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

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In Matter of)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)
)
To: The Commission)

CC Docket No. 96-98

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REPLY COMMENTS OF CO SPACE SERVICES, LLC.
TO THE SECOND FURTHER NOTICE
OF PROPOSED RULEMAKING

CO SPACE SERVICES, LLC.

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SUMMARY OF COMMENTS

The Commission should find that (i) dark fiber in the local loop is a national UNE; and (ii) dark fiber present in the interoffice portion of the network is also a national UNE.

Dark fiber is a network element. Virtually every court and most state commissions to decide the matter have reached this conclusion. To hold otherwise would be inconsistent with not only the U.S. Supreme Court's finding that section 153(29) of the Act should be interpreted broadly, but also with the Commission's findings that other surplus capacity in the network constitutes network elements.

The Commission should conclude that the local loop must be a national UNE. More and more of the local loop is becoming fiber and an ever-increasing number of end-users need access to advanced services that will be provided through fiber. Therefore, it is absolutely critical that the dark fiber portion of the local loop is also a national UNE. Otherwise, competition will be severely harmed.

The Commission also should find that interoffice transport is a national UNE. Therefore, the dark fiber portion of that part of the network also should be a national UNE. In many locations, there is no alternative to the incumbent LECs' fiber. Moreover, even where an alternative exists, it is often inadequate or at best creates a duopoly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Matter of)
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Implementation of the Local Competition) CC Docket No. 96-98
Provisions in the Telecommunications Act)
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**REPLY COMMENTS OF CO SPACE SERVICES, LLC. TO THE
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

CO Space Services, LLC. (“CO Space”) hereby files its reply comments with respect to the Second Further Notice of Proposed Rulemaking (the “Second NPRM”) in the above-captioned proceeding.

DISCUSSION

I. **Dark Fiber Is A Network Element**

Most of the commenters in this proceeding who discussed dark fiber either explicitly or implicitly concluded it is a network element. While a few incumbent LECs espoused the contrary view, they are incorrect. As shown below, virtually every federal court and most state commissions deciding the matter have held that dark fiber is a network element, and the trend is clearly toward such holdings. The courts and state commissions adopting the majority view are undoubtedly correct in light of the following: (i) the U.S. Supreme Court has recognized that the definition of “network element” under section 153(29) of the Act is broad; (ii) the reference to the word “used” in section 153(29) is to ensure that the network element is employed for telecommunications services and not other types of services; (iii) a finding that dark fiber is not a

network element would be wholly inconsistent with the Commission's findings that other surplus capacity in the network constitutes network elements and with the fact that dark fiber is already in the field; (iv) competition will be severely harmed if dark fiber is not a network element; and (v) the Commission has held that dark fiber is wire communication.

A. Virtually All of The Federal Courts and Most of the State Commissions Deciding the Matter Have Held That Dark Fiber Is a Network Element

1. Federal Court Decisions

The federal court decisions support CO Space's position here. In fact, every federal court but one that has decided the issue has held that dark fiber is a network element. See, e.g., U.S. West Communications, Inc. v. Jennings, No. 97-26-PHX-RGS-OM, 1999 U.S. Dist. LEXIS 6821 (D. Az. May 4, 1999); U.S. West Communications, Inc. v. AT&T Communications, No. 97-1575-JE, 1999 U.S. Dist. LEXIS 6416 (D. Or. May 3, 1999); MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., No. 97-76, 1999 U.S. Dist. LEXIS 2775 (E.D. Ky. Mar. 11, 1999); Southwestern Bell Tel. Co. v. AT&T Communications, No. A 97-CA-132 SS, 1998 U.S. Dist. LEXIS 15637 (W.D. Tex. Aug. 31, 1998); MCI Telecomms. Corp. v. U.S. West Communications, Inc., No. C97-1508R, 1998 U.S. Dist. LEXIS 21585 (W.D. Wash. July 21, 1998) MCIMetro Access Transmission Servs., Inc. v. GTE Northwest, Inc., No. C97-742WD, 1998 U.S. Dist. LEXIS 11335 (W.D. Wash. July 7, 1998); U.S. West Communications, Inc. v. AT&T Communications of the Pac. Northwest, Inc., 31 F. Supp. 2d 839 (D. Or. 1998); MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., 7 F. Supp. 2d 674 (E.D.N.C. 1998). But see MCI Telecomms. Corp. v. Pacific Bell, No. C 97-0670 SI, 1998 U.S. Dist. LEXIS 17566 (N.D. Cal. Sept. 28, 1998). Not one of the courts that found dark fiber to be a network element

gave any indication that a contrary holding was even plausible. In contrast, while it is not entirely clear, the lone court to reach the opposite conclusion may very well have held as it did only because the state commission had so held, and the court did not consider the state commission's finding to be unreasonable. MCI Telecomms. Corp., 1998 U.S. Dist. LEXIS 17566, at *75.^{1/}

2. State Commission Decisions

Not only have virtually all of the courts ruling on the matter found that dark fiber is a network element, but so have a solid majority of the state commissions deciding the issue.^{2/}

^{1/} Moreover, as discussed in the next subsection, that state commission appears to have retreated from its position.

^{2/} See, e.g., In re MCI Tecomms. Corp., Docket No. 6865-U (Ga. PSC Dec. 17, 1996); MCI Telecomms. Corp.: Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Central Telephone Company of Illinois ("Sprint"), 96 AB-009 (Ill. CC Feb. 5, 1997); In re AT&T Communications of the Midwest, Inc., Docket No. P-442, 421/M-96-855 (Minn. PUC Mar. 17, 1997); In re AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecomms. Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Tel. Co.; In re Petition of MCI Tecomms. Corp. and Its Affiliates, Including MCImetro Access Transmission Servs., Inc., For Arbitration and Mediation Under the Fed. Telecomms. Act of 1996 of Unresolved Interconnection Issues With Southwestern Bell Tel. Co., Case Nos. TO-97-40 and TO-97-67, 1996 MO. PSC LEXIS 65 (Mo. PSC Dec. 11, 1996); In re MCI Telecomms. Corp., Case No 96-888-TP-ARB, slip op. (Oh. PUC Feb. 20, 1997); In re AT&T Communications of South Central States, Inc., Docket Nos. 96-01152 and 96-01271 (Tn. Regulatory Auth. Jan 23, 1997); In re MFS Communications Co., PUC Docket Nos. 16189, 16196 and 16226, slip op. (Tx. PUC Nov. 7, 1996); In re Bell Atlantic, DE 97-229, Order No. 22,942 (N.H. PUC May 19, 1998); Petition for Arbitration of an Interconnection Agreement Filed by MCI Telecommunications Corporation, Docket No. 2467, Order No. 15201 (RI PUC, Jan. 24, 1997); In re AT&T Communications of the Mountain States, Inc., Docket Nos. U-2428-96-417 and E-1051-96-417, Decision No. 59915, 175 P.U.R. 4th 98, at 21 (Dec. 10, 1996) (Ariz. Slip Op.); In re MCImetro Transmission Servs., ARB 9 Order No. 97-038, Slip Op. at 34 (Feb. 3, 1997); In re AT&T Communications of the Midwest, Inc., Docket No. AIA-96-3 (ARB-96-3) (Remand), slip op. (Iowa Utils. Bd. Aug. 27, 1998); In re New England Tel. & Tel. Co. dba NYNEX, D.P.U. 96-73/74 D.P.U. 96-75, 96-80/81 D.P.U. 96-83, 96-94 - Phase 3, slip op. (Mass. Dep't Pub. Utils. Dec. 4, 1996); In re AT&T Communications of the Southwest, Inc., Docket No.

Moreover, CO Space's review of the initial comments filed last month in this proceeding reveals that the (already small) number of state commissions finding that dark fiber is not a network element may be shrinking even further. The California Public Utilities Commission, which was one of the state commissions to hold that dark fiber is not a network element, appears to have retreated from this position. The California PUC commented that the issue of whether dark fiber is a UNE should be determined on a case-by-case basis.^{3/} Obviously, there is no need for case-by-case determinations if dark fiber is not a network element in the first place. Accordingly, the California PUC apparently now recognizes that dark fiber is a network element.

96-395-U, Order No. 5, slip op. (Feb. 28, 1997); In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest, Inc., pursuant to 47 U.S.C. Section 252, Commission Order Approving Interconnection Agreement, Docket No. UT-960307 (Wash. Utils. & Transp. Comm'n Aug. 20, 1997); But see Petition of AT&T Communications of California for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell, Arbitrator's Report, Application 96-08-040, at 25 (Oct. 31, 1996), approved agreement based on Arbitrator's Report, Decision 96-12-034 (Aug. 20, 1996); Petition of AT&T Communications of New York, Inc. for Arbitration of an Interconnection Agreement with New York Telephone Company; Petition of New York Telephone Company for Arbitration of an Interconnection Agreement with AT&T Communications of New York, Inc., Cases 96-C-0723, 96-C-0724, Order No. 96-31, 1996 N.Y. PUC LEXIS 704 (Nov. 29, 1996); Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Docket Nos. 960847-TP, 9600980, Order No. PSC-97-0064-FOF-TP, 97 FPSC 1:263 (Jan. 17, 1997); Petition of MCI Metro Access Transmission Services, Inc. for Arbitration of Its Interconnection Request to Bell Atlantic-PA, Inc., Cause No. 40571-INT02 (IN Util. Regulatory Comm'n Dec. 12, 1996). Several of the PUC decisions cited by SBC in footnote 94 of its comments did not hold that dark fiber falls outside of the definition of a network element. In fact, the Louisiana decision cited in that footnote by SBC does not even concern dark fiber.

^{3/} See Comments of the People of the State of California and the California Public Utilities Commission at 9.

The Florida Public Service Commission also may be backing away from its earlier ruling that dark fiber is not a network element. In its comments, the Florida Public Service Commission did not argue that the Commission cannot find that dark fiber is a UNE because it is not a network element. Rather, the Florida Public Service Commission merely stated that “we do not think it is necessary for the FCC to deem dark fiber a UNE,” apparently implying that dark fiber is a network element but it is not necessary to have it unbundled.^{4/}

3. The Clear Trend

The comments from the California and Florida commissions are not surprising in light of the following undeniable fact: there is a clear and consistent trend toward findings that dark fiber is a network element. The incumbent LECs have not cited to any 1999 decisions finding that dark fiber is not a network element, and the only 1998 decision they cited is the California federal district court holding, discussed in subsection 1 above, that may have been decided the other way if the California PUC had recognized — as it now apparently does — that dark fiber is a network element. In any event, based on the citations provided by the incumbent LECs, the relatively few state commissions holding that dark fiber is not a network element initially reached their conclusion in either 1996 or very early 1997 at the latest. In contrast, as shown in the preceding subsection, all of the federal court decisions finding that dark fiber is a network element were decided in 1998 or 1999 and some state commission rulings finding that dark fiber is a network element were rendered in the last two years.

^{4/} See Comments of the Florida Public Service Commission at 8.

4. The Incumbent LECs' Circular Strategy

The few state commissions that adopted the minority view often relied at least in part on the following argument from the incumbent LECs: the state commission must refuse to find that dark fiber is a network element since the Federal Communication Commission itself did not have sufficient information in the Local Competition Order to find that dark fiber is a network element. See 1996 Pa. PUC LEXIS 169 at **33, 34 (dark fiber should not be unbundled since “the FCC held that unbundling was not appropriate because the parties had failed to provide sufficient information to justify unbundling under § 251(c) (3) and 251(d)(4) of the Act”); In re AT&T Communications of Indiana, Inc., Cause No. 40571-INT02, Slip Op. at 15-16 (Dec. 12, 1996) (“Indiana Slip Op.”) (“The FCC declined to address the unbundling of an ILEC’s dark fiber because of a lack of information as to whether dark fiber constitutes a network element. . . . We find that there is insufficient information in the record to convince us that dark fiber is a network element as defined in the Act....”); In re Petition of MCI Telecomms. Corp., Pursuant to Section 252(b) of the Telcomms. Act of 1996, for Arbitration to Establish an Intercarrier Agreement Between MCI and New York Tel. Co., Case 96-C-0787, Op. No. 96-33, 1996 N.Y. PUC LEXIS 704, at *38 (Dec. 23, 1996) (“It is significant, New York Telephone asserts, that the FCC has not acted to require it to lease its dark fiber to competitors, especially since the FCC has declined to consider dark fiber to be an unbundled element under the Act”); In re Petitions By AT&T Communications of the Southern States, Inc., MCI Telecomms. Servs., Inc., for arbitration of certain terms and conditions of a proposed agreement with GTE Florida, Incorporated concerning interconnection and resale under the Telecommunications Act of 1996, Docket Nos. 960847-TP and 960980-TP, Order No. PSC-97-0064-FOF-TP, 97 FPSC 1:263, at

*281 (Jan. 17, 1997) (noting that the FCC declined to decide whether dark fiber qualifies as a network element under the 1996 Act). The incumbent LECs apparently framed their argument in the following manner:

Ameritech points out that the FCC refused to require incumbent LECs to provide unbundled access to dark fiber because of the insufficiency of the record before it (FCC Order at p 450). Ameritech contends that the panel had nothing more before it and, therefore was not justified in departing from the FCC's decision.

In re MCI Telecomms. Corp., Case No. 96-888-TP-ARB, Slip Op. at 14 (Jan. 9, 1997) ("Ohio Slip Op.")^{5/}

Having convinced a few state commissions to hold that dark fiber is not a network element, in large part because this Commission had insufficient information to reach a contrary conclusion in the Local Competition Order, some incumbent LECs in this proceeding now try to use a circular strategy. They seek to have this Commission hold that dark fiber is not a network element because some state commissions have so held. If successful, they would in essence have convinced the Commission to refrain from finding in 1999 that dark fiber is a network element because in 1996 the Commission had insufficient information to make this decision. The Commission should reject out of hand the incumbent LECs' circular strategy. Instead, the Commission should hold, as virtually every court and the solid majority of state commissions already has, that dark fiber is a network element.

^{5/} In the Ohio proceeding, Ameritech's argument was rejected.

B. Section 153(29) Must Be Construed Broadly, and Any Construction That Would Cause Dark Fiber to Fall Outside of That Section Would Be a Narrow Interpretation That is Inconsistent with the Commission’s Other Findings Regarding Network Elements, and Would Cause Great Damage to Competition

1. Section 153(29) Must Be Interpreted Broadly

Section 153(29) provides that a network element includes, among other things, any facility or equipment used in the provision of telecommunications service. 47 U.S.C. § 153(29). The United States Supreme Court has recognized that the definition of “network element” under section 153(29) is broad, and includes not only physical elements but non-physical elements as well. AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S. Ct. 721, 731 (Jan. 25, 1999). This broad definition encompasses dark fiber. Even before the Supreme Court upheld the Commission’s and Eighth Circuit’s broad construction of section 153(29), a federal district court in North Carolina recognized that the broad construction of section 153(29) must mean that dark fiber — a physical element — is, in fact, also a network element:

Most persuasive is the general tenor of the Eighth Circuit decision in Iowa Utilities. That decision expanded the definition of network elements to include non-physical elements. If non-physical elements are brought under the definition, it seems only logical that an expansion to a true physical element ... is more than warranted.

MCI Telecomms. Corp., 7 F. Supp. 2d at 680 (emphasis added).

2. The Reference to the Word “Used” in Section 153(29) Is to Ensure That the Element Is Employed for Telecommunications Services and Not Other Types of Services

Some incumbent LECs claim that dark fiber is not a network element because it is not “currently used” to provide telecommunications services. This is an “extremely narrow interpretation” of Section 153(29), Southwestern Bell Tele. Co. v. AT&T Communications of the Southwest, Inc., 1998 U.S. Dist. LEXIS 15637, at **21-22 (W.D. Tx. Aug. 31, 1998), and should be rejected. Contrary to the necessary implication in the incumbent LECs’ argument, Section 153(29) does not provide that the element must be “currently” in use. The reference to the word “used” in that section is to ensure that the element is employed for telecommunications services and not other types of services. As the Illinois Commerce Commission held:

[T]he Commission rejects Sprint’s argument that dark fiber is not currently “used” to provide a telecommunications service, and, therefore, it is not a network element within the meaning of the 1996 Act. The term “used” essentially refers to that which is customarily employed for the purpose. This view is entirely consistent with the FCC’s expansive definition of a network element, which includes features, functions and capabilities of facilities and equipment.

MCI Telecomms. Corp.: Petition for Arbitration pursuant to Section 252(b) of the Telecomms. Act of 1996 to establish an interconnection agreement with Central Tel. Co. Of Ill., 96 AB-009, 1997 Ill. PUC LEXIS 61, at * 7 (Feb. 5, 1997) (emphasis added). The New Hampshire Public Utilities Commission reached the same conclusion:

Bell Atlantic reasons that because Dark Fiber does not transmit information, it is not used to provide a telecommunications service. The nub of Bell Atlantic’s argument is that Dark Fiber is not “currently used.” The more reasonable interpretation is that . . . “used” refers to that which is customarily employed for the purpose, or, . . . ‘intended for and capable of use’ for the purpose. For

example, fiber optic cable is customarily employed by telecommunication carriers for the purpose of providing a telecommunications service. At least at the current time, fiber is a facility that is not used for any purpose other than telecommunications service; its sole purpose is telecommunications.

In re Bell Atlantic, DE 97-299, Order No. 22, 942, Slip Op. at 9 (May 19, 1998) (“New Hampshire Slip Op.”).

3. A Finding That Dark Fiber Is Not a Network Element Would Be Wholly Inconsistent with the Commission’s Findings That Other Surplus Capacity in the Network Constitutes Network Elements and with the Fact That Dark Fiber Is Already in the Field

The decisions referred to in the previous subsection are undoubtedly correct.

Almost all parts of the network have surplus capacity. In re New England Tel. & Tel. Co. dba NYNEX, D.P.U. 96-73/74 D.P.U. 96-75, 96-80/81, D.P.U. 96-83, 96-94 - Phase 3, Slip Op. at 25 (Dec. 4, 1996) (“Mass Slip Op.”); New Hampshire Slip Op. at 9 Therefore, a finding that dark fiber is not a network element because it is not “currently” in use cannot be sustained because it would be wholly inconsistent with the Commission’s findings that switches, copper loops, NIDs and other parts of the network are network elements. Moreover, dark fiber is not like inventory in a warehouse but rather it is already in the field. As shown from the bullet points below, in holding that dark fiber is a network element, numerous courts and state commissions have reached these same inescapable conclusions:

- The court agrees with the PUC’s determination that dark fiber is a “network element” that must be unbundled. Although dark fiber is not presently being used to provide telecommunications services, the same argument could be made with regard to switching or other excess capacity. This fiber is not just sitting in a warehouse, but it is in the field ready for use once the appropriate electronics are installed on either end. U.S. West Communications, Inc., 31 F. Supp. 2d at 854.

- GTE argues that, because the fiber optic facility installed in the ground is not actually transporting telecommunications, it is not used in the provision of telecommunications. The facility will only be “used” when lit by GTE electronics. This argument cannot be adopted. To do so would place any spare equipment or facility off limits to unbundling. . . . Dark fiber is not stored. It is installed and ready for use when there is a demand. As soon as MCImetro makes a demand, the fiber is converted from “ready for use” to “used.” In re MCImetro Transmission Servs., ARB 9 Order No. 97-038, Slip Op. at 34 (Feb. 3, 1997) (“Oregon Slip Op.”).
- SWBT’s contention that dark fiber cannot be a network element because SWBT is not presently using it to provide telecommunications service could logically be extended to other elements to prevent other services or facilities from being classified as network elements. According to SWBT’s position, all that is required to deny a CLEC access to an unbundled network element is to declare the capacity to provide a service as excess and unused at the time to provide telecommunications service. SWBT deploys facilities based upon projections. According to its interpretation, SWBT could declare any facility, such as copper cable, that was deployed for future growth not an element used to provide service and not subject to unbundling. This argument could too easily be used to defeat the intent of the 1996 Act. In re AT&T Communications of the Southwest, Inc., Docket No. 96-395-U, Order No. 5, Slip Op. at 17 (Feb. 28, 1997) (“Arkansas Slip Op.”).
- As a form of spare capacity, “dark” fiber is not fundamentally different than “dead” copper. Once either transmission media runs underground or on poles, it ceases being “inventory” for general use. It is committed to carrying traffic on a specific route. At that point, it becomes an element of the carrier’s network. In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest, Incorporated, Washington UTC Docket No. UT-960307, Commission Order Approving Interconnection Agreement, at 19-20 (1997) (“Washington UTC Order”).
- Ameritech continues to argue that dark fiber, since it cannot be used to provide a telecommunications service, should not be considered as a network element. Despite Ameritech’s arguments to the contrary, we find that dark fiber meets the definition of a network element. Given Ameritech’s position, copper loops without any electronics attached would also fail its criteria as an appropriate network element. Yet copper loops are recognized and required to be offered as UNEs by this Commission and the FCC. Ohio Slip Op. at 14.

- There is no meaningful distinction between dark fiber and an unbundled copper loop or a network interface device, both of which have virtually no stand-alone capabilities. 1997 Ill. PUC LEXIS 61, at *10.
- The fact that, by definition, dark fiber is currently unused in the provision of service to customers does not distinguish it from other portions of the network. Virtually all portions of the network are designed to have surplus capacity relative to that which would be needed to meet current levels of demand. This would be especially expected in the case of fiber, as it is common practice for an ILEC to install much more capacity than is currently needed because of the dramatic economies of scaled involved in the installation of this equipment. Mass. Slip Op. at 25. See also New Hampshire Slip Op. at 9 (most parts of the network are designed to have spare capacity and fiber is no exception).
- BellSouth argues that dark fiber is merely inventory, like rolls of copper wire or stacks of unused switches, which are not currently part of a network and thus not network elements. This court agrees with MCI that dark fiber is completely different from the rolls of copper wire and stacks of switches alluded to by BellSouth, because dark fiber is already in the ground. It is thus more a part of the network than it is inventory. In some cases . . . it is wound around "lit" fiber inside the same sheathing. MCI Telecomms. Corp., 7 F. Supp. 2d at 679.
- This Court finds that dark fiber is a UNE because it is in the ground ready to go and in some cases wrapped around lit fibers that are classified as UNEs. Dark fiber in the ground is less like inventory and more like a network element; that is, a facility or equipment used in the provision of a telecommunications service. MCI Telecomms. Corp., 1999 U.S. Dist. LEXIS 2775, at *23.
- The Commission distinguished between laid fiber, which must be unbundled, and fiber in a warehouse, which would be part of US WEST's inventory and need not be unbundled. In re AT&T Communications of the Midwest Inc., Docket No. P-442, 421/M-96-855, 1997 WL 178604, at *14 (Minn. P.U.C. Mar. 17, 1997) ("Minn. Slip Op.").

4. Competition Will Be Severely Harmed If Dark Fiber Is Not a Network Element

Further support for CO Space's position that dark fiber is a network element comes from the consequences to competition if it is not a network element, and therefore is not a UNE. As discussed in Section II of these Reply Comments, competition will be greatly harmed if dark fiber is not a UNE, particularly where fiber is replacing copper in the local loop.

5. The Commission Has Held That Dark Fiber Is Wire Communication

Finally, as discussed in CO Space's initial comments, further evidence that dark fiber is a network element comes from the Federal Communications Commission's holding that dark fiber service is "wire communication" under the predecessor to the 1996 Act. In re Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Serv., Memorandum Opinion and Order, 8 F.C.C.R. 2589, 2593 (1993), remanded on other grounds, Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475 (D.C. Cir. 1994) ("Dark Fiber Serv. Proceeding"). Several courts have relied in large part on this holding to find that dark fiber is a network element. MCI Telecomms. Corp., 1999 U.S. Dist. LEXIS 2775, at *23; MCI Telecomms. Corp., 1998 U.S. Dist. LEXIS 21585, at *18; MCI Telecomms. Corp., 7 F. Supp. 2d at 679.

II. Dark Fiber Should Be Unbundled On A National Basis^{6/}

For the reasons set forth in CO Space's initial comments, dark fiber should be a national UNE.^{7/} Many commenters agree, including the Illinois Commerce Commission, the Iowa Utilities Board and the General Services Administration. See Comments of Illinois Commerce Commission at 15 (“[l]ike access to the local loop, access to dark fiber is critical to CLECs seeking to enter the local market and compete for the provision of advanced telecommunications services”); Comments of Iowa Utilities Board at 9 (“[a]s local service competition begins to broaden, many situations will develop where a particular competitor will need to use the incumbent LEC’s dark fiber to be able to provide a service at a competitive price or with a technological advantage”); Comments of General Services Administration at 7 (“[t]he availability of dark fiber is critical for advanced telecommunications services, because fiber optic facilities provide high transmission capacities at relatively low cost”).

One of the few facts not in dispute in this proceeding is that portions of the local loop and the interoffice transport network are comprised of fiber, some of which is dark. Therefore, as discussed below, if the Commission finds that the local loop is an unbundled network element nationally, the Commission should conclude that the dark fiber portion of the local loop is a national UNE. Similarly, if the Commission finds that interoffice transport is an unbundled

^{6/} The issue of whether national UNEs should be created has been fully briefed. CO Space would simply like to add that it believes that over the next few years either litigation or competition will reign — but not both. If the Commission adopts a set of national UNEs that includes dark fiber, competition likely will result. If the issues must be resolved on a state by state or even smaller geographical basis, litigation will carry the day to the detriment of competition.

^{7/} For the sake of brevity, CO Space will not repeat its reasoning set forth in its initial comments at pages 4-11.

network element nationally, the Commission should conclude that the dark fiber portion of the facilities providing interoffice transport is a national UNE.^{8/}

A. The Dark Fiber Portion of the Local Loop Should Be Unbundled on a National Basis

For all of the reasons set forth in the comments of AT&T, MCI WorldCom, the Association for Local Telecommunications Services and many others, the local loop should be unbundled on a national basis. If the local loop is unbundled on a national basis, the dark fiber portion of that loop must be as well. No other holding would be logical. If competitors will be impaired by an inability to obtain copper wiring on the local loop at TELRIC prices, they certainly will be impaired if they cannot receive fiber on the local loop. As the incumbent LECs admit, fiber is more reliable than copper wire, and it has higher quality in terms of cross-talk, signal-to-noise ratios, and other factors.^{2/} In fact, at least one state commission has held that the impairment to competitors from a lack of access to fiber would be greater than an impairment from the lack of access to copper wire. See Washington UTC Order at 19-20 (“There is greater impairment to a CLEC’s ability to provide competing services from withholding “dark” fiber than “dead” copper because the CLEC can match fiber’s capacity to its needs by attaching higher or lower capacity electronics to the fiber”).

^{8/} The Commission could find that dark fiber is a separate network element or it could simply hold that the dark fiber portions of the local loop and the dark fiber portion of the facilities used to provide interoffice transport are part of those network elements and must be unbundled.

^{2/} See Affidavit of Jorde, Sidak and Teece, attached to Comments of USTA, at 16.

For at least two reasons, the impairment will only get worse over time if the dark fiber portion of the loop is not unbundled on a national basis. First, as time passes, more and more customers will need access to advanced telecommunications services for which fiber must be the means of delivery. Without access to such fiber, alternative providers will be out of luck as to an ever-growing number of customers.

Second, as the incumbent LECs readily acknowledge, they have been replacing copper in the local loop with fiber.^{10/} In fact, the incumbent LECs recognize that “fiber is the most important alternative loop technology.”^{11/} Therefore, the percentage of the local loop that is copper is continually decreasing while the percentage that is fiber continues to increase. Thus, if alternative providers do not have access to dark fiber, they will have access to an ever-shrinking percentage of the local loop. Under these circumstances, to give alternative providers unbundled access to the local loop while simultaneously denying them unbundled access to the dark fiber portion of the local loop would defy common sense, prevent them from having access to a significant portion of the local loop and prevent them from serving an ever-growing number of customers who need advanced telecommunications services.

While the incumbent LECs claim that others have dark fiber available, there is little question that most of that availability is not in the local loop. Moreover, the little that is in the local loop certainly will not enable alternative providers to reach all of the end-users they need to reach.

^{10/} See Affidavit of Jorde, Sidak and Teece, attached to Comments of USTA, at 16.

^{11/} See UNE Fact Report, attached to Comments of USTA, at 10.

In sum, the Commission should find that the dark fiber portion of the local loop is an unbundled network element. To hold otherwise would not only undercut any holding that the local loop is a UNE, but it would undermine competition as well, as more and more of the local loop and end-users would fall beyond the reach of competitors.

B. The Dark Fiber That Is Present in the Interoffice Portion of the Network Should Also Be Unbundled on a National Basis

The Commission should agree with AT&T, MCI WorldCom, the Association for Local Telecommunications Services and others who assert that interoffice transport should be a national UNE. If the Commission does so agree, it should further find that the dark fiber portion of the interoffice transport facilities is also a national UNE. There is no reason to distinguish between the dark fiber portion and the other portions. With respect to both portions, there is certainly no competitive wholesale market. While the incumbent LECs discuss the fiber that alternative providers have built, the incumbent LECs fail to mention the difficulties others often have in accessing that fiber, which difficulties are discussed in CO Space's initial comments.^{12/} Moreover, even if in some locations another entity has dark fiber that it is willing to lease, and even if its dark fiber is adequate to meet the needs of the CLEC — which is often not the case — a duopoly exists. And a duopoly is no more the answer here than it was in the cellular field.

^{12/} See Initial Comments of CO Space at 9.

C. GTE's Assertion That Dark Fiber Should Not Be a Nationwide UNE Because Incumbent LECs Need to Preserve Dark Fiber for Their Own Use Has No Merit

GTE claims that dark fiber also should not be a national UNE because incumbent LECs need to preserve dark fiber for their own use. GTE is incorrect. As an initial matter, Section 251(d)(2) does not provide that a non-proprietary network element can be withheld where the withholding of the element will impair the party seeking to use it. As explained in the initial comments of many parties, given the pro-competitive purposes of the 1996 Act, Section 251(d)(2) should be read to require that a non-proprietary network element must be unbundled whenever failure to unbundle would impair the alternative provider.

But even if the Commission does not reach this same conclusion, GTE's argument would still lack merit. Numerous state commissions and at least one federal court have rejected incumbent LECs' contentions that dark fiber should not be unbundled because it must be preserved for the incumbent LEC. In re AT&T Communications of the Mountain States, Inc., Docket Nos. U-2428-96-417 and E-1051-96-417, Decision No. 59915, 175 P.U.R. 4th 98, at 21 (Dec. 10, 1996) ("Arizona Slip Op.") (dark fiber should be available to CLECs because "[a]s with other capacity issues, such as poles, switches or available space, US WEST may not reserve the future capacity of its network elements for its own use"); U.S. West Communications, Inc. v. AT&T Communications of the Pac. Northwest, Inc., 31 F. Supp. 2d at 854; In re AT&T Communications of the Southwest, Case Nos. TO-97-40 and TO-97-67, 1996 Mo. PSC LEXIS 65, at *10 (Dec. 11, 1996); ^{13/} Southwestern Bell Tel. Co. V. AT&T Communications of the

^{13/} The Missouri commission noted that the incumbent LEC might not even need more capacity given that (i) an increase in the amount of traffic carried by others may mean a decrease in the amount of traffic carried by the incumbent LEC; and (ii) improvements to the electronics

Southwest, Inc., No. A 97-CA-132 SS, 1998 U.S. Dist. LEXIS 15637, at *25 (W.D. Tx. Aug. 31, 1998); (“Texas Slip Op”); Ohio Slip Op. at 14; Mass Slip Op. at 28. As the above decisions show, competition and access to UNEs is too important to be thwarted by mere speculation regarding potential future dark fiber needs of the ILEC.

attached to fiber are increasing the capacity of the fiber. Id.

CONCLUSION

For the reasons set forth in CO Space's initial comments and herein, the Commission should adopt rules consistent with the comments and proposals of CO Space.

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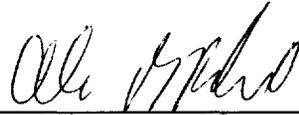
Dated: June 10, 1999

CERTIFICATE OF SERVICE

The undersigned, being an attorney, does hereby certify that a true copy of the foregoing
REPLY COMMENTS OF CO SPACE SERVICES, LLC. TO THE SECOND FURTHER
NOTICE OF PROPOSED RULEMAKING was sent via hand delivery on this 10th day of June,
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