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

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	
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REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully replies to the comments filed in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

Rather than attempt to address every ILEC argument against the availability of UNEs or analyze every UNE that has been proposed in this proceeding, CompTel focuses this Reply on two issues of significance to evaluation of every UNE within the scope of Section 251(c)(3).

First, as expected, the ILECs view UNEs as an afterthought, and as a threat to the slow-roll of competition they would prefer. By seeking to limit competitors' business plans to a "construct, then enter" model, and by arguing that the accompanying delay and customer limitations are acceptable, the ILECs directly challenge the three methods of entry contemplated by the Act. For them, only facilities-based entry is acceptable, and they are perfectly willing to

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking (1999)("*FNPRM*"). CompTel filed initial comments on May 26, 1999.

wait the years (or even decades) it will take for meaningful competition to develop in this way. Remarkably, when it comes to their own "entry" plans, however, the ILECs consistently conclude that they must merge with other incumbents rather than construct their own facilities to compete like CompTel's members. CompTel urges the Commission to reject these attempts to limit competition, and instead to open the door to the robust and innovative competitive landscape that results from competitors having a wholesale market entry strategy through the use of UNEs.

Second, CompTel urges the Commission to look critically at the ILECs' evidence of alternatives to the various UNEs. As CompTel explained in its initial comments ("Comments"), access to UNEs advances the pro-competitive goals of the Act in any instance where a functioning wholesale market for network elements does not exist. Thus, the question is not whether, at a theoretical level, a carrier can buy a local switch or develop a means to bypass the ILEC local loop. At some level, or for some narrow business plan, such alternatives always will be theoretically available. However, carriers as diverse as CompTel members Golden Harbor, Birch Telecom, ATX and Z-Tel all need access to ILEC UNEs, each to fill a different need in its business plan, even if another carrier's business plan does not require that network element at this time. In order to conclude that CLECs as a group are not impaired, the Commission must find that (1) externally supplied elements may be connected and used interchangeably with an ILEC element, and that (2) competitive wholesale supply is actually available.

As shown below, for switching, loops, and transport, as well as for identical functions needed to support advanced services, external elements are neither interchangeable nor available on a wholesale basis. Indeed, although the ILECs spend a great deal of time counting

switches and collocated CLECs, they completely ignore the additional costs, increased delay and limited scope of service that arise from using these alternatives. Finally, although the record indicates that operator services and directory assistance are closest to meeting the interchangeability and wholesale supply criteria, unbundled access to ILEC data is needed to ensure that this wholesale alternative can become comparable to ILEC OS/DA arrangements.

II. THE NECESSARY AND IMPAIR STANDARDS MUST NOT BE INTERPRETED IN A MANNER THAT LIMITS COMPETITION OR SLOW-ROLLS COMPETITIVE ENTRY

The Supreme Court has asked the Commission to give meaning to the "necessary" and "impair" standards and determine which network elements must be unbundled in a way that is "rationally related to the goals of the [1996 Telecommunications] Act."[2] The central goal of the 1996 Act is to establish competitive options for providers of local telecommunications services.[3] As CompTel explained in its Comments, the FCC must interpret the necessary and impair standards in a way that ensures the availability of *all* pro-competitive local entry options: resale, use of UNEs (wholesale entry) and facilities-based provision of service. The simultaneous availability of all three entry strategies, most significantly Section 251(c)(3)'s wholesale market entry option, is the key to achieving rapid entry in all telecommunications markets, particularly in markets that depend on local services.

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2 *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734 (1999).

3 *See* S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996) (explaining that the 1996 Act erects a "procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

A. The ILEC Standard Will Unreasonably Delay Competitive Entry and Deny Consumers Innovative New Services

Without hesitation, the Commission can and should reject ILEC attempts to use this remand proceeding to rewrite Section 251(c)(3) to eliminate its inpact. For example, Ameritech unabashedly proposes a standard that, for all practical purposes, delays competitive entry for up to two years, as competitors are required to meet Ameritech's view of a worthy entry strategy.[4] Although Ameritech purports to agree that the necessary and impair standards must be considered in conjunction with the objectives of the Act,[5] it wholly ignores these objectives when it argues that competitors are not impaired if they can provide service through an alternative *within two years* of its request for an element. Remarkably, Ameritech considers this a "reasonably timely fashion" for entry.[6]

It is outrageous to suggest that a two year entry delay does not constitute impairment. In the *FNPRM*, the Commission noted that the use of UNEs "is integral to achieving Congress' objective of promoting *rapid* competition in the local telecommunications market."[7] Clearly, prolonging the ILECs' local monopoly for another two years does not promote *rapid* competition. Yet, for Ameritech's part, it is perfectly willing to wait this long, and it apparently believes the Commission - and American consumers - should wait as well. But patience is not always a virtue, and certainly is not in this instance. Consumers can benefit *now* from competition, if only the Commission makes sure the UNEs needed to enter are available.

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4 Ameritech Comments at 34-35.

5 *Id.* at 47.

6 *Id.* at 35.

7 *FNPRM*, ¶ 2 (emphasis added).

Immediate entry via network elements allows competitors such as Golden Harbor to meet their customers where they need service. It also allows innovative applications providers like Z-Tel to offer new products and new capabilities to end users. Finally, it allows carriers such as ATX and Birch Telecom to build (or retain) a customer base in preparation for transitioning to facilities-based provisioning when sufficient economies of scale and scope are obtained. This is precisely the type of robust competition Congress sought to encourage through the availability of UNEs.

Another ILEC attempt to slow-roll competition is the claim that access to UNEs must be limited, allegedly in order to give competitors an incentive to build their own facilities.[8] Their paternalistic rhetoric misunderstands the realities of entry in competitive markets and ignores the long term goal of the majority of CLECs in the local market. ILECs mistakenly believe that by restricting access to network elements, CLECs will be forced to build their own facilities. In fact, the opposite is true.

Access to UNEs *promotes* facilities deployment in the long term. One purpose of UNEs is to enable new entrants to enter markets rapidly while gradually building out their own networks. The development of a significant customer base will allow a carrier to achieve economies of scale that, in turn, can justify the deployment of facilities. As AT&T points out: "CLECs will always have powerful incentives to cease leasing network elements and to build their own facilities instead wherever the economic case for doing so is even close."[9] No rational

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8 *See* GTE Comments at 16; BellSouth Comments at 26-27; Bell Atlantic Comments at 11; Ameritech Comments at 24-26.

9 AT&T Comments at 24. *See also* Hubbard/Lehr/Willig Aff. at 33-34 ("CLECs need to free themselves from these tortured business relationships with their monopoly competitors and the endless litigation those dependencies generate, and to establish a different and superior cost structure under which a long-term competitive position can be successfully maintained.")

CLEC would want to remain dependent on its main competitor – the ILEC – for any longer than is absolutely necessary. Therefore, competitors will choose to construct new facilities as soon as it is efficient to do so (for example, when traffic volumes justify facilities deployment or where competitors need new facilities in order to offer new or more efficient services). In fact, the CLEC facilities construction to date – which has occurred under national rules mandating open access to UNEs – demonstrates that the availability of UNEs does not deter facilities deployment. As the Commission told the Supreme Court, new entrants have "powerful incentives to develop their own facilities" when UNEs are available.[10]

This is illustrated by the variety of business plans supported by CompTel members seeking access to UNEs. One CompTel member, Birch Telecom, plans to use UNE combinations as a market entry tool to build market share before making an investment in a switch.[11] For Birch, broad access to network elements is required in order to break into the local market and serve a wide range of customers. Indeed, Birch's experience demonstrates that availability of UNE combinations significantly expands the number and scope of customers it may serve in an area.[12] Golden Harbor, by contrast, must be able to reach customers with locations in multiple geographic regions, including some areas where Golden Harbor has not yet deployed facilities.[13] Prior to the time when it can economically deploy its own facilities, access to the ILEC's network elements is crucial to its ability to serve such customers anywhere.

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10 *See FCC v. Iowa Utils. Bd.,* Case No. 97-826, et al, Reply Brief for the Federal Petitioners and Brief for the Federal Cross Respondents at 41 (U.S. Oct. Term 1997).

11 *See* Affidavit of Richard L. Tidwell of Birch Telecom, Inc. attached to CompTel's Comments as *Exhibit E.*

12 *Id.*, ¶ 7.

13 *See* Affidavit of Jerry James of Golden Harbor of Texas, Inc. attached to CompTel's Comments as *Exhibit F.*

It is important for the Commission to recognize that broad access to UNEs is consistent with Justice Breyer's observation (in his dissenting opinion) that meaningful competition flows from the unshared portions of an enterprise.[14] Innovative and meaningful competition *is promoted* by requiring the ILEC to make its network available. For example, value-added service providers, such as Z-Tel, offer new or more effective ways of using the existing ILEC infrastructure or technology.[15] Z-Tel has developed a sophisticated application control system that "overlays" the traditional network to provide customers an integrated voice, data and messaging package. For carriers such as Z-Tel, innovation occurs *principally because* it is not required to duplicate the ILEC UNEs, and instead, can share the underlying network functionalities.[16] In areas where Z-Tel cannot obtain access to those inputs it cannot provide its innovative product to end users.[17]

B. Impairment Should Be Evaluated from the Perspective of a Requesting Carrier Most Likely to Use UNEs, not from the Perspective of a Single Most Capable Entrant

In keeping with the goal of interpreting the necessary and impair standards in a pro-competitive manner, the Commission should put itself in the shoes of the type of requesting carrier for which Congress created the UNE requirement in the first place; that is, a carrier most likely to need UNEs to enter the market. As in all economic matters, decisions are made at the margins, or in this case, at the level of the carrier for whom access to UNEs dictates whether it will enter the market at all. If UNEs enable this carrier to enter, then all carriers in a *better*

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14 *See AT&T Corp.,* 119 S. Ct. at 754 (Breyer, J., concurring in part and dissenting in part).

15 *See* Affidavit of David Malfara of Z-Tel Network Services, Inc. attached to CompTel's Comments as *Exhibit C.*

16 *Id.*, ¶ 5.

17 *Id.*, ¶ 8.

position to enter the market also will be able to enter, thereby promoting maximum competition, consistent with the pro-competitive goals of the Act.

CompTel agrees with SBC that the "impair" standard does not turn on the identity of a particular identified carrier.[18] Rather, as explained in CompTel's Comments, the Commission should analyze impairment from the perspective of a prototypical or model requesting carrier. This carrier should be: (1) a new entrant; (2) without local facilities of its own; (3) attempting to enter both the residential and the business markets; (4) providing a scope of services as least as extensive as those supported under Section 254; and (5) serving a sufficiently large service area as expected.

In contrast, the ILEC arguments, particularly those of Bell Atlantic and U S West, put forward as an implicit model that carrier which is in the *best* position to enter the market by duplicating facilities, and therefore, one that is *least* in need of UNEs.[19] For example, Bell Atlantic argues that the existence of *a single* competitor using its own element "is sufficient proof that it can be done and that competitors do not need that element from incumbents."[20] Likewise, U S West states that "evidence that *one* or more CLECs are obtaining an element from a non-ILEC source conclusively demonstrates that mandatory unbundling of that element is not appropriate. . ."[21] The ILEC paradigm is seriously flawed and runs counter to the pro-competitive purposes of the Act.

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18 SBC Comments at 7.

19 *See* Bell Atlantic Comments at 14-16; U S West Comments at 12-14.

20 Bell Atlantic Comments at 14.

21 U S West Comments at 12 (emphasis added).

Just as the Supreme Court made clear that the impair standard could not be triggered by *any* increase in cost or decrease in quality, no matter how trivial, the standard also surely cannot turn on whether *any* potential substitute, no matter how limited in application, could be employed by a single carrier. The fact that a single carrier is bypassing an ILEC element does not indicate that such action came at no cost or impact on the carrier's business plan. At best, it indicates only that, for that particular carrier, the disadvantages of using an external element were outweighed by other factors (or did not undermine that carrier's business strategy). But all carriers cannot have their business plans limited by the choice of the entity that least desires UNEs. This turns the impairment standard on its head, demanding proof not that a "requesting carrier" would be impaired, but that *every conceivable carrier* is impaired. Nothing in Section 251(d)(2) supports such an insurmountable barrier to the use of UNEs.

Implicit in Bell Atlantic's "best carrier" approach to interpreting the necessary and impair standards is the idea that other carriers can duplicate the "best carrier's" actions. The fallacy of this logic is aptly illustrated by the ILECs' prominent touting of AT&T Corp.'s potential capabilities after its recent moves to acquire cable television systems, including TCI. Yet, even if one assumes that AT&T ultimately will be successful in providing telephone services over the cable systems – and further assumes that AT&T would not be impaired if ILEC UNEs were not provided in these areas – this says nothing about the capabilities of all other CLECs, including CompTel's member companies. Put simply, the "AT&T model" cannot be followed by other carriers. First, at most, only one or two other carriers might have the economic resources to spend the $115 billion AT&T spent to purchase both TCI and Media One. Moreover, even if another carrier had the resources, there typically is only one cable system in any particular area and thus cable-based competition would lead to, at best, a duopoly in most

locations. No other carrier has a ubiquitous "cable path" into the areas served by AT&T/TCI (or AT&T/Media One). Having moved first, AT&T now owns the only ubiquitous national presence in cable systems. Finally, *use* of the AT&T cable systems also is not an alternative, as AT&T repeatedly has demonstrated its unwillingness to share the facility.[22] Thus, if UNEs were denied based upon the existence of the AT&T model, consumers likely would be left with at best a duopoly, not competition, in local services.[23] This scenario would utterly fail to accomplish the open competition that Congress envisioned in the 1996 Act.

CompTel urges the Commission to keep in mind that Section 251 mandates three modes of entry and that the Act "neither explicitly nor implicitly expresses a preference for one particular entry strategy."[24] In direct contravention of these goals, the ILECs' proposed standard requires the conclusion that facilities-based entry is the only relevant goal. Their standard for evaluating impairment requires carriers to follow the facilities-based model, and to do so based upon the business plan of the carrier most capable of surviving without ILEC UNEs. The competition that will result from such a standard is much more limited than will result from CompTel's proposed standard. The ILEC standard necessarily limits CLECs to at most a few business plans and no alternatives to building one's own facilities. With this standard, only a handful of carriers will be able to enter the market and competitive alternatives will be limited to

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22 Other limitations, such as the need in some cases for additional construction before a CLEC could use a cable system to provide service, would apply even if AT&T made its cable system available in some manner to unaffiliated providers.

23 Indeed, consumers in some areas, especially rural areas, would be left for all practical purposes with a monopoly because the telecommunications provider and the cable company are often owned by the same entity.

24 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 12 (1996) ("*Local Competition Order*").

narrow geographic regions and/or high volume customers. On the other hand, if the Commission adopts CompTel's pro-competitive standard, competitive entry will be possible for carriers with a variety of business plans, leading to broad based competition and, ultimately, a functioning wholesale market.

III. THE ILECS' ARGUMENTS REGARDING SPECIFIC UNES IGNORE WHETHER AN ELEMENT IS INTERCHANGEABLE WITH THE ILEC ELEMENT AND WHETHER WHOLESALE SUPPLY IS AVAILABLE

As CompTel explained in its Comments, a requesting carrier is "impaired" whenever use of a non-ILEC network element would result in a material increase in cost, a material delay, or a material reduction in the number or scope of customers served.[25] Equally important, the CompTel impairment standard requires the Commission to look to *all* of the factors affecting the interconnection and use of an externally supplied element, as compared to the use of the ILEC's integrated element, and to ask whether an external element is interchangeable with an ILEC element and, if so, whether adequate wholesale supply of the external element exists. The Commission simply cannot evaluate impairment in isolation, but must look, as the Supreme Court directed, to the real world considerations that affect the use of an element.

The ILECs, however, largely rely on a so-called "UNE Fact Report" that reads like a tour through the ivory tower of academia. Viewing any theoretical or potential substitute as reality, and taking any evidence of alternative deployment (no matter how limited) as a

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25 CompTel Comments at 9-10. Virtually all competitive carriers agreed with this standard. *See, e.g.,* ALTS Comments at 26-27; Cable & Wireless USA, Inc. Comments at 10-14; MCI WorldCom Comments at 15; NEXTLINK Comments at 12-13; NorthPoint Comments at 6.

blueprint for all carriers, the ILECs not surprisingly arrive at a dismantling of the UNE entry method in precisely the places and at precisely the time when competitors have begun using this method as intended by Congress and the Commission.

Most importantly, the "UNE Fact Report" utterly fails to ask the right questions. Nowhere in this voluminous submission do the ILECs attempt to demonstrate that the potential alternatives described are interchangeable with an ILEC element or that competitive wholesale supply of the alternative has developed. As a result, the "UNE Fact Report" does nothing to undermine the record evidence showing that competitors need access to each of the UNEs identified in CompTel's Comments. Although CompTel will not address every element here, analysis of the ILECs' arguments with respect to switching, loops, transport, advanced services and OS/DA demonstrate the critical need for ILEC UNEs in order for competitive wholesale markets for these elements to develop.

A. Local Switching Must Remain a UNE

The ILECs seek to eliminate the switching UNE in any geographic area that is served by at least one CLEC-installed switch.[26] The principal "support" for this argument comes from assertions in the "UNE Fact Report" that (1) CLECs have deployed around 600 switches throughout the country, (2) at least one CLEC switch has been deployed in one-third of BOC/GTE rate centers, and (3) switches are easy to buy from manufacturers.[27] None of these assertions leads to the conclusion that requesting carriers are not impaired by denial of access to ILEC switching.

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[26] *See, e.g.,* Ameritech Comments at 5; Bell Atlantic Comments at 23; GTE Comments at 39.

[27] USTA Comments, UNE Fact Report at I-1, I-7 and I-28.

Initially, CompTel notes that the UNE Fact Report's reliance on an article claiming that the "entire process" to deploy a switch takes 40 days is patently absurd.[28] If switch installation were this easy, carriers would have more than duplicated the ILECs' 23,000 switches nationwide long before now. However, the reality is much more in line with the Commission's conclusions in the initial *Local Competition Order*. As CompTel members' experience attests, installation of a switch takes, on average, between 9 months and two years, and costs several million dollars.[29]

Most importantly, the UNE Fact Report wholly ignores the collocation and provisioning difficulties *attendant* to using a carrier's own local switch. For example, use of a CLEC's own switch to serve a customer requires collocation in each end office where a customer is located, a process that still can cost hundreds of thousands of dollars and involve significant delays in provisioning service.[30] Indeed, the ILECs admit that collectively they have over twice as many collocation requests pending now as the *total number* of collocation arrangements they have installed in the entire three years since the 1996 Act.[31] This hardly bodes well for the elimination of collocation as a factor impairing the use of a CLEC switch.

An external switch also does not operate interchangeably with an ILEC-provisioned switch. In order to be useful, a switch must be connected with an ILEC loop and with transport. The process for connecting loops with switches remains a manual process riddled

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28 UNE Fact Report at I-30 (asserting that, "according to Lucent, 'the entire process, from prefab to the deployment of service takes 40 days'").

29 Affidavit of Martin J. Arias of ATX Telecommunications Services, Ltd. attached to CompTel's Comments as *Exhibit D*, ¶ 5; Tidwell Aff., ¶ 5.

30 Tidwell Aff., ¶ 5.

31 UNE Fact Report at II-19 (reporting 1407 collocation arrangements in end offices serving at least 20,000 lines and 3007 "pending" collocation requests).

with costs, delays and ILEC errors.[32] Indeed, MCI WorldCom reports that, even though it has a switch installed in New York City, it does not use that switch to provide mass market service because Bell Atlantic cannot provision loops in the commercial volumes necessary to support use of the switch.[33] As a result, CLECs simply cannot serve their customers fast enough using their own switches. Most CLECs, even those the ILECs identify as facilities-based CLECs, are in a position similar to Golden Harbor or Birch Telecom. Although they have deployed facilities in some areas, their networks simply are not and cannot be ubiquitous. They must obtain access to ILEC switching, in all areas, in order to ensure that their "footprint" can reach the locations where their customers need service.[34]

The ILECs similarly ignore the availability of wholesale local switching supply. The presence of one CLEC's switch in a particular area does not mean that the switching capability is available for others to use. Indeed, the deployment of switches thus far has been for the CLEC's own use; no carriers are offering wholesale switching capacity to others.[35] In this regard, the contention of some ILECs that no carriers have requested unbundled switching is flatly wrong and borders on the disingenuous. Where it is made available in a useful manner (such as in those few areas where a UNE combination has been provided), CLECs have

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32 *See* CompTel Comments at 40; MCI WorldCom Comments at 58-61 (a CLEC faces substantial obstacles in combining an ILEC loop with its own switch); AT&T Comments at 86-88, 93-98 (the costs taken together are "so high that they preclude a rational CLEC from attempting to enter the local market on a broad, mass market basis using its own switch.")

33 MCI WorldCom Comments at 60.

34 *See* James Aff., ¶ 4; Tidwell Aff., ¶ 5.

35 Tidwell Aff., ¶ 5; *see* Sprint Comments at 33.

requested local switching and are using it to serve customers.[36] The problem is that ILECs have erected so many obstacles to the use of switching (or simply have flat out refused to provide switching as ordered by the Commission) that what ILECs currently describe as "unbundled switching" is of no benefit whatsoever to new entrants. Not surprisingly, consequently, the line to use ILECs' so-called "switching UNE" is not very long.

Finally, although even the ILEC comments generally concede that no proprietary concerns are raised by the UNEs discussed in this proceeding, Ameritech (alone) persists in its attempt to deny access to all of the features and capabilities of the local switch. Consistent with its boundless desire to undermine shared transport ordered by the Commission, Ameritech contends that the routing tables used by its switches are "proprietary."[37] Essentially, its claim that routing tables are proprietary rests on the fact that the routing table is "updated" to achieve efficient network management and is "unique" to each switch.[38] But a function performed in order to allow an element to operate within the ILEC's network does not render that function proprietary. If it were otherwise, the network would be awash in "proprietary" elements, including binder pair assignments for loops, switch port assignments, and CLLI codes for equipment, POPs and databases. Moreover, there is nothing in the use of unbundled switching that would disclose the choices made by Ameritech's engineers or the criteria used to program the routing table.[39] Accordingly, switch routing tables are not proprietary and should be included within the unbundled switching element.

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36 For example, Z-Tel uses unbundled switching as part of a "platform" arrangement to provide its services in New York. *See* Malfara Aff., ¶ 5.

37 Ameritech Comments at 84-86.

38 *Id.* at 85.

39 *See* CompTel Comments at 18-19 (discussing the definition of "proprietary").

B. Local Loops Need to be Available in All Forms for All Customers

The local loop UNE is the critical starting place for competitive entry in all markets, including dense metropolitan areas. Although it is undeniable that competitive entry initially is most viable in areas with dense concentrations of business and residential customers, and for higher volume customers, access to the loop remains critical no matter what the size or location of the customer. The Commission should continue to mandate access to the loop UNE everywhere in order to allow competition to continue to develop – via all three entry methods contemplated by the Act.

Conceding that elimination of all obligations to provide loops is impossible, even under the ILECs' own distorted views of impairment, the ILECs instead seek to eliminate loop UNEs where competitors compete against the ILEC, *i.e.,* in precisely the areas where competitors are using loops or most likely to seek to use them in the near term. BellSouth, for example, wants to eliminate "business" loops in urban and suburban (including "small city") areas and eliminate them everywhere that cable telephony is offered.[40] Similarly, GTE seeks to eliminate the loop UNE for "large business customers" (those with 20 or more lines),[41] while Ameritech and SBC seek to eliminate loops in "dense" wire centers (those with 40,000 or more lines).[42] Finally, Bell Atlantic wants to eliminate the "high capacity" loops most useful to serving higher volume customers.[43]

As with switching, the support for these positions is the UNE Fact Report. That analysis is peppered with discussions of theoretical alternatives, such as cable telephony, fixed

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40 BellSouth Comments at 66-76.

41 GTE Comments at 63.

42 Ameritech Comments at 6, 100-06; SBC Comments at 30.

43 Bell Atlantic Comments at 39.

wireless and cellular/PCS services.[44] The remainder of its support boils down to the assertion that CLEC-deployed fiber collectively reaches 15 percent of commercial office buildings and that CLECs may be serving as much as 18 percent of business lines in certain narrowly-defined geographic and product markets.[45]

Congress did not intend to foreclose unbundling, as the ILECs suggest, simply because CLECs pass near 15 percent of the nation's commercial office buildings or because they achieved a double digit market share in a segment of a particular local services market.[46] Rather, as the ILECs are so quick to contend in other contexts, such simple "metrics" cannot answer the question. Congress already decided that all consumers should reap the benefits associated with the ubiquitous networks they paid for during the past hundred years – the provisioning of UNEs to competitive providers being one of the means by which this is done. Until the advantages inherent to the integration of elements in the ILECs' networks come undone by competition, Section 251(c)(3) unbundling obligations must remain firmly in place.

But on this front, the ILECs are silent. They make no attempt whatsoever to argue that any of the loop alternatives they identify can be used interchangeably with the ILEC loop. Moreover, the ILECs do not mention that their own obstructionism is hindering the use of ILEC loops more broadly than they are used today. They do not mention that ILECs refuse to provide loops combined with switching or that unbundled loops are not provisioned electronically, but instead require significant manual coordination and high non-recurring

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44 UNE Fact Report at III-10, III-17 and III-22.

45 *Id.* at III-3, III-16.

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

charges to provision, or even that the ILECs will not combine an unbundled loop with unbundled transport.

Further, despite ILEC claims that CLECs can provision high capacity loops easily, a wholesale loop market has yet to develop. The lack of such a wholesale alternative derives in part from the fact that non-ILEC providers remain at a distinct disadvantage in terms of ubiquity, economies of scale/cost, and time-to-market factors. It is the ILEC, and only the ILEC, that has the advantages of density, connectivity and scope as a result of its ubiquitous network.

C. Both Dedicated and Shared Transport Must be Available as UNEs

The ILECs' arguments against transport essentially mirror those made against switching. Specifically, the UNE Fact Report asserts that (1) CLECs have rapidly deployed fiber in a number of dense urban areas, (2) many CLECs have operational collocation arrangements, and (3) those CLECs with collocation are not ordering transport.[47]

The problem with the ILECs' arguments is that they ignore the costs and difficulties of using competitively provided transport. For example, since transport generally is cheaper per "line" for higher capacities, it is not profitable for many CLECs to split traffic among several transport providers. Thus, if a competitive alternative is not as ubiquitous as the ILEC, and cannot provide the many thousands of end office connections currently provided by the ILEC, then a CLEC would experience an increase in per line costs by having some traffic routed to the competitive provider and some to the ILEC. This economy of scale strongly militates toward use of the ILEC's transport even in end offices where other providers are available.

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[47] *See* UNE Fact Report at II-6, II-8 and II-21.

Moreover, the ILECs grossly overstate the extent to which competitive transport has penetrated the market. According to the largest ILECs' 1998 Annual Access Filings, competitive transport providers in the switched access market had made only negligible inroads on the ILEC monopoly. The ILECs reported their own market shares as follows:[48]

	ILEC Market Share
Ameritech	98.1%
Bell Atlantic	90.0%
BellSouth	99.5%
Pacific	65.9%
Nevada	100.0%
SWBT	98.8%
U S West	94.8%
GTE	90.2%

Clearly, a wholesale market for competitively provided transport is still in its infancy.

Finally, CompTel notes that the ILECs who assert CLECs are not ordering transport UNEs fail to acknowledge the barriers they have erected to use of such UNEs. First, by excluding all carriers forced to order transport from the ILECs' tariff, rather than as a UNE, these ILECs hide the true demand for ILEC-provided transport.[49] Part of the reason CLECs must order from the tariff is that ILECs will not provision a transport UNE unless the CLEC is collocated at both the originating and the terminating end office. Where CLECs are collocated in only one location, such as in a situation where the CLEC wishes to obtain an extended link, the transport UNE is not available, and the only option is to order ILEC tariffed services. Moreover,

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48 Source: 1998 Annual Access Filing (Data for Calendar Year 1997) (Compares Interconnection Minutes that use ILEC Transport to Total Interconnection Minutes).

49 *See* UNE Fact Report at II-21 (excluding "ILEC facilities obtained pursuant to tariff" from CLEC requests for ILEC transport).

by refusing to provide transport in combination with other UNEs, such as the loop, the ILECs are suppressing the demand they contend does not exist. If the ILECs were to permit feasible combinations that include transport, there is no doubt that CLECs would be ordering ILEC transport in significant numbers.

D. UNEs Useful for Advanced Services are Needed to the Same Extent as UNEs for POTS and other Voice Services

The record in this proceeding demonstrates that access to UNEs is as important for the provisioning of advanced services – in particular, high capacity data services provided over Digital Subscriber Line, Asynchronous Transfer Mode, Internet Protocol and Frame Relay technologies – as it is for traditional circuit-switched "plain old telephone service." As the Commission has already found, "Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[50] This finding compels the rejection of ILEC claims that they should be exempted from Section 251's requirements for elements used to provide advanced services.

The ILECs' control of loops and critical aggregation points in the network is the same for advanced services as it is for POTS. Since advanced services such as DSL are both fully integrated into the ILECs' network architecture and are designed to work in conjunction with the ILECs' existing networks, there should be no doubt that the same network advantages that apply when the ILECs provide voice services also apply when they provide advanced services. It is for that reason that CompTel's proposed UNE rules do not distinguish, for

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50 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking* at ¶ 11 (rel. Aug. 7, 1998).

example, between "POTS" loops and high capacity or data loops.[51] The central issue is one of connectivity to the customer premise: the ILECs' connectivity advantages apply regardless of the transmission technology used to reach the customer over the network.[52]

Because of these advantages, the Commission also should not credit some ILECs' claims that they "start at zero" in providing advanced services and actually are trailing CLECs in the deployment of advanced services equipment.[53] It is not unusual in a market to find that the incumbent initially falls behind new competitors in some new technologies. However, if the incumbent's advantages allow it to quickly overtake these competitors, the early start is meaningless. Ironically, the ILECs' arguments effectively are refuted by the UNE Fact Report. In discussing the growing convergence of voice and data, the UNE Fact Report acknowledges that, "fast packet networks will soon occupy center stage, not only for data traffic, but for voice too."[54] It is clear that the ILECs are and will continue to modify their network to move to the new "center stage" in a voice/data world. In so doing, they will transfer the network advantages of their existing network to the evolving network of tomorrow. In order to ensure that advanced services competition can proceed despite the ILECs' network advantages, the Commission must make UNEs as fully available for the provision of advanced services as they are for the provision of voice services.

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51 *See* CompTel Proposed Rules, § 51.319(a), attached to CompTel's Comments as *Exhibit A,* at 3.

52 For purposes of clarity only, CompTel proposes that the Commission separately define packet switching as a UNE. *See id.*, § 51.319(c)(3) at 5.

53 *See, e.g.,* Ameritech Comments at 118-19; SBC Comments at 66; Bell Atlantic Comments at 40.

54 UNE Fact Report at I-33.

E. Although the Operator Services and Directory Assistance Functions are Showing Signs of a Working Wholesale Market, the Commission Must Ensure that Underlying Information and Functions Necessary to Utilize an Alternative Provider Interchangeably are Made Available by ILECs

For operator services and directory assistance, there is no doubt that the signs of a working wholesale market are beginning to appear. The UNE Fact Report is correct that several alternative providers offer one form or another of alternative operator services or directory assistance today.[55] Indeed, some of the providers identified are CompTel members, and CompTel views the development of alternative sources as a credit to the resourcefulness of the industry. However, ILEC arguments that these market providers relieve them of all obligations with respect to operator services and directory assistance go too far.[56]

The provision of a competitive directory assistance service requires that two separate functions be available. The first, and easiest to provide interchangeably, is the Call Center capability. This capability in turn involves two elements. First there is a human element encompassing a separate facility staffed by operators sufficient to handle OS/DA calls. This element of OS/DA clearly can be duplicated by CLECs without impairment, and competitive wholesale supply appears to exist. The second element of the Call Center is equipment, including appropriate search engines capable of locating the right data source and finding a requested listing. Here also, several major search engine platforms are available competitively.

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55 However, it is important to distinguish between alternatives *consumers* have to receive this information and alternatives that competitive local service providers have to provide an operator service or DA functionality to consumers. For example, the UNE Fact Report's discussion of 10-10-XXXX or internet directories is irrelevant to the Commission's analysis. UNE Fact Report at IV-1 to IV-3. A CLEC can not serve a customer requesting a listing by telling the customer to go on the world wide web.

56 *See, e.g.,* U S West Comments at 55; SBC Comments at 58; Ameritech Comments at 106-08.

Thus, the ILECs are correct that the wholly independent portion of OS/DA is competitively available in a wholesale market.

However, the second function critical to OS/DA is not available interchangeably with the ILEC's OS/DA. Specifically, this second functionality is access to the underlying subscriber listing information, including updates. This information is the core of the provision of OS/DA services. Customers calling to receive OS/DA services expect accurate, up to date information.[57] If a competitive provider cannot receive this information, however, then the carrier providing service clearly is impaired by the inability to provide a service equal in quality to the ILEC's service. Despite the development of wholesale providers for the "human" element to OS/DA, the information element remains the province of the ILECs. They, and they alone, have complete information on subscribers, including the listings of subscribers to CLECs. Moreover, the ILECs are the ones that implement service changes for customers, meaning that they are the only ones with possession of up-to-date information on subscriber listings.

Accordingly, the OS/DA UNE must continue to provide CLECs with access to current listings of subscriber names, addresses and phone numbers, as well as daily updates (or, at a minimum, updates as frequently as the ILEC itself updates its information) of this information.

In addition, a CLEC must have the ability to reach a competitive source of OS/DA services. This means first that a wholesale OS/DA provider must be able to order the OS/DA UNE independent of the CLEC to whom it is providing service. That is, even if an OS/DA provider does not qualify as a "requesting telecommunications carrier" it should have a

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[57] Customers do not expect, for example, to be limited to information available in published directories, which typically can be up to one year out of date.

right to obtain this information directly, *on behalf of* the telecommunications carrier clients it serves or expects to serve.[58] In addition, access to other UNEs must provide CLECs with the ability to route traffic to a competitive provider of OS/DA. For example, access to the switching UNE must provide a CLEC with the ability to *easily* modify line class codes to implement custom routing of OS/DA traffic to a provider of the CLEC's choice. Moreover, the actual facilities used to route traffic to a provider must pass FGD trunk signaling to the provider.

Finally, scaling back the OS/DA UNE to encompass underlying data and connectivity does not relieve the BOCs of the obligation to provide end user OS/DA services on a nondiscriminatory basis. Section 271 specifically requires BOCs to provide nondiscriminatory access to directory assistance *services* and operator call completion *services.*[59] Therefore, the BOCs must continue to offer non-branded and customized-branded OS/DA services to carriers on nondiscriminatory rates and terms.

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58 This requirement is similar to the way in which the Commission handles access to billing name and address ("BNA") information. Although billing clearinghouses are not themselves telecommunications carriers, they are permitted by the BNA rules to obtain this information directly, for use in the provision of service to their telecommunications carrier customers. 47 C.F.R. § 64.1201(b).

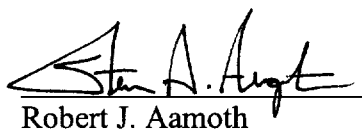
59 47 U.S.C. § 271(c)(2)(B)(vii). The statutory reference to nondiscriminatory access to *services* suggests that this checklist obligation, unlike the checklist obligations to unbundle loops, switching and transport, applies to end user services, not capabilities or functionalities of the ILEC network.

IV. CONCLUSION

For the foregoing reasons, the Commission should reject the attempts of ILECs to strip the UNE entry strategy of its usefulness. The Commission should interpret the terms "necessary" and "impair" to promote the objectives of lowering entry barriers and encouraging the widespread introduction of competition for end user customers. It should also require access to all of the UNEs described above and in CompTel's Comments on a national basis, without exceptions.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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