.C below, the mere fact that a network element may be obtained in one geographic area from a non-ILEC source does not render the market for that network element fully competitive. Furthermore, adopting a specific sunset date will only encourage RBOCs to drag their heels in an attempt to delay or to avoid altogether the provision of UNEs.²¹

C. The "Necessary" and "Impair" Standards Do Not Incorporate the "Essential Facilities" Doctrine.

In their comments, the RBOCs offer interpretations of the necessary and impair standards which are excessively rigorous and which borrow too much from the essential facilities doctrine. As regards the impair test, the RBOCs generally assume that an efficient competitor's ability to provide service is not impaired by lack of ILEC unbundling, if any non-ILEC entity offers that network element in a given market, no matter how limited in scope, and without regard to whether the CLEC's service could be offered more efficiently using the ILEC rather than the non-ILEC UNE.²² As US West states (p. 12), "[e]vidence that one or more CLECs are obtaining

²⁰ See also, AT&T, p. 58; MCI Worldcom, p. 11; Level 3, p. 29.

²¹ The RBOCs should also not be allowed to exaggerate the alleged technical problems associated with unbundling network elements. SBC, for example, states (p. 31) that "unbundling the loop at the FDI [feeder distribution interface] would necessitate entry by multiple parties into the cabinet, posing a greater threat of network trouble...[and raising] a host of technical, safety, security and maintenance issues." However, Sprint does not need sub-loop unbundling within the FDI, but at the DLC (digital loop carrier) location. A tie cable can be placed from the FDI to an external cross-connect cabinet. The external cross-connect cabinet would become the point of termination and it would be Sprint's responsibility to provide testing and maintenance of the cross-connect.

²² See, e.g., Ameritech, p. 34 (no impairment if CLEC can earn "a normal economic profit" and can offer service within two years if it uses alternative network elements); BellSouth, p. 23 (impairment measured by CLEC's ability to implement "a realistic business plan for service rollout that would create competitive benefits for consumers"); SBC, p. 5 (threshold test is whether failure to provide access to a particular network element "would preclude meaningful opportunities for competitive entry by an efficient competitor"); US West, p. 10.

an element in a geographic market from non-ILEC sources conclusively demonstrates that mandatory unbundling of that element is not appropriate in that market....”

Numerous other parties explain at length in their comments that impairment cannot be defined as the total inability of the new entrant to provide the service; rather, impairment goes to the inability of the competitor to offer service as quickly, as broadly, as effectively, and of comparable quality, using alternative network elements rather than ILEC-provided unbundled network elements.²³ If non-ILEC and ILEC-provided network elements were in fact interchangeable, or even approximately so (and, as demonstrated by Sprint and other parties, this is clearly *not* the case), there would be more reason to expect that a wholesale market could arise for that network element – CLECs would turn to the alternative source of supply for no reason other than to reduce their dependence on their primary competitor. However, as discussed above, there is currently no wholesale market for network elements, and this lack is clear and dispositive evidence that CLECs’ ability to provide service remains impaired without access to ILEC-provided UNEs.

The mere fact that one CLEC in one market may have self-provisioned a network element does not establish that ILEC unbundling of that network element in any market is no longer necessary. Not all non-ILEC-provided network elements are fungible or available for use by other CLECs; for example, the fact that a CLEC may have self-provisioned a local loop to a particular end user does not mean that that loop is available for use by any other CLEC or that it is economically viable to self-provision local loops to all end users or even to end users in the same broad class (*e.g.*, business customers).

²³ See, *e.g.*, Sprint, p. 12; AT&T, p. 29; ALTS, p. 25; MCI Worldcom, p. 15.

More importantly, Section 251(c)(3) imposes upon ILECs the duty to provide “to *any* requesting telecommunications carrier for the provision of a telecommunications service, non-discriminatory access to network elements on an unbundled basis...” (emphasis added). Not every CLEC is similarly situated, and one CLEC’s ability to provide service may well be impaired by lack of access to an ILEC UNE even if another CLEC has found it economic and rational to self-provision that same UNE in a particular market. Until there is no impairment – that is, until there is a robust, viable wholesale UNE market – the ILEC remains obliged to unbundle the network element.

The RBOCs also seek to limit access to network elements by claiming that any element which contains proprietary protocols or proprietary information must satisfy the “necessary” standard for unbundling,²⁴ and by asserting that the necessary test incorporates the essential facilities doctrine.²⁵

As numerous parties explain at length, the essential facilities doctrine does not apply here, a finding affirmed by the Supreme Court.²⁶ This doctrine is an antitrust doctrine used to determine when a firm’s conduct is so anticompetitive as to be a violation of the antitrust laws; in contrast, Section 251 of the Act imposes pro-active obligations upon ILECs to cooperate with their competitors in a variety of ways. Furthermore, the essential facilities doctrine is not codified in the Act (*id.*). There is nothing in the plain language of Section 251(d)(2) or its legislative history to suggest that Congress meant to incorporate the essential facilities doctrine in the

²⁴ See, e.g., Ameritech, p. 42; BellSouth, p. 18; SBC, p. 12; US West, p. 25.

²⁵ See, e.g., BellSouth, p. 18; Ameritech, p. 29; US West, p. 6.

²⁶ See, e.g., Sprint, p. 15; AT&T, p. 12; MCI Worldcom, p. 28; Qwest, p. 48.

Communications Act, and the Commission should resist the RBOCs' efforts to have such an unfounded interpretation codified in the Rules.

ILECs should not be allowed to claim that a network element is proprietary if the features and capabilities are defined by recognized industry standard-setting bodies or are widely available from vendors, or if the proprietary information is not revealed to (as opposed to used by) the CLEC (*e.g.*, through mediated access).²⁷ This interpretation of "proprietary" adequately balances the ILECs' interest in protecting any confidential, legally protected information, with the need to provide unbundled access to new entrants.

IV. THE RBOCs' ATTEMPTS TO LIMIT THE AVAILABILITY OF UNEs IS INCONSISTENT WITH POSITIONS TAKEN IN MERGER PROCEEDINGS.

The degree of resistance reflected in the RBOC comments to the meaningful availability of UNEs is remarkable if nothing else because of the large hypocrisy factor at work. Four of the major ILECs -- SBC, Ameritech, Bell Atlantic and GTE -- have merger applications pending before the FCC, applications which they proclaim to be public interest achievements because of the out-of-region strategies the mergers would purportedly facilitate. The gap between the RBOC/GTE public advocacy of the merger proceedings on the one hand, and that found in this docket may indeed define a new measure of unabashed inconsistency.

In its merger docket, for example, SBC has explained to the Commission that it will offer competitive local services in at least 30 markets in the United States within a year and a half. When other parties questioned the feasibility of this promise, SBC sought to assure the FCC that the plans would be brought to fruition -- through a combination of new facilities construction, total resale, *unbundled network elements and UNE-platform*. *See, e.g.* Narrative Response of

²⁷ *See, e.g.* Sprint, p. 11; ALTS, p. 15; AT&T, p. 52; MCI Worldcom, p. 20.

SBC Communications Inc. in CC Docket No. 98-141, at 26 (filed Feb. 2, 1999). It restates the obvious to note that, if the RBOC/GTE position on UNE availability were to prevail here, no CLEC could rationally rely upon the use of UNEs or UNE-P as a means of entry -- either as a short term strategy or on an ongoing basis. The RBOCs cannot have it both ways.

Similarly, the merger parties have insisted that meaningful entry on a broad-scale basis requires substantial scale and scope. The utility of UNEs to reduce the minimum efficient scale and permit entry more rapidly is wholly ignored here. The RBOCs have repeatedly insisted that the large business customer segment demands suppliers that are able to serve a large majority of a customer's telecom requirements (70-80%). *See, e.g.*, Joint Opposition of SBC Communications Inc. and Ameritech Corporation to Petitions to Deny in CC Dkt. No. 98-141, at 22 (filed Nov.16, 1998) ("a company that serves only the thirteen-state service area of the combined SBC and Ameritech [sic] will not begin to meet their needs"). Thus, they have contended that "it is essential to have a truly national footprint in order to compete" (*id.* at 26-27). They have also asserted that residential and small business customers can be served after having reached such scale. Yet the only economically feasible way for any supplier "to begin to meet their needs" on a timely basis is through some combination of facilities construction and leasing of UNEs.²⁸ *Id.* at 23-24 (emphasizing need for rapid, broad-based entry: "The larger the base of existing business customers to follow, the faster we will expand geographically. And the faster we expand in that dimension, the faster we will extend competition into small business and residential markets outside our region"). It is simply not conceivable that any BOC (merged or otherwise) can con-

²⁸ In this regard, it is important to note that GTE has apparently discarded CLEC entry via resale entirely. *See* Declaration of Jeffrey C. Kissell, submitted Oct.2, 1998 in CC Dkt. No. 98-184, at 3-4 ("GTECC's experience-- along with that of other CLECs -- has proven that resale margins alone, although accurately reflecting the ILECs' avoided costs, are not large enough to support a sustained out-of-franchise effort"). This makes UNEs and the UNE-platforms all the more important for competitive entry.

struct nationwide CLEC *facilities* within the next few years; importantly, not even the merger advocacy goes so far. This leaves the FCC with the unchallenged reality that UNEs are crucial to both the near term prospects for competition as well as for the long term benefits. The near term benefits for consumer welfare are given short shrift here, however.

The RBOCs have also insisted that their local markets are "competitive" because of the use by CLECs of the very UNEs they would now deny access to.²⁹ In Section 271 applications, merger applications, tariff deregulation and other proceedings, the use of UNEs by CLECs has been hailed by the incumbents as a source of significant competitive pressure. There is plainly some truth in this, although of course it has been greatly exaggerated. And of course the statements might have some additional basis if in fact the BOCs were not continuing to block the availability of other critical inputs, such as shared transport or UNE-platforms. But the point here is that absent the use by CLECs of the currently available UNEs, the small degree of commercial pressure that exists would be that much more diminished. And most importantly, the ability to build rapidly and bring about truly competitive environments will be sacrificed if the RBOCs' arguments were taken seriously.

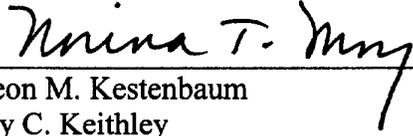
V. CONCLUSION.

As demonstrated in Sprint's initial comments and as reiterated above, whatever local competition exists is as yet nascent, and there is currently no wholesale market for network elements. Because CLECs' ability to provide local service will be impaired by lack of access to ILECs' network elements, the RBOCs' attempts here to unreasonably restrict the availability of such network elements should be rejected.

²⁹ See, e.g., SBC's October 1998 Market Opening Report, Attachment 14 to Reply Affidavit of James S. Kahan, at 6-8 (describing CLEC use of numerous UNEs).

Respectfully submitted,

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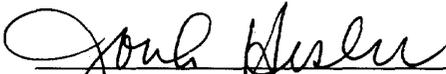
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I hereby certify that a copy of the foregoing REPLY COMMENTS in CC Docket No. 96-98 was Hand Delivered or sent by United States first-class mail, postage prepaid, on this the 10th day of June, 1999 to the parties listed below.


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