

no efficient competitor today would try to duplicate an ILEC's existing network. ILEC networks were designed and built at a time when switching and other technologies were far less advanced than they are today. Thus, while an ILEC might serve a metropolitan area with 50 switches (one for each rate center) and the transport facilities needed to connect them all, a new entrant might well be able to serve the same area with one or two switches.<sup>51/</sup> As even MCI WorldCom acknowledges, "ILECs have approximately 23,000 switches at which their loops terminate. The CLECs are employing forward-looking networks that, given such advances as fiber technology, will require far fewer switches."<sup>52/</sup>

Thus, the scale of investment needed by an efficient CLEC to reach all the customers in a particular local exchange market is far less than an ILEC's historical investment. Accordingly, when AT&T argues that switching must be unbundled because ILECs have deployed 24,000 switches, while CLECs have deployed 600,<sup>53/</sup> it is mixing apples and oranges: Those 600 switches, given their broader reach, serve a far greater area than 600 of the incumbents' switches. The key question is not whether a CLEC can economically obtain from non-ILEC sources precisely the same mix of facilities as an incumbent. Instead, the issue is what facilities an efficient CLEC, using the technology available today, reasonably can deploy using non-ILEC sources and how far and who those facilities can reach. Put another way, the Act asks

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<sup>51/</sup> See *UNE Fact Report* at I-3 to I-6, I-23 to I-25.

<sup>52/</sup> MCI WorldCom Comments at 39.

<sup>53/</sup> See AT&T Comments at 90-91.

only whether a competitor's "ability to provide service" is impaired,<sup>54/</sup> not its "ability to provide service using exactly the same network configuration as the incumbent."

Ultimately, adopting an interpretation of the necessary and impair standards that protects all competitors, regardless of their size, efficiency, or business plan is a recipe for *perpetual* national unbundling requirements. ALTS candidly admits this when it observes that its approach would require unbundling to "remain[] an option for competitors of all sizes and for start up companies that currently are entering the market or *will do so in the future.*"<sup>55/</sup> The results are even more outrageous when this approach is combined with the insistence of some commenters that elements must be unbundled everywhere in the country if they are needed anywhere at all.<sup>56/</sup> In this scenario, every incumbent facility everywhere in the country would have to be unbundled in perpetuity simply because someone, somewhere might possibly decide to enter some market in such a way that the element was needed for instantaneous profitability. Such an outcome, of course, would be contrary to the Supreme Court's holding that the necessary and impair tests impose real *limits* on the scope of unbundling. As the Court held, "if Congress had wanted to give blanket access to incumbents' networks . . . , it would not have included § 251(d)(2) in the statute at all."<sup>57/</sup>

In lieu of adopting an approach that leads to such absurd results, the Commission should apply the necessary and impair tests by looking to whether a reasonably efficient

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<sup>54/</sup> 47 U.S.C. § 251(c)(3).

<sup>55/</sup> ALTS Comments at 34.

<sup>56/</sup> *See, e.g.*, MCI WorldCom Comments at 18.

<sup>57/</sup> *AT&T v. Iowa Utils. Board*, 119 S. Ct. at 735.

competitor would be substantially handicapped by the nonavailability of a particular ILEC element.<sup>58/</sup> And in determining whether that standard has been met, the Commission should rely first and foremost on the record evidence concerning actual entry: Where one or more CLECs already obtain an element from non-ILEC sources in a market, then the Commission should at the very least presume that any reasonably efficient competitor could do so as well and that the impair test therefore is not met.

**D. Because the Need for UNEs Varies across Markets, the Commission Should Adopt National Unbundling Rules That Tailor Unbundling Obligations to Particular Markets Based on Objective Market Criteria.**

Virtually no commenter denies that the need to unbundle certain ILEC facilities varies by geographic region. Moreover, many commenters — including ILECs, CLECs, and state PUCs — recognize that the Commission’s unbundling regime should be tailored to reflect the market by market variations in the CLECs’ need for ILEC elements.<sup>59/</sup> Even AT&T and MCI

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<sup>58/</sup> Of course, adopting a reasonably efficient competitor standard does *not* mean that small carriers will be unable to enter the market. As Focal Communications explains from its own experience, “there do not appear to be significant obstacles to CLECs raising the capital to purchase switches with the proper business plan and experience. Focal was a start-up company with almost no business three years ago, yet Focal has been able to raise almost two hundred million dollars” from capital markets. Focal Communications Comments at 4; *see also UNE Fact Report* at I-1 & n.7 (noting that among the CLECs who have deployed their own switches are carriers such as Waller Creek and Otter Tail, each of which had about \$600,000 in revenue in 1998).

<sup>59/</sup> *See, e.g.,* Qwest Comments at 40 (“[S]tate commissions can and should have an important role in developing the factual record needed to determine whether a wholesale market has developed in a particular geographic area.”); Texas PUC Comments at 3 (“The application of standard evaluation criteria for the “necessary” and ‘impair’ standards may well produce varied results across geographical regions and among services, just as the availability of local service

(continued...)

WorldCom are forced to concede that, in some areas, competitors do not need certain UNEs.<sup>60/</sup> AT&T, for example, states that “[t]he reality is that there are today no remotely adequate substitutes for any of [the seven] elements . . . in *vast areas* of the nation.”<sup>61/</sup> Even if AT&T were correct that substitutes are unavailable in “vast areas” of the nation (which it is not), that would not be the same as their being unavailable everywhere. Indeed, as the *UNE Fact Report* demonstrates, CLECs are competing strongly without ILEC facilities in many urban areas that — whether or not “vast” in area — include a significant portion of the nation’s population.

Nonetheless, AT&T, MCI WorldCom, and other parties urge the Commission simply to ignore this geographic variation and to impose uniform nationwide unbundling duties.<sup>62/</sup> MCI WorldCom puts the point in an extreme fashion: “[I]f unavailability threatens the ability of *a* CLEC to earn a reasonable return on capital in offering services generally, or for *any* class of customers, or in *any* geographic area (*regardless* of the absolute size of the additional

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<sup>59/</sup> (...continued)  
alternatives in the marketplace will continue to vary from region to region.”); TRA Comments at 28-34.

<sup>60/</sup> See, e.g., AT&T Comments at 16 (“While it is in some limited circumstances possible for some CLECs economically to purchase and use their own switches to serve some market segments, it is not economic for mass market services that otherwise depend on elements obtained from LECs.”); MCI WorldCom Comments at 10 (“There are no doubt sporadic instances in which a particular CLEC in a particular locations seeks access to a particular element even though it could as a practical matter, self-provision.”).

<sup>61/</sup> AT&T Comments at 15 (emphasis added).

<sup>62/</sup> See, e.g., ALTS Comments at 3-6; AT&T Comments at 39-46; MCI WorldCom Comments at 4-10, 65; Sprint Comments at 8-9.

cost involved), CLECs should have unbundled access to the element.”<sup>63/</sup> Under this standard, if there is a single geographic enclave anywhere in the nation where an inefficient CLEC could not earn a reasonable profit without a particular UNE, ILECs would be required to unbundle that element on a uniform *nationwide* basis.

Such hyperbolic positions and “expansive methodolog[ies]”<sup>64/</sup> unlawfully collapse the impairment test back into a “blanket access rule,” effectively writing the test out of the statute.<sup>65/</sup> The key issue is to focus on the relevant market for a particular element.<sup>66/</sup> For some elements, such as operator services and directory assistance, the market is national because the service can be provided anywhere in the country from a single location. For such elements, availability does not vary by location, and a nationally uniform unbundling rule would be perfectly tailored to the actual availability of these elements. But for elements whose availability does vary by local market — and all the facts presented in this proceeding suggest this describes a number of elements — a nationally uniform unbundling rule will be unacceptably over- or underinclusive. If unbundling obligations are unnecessarily applied to local markets where an

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<sup>63/</sup> MCI WorldCom Comments at 18 (emphases added).

<sup>64/</sup> *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 736.

<sup>65/</sup> *Id.* at 735.

<sup>66/</sup> The Commission has relied on this principle in other contexts such as merger reviews. 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).

element is reasonably available from alternative sources, the market suffers all the harms of squelching investment incentives without realizing any short-term boost to competition. The Commission has previously recognized this very point when it 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.”<sup>67/</sup>

As U S WEST,<sup>68/</sup> other ILECs,<sup>69/</sup> and several state commissions <sup>70/</sup> have advocated, the Commission should accordingly adopt a national set of rules that varies the obligation to unbundle facilities based on easily measured, objective marketplace criteria, such as line density. The Commission would promulgate a single set of rules defining these market criteria, and state commissions would apply those criteria to the particular markets in their jurisdiction. Contrary to the suggestion of several commenters, this approach would not unlawfully require the Commission to “delegate its rulemaking authority to the states.”<sup>71/</sup> Nothing in the 1996 Act prohibits states from determining where elements must be unbundled,

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<sup>67/</sup> *Local Competition*, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission (Dec. 1998) at 4.

<sup>68/</sup> *See* U S WEST Comments at 30-31.

<sup>69/</sup> *See, e.g.*, Ameritech Comments at 53-68; Bell Atlantic Comments at 20.

<sup>70/</sup> *See, e.g.*, Ohio PUC Comments at 4 (“The fact that a particular UNE is on the FCC’s list really means that there is a presumption that it generally meets the ‘necessary’ and ‘impair’ standards, which presumption can be rebutted where a proper showing is made.”); New York State Department of Public Service Comments at 6 (states should determine whether provision of service through non-ILEC facilities is “commercially viable” by applying criteria set by the Commission); Florida PSC Comments at 6 (proposing a system of rebuttable presumptions).

<sup>71/</sup> Sprint Comments at 8; *see also* AT&T Comments at 40-41.

provided the states merely *apply* Commission rules and do not simply make up their own. The Supreme Court made clear in *Iowa Utilities Board* that the Act gives the Commission broad rulemaking authority to carry out section 251 and that the states are obliged to follow those rules when establishing specific interconnection and unbundling arrangements pursuant to section 252.<sup>22/</sup> U S WEST's proposal is a straightforward application of this scheme: The Commission would prescribe general rules that limit unbundling to areas that meet certain criteria, and the states would apply those rules to the facts in specific situations.

Nor would this market-tailored approach be difficult to administer or prone to excessive litigation, as some commenters suggest.<sup>23/</sup> Measuring the number of access lines served by a given wire center or determining if a CLEC has collocated at a particular central office is a simple matter. If the Commission clearly states what threshold will trigger (or excuse) unbundling obligations, both ILECs and CLECs can easily predict what elements will be available where and can formulate business plans accordingly. There would also be few opportunities for delay and litigation: State commissions would have very little discretion and essentially would make only narrow, factual findings where they apply a Commission presumption.<sup>24/</sup> Likewise, there would be little room for CLECs or ILECs to dispute or litigate such findings since the proposed market benchmarks are objective and easily measurable.

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<sup>22/</sup> See *Iowa Utils. Bd.*, 119 S. Ct. at 730.

<sup>23/</sup> See, e.g., ALTS Comments at 3-6; AT&T Comments at 41-42; MCI WorldCom Comments at 5; NEXTLINK Comments at 3-7; Qwest Comments at 38-42.

<sup>24/</sup> See, e.g., Ameritech Comments at 66-69; SBC Comments at 18-20.

By contrast, the proposal made by many CLECs to allow states to impose unbundling requirements over and above the Commission's rules<sup>75/</sup> would violate section 251(d)(2) and disrupt the predictability that all parties agree is necessary to promote competition. The Supreme Court recognized that the Act "requires *the Commission* to determine on a rational basis *which* network elements must be made available."<sup>76/</sup> Although the 1996 Act may give states some flexibility in *applying* the Commission's rules, section 251(d)(2) requires the Commission first to analyze CLECs' need for elements and to prescribe the conditions under which they must be unbundled. As discussed above, section 251(d)(2) plays an integral part in Congress' plan to promote facilities-based competition by limiting unbundling obligations. If, however, states are permitted to superimpose unbundling obligations not contemplated by the Commission's rules, the purpose of section 251(d)(2) could be undermined. Furthermore, such a regime would "set[] in motion a new process of interminable state-by-state, element-by-element proceedings,"<sup>77/</sup> which hardly would promote regulatory predictability.

Finally, rules that vary unbundling obligations by market would reduce the need for future regulatory proceedings and would promote competition because they are fundamentally more accurate than blanket rules. If the Commission imposes a single, uniform unbundling obligation on ILECs, they will be put in a position where they have to challenge the

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<sup>75/</sup> See, e.g., ALTS Comments at 15; MCI WorldCom Comments at 12 n.21; NEXTLINK Comments at 6-7; Qwest Comments at 42-43; RCN Comments at 4-5; Sprint Comments at 8.

<sup>76/</sup> *Iowa Utils. Bd.*, 119 S. Ct. at 736 (first emphasis added; second emphasis in original).

<sup>77/</sup> AT&T Comments at 42.

application of those rules (or seek waivers or forbearance) in those situations where the facts clearly demonstrate that unbundling is not needed. Rules pegged to objective market characteristics, on the other hand, automatically evolve as market conditions change, thus obviating the need for sunset, forbearance, or other follow-up regulatory proceedings by the Commission. And because market-tailored rules would be tied directly to the evolution of competition, they would strengthen ILECs' incentives to *encourage* the development of competition and thereby eliminate the unbundling burdens. In short, far from being inconsistent with the 1996 Act, national rules that tailor unbundling obligations to particular markets would further the 1996 Act's goals by promoting competition and reducing administrative costs.

**E. The Commission May Not Use This Proceeding To Resuscitate Rules That Were Struck Down by the Eighth Circuit and Not Appealed to the Supreme Court.**

AT&T and a few other parties ask the Commission to reinstate its superior quality rules (Rules 305(a)(4) and 311(c)) as well as its UNE combination rules (Rules 315(c)-(f)).<sup>28/</sup> This request is both legally flawed and deeply ironic: AT&T is trying to use this proceeding — which is the Commission's attempt to adopt a *limiting* standard for unbundling in accord with the Supreme Court's decision — to *expand* unbundling obligations through the reinstatement of rules that AT&T and other CLECs expressly chose not to challenge before that Court. The Commission should reject this suggestion.

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<sup>28/</sup> See AT&T Comments at 136-45; see also ALTS Comments at 80; CompTel Comments at 48 n.110.

The Commission lacks authority to reinstate its superior quality and UNE combination rules, because the Eighth Circuit’s vacatur of those rules was not undermined by the Supreme Court’s decision. *First*, AT&T is plainly wrong that the Eighth Circuit’s misinterpretation of section 2(b) of the Act infected the court’s review of rules *not* involving federal and state jurisdictional issues.<sup>79/</sup> The Eighth Circuit’s opinion makes plain that the court applied the same standard of review to these rules as the Supreme Court did in its decision — namely, the deferential standard of review required by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.<sup>80/</sup> After its analysis of the Commission’s jurisdiction to issue its pricing rules, the Eighth Circuit repeatedly applied the *Chevron* standard to the Commission’s non-jurisdictional rules.<sup>81/</sup> The Eighth Circuit upheld some of these rules as reasonable applications of the 1996 Act, but found that the superior quality and UNE combination rules were inconsistent with the “plain meaning”<sup>82/</sup> and “plain terms”<sup>83/</sup> of the Act, respectively. That is precisely the analysis required by *Chevron*. Indeed, AT&T does not — and cannot — point to

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<sup>79/</sup> See AT&T Comments at 138-40.

<sup>80/</sup> 467 U.S. 837 (1984).

<sup>81/</sup> See, e.g., *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 808-09 (8th Cir. 1997) (analyzing Commission’s definition of “network element”); *id.* at 810 (reviewing Rule 317); *id.* at 812 (reviewing Commission’s interpretation of impairment standard); *id.* at 819 (reviewing resale rules); see also *id.* at 800-01 (reviewing the “pick and choose” rules under the standard in *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), which itself applies *Chevron*); *id.* at 818 (“[T]here is no justification for withholding the traditional deference that we afford to reasonable agency interpretations of statutes.”).

<sup>82/</sup> *Iowa Utils. Board v. FCC*, 120 F.3d at 813.

<sup>83/</sup> *Id.* at 812.

any language in the Eighth Circuit's opinion suggesting that these specific holdings were in any way affected by the court's misinterpretation of section 2(b).

*Second*, AT&T is wrong that other aspects of the Supreme Court's decision undercut the Eighth Circuit's decision. AT&T, for example, argues that the superior quality rules should be reinstated because the Supreme Court's reinstatement of Rule 315(b) supposedly establishes a nondiscrimination principle, prohibiting an ILEC not only from favoring one CLEC over another but also from favoring itself over CLECs generally.<sup>84/</sup> But the Eighth Circuit's vacatur of the superior quality rules is plainly consistent with that principle: The Eighth Circuit held that section 251(c)(3) does not force an ILEC to *favor* CLECs *over itself* by providing them with superior quality services. Similarly, AT&T is incorrect that the Supreme Court's reinstatement of Rule 315(b) requires the reinstatement of the UNE combination rules.<sup>85/</sup> The Supreme Court held that it was rational for the Commission to prohibit ILECs from disconnecting network elements that they already connected and were providing to themselves. That holding, however, says nothing about whether the Commission can require an ILEC to combine elements in new ways that it does not do for itself.

Perhaps the clearest indication that the Eighth Circuit's rulings are logically independent of the Supreme Court's decision is that neither AT&T nor the Commission chose to appeal these rulings to the Supreme Court. Although both AT&T and the Commission aggressively challenged the Eighth Circuit's interpretation of section 2(b) and its vacatur of Rule

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<sup>84/</sup> *See id.* at 145.

<sup>85/</sup> *See* AT&T Comments at 140-41.

315(b), neither party requested in their petitions for certiorari that the Court reinstate the superior-quality and UNE combination rules based on these arguments. Furthermore, although AT&T did raise its novel theory about the appropriate standard of review in its merits brief before the Supreme Court,<sup>86/</sup> the Court's failure even to recognize this argument, much less give it any effect, strongly implies that the Court did not find it credible.

Even assuming, *arguendo*, that the Supreme Court's decision *did* affect the Eighth Circuit's decision on the superior quality and UNE combination rules, that issue is now squarely before the Eighth Circuit. Indeed, the Eighth Circuit *today* specifically asked the parties to brief the question whether the Supreme Court's decision requires the Eighth Circuit to take any further action regarding these rules.<sup>87/</sup> The Commission should not circumvent the Eighth Circuit's authority by attempting to resuscitate those rules before the court has had a chance to analyze them in light of the Supreme Court's decision.

If further Commission action is permissible after the Eighth Circuit finishes its analysis, the Commission then should institute a rulemaking that directly deals with the superior quality and UNE combination rules. The *Second FNPRM* does not mention the superior quality rules as a matter upon which parties should comment,<sup>88/</sup> and AT&T's argument — that the UNE

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<sup>86/</sup> See Brief of Petitioners AT&T *et al.* at 32-34, *AT&T Corp. v. Iowa Utils. Bd.* (No. 97-826) (filed April 3, 1998).

<sup>87/</sup> *Iowa Utils. Bd. v. FCC*, Order, Nos. 96-3321 *et al.* (8th Cir. June 10, 1999).

<sup>88/</sup> See *Simmons v. ICC*, 757 F.2d 296, 300 (D.C. Cir. 1985) (stating that an NPRM must be “sufficiently descriptive of the ‘subjects and issues involved’ so that interested parties may offer informed criticism and comments.”); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (“Agency notice must describe the range of alternative  
(continued...)”)

combination rules should be reinstated because ILECs are not permitting CLECs to access their networks — plainly requires more support and development than the few isolated quotations cited by AT&T.<sup>88/</sup> In light of the numerous complex issues raised in this proceeding about the application of section 251(d)(2), the Commission should reserve any examination of the reinstatement of the superior quality and UNE combination rules for a future rulemaking proceeding that can take into account the Eighth Circuit’s decision and give these subjects more thorough treatment.

**II. THE EVIDENCE ON THE RECORD DEMONSTRATES THAT THE COMMISSION SHOULD ADOPT THE NATIONAL RULES AND PRESUMPTIONS PROPOSED BY U S WEST.**

U S WEST and other ILECs have presented a comprehensive factual case demonstrating that in many markets CLECs have self-provisioned many of the elements contained in the Commission’s original Rule 319. Indeed, U S WEST documented that CLECs entering the market typically forego relying on ILEC elements so that they may differentiate their services and obtain a competitive advantage over ILECs. Commenters proposing to keep or even expand the FCC’s original list have submitted no meaningful factual evidence of their own. Accordingly, the record makes an overwhelming case for adopting the national rules and presumptions set forth in U S WEST’s initial comments.

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<sup>88/</sup> (...continued)  
being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking.”).

<sup>89/</sup> See AT&T Comments at 141-42.

In addition to discussing the seven original UNEs as defined by the Commission, CLECs take the opportunity to propose a myriad of ways to expand the original definition of the UNEs, to add new elements, and to define new combinations of elements as UNEs. Most, if not all, of these proposals raise significant issues under the necessary and impair tests, and many are not even technically feasible. But it is practically impossible at this stage for U S WEST or any other commenter to respond to this flurry of new proposals, which are scattered throughout various parties' comments. Answering these proposals is also beyond the purpose of this proceeding, which, after all, is intended to implement the Supreme Court's mandate that the Commission develop and apply a standard *limiting* the availability of UNEs.

The Commission has no legal or factual basis on the record before it to accept any part of this grab-bag of proposals, virtually none of which were mentioned in the NPRM. Making rules on these new items would violate the Commission's legal obligation to give parties fair notice and a meaningful opportunity to comment.<sup>20/</sup> The Commission should simply assess the seven original UNEs (as originally defined), as well as perhaps the few other issues expressly raised in its notice. Although the record contains no justification to do any more, to the extent the Commission believes any of these new proposals warrant consideration, it should issue a further notice of proposed rulemaking setting forth specific proposals to which parties can fairly respond and for which a record can be developed.

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*See supra* n. 88.

## A. Loops

Redefinition of loop. Many CLECs, apparently recognizing that advanced services electronics cannot meet the necessary and impair tests, try to bootstrap these electronics into the unbundling regime by redefining the loop to include them.<sup>21/</sup> The CLECs' theory seems to be that, because an ILEC conceivably could leverage market power derived from loop ownership to markets for advanced services that are based on facilities added to loops (*e.g.*, DSL technology), then the added facilities must be unbundled as well. The Commission should reject this gambit, which plainly is an effort to evade Congress' purpose in enacting section 251(d)(2).

As discussed above, the Supreme Court has directed the Commission to interpret section 251(d)(2) as a serious limiting standard on its unbundling regime. Unbundling rules therefore must be constructed narrowly to require ILECs to unbundle those facilities CLECs need for competitive entry, but no others. Although the Commission may address ILEC market power in a network facility, the Act does not permit the Commission to unbundle competitive facilities as well, even if they are somehow attached to the unbundled facility. Thus, to be consistent with the Act, the Commission must look for the lowest level in the ILEC's network at which unbundling can be applied and limit its action to that level. Any approach that requires an ILEC to unbundle facilities simply because they are connected to other facilities that must be unbundled would result in a massive and almost limitless approach to unbundling, which clearly is inconsistent with the Supreme Court's decision.

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<sup>21/</sup> See, *e.g.*, AT&T Comments at 77-81; MCI WorldCom Comments at 50; Sprint Comments at 36-37; Qwest Comments at 61-63; CompTel Comments at 32-33.

In light of these principles, lumping advanced service electronics into the definition of the local loop would be an obvious evasion of the Supreme Court's mandate. As the *UNE Fact Report* establishes<sup>22/</sup> and as discussed in Part II.G below, the evidence is clear that DSL facilities and other packet switching facilities are readily available from independent sources and that CLECs are, in fact, deploying such facilities on a wide scale. Thus, if an ILEC's control of a loop creates the potential for competitive harm, the proper regulatory response is for the Commission to address the issue of loop availability directly, not to regulate the DSL facilities as well. Once unbundled loops and reasonable collocation space are available to competitors (as they in fact are), nothing more can be demanded from ILECs, and there is no sustainable rationale for the Commission to redefine loops to include advanced services electronics.

Intrabuilding cable in multiple tenant environments (MTEs). A number of CLECs argue that, in order to help CLECs provide services to multiple tenant environments ("MTEs"), the Commission should require ILECs either to relocate demarcation points outside MTEs or to unbundle intrabuilding cable (or "wiring") in MTEs.<sup>23/</sup> These proposals are fundamentally flawed and raise issues that should be addressed, if at all, only in a separate industrywide proceeding in which the Commission can impose access obligations on both ILECs and CLECs alike.

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<sup>22/</sup> See *UNE Fact Report* at VI-26 to VI-27.

<sup>23/</sup> See, e.g., MCI WorldCom Comments at 45-47; Optel Comments at 7-13; Teligent Comments at 2-14; WinStar Comments at 1-13.

CLECs already can compete for the business of MTE residents by either (1) leasing entire ILEC loops, or (2) laying their own fiber to the MTE and then installing their own intrabuilding cable to the demarcation points. Although the CLECs claim that it is too difficult for them to install their own intrabuilding cable, that fact — even if true — has nothing to do with ILEC market power. The location of the demarcation point in MTEs is a contractual matter that MTE building owners must decide on behalf of their residents. U S WEST, for example, gives developers various options for the location of demarcation points, and in many cases, it is the building owner, not the ILEC, that owns the intrabuilding cable. Furthermore, even if an ILEC does own the cable, the MTE building owners generally can negotiate with the ILEC to change the location of the demarcation point.

If, however, the Commission finds that new access requirements for intrabuilding cable are needed, any such requirements should cover both CLECs and ILECs. In cases of new construction, it is often a CLEC that installs and owns MTE intrabuilding cable. Indeed, ILECs now are frequently in the position of having to negotiate access to MTE intrabuilding cable, and the Commission would need to place access requirements on both CLECs and ILECs in order to create a level playing field. Thus, if the Commission wants to adopt any such requirements, it should commence an industrywide proceeding rather than impose piecemeal measures here that would affect only ILECs.<sup>24/</sup>

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<sup>24/</sup> Whatever the Commission decides to do regarding intrabuilding wiring, it is indisputable that an ILEC pays for and owns MTE intrabuilding facilities up to the demarcation point. Any mandatory relocation of the demarcation point (as proposed by Teligent and WinStar) would constitute a taking of U S WEST's property and require just compensation.

## **B. Operations Support Systems**

U S WEST agrees that the five OSS functions identified in the *Local Competition Order* (pre-ordering, ordering, provisioning, maintenance and repair, and billing) meet the necessary and impair tests. However, the Commission should reject the suggestions of various commenters to expand the OSS unbundling obligation.

First, ILECs should have to provide OSS functions only with respect to *ILEC* network elements, not elements CLECs obtain from other sources. In particular, the Commission should reject CompTel's suggestion that "ILEC systems must provision and connect network elements to each other through means that eliminate all material differences in cost, time to provision and functionality between use of an ILEC network element and use of a competitively-supplied alternative."<sup>95/</sup> The CLEC must bear the responsibility of combining elements it receives from the ILEC with those it obtains from other sources, rather than requiring the ILEC to develop new systems that will allow it to act as the intermediary between a CLEC and whatever other sources from which it obtains elements. Such an obligation would violate the Eight Circuit's holding that the Commission may not require ILECs to provide superior quality elements. Moreover, the CLEC can combine ILEC and non-ILEC elements without the ILEC's help through, for example, using its own (or vendor-supplied) OSS. Accordingly, such a requirement would not meet the necessary and impair tests.

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CompTel Comments at 16.

Second, the Commission should reject any suggestion that CLECs are entitled to direct access to an ILEC's OSS.<sup>26/</sup> Permitting third parties such direct access would raise serious concerns about maintaining the integrity and reliability of ILECs' OSS and indeed their telephone service more generally. In any case, because ILECs already have an obligation to provide CLECs access to OSS functionalities that is comparable in quality to what the ILEC itself obtains, direct access cannot be justified on the ground of nondiscrimination.

Finally, the Commission should not establish any "national provisioning standards for OSS."<sup>27/</sup> Development of such standards would be infeasible and is not needed to ensure meaningful opportunities for entry. National standards are impractical for the simple reason that the interfaces and capabilities of ILECs' OSS differ, often substantially, and CLECs themselves have varying capabilities and needs with respect to OSS. No uniform national standard could hope to account for such differences. Moreover, such a national standard is not needed. U S WEST and other industry members have put substantial effort in overcoming the technical challenges posed by OSS unbundling. The promulgation of mandatory national standards would only complicate these efforts.

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<sup>26/</sup> See, e.g., COVAD Comments at 54 ("ILECs should be required to utilize *the same* OSS to support the provision of their own xDSL services."); RCN Telecom Services, Inc. Comments at 19 (CLECs should receive "real time electronic interfaces to the underlying information").

<sup>27/</sup> Prism Communications Services Comments at 23.

### C. Switching

AT&T and MCI WorldCom — two of the largest and most well-financed telecommunications carriers in the world — list numerous alleged difficulties in self-provisioning switches that they claim preclude switch-based entry from being “economically viable”<sup>98/</sup> and make “the business case for deploying a switch . . . undermined altogether.”<sup>99/</sup> But these protestations fail to explain how it is that numerous CLECs, including those with a small fraction of the resources available to AT&T and MCI WorldCom, have actually deployed hundreds of their own switches since passage of the 1996 Act. Indeed, notwithstanding their protestations, AT&T and MCI WorldCom have likewise been deploying their own switches for local exchange purposes.<sup>100/</sup> This undisputed evidence of actual deployment demonstrates beyond doubt that the alleged difficulties in obtaining switches from non-ILEC sources — whether or not real — simply do not preclude meaningful opportunities for entry by numerous competitors in many markets.

The uncontested facts in the record are clear. CLECs have deployed over 700 traditional voice switches in numerous different local markets.<sup>101/</sup> These switches serve more

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<sup>98/</sup> AT&T Comments at 88-89, 92 (emphasis in original).

<sup>99/</sup> MCI WorldCom Comments at 54.

<sup>100/</sup> See, e.g., MCI WorldCom Comments, Affidavit of Mark T. Bryant at 11 (“MCI WorldCom and other carriers are actively deploying switches in local markets across the country.”).

<sup>101/</sup> *UNE Fact Report at I-1.*

than a third of all BOC and GTE rate centers and could be expanded to serve many more.<sup>102/</sup> In 25 of the largest 30 MSAs, CLEC switches serve 70 percent or more of all rate exchange areas.<sup>103/</sup> Moreover, CLECs are expressly choosing *not* to rely on unbundled switching. Since passage of the 1996 Act, not a single CLEC has purchased unbundled switching from U S WEST. Similarly, in Ohio, which has 14 facilities-based CLECs, no CLEC is purchasing the unbundled switching element.<sup>104/</sup> Accordingly, as the Ohio Commission explained, “[s]ince no CLEC has purchased the stand-alone unbundled local switch, yet facilities-based CLECs with local service are operational . . . it would be difficult for a CLEC to argue that, unless the ILEC provides the switch, the CLECs ability to provide service is ‘impaired.’”<sup>105/</sup>

Numerous other non-ILECs in this proceeding acknowledge the clear consequence of the evidence: switching does not meet the necessary and impair tests in many markets. For example — notwithstanding AT&T’s claim that switch-based entry is not “economically viable” — MGC Communications has successfully adopted a strategy of “deploying its own switching equipment, collocating interconnection equipment in ILECs central offices (“COs”), leasing fiber optic transmission capacity from ILECs, and leasing local loops from ILECs to provide a facilities-based offering to all ILEC customers in a given wire center,”

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<sup>102/</sup> *Id.* at I-7.

<sup>103/</sup> *Id.* at I-11.

<sup>104/</sup> *See* Ohio PUC Comments at 7.

<sup>105/</sup> *Id.* at 8.

including both residential and small business customers.<sup>106/</sup> MGC accordingly states that switching need not be unbundled.<sup>107/</sup> Similarly, Focal Communications explains that in those areas where CLECs are self-provisioning switches,

the very existence of switch-based CLECs suggests that the “impair” standard may not be met for ILEC switching. Second — and of equal importance — requiring switch-based CLECs to compete with unbundled ILEC switching would be completely inconsistent with the Act’s goal of encouraging facilities-based competition. . . . Accordingly, the Commission would not be faithful to the Court’s remand if it failed to exclude unbundled switching as a UNE in those locations where it is currently being self-provisioned.<sup>108/</sup>

The presumption advocated by U S WEST is limited to precisely those markets where CLECs have deployed their own switches — it exempts from unbundling only those ILEC switches within 50 miles of one or more CLEC switches. Conversely, where no CLEC has deployed a switch, U S WEST’s presumption would require the continued unbundling of ILEC

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<sup>106/</sup> MGC Comments at 4.

<sup>107/</sup> *Id.* at 31.

<sup>108/</sup> Focal Comments at 2; *see also* Rhythms Netconnections Comments at 28 (“[I]t appears that because a new entrant can in many circumstances buy and use electronic switching systems on comparable terms and conditions from several different commercial vendors, a competitor's ability to provide service would, in general, not be materially diminished by an inability to gain access to an ILEC's switch.”); Comments of KMC Telecom, Inc. at 15 (“KMC, as a facilities-based provider, does not obtain its switching capabilities from outside sources and has no plans to do so in the future.”).

A number of other non-ILEC commenters also do not advocate the unbundling of switching. ALTS, for example, “addresses existing and new UNEs that are essential to its facilities-based members’ entry plans,” yet is conspicuously silent as to switching. ALTS Comments at 33. Similarly, CLECs such as NextLink and Cox Communications do not profess to need the unbundling of switching.

switching. Thus, even if the claims of AT&T, MCI WorldCom, and others that self-provisioning in particular markets is not economically feasible were true, U S WEST's presumption is tailored to deal with this problem.

In fact, however, as the overwhelming evidence of CLEC switch deployment attests, the alleged difficulties identified by AT&T and others are nonexistent or highly exaggerated. For example, AT&T's argument that switching must be unbundled because ILECs have deployed 24,000 switches, while CLECs have deployed 600,<sup>109/</sup> is a red herring. Given the advances in switch technologies, even MCI WorldCom acknowledges that "[t]he CLECs are employing forward-looking networks that, given such advances as fiber technology, will require far fewer switches" than ILECs have deployed.<sup>110/</sup> In Phoenix, for example, the CLEC TCG explained back in 1996 that its "digital switches provide dial tone service throughout an entire metropolitan area. By contrast an ILEC's end office digital switches typically serve only a tiny portion of a metropolitan area, and *dozens or even hundreds of ILEC end office switches are required to serve a metropolitan area that TCG will serve with a single switch . . .*"<sup>111/</sup>

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<sup>109/</sup> AT&T Comments at 90-91.

<sup>110/</sup> MCI WorldCom Comments at 39; *see also* Ohio PUC Comments at 8 ("CLECs are not entering the local market with a desire to follow the same network design of the ILECs. Many CLECs have touted the abilities of their efficient network designs and advanced switches to serve very large geographic areas. Unlike an ILEC that has historically had, at least, one switch in every exchange, a CLEC can choose to serve multiple exchanges, even multiple counties with a single switch.").

<sup>111/</sup> Testimony of Kenneth A. Shulman on behalf of TCG Phoenix, *Petition of TCG Phoenix for Arbitration Pursuant to §252(b)*, Docket No. U-3016-96-402 at 8 (Az. Corp. Comm'n).

The claims of extraordinary delay in self-provisioning are similarly meritless.<sup>112/</sup> First, the fact that CLECs have deployed hundreds of switches in the approximately three years since passage of the 1996 Act shows that any alleged delay does not preclude meaningful opportunities for entry. Second, the claimed delays are extremely inconsistent and exaggerated. MCI WorldCom, for example, alleges that it takes 18-24 months to deploy a Class 5 switch, while AT&T puts the figure for an average switch at exactly half that time.<sup>113/</sup> In any case, these claims ignore numerous developments that expedite switch deployment, such as pre-fabricated central offices. Third, even if delay were an issue, U S WEST's presumption takes this into account: an ILEC switch is exempt from unbundling only *after* one or more CLECs has deployed a switch in the same area. Accordingly, even if it took two years for any CLEC to deploy a switch in a particular market, the ILEC switch would be available on an unbundled basis for that period. Thus, any delays in deployment can offer no rationale for rejecting U S WEST's presumption.

AT&T and others also fail in their attempts to justify unbundling by pointing to alleged costs that CLECs "uniquely face" in using their own switching.<sup>114/</sup> AT&T points in particular to the costs associated with forecasting call traffic patterns and with obtaining collocation and transport from a CLEC switch to ILEC switches.<sup>115/</sup> These so-called "unique"

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<sup>112/</sup> See, e.g., AT&T Comments at 91; MCI WorldCom Comments at 54; TRA Comments at 22.

<sup>113/</sup> Compare MCI WorldCom Comments at 54 with AT&T Comments at 91.

<sup>114/</sup> See, e.g., AT&T Comments at 93.

<sup>115/</sup> See AT&T Comments at 93-98.

costs identified by AT&T are in fact paradigmatic examples of costs faced by any new entrant in any industry: the costs of business planning and of deploying facilities. If such normal costs of entry were deemed to meet the impair test, then the test would be robbed of all meaning.

Moreover, AT&T exaggerates these costs by positing entry strategies that no reasonably efficient competitor would use. For example, as discussed above, an efficient competitor would not attempt to duplicate an ILEC's entire interoffice network. In addition, no efficient competitor would immediately deploy all the facilities needed to enter a market without having any idea what the demand would be. Instead, an efficient competitor would deploy facilities in stages and engage in meaningful planning and forecasting. Brooks Fiber Communications, for example, explained that, in entering the Tucson, Arizona market, it had no need to obtain collocation in all of U S WEST's central offices and transport from each U S WEST switch to its single switch. Instead, it simply connected its switch to the ILEC's *tandem* switch, which allowed it "to serve just about any customer throughout U S WEST's network through the use of unbundled elements such as unbundled loops and transport."<sup>116/</sup> Thus, Brooks Fiber was able to serve the *entire* Tucson metropolitan area with its one switch, transport from that switch to U S WEST's tandem switch, and collocation and UNEs obtained from U S WEST — a far cry from the exaggerated switch-related costs AT&T describes.

Ultimately, the mere fact that a CLEC bears different, or even greater, costs than an ILEC is not sufficient to satisfy the impair test. Any new entrant in any industry faces certain

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<sup>116/</sup> Testimony of Charles P. Johnson on behalf of Brooks Fiber Communications, *Petition of Brooks Fiber Communications for Arbitration*, Docket No. U-3009-96-478 at 14 (Az. Corp. Comm'n).