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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	)	CC Docket No. 96-98
of 1996	)	
	)	

REPLY COMMENTS OF CORECOMM LIMITED

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Dated: June 10, 1999

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No. of Copies rec'd 0+12
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EXECUTIVE SUMMARY

The Comments filed by other parties in this proceeding demonstrate that the Commission has broad authority and discretion, as well as good cause and a reasonable basis, to designate a national minimum list of unbundled network elements ("UNEs") for access by new entrants in light of the statutory standards and the procompetitive thrust of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"). While the incumbent local exchange carriers ("ILECs") argue generally in support of a market-by-market approach to identifying UNEs, they ignore or understate the administrative, regulatory, and financial costs associated with such a regime, and fail to acknowledge the significant barrier to entry that would be imposed as a result of fifty or more different unbundling regimes. Indeed, even the state commissions recognize the value and purpose under the Act of adopting a national list of UNEs in the first instance.

The ILECs' position with respect to how UNEs should then be identified is similarly flawed. Specifically, the ILECs cling stubbornly and inappropriately to the "essential facilities doctrine" in an effort to narrow their unbundling obligations under the Act. The Comments filed by CoreComm and other parties show, however, that nothing in the Act itself, the statute's legislative history, or the Supreme Court's *Iowa Utilities Board* decision dictates (or even recommends) an antitrust analysis of unbundling. In fact, as the ILECs' analysis demonstrates, reading the "essential facilities doctrine" into the Act would effectively write the "necessary" and "impair" standards out of the Act. Rather than taking account of various factors that could adversely affect a competitor if a UNE is unavailable, the ILECs contend that the Act precludes a finding of impairment where a single competitor has already deployed similar facilities. Such a narrow reading of the statute would undermine its procompetitive purpose and ignores the fact that efficient market entry decisions will

vary for each new entrant. Moreover, the ILECs attempt to limit further their unbundling obligations under the Act by defining "proprietary" UNEs in an overly broad manner and by inappropriately shifting the burden of proof. CoreComm therefore urges the Commission to reject the ILECs' strained interpretations of the standards set forth in Section 251(d)(2) of the Act. Instead, CoreComm respectfully requests that the Commission adopt rules that more accurately interpret these unbundling standards in light of the Act's procompetitive intent and the high hurdles that CLECs must overcome to enter the local exchange market

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CoreComm Limited ("CoreComm"), by undersigned counsel, hereby submits its Reply Comments in the above-captioned proceeding. CoreComm and numerous other parties have argued in their initial Comments that the Commission has broad authority and discretion, as well as good cause and a reasonable basis, to establish a national minimum list of unbundled network elements ("UNEs") for access by new entrants in light of the statutory standards and the procompetitive thrust of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act").

By contrast, the incumbent local exchange carriers' ("ILECs") proposals regarding competitive access to UNEs would unnecessarily hinder competitive entry, compel the inefficient build-out of network facilities, and undermine the Act's intent to make available a variety of competitive market entry mechanisms. Even if the text of the ILECs' proposed rules is not so troubling on its face, the interpretation and application of those rules urged by the ILECs would deny competitive local exchange carriers ("CLECs") access to the facilities through which they are most likely to successfully enter the local exchange market. Thus, the Commission should reject the ILECs' narrow interpretation of the standards set forth in Section 251(d)(2) of the Act, and instead adopt rules that more accurately interpret these unbundling standards in light of the Act's

procompetitive intent and the high hurdles that CLECs must overcome to enter the local exchange market.[1]

I. ADOPTING A NATIONAL MINIMUM LIST OF UNES WOULD BE CONSISTENT WITH THE ACT AND MINIMIZE ADMINISTRATIVE AND REGULATORY BURDENS.

A. The ILECs' Market-by-Market Approach to Unbundling Would Generate Regulatory Costs, Create Administrative Burdens, and Hinder Competitive Entry.

The ILECs oppose the adoption of a national minimum list of UNEs on the grounds that the Commission will not be able to identify the availability of alternative facilities through such a nationwide focus.[2] Such arguments, however, emphasize the purported benefits of a market-by-market approach to identifying UNEs without taking substantive account of the likelihood of immense regulatory and administrative costs associated with a market-by-market approach, or the likely adverse impact such an approach would have on competitive entry. For example, the ILECs

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[1] In other fora, the ILECs themselves have emphasized the difficulty of competitive entry in the local exchange market. *See* Merger of SBC Communications Inc. and Ameritech Corporation, Description of the Transaction, Public Interest Showing and Related Demonstrations, filed July 24, 1998, at 8 (claiming that neither SBC nor Ameritech alone could undertake their "National-Local Strategy" absent the merger); Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control, Affidavit of Jeffery C. Kissell, filed Oct. 2, 1998, ("Kahan GTE Merger Affidavit") at ¶ 3 (stating that it is impossible for a CLEC to succeed without "a substantial up-front investment in platform development").

[2] Ameritech at 54; SBC at 15-16; United States Telephone Association ("USTA") at 24; GTE at 20-22.

– who in other respects express serious concern about the relative costs and benefits of regulation[3] – inexplicably fail to consider the fact that state-by-state litigation of UNE access will almost certainly drive up regulatory costs for both CLECs and ILECs. While ILECs may have the deep pockets, legal resources, and established regional reach to engage in such proceedings over and over again, individual CLECs are not as well equipped to litigate UNE access on a state-by-state basis. CoreComm explained in its initial Comments that there is a rational basis for adopting a national minimum list of UNEs in light of the likelihood that UNE access could only be decided otherwise through complicated arbitration and litigation on a state-by-state basis.[4] Other commenters support such an analysis, noting among other things that "the costs of piecemeal litigation would be enormous and any benefits from particularized determinations would be minimal or non-existent."[5] Only a national minimum list will allow CLECs, ILECs, *and* the state commissions to avoid the repetitive, expensive, and time-consuming process of identifying those UNEs to which CLECs should be permitted access. The Commission is therefore justified in adopting a national minimum

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[3] U S WEST at 2-3 (stating that the "real economic costs" associated with "government-mandated sharing" must be outweighed by the competitive benefits of such a mandate).

[4] CoreComm at 9. The Commission appropriately recognized the significant potential for such litigation costs in its *Local Competition Order*. *See 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, 15624 (1996), at ¶ 242.

[5] AT&T at 44; *see also* MCI at 7-8 (stating that the "heavy costs of a state-by-state approach to making unbundling rules have been illustrated by the experience of the past several years").

list to minimize such regulatory litigation costs, particularly in light of the ILECs' failure to consider such costs at all in touting the purported benefits of a market-by-market analysis.

The Commission also has a reasonable basis for adopting a national minimum UNE list in order to promote the competitive objectives of the Act by reducing the administrative barriers faced by competitive entrants. Very few CLECs currently have the capability or resources to engage in competitive entry on a national basis. Those CLECs hoping to develop a national strategy, however, would be significantly impaired if they faced the prospect of fifty different unbundling regimes.[6] As a preliminary matter, it would be difficult for financial markets to gain the certainty they need to invest in local exchange competition if competitive access to basic facilities is subject to a patchwork of regulation. Moreover, even the most efficient CLEC cannot be expected to formulate a sound business plan when it will need to modify its fundamental entry strategy for each market it hopes to enter. As Excel Communications, Inc. explains, "Without a single entry strategy that they can employ nationwide, entrants will lose the administrative, business and operational economies from pursuing a single, integrated business plan. In the end, entrants would choose to enter only selected local markets, or no markets at all, rather than endure the costs and burdens of seeking to enter local markets broadly throughout the country"[7] Just as the Commission should not interfere in the market by favoring individual CLECs or specific modes of competitive entry (*i.e.*, resale

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[6] The Commission acknowledged the likelihood of such impairment in first deciding to promulgate a national minimum list of UNEs. *Local Competition Order*, at 15624, ¶ 242.

[7] Excel at 17.

versus UNEs), the Commission should not interfere in the market by establishing a regime that precludes CLECs from having the degree of business certainty necessary to plan for broad-scale national or regional competitive entry. Establishing a national minimum list of UNEs available to all CLECs would remove such artificial planning limitations, promote access to capital, reduce the administrative costs of managing varying unbundling regimes, and allow the CLECs to determine the scope of entry is most efficient in the context of their operations.

Allowing states to define UNE access in the first instance on an individual basis would ultimately harm the development of competitive local exchange markets.[8] A national minimum list would not favor individual competitors, as the ILECs allege,[9] but rather would ensure that all competitors – including those ILECs that plan to compete outside of their own regions[10] – are able to employ the business plan that is most efficient and reasonable in the context of their own operations. As noted above, the prospect of litigating in each state and then facing fifty different unbundling requirements would effectively serve as a barrier to entry into the local exchange market. Cable & Wireless may have best summarized the adverse impact of the failure to adopt a national

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[8] As noted in its initial Comments, CoreComm does not oppose giving states the ability to supplement a national minimum list of UNEs as appropriate and consistent with the standards used by the Commission to establish the national list.

[9] U S WEST at 16; Ameritech at 16-17, 36.

[10] In pursuing the promised National-Local Strategy, SBC has stated that it intends to "construct the facilities that are most needed, combine them with unbundled elements purchased from the incumbent LEC, and where appropriate, [intercity] transport networks owned by third-parties." SBC/Ameritech Merger Statement, at 15.

minimum list in stating that "[e]volution of impairment on a central office-by-central office basis is equivalent to ceding competition behind the Iron Curtain of ILEC litigation and delay."[11]

B. The State Commissions Have Expressed an Overwhelming Interest in the Adoption of a National List of UNEs.

The Comments filed by the vast majority of state commissions support the adoption of a national list of UNEs.[12] It is clear that the state commissions do not see the purported value of using a market-by-market approach in the first instance, particularly when compared to the costs associated with trying to identify UNEs first on an individual state basis. For example, the California Public Utilities Commission concurs with CoreComm and other CLECs that a national list is essential to allow "multi-state competitors to create a national business plan, with the certainty of knowing that a discrete set of network elements will be available in all states."[13] Moreover, according to California, the condensed time frames under which arbitrations must be conducted "would make it difficult for state commissions to define which unbundled elements are to be included in each and every case."[14] Thus, most of the state commissions urge the Commission to define in the first instance, on a national basis, which UNEs should be made available to competitors.

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[11] Cable & Wireless at 22.

[12] California PUC at 3; Connecticut Dept. of Public. Utils. Control at 3; Illinois Commerce Comm'n ("ICC") at 2; Iowa Utilities Board ("IUB") at 2; Public Utilities Comm'n of Ohio ("PUCO") at 4; Public Utilities Comm'n of Texas ("PUCT") at 2; Washington Transp. and Utils. Comm'n at 5.

[13] California PUC, at 3.

[14] *Id.* at 3-4.

Several of these state commissions undermine their own reasoning, however, when they conclude that they should be able to remove UNEs from the national list once it has been adopted. The Public Utilities Commission of Ohio, for example, advocates the adoption of a national list, but then notes that "[a]n integral component of the PUCO's position regarding the FCC's creation of a UNE list is that the list can be added to, *or subtracted from*, consistent with an FCC-designated set of criteria/guidelines."[15] As CoreComm explained in its initial Comments, if a regime were established under which the state commissions could remove UNEs from the national list, this would defeat the very purpose of establishing such a national list in the first instance. It makes little sense to adopt a national UNE list in order to promote competitive entry by reducing regulatory and administrative costs and facilitating business certainty, operational consistency, and access to capital, and then to delegate authority to the states to remove UNEs from the list on an individual case basis through arbitrations and litigation. Moreover, if each state were permitted to eliminate specific UNEs from the national list, or to place conditions on the use of UNEs on the list, this delegation of authority would necessarily lead to conflicts with the Commission's prior determination that each UNE should be included on the national list in the first instance. More sound and consistent reasoning dictates that the national minimum list be just that – a floor below which the states may not go in ensuring that CLECs have adequate access to UNEs.

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[15] PUCO at 4 (emphasis added). *See also* PUCT at 3; New York Department of Public Service ("NYDPS") at 6-7.

CoreComm's position is in fact supported by several of the state commissions. California explains that states need only the authority "to add elements, or to remove elements *previously added* [by the state], based on local conditions."[16] The Vermont Public Service Board concurs with this reasoning, noting that "the Act's broad savings clauses and narrow preemption provisions establish a *floor* beneath which State regulatory bodies may not go, but not a *ceiling* on State efforts to encourage competition."[17]

The Illinois Commerce Commission similarly recommends that "the FCC rather than state commissions determine whether items should be eliminated from the national UNE list . . . ." Indeed, the concerns raised by the ICC mirror those reflected above and in CoreComm's initial Comments. The ICC argues that "if individual states were allowed to delete items from the national UNE list during this crucial period of transition in the local exchange market, a competing LEC would be unable to obtain a standardized set of UNEs nationwide." Moreover, according to the ICC, "if each state makes its own determination, arguments for removal will be inconsistent from state-to-state, which may lead to increased litigation." The ICC adds that allowing state commissions to eliminate elements may delay approval of section 271 applications because the Commission's national UNE list could differ from the state's UNE list.[18]

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[16] California PUC at 9 (emphasis added).

[17] Vermont Public Service Board ("PSB") at 4-5 (emphasis in original).

[18] ICC at 3-4.

In light of these reasonable arguments supporting the need for a national list that is binding as a floor in all states, there is good reason to reject the ILEC requests to adopt a market-by-market approach to identifying UNEs. The Commission was correct in commenting that "nothing in the Supreme Court's decision . . . calls into question our decision to establish minimum national unbundling requirements."[19] Indeed, such a national minimum list is warranted for the reasons identified above. In the end, the ILECs' proposals would generate inefficiency and uncertainty in the nation's competitive local telecommunications industry, and burden carriers and state regulators with excessive process costs. The only parties that would benefit from such developments would be the ILECs themselves, as they are best prepared to withstand the costs of redundant litigation and best served by increasing the delay and cost associated with competitive entry. Adopting a national minimum UNE list is therefore sound policy, permissible under the holding of the Supreme Court, and consistent with the unbundling standards set forth in the Act.

II. THE ILECS' INTERPRETATIONS OF THE STATUTORY STANDARDS HINGE UPON A MISGUIDED FOCUS ON ANTITRUST THEORY AND WOULD INAPPROPRIATELY LIMIT ACCESS TO UNES.

A. Reading an "Essential Facilities" Requirement Into the Act Writes "Necessary" and "Impair" Out of the Act.

The ILECs' interpretations of the unbundling standards set forth in section 251(d)(2) of the Act proceed from the fundamentally flawed premise that these statutory standards are meant to

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[19] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking (rel. Apr. 16, 1999), at ¶ 14.

capture antitrust jurisprudence. USTA, for example, argues that "by enacting the Telecommunications Act of 1996, Congress did not create a conflict in objectives between that statute and the existing body of antitrust jurisprudence."[20] GTE similarly contends that the objective of fostering competition "should be interpreted in light of the existing body of law embodying the Nation's competition policy – federal antitrust law."[21] In urging the Commission to narrow the scope of their unbundling obligations, Ameritech and U S WEST also rely upon a belief that the Supreme Court embraced the "essential facilities doctrine" in directing the Commission to apply some limiting standard to these obligations.[22]

These arguments are simply without merit. The ILECs' primary justification for importing the essential facilities doctrine into the Act is that both section 251(d)(2) and the essential facilities doctrine are meant "to promote increased competition and enhanced consumer welfare."[23] Yet even Ameritech and U S WEST admit that there is no direct correlation between the essential facilities doctrine and the "necessary" and "impair" standards set forth in the Act.[24] Moreover, just because

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[20] USTA at 3.

[21] GTE at 14.

[22] Ameritech at 29; U S WEST at 6.

[23] U S WEST at 6; *see also* Ameritech at 30 (the essential facilities doctrine's purposes "are identical to the purposes of the Act"); GTE at 15 (the essential facilities doctrine is "the only relevant line of authority analogous to section 251(d)(2)"); USTA at 3 (both the intent of antitrust law and the intent of the Act "is the promotion and protection of the competitive process").

[24] *See* Ameritech at 29 (acknowledging that "the Supreme Court declined to address whether section 251(d)(2) codifies the essential facilities doctrine *per se*"); U S WEST at 6

the essential facilities doctrine may serve a similar purpose to the statutory unbundling standards does not mean that it is a precise or even appropriate substitute for those standards. If an application of the essential facilities doctrine suffices to open ILECs' networks to competitive access, one must question why it took so long for CLECs to gain such fundamental access, and why it finally took legislation to compel the opening of those networks.

The legislative history of the Telecommunications Act of 1996 ("1996 Act") supports the rejection of any effort to read the essential facilities doctrine into the statute's "necessary" and "impair" standards. MCI WorldCom has explained that previous drafts of legislation that were intended to open the nation's telecommunications markets to competition expressly referred to "essential facilities.[25] Thus, the term "essential facilities" was previously considered, and Congress chose not to act upon the legislation including that language. Instead, the plain language of the legislation that was finally enacted omits any such reference. Moreover, in considering a later version of telecommunications legislation, one representative stated that the interconnection and unbundling requirements of H.R. 3636 were *not* restricted to essential facilities.[26] While a few legislators and witnesses may later have used the term "essential facilities" during debates over the

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(acknowledging that Congress "may not have simply transplanted all the particulars of the essential facilities doctrine into section 251").

[25] MCI WorldCom at 35 (citing 137 Cong. Rec. S7054, S7058 (daily ed. June 5, 1991) (reading S.1200, 102d Cong., § 202 (1991)).

[26] *See* MCI WorldCom at 36 (citing 140 Cong. Rec. H5216, H5243 (daily ed. June 28, 1994).

1996 Act,[27] RCN notes that a chief architect of the legislation indicated during the debate over the bill that Congress intended to free the Commission from the bounds of judicially established policies such as antitrust jurisprudence.[28] Indeed, in light of Congress' failure to approve early drafts of legislation referring expressly to "essential facilities" and the plain language of the legislation that became law, there is no reason to believe that the passing mentions of "essential facilities" by two or three legislators and witness in considering subsequent legislation limit the substantive application of the Act. If Congress had intended for the more stringent essential facilities doctrine to apply in the context of identifying UNEs under the Act, the 1991 legislation demonstrates that it certainly knew how to state that intent expressly in lieu of the broader terms, "necessary" and "impair."[29] Conflating the pre-existing essential facilities doctrine with the statutory unbundling standards of "necessary" and "impair" at the urging of the ILECs would effectively write section 251(d)(2) out of the Act.[30]

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[27] *See* Ameritech at 31-32.

[28] RCN at 5-6 (citing 141 Cong. Rec. S 7889-01 (June 7, 1995) (Sen. Pressler) (the 1996 legislation was intended to "terminate the involvement of the Justice Department and the Federal courts in the making of national telecommunications policy")).

[29] MCI WorldCom at 31 (discussing the "more lenient" nature of impairment and necessity as compared to the essential facilities doctrine)."

[30] As the Washington UTC argues, "given the prominence of the [essential facilities doctrine] in some pre-Act case law and the total lack of reference to the essential facilities doctrine in the legislative history of the Act, a more logical conclusion is that Congress did not intend that standard to be applied by the Commission or the state commissions in implementing the Act." Washington UTC at 11. In fact, many state commissions oppose applying the essential facilities doctrine on similar grounds. *See, e.g.,* PUCT at 9-10; Oregon Public Utilities Commission at 2;

As an equally weak alternative argument, the ILECs also claim that the Supreme Court's holding effectively dictates the adoption of an essential facilities requirement upon remand.[31] Nothing could be further from the truth. Even Ameritech appears to have recognized the fallacy of its argument, as it tries to explain away the Court's reluctance to read the essential facilities doctrine into the Act as "turn[ing] on the fact that the Court had never formally adopted the essential facilities doctrine," or the fact that there are "varying articulations of that doctrine," or because of "confusion engendered by what seemed to be two standards in the statute."[32] The only confusion is on the part of Ameritech and the other ILECs. There *are* "two standards" in the statute – "necessary" and "impair." The Supreme Court's reluctance to read an essential facilities doctrine into these standards was not passive but deliberate. In fact, the Court considered the essential facilities doctrine and found that "it may be that *some other standard would provide an equivalent or better criterion* for the limitation upon network element availability that the statute has in mind."[33] As CoreComm noted in its initial Comments, the Commission is therefore free to adopt a limiting standard that is

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Vermont PSB at 6.

[31] *See, e.g.*, Ameritech at 30 ("While the Court may not have labeled its analysis an essential facilities analysis, that is, in fact, precisely what, at its core, it was."); USTA at 20 (asserting that an antitrust analysis "comports with the Supreme Court's instructions that the Commission must take into account the availability of substitutes for ILEC network elements outside ILEC networks"); GTE at 18-19 (relying upon the concurrence of Justice Breyer for the proposition that the limits upon the Commission's power to mandate unbundling are "related" to those applicable under the essential facilities doctrine).

[32] Ameritech at 29.

[33] *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721, 734 (1999) (emphasis added).

"rationally related" to the procompetitive goals of the Act and consistent with the standards of section 251(d)(2) without retreating to the essential facilities doctrine to do so.

Without the crutch of antitrust jurisprudence upon which the ILECs depend in interpreting section 251(d)(2), their analysis falls apart. All of the ILECs' analysis with respect to individual UNEs proceeds from the erroneous presumption that only essential facilities should be made available to competitors. Yet, for the reasons explained above, neither the Act nor the Court's *Iowa Utilities Board* decision requires (or even recommends) such a result. To the contrary, the Act quite clearly sets forth a standard that is different from, and less stringent than, the tenets of the essential facilities doctrine, in order to promote more widespread competitive access to UNEs. The Commission should therefore reject the ILECs' invitation to impose excessive limitations on competitive access to UNEs, and instead interpret section 251(d)(2) in a manner that is more true to the language of the Act and better serves the procompetitive intent of the statute.

B. The ILECs Pay Little Heed to "Necessary" and "Impair" in Dismissing the Various Factors to be Considered by the Commission in Examining Which UNEs Should be Made Available to Requesting CLECs.

Several of the ILECs cloak their analysis of the "necessary" and "impair" standards in lofty sounding tones regarding "meaningful opportunities for competitive entry" and promotion of the ability of "reasonably efficient" CLECs to compete for customers.[34] The devil, however, is in the details. In their analyses, the ILECs effectively dismiss each and every factor that should be considered important in assessing whether the absence of a UNE would adversely affect a CLEC's

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[34] *See* U S WEST at 11; Ameritech at 36; SBC at 5.

ability to compete. In its initial Comments, CoreComm generally urged the Commission to consider a number of factors in examining whether an efficient CLEC should be able to gain access to a particular network element, including price, ubiquity, quality, interoperability, schedule, and impact upon business plans.[35] The ILECs, however, have proposed reasons why several of these criteria should pose no concern. In the end, the ILECs carve out so many exceptions to these factors that the proposed criteria would be rendered meaningless in practice. As a result of this misguided effort to dismiss these factors, the ILECs miss the mark in making their unbundling recommendations.

1. Price/Cost

The prices charged by the ILECs for UNE access will be a cost to CLECs as they attempt to compete with the ILECs. Yet several ILECs urge the Commission to ignore certain CLEC costs in significant respects in considering whether alternatives to UNEs will adversely affect a CLEC's meaningful opportunity to compete.[36] According to GTE, "any analysis into the competitive effects of denying access to an ILEC element cannot turn on a formulaic comparison between the cost of a particular substitute for a single element and the cost of purchasing that element from the ILEC."[37] Moreover, SBC states that the Commission should not consider prices for a UNE that are based upon

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35 CoreComm at 17-18, 21-22.

36 SBC at 7; GTE at 23.

37 GTE at 24.

Total Element Long-Run Incremental Cost ("TELRIC") in determining whether alternatives to that UNE are more costly.[38]

CoreComm recognizes that the ILECs continue to have a difficult time accepting that Congress required the forward-looking cost-based pricing of UNEs under section 252(d) of the Act. This stubborn opposition on the part of ILECs to TELRIC pricing, however, should not color the determination of how a CLEC will be affected by the inability to obtain a UNE from the ILEC. As the Commission pointed out in its *Local Competition Order*, Congress required TELRIC pricing because it wanted "to encourage efficient levels of investment and entry."[39] Failing to factor these cost-based prices into the determination of whether a particular UNE alternative might be more costly for a CLEC would undermine the very purpose of using forward-looking prices in the first instance to promote competitive entry into a more efficient local exchange market. Moreover, if the Commission will not use the TELRIC price as a measure of the CLEC's costs in obtaining access to UNEs and UNE alternatives, one must ask what cost input measure would be used to determine whether the use of an alternative would impair a CLEC's ability to compete. The ILECs' proposals to ignore TELRIC prices in identifying harm to CLECs are simply another form of collateral attack on the use of the TELRIC methodology, and one more attempt to narrow impermissibly their unbundling obligations under the Act.

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[38] SBC at 7.

[39] *Local Competition Order*, at 15844, ¶ 673.

2. Ubiquity/Economies of Scale

On a matter related to cost, the ILECs also contend that the Commission should not take account of any economies of scale in considering whether a UNE alternative will be more costly for efficient CLECs. U S WEST, for example, claims that the "impairment" test should not be met "merely by showing that lack of access to an element would prevent an entrant from taking advantage of the same economies of scale as the incumbent."[40] Yet such reasoning is directly contrary to the sensible and valid conclusions of the *Local Competition Order*, in which the Commission found that CLECs must be able to enjoy economies of scale if they are going to compete effectively with the ILECs.[41] It is unreasonable to expect that CLECs will develop ubiquitous operations and economies of scale starting from scratch against what remains an effective monopoly in each local exchange market, particularly when that monopoly only achieved its own economies of scale years ago as a result of government intervention through the regulatory compact. Ignoring economies of scale would leave the incumbents with a sizeable - and perhaps

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[40] U S WEST at 17; *see also* Ameritech at 62 (arguing that "a myopic focus on scale economies would be at odds with both sound economics and legal precedent"). Interestingly, even though Ameritech dismisses the importance of economies of scale here, the opportunity to take advantage of economies of scale has been touted as "critical" by both Ameritech and SBC in explaining why they need to merge. SBC/Ameritech Merger Statement, at 54. (citing precedent demonstrating that economies of scale and scope are "critical factors in purchasing and deploying new technologies and services"). GTE has also cited in other proceedings the need for "larger scale" in funding "the necessary platform and facilities investments required to compete in new out-of-franchise CLEC markets." Kahan GTE Merger Affidavit, at ¶ 12.

[41] *Local Competition Order*, at 15528, ¶ 56, and 15624, ¶ 242.

insurmountable – cost advantage, and prevent CLECs from duplicating the ubiquitous reach that first gave rise to the ILECs' economies of scale.

3. Schedule/Delay

U S WEST also urges the Commission to overlook timing concerns in considering whether CLECs would be impaired by the inability to access a UNE.[42] Relying yet again on antitrust theory, Ameritech goes one step further to argue that no CLEC would be impaired if it could deploy alternative facilities within two years of its decision to do so.[43] In an industry where "speed to market" is a common and well-founded mantra, it is unreasonable to fail to take account of the delays that CLECs might encounter in providing service if a UNE is unavailable. While U S WEST argues that the presence of facilities-based competitors in a market "conclusively demonstrates that any delay from self-provisioning does not preclude the development of competition,"[44] this conclusion rests upon the faulty assumption that what is efficient for one CLEC is efficient for all. Moreover, Ameritech's two-year proposal is premised upon the theory that antitrust jurisprudence should govern the interpretation of section 251(d)(2) – a proposition that is plainly erroneous for the reasons discussed above. An examination of the delay that would be involved if a UNE were absent

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[42] U S WEST at 22.

[43] Ameritech at 35. Interestingly, in discussing when unbundled requirements should be eliminated, Ameritech suddenly becomes concerned about timing – "[t]he problem of regulatory lag" – and its adverse impact upon the development of market-based competition. *Id.* at 68.

[44] U S WEST at 22.

from the local exchange market must play an integral role in determining whether CLECs are impaired by the absence of the UNE.

4. Business Plans/Means of Entry

Finally, according to SBC, "the current business plans of various CLECs" should not play a significant role in determining whether a CLEC should gain access to a particular UNE.[45] U S WEST further argues that "where one or more CLECs are providing service by obtaining a particular element from a non-ILEC source, any cost difference for the element by definition does not preclude meaningful opportunities for competitive entry."[46] Yet SBC and U S WEST have overlooked the fact that while it may be efficient for one carrier to rely exclusively upon its own facilities, it may be more efficient for another carrier, in the context of its own operations, to pursue a different entry strategy. In other words, the ILECs have made the mistake of translating facilities ownership into efficiency in nearly every case.

At its essence, the ILECs' position proceeds from the proposition that, as an objective matter, there can be only one efficient way to enter the local exchange market – through full facilities deployment – and that any other means of entry must inherently be less efficient. This erroneous conclusion is based upon the same flawed reasoning that has led the ILECs to reject the consideration of CLEC business plans in discerning "impairment." It mistakenly overlooks factors such as: (i) CLECs enter markets at different points in time; (ii) CLECs operate under different

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[45] SBC at 7; *see also* U S WEST at 16.

[46] U S WEST at 16.

market circumstances (*e.g.*, one CLEC may have poured all of its resources into operating in one state, while another CLEC may have a regional or national focus); and (iii) CLECs are structured differently, so that initial entry through facilities bypass or even partial facilities deployment may not always be the most efficient choice. Nor will it always be the case that the alternative of purchasing service from the first facilities-based CLEC in the market will be a viable alternative for an efficient CLEC coming along later in the market. Indeed, in many cases, concerns about ubiquity, interoperability, quality, cost, and scheduling will almost certainly make it such that the ILEC's UNEs are a more attractive alternative for an efficient CLEC than another CLEC's facilities.

Several ILECs claim that taking account of differences between CLEC entry strategies is tantamount to protecting individual competitors.[47] Such a claim is inapposite, and essentially reads a build-out requirement into the Act. The Act recognizes that efficient entry can take a variety of forms. Bell Atlantic and Ameritech are in fact correct when they say that the Act should not be interpreted in a manner that would deter facilities investment by CLECs.[48] What these ILECs miss, however, is that the Act should not compel such investment either. Indeed, while the ILECs cite to the present amount of CLEC facilities investment in their comments as evidence that CLECs do not need access to specific UNEs, this CLEC facilities investment serves as evidence that *even with the current list of seven UNEs available*, CLECs are still incented to invest in facilities without being forced to do so simply because UNEs are unavailable. Thus, the Commission would not be

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[47] U S WEST at 16; Ameritech at 36.

[48] Bell Atlantic at 10; Ameritech at 20.

protecting individual competitors by making the broadest range of UNEs permissible by statute available to competitors, nor would it be deterring investment in facilities by CLECs. Rather, the Commission would simply be serving the procompetitive purpose of the Act and ensuring that CLECs have the broadest array of options available – including partial or complete facilities investment – in making the most efficient choice of market entry.

5. The Importance of Applying these Factors

Notwithstanding the ILECs' efforts to dismiss questions of cost, ubiquity, schedule, and business strategy, it is clear from the comments filed by other parties to this proceeding that these factors and the others identified by CoreComm are relevant and important to consider in determining whether the absence of a UNE will prevent a CLEC from having a meaningful opportunity to compete.[49] Indeed, many of these commenters devote considerable attention to the impact of these factors in discussing why specific UNEs should be made available.[50] Rather than declining to consider these factors at the recommendation of the ILECs, the Commission should carefully examine these factors and the evidence presented by other commenters in issuing revised unbundling rules.

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[49] Cable & Wireless at 11-15; NorthPoint at 6-10; MCI WorldCom at 16-18; AT&T at 35-37; PUCT at 7.

[50] *See, e.g.,* AT&T at 61-66, CompTel at 34-35 (loops); NorthPoint at 19, Qwest at 74-76, MCI WorldCom at 62-63, AT&T at 114-125 (transport); California PUC at 5-6, Cable & Wireless at 39-40, MCI WorldCom at 67-70 (OSS); Waller Creek Communications at 17, NorthPoint at 17-18 (sub-loop components); Qwest at 89, ICC at 11, PUCT at 16-18 (dark fiber); California PUC at 6-7 (extended loops).

An examination of transport facilities provides an example of how important these factors are in assessing whether a particular UNE should be made available by the ILECs. While the ILECs claim that CLEC deployment of transmission facilities is proof that the absence of unbundled transport would not impair CLEC operations,[51] the ILECs again focus on the mere presence of alternatives without paying appropriate attention to the mitigating factors that drive CLECs to seek unbundled transport from the ILECs in the first instance. As a preliminary matter, the ILECs overstate the presence of alternatives to the use of their transport facilities. The market for long-haul transport is much more competitive and mature than the market for local transport. As Sprint has noted, alternative interoffice transport providers typically are not collocated in enough central offices to allow CLECs to make practical use of alternative dedicated switched transport.[52] This is particularly true in the case of those residential areas that CoreComm hopes to serve. Qwest has further pointed out that Bell Atlantic currently holds an 88% market share in the wholesale dedicated transport market in the southern half of its region.[53] Thus, before we even get to the question of whether available alternatives would "impair" a CLEC's ability to complete, it must be noted that, in many cases, *CLECs simply have no alternative whatsoever to the ILEC's unbundled transport.* CLECs would therefore be prevented from providing service (not to mention the ability to take

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[51] SBC at 45-47; GTE at 57-58; Bell Atlantic at 26-31.

[52] Sprint at 32.

[53] Qwest at 76.

advantage of economies of scale and duplicate the ubiquitous reach of the ILECs) if they could not access unbundled transport.

Moreover, even where alternatives to ILEC unbundled transport may be available, there is a reasonable basis for concluding that the inability to access unbundled transport would still impair a CLEC's ability to compete. Interoperability, quality, and administration would prove to be a concern for CLECs as they would need to manage and interconnect facilities obtained from several different providers. For example, as CoreComm explained in its initial Comments, if a CLEC is using an ILEC's unbundled loop, the transport facilities it acquires from another source may not be fully interoperable with the loop, thereby causing the CLEC to experience technical obstacles to providing service.[54] Furthermore, cost would be a concern even where alternative transport facilities may exist, as the ILEC's facilities often represent the most economical means available to CLECs for delivering traffic.[55] Finally, the level of capacity offered by alternative transport providers might also be of concern. NorthPoint has stated that ILECs are typically the exclusive providers of interoffice transport at a capacity of DS-3 or greater.[56] Thus, even where transport facilities along a route might be available from other providers, a CLEC needing high-capacity facilities to move traffic would be impaired without access to a facility with the level of capacity that only the ILEC maintains.

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[54] CoreComm at 29.

[55] AT&T at 111.

[56] NorthPoint at 19.

A consideration of these mitigating factors also makes clear that the self-provisioning of transport facilities would impair a CLEC's ability to compete in many instances. With respect to cost, AT&T notes that the build-out of transport would be inefficient and more costly for CLECs (and for society) than the use of unbundled transport because CLECs do not know beforehand the likely traffic volumes or routing patterns.[57] AT&T also notes that there are administrative costs and concerns about delay associated with obtaining the rights-of-way and collocation space necessary to deploy transport facilities.[58]

Taking all of these factors together – economies of scale, ubiquity, administrative cost, price/cost, and delay – it becomes clear that CLECs would be significantly impaired without access to unbundled transport from the ILECs. Although the ILECs attempt to discourage the Commission from considering anything other than the mere presence of an alternative to a UNE in the local exchange market, it is critical for competition and required by the Act that the Commission consider all of these factors in discerning whether a CLEC would be impaired by the absence of a UNE.

C. There is Simply No Basis in Law or Policy for Ameritech's Proposal to Limit UNE Access to Residential Services.

CoreComm explained in its initial Comments that the provision of service to both residential and business customers is a fundamental part of its market entry strategy. However, it would seriously impair CoreComm's ability to compete in both markets if it were denied the ability to use

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[57] AT&T at 108.

[58] *Id.* at 111-112.

a single business model in both markets. CoreComm therefore objects to Ameritech's ill-conceived and unsupported proposal to limit the use of UNEs to only the service of residential customers "in appropriate circumstances."[59] Just as it would impose significant costs upon CLECs if they were required to adopt a different business plan for every state they desired to enter depending upon the varying availability of UNEs, so too would Ameritech's proposed restriction impose unnecessary additional costs upon carriers such as CoreComm that plan to provide service in both the residential and business markets. Nothing in the Act's unbundling standards supports such a distinction between residential and business services, and the Commission has already found that the Act does not allow for restrictions on the use of UNEs.[60] In the end, this proposal represents just another example of how the ILECs will seek out every opportunity to limit CLECs' access to, and use of, UNEs. The Commission should therefore confirm that CLECs will be able to use UNEs obtained from the ILEC to provide any telecommunications services they choose to any kind of customer.

III. THE ILECS' READING OF "PROPRIETARY" WOULD ALLOW EXCESSIVE MANIPULATION OF THE LIST OF UNES AVAILABLE TO COMPETITORS.

The ILECs' arguments with respect to what should be considered "proprietary" under section 251(d)(2)(A) of the Act suffer from two fundamental flaws. First, Ameritech contends that the status of a UNE as "proprietary" should not depend upon whether the proprietary information would be

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[59] Ameritech at 65.

[60] *Local Competition Order*, at 15680, ¶359.

disclosed to the requesting carrier through use of the UNE.[61] This definition of "proprietary" is overbroad, and if adopted, could be used by the ILECs in an effort to limit competitive access to their networks. As CoreComm and several other commenters have noted, there is no reason to consider a UNE "proprietary" under the Act if the proprietary information contained in the UNE is not released or disclosed to users of the UNE.[62] The Commission previously found in its *Local Competition Order* that concerns about the proprietary nature of a UNE would arise only if such information "would be revealed" through use of the element.[63] The ILECs have offered no reason to believe that this definition has led to the inappropriate disclosure of sensitive information to competitors over the past three years, and accordingly, there is no reason to vary from this definition now.

Second, the ILECs seek to limit CLEC access to UNEs by claiming that elements are proprietary within the meaning of section 251(d)(2) even if the information in question is not proprietary to the specific ILEC.[64] This position should be rejected for several reasons. First, if a protocol, feature, or functionality is not specific to the carrier in question, there is no basis for concluding that the item in question is proprietary to that carrier. This is particularly true where several vendors make similar products available to carriers, or where the standards for a function or

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61 Ameritech at 44.

62 CoreComm at 15-16; Cable & Wireless at 17-18; Sprint at 10.

63 *Local Competition Order*, at 15694, ¶ 388.

64 Ameritech at 43; SBC at 12, n.17; GTE at 27; U S WEST at 25.

feature are established by an industry-setting body. Moreover, it would be troubling policy to let ILECs hide from their unbundling obligations behind the shield of third-party licenses. Even if third-party information is considered "proprietary" under the statute – a point with which CoreComm disagrees – the ILECs should not be allowed to use these third-party licenses in a proactive manner to narrow their unbundling duties under the Act.[65] The third-party interests in allegedly proprietary information can be protected through means other than narrowing access to ILEC UNEs.[66]

IV. THE BURDEN OF PROOF IS MORE APPROPRIATELY PLACED UPON THE PROPONENTS OF ANY CHANGES TO THE NATIONAL MINIMUM LIST.

The ILECs would place the burden of proof on CLECs in determining which network elements should continue to be made available on an unbundled basis.[67] According to U S WEST, placing the burden on CLECs "is particularly appropriate because CLECs have unique access to most of the statistical and market evidence that the Commission should consider under section 251(d)(2)."[68] Such arguments miss the mark badly. CLECs do not have access to one another's market entry data. In fact, this information is considered highly sensitive by CLECs because of the insight it provides into their business plans, so that collecting this information would prove nearly impossible for any individual CLEC.

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65 *See* Waller Creek at 12; Sprint at 9-10; Qwest at 37.

66 CoreComm at 16; Qwest at 37.

67 USTA at 45-46; U S WEST at 32-33.

68 U S WEST at 33.

CoreComm has no better idea about what MCI WorldCom, RCN, or AT&T are doing in the local exchange market than Bell Atlantic or Ameritech might. The CLECs' purported access to market data therefore provides no basis for placing the burden of proof on the CLECs. Placing the burden of proof on the CLECs would effectively lead to denial of UNE access – particularly if the ILECs' approach to identifying UNEs through a market-by-market analysis of total CLEC data were adopted. In fact, it stands to reason that the ILECs have *better access* to aggregate information about what is happening in the local exchange market than individual CLECs do. Unless a CLEC is engaged in complete facilities bypass, it will necessarily order some kind of UNE or resold services from the ILEC. Moreover, even where a CLEC has bypassed the ILEC's facilities, it presumably will be exchanging traffic with the ILEC such that the ILEC has some understanding of the CLEC's activities. The burden of proof for the elimination of existing UNEs therefore falls more appropriately upon the ILECs, given their superior access to total market data and the fact that they will almost certainly be the proponents of removing UNEs from the national minimum list at a later date.[69]

V. CONCLUSION

Reading the essential facilities doctrine into the Act, as urged by the ILECs, would effectively write the "necessary" and "impair" standards out of the Act. This result can be seen in the ILECs' Comments as they fail to take account of the various factors that would lead to

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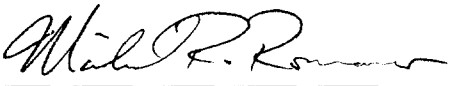
[69] GSA at 9; MCI at 15; NorthPoint at 10; Qwest at 32; Waller Creek at 11; ICC at 9; PUCT at 4.

impairment of a CLEC's operation and instead propose that access be awarded only where there is no other means of deploying a given facility. In light of the plain language and the procompetitive intent of the Act, the clear delegation of authority to the Commission to interpret and implement the Act, and the evidence in this proceeding demonstrating the clear benefits of competitive access to UNEs, the Commission should reject the ILECs' efforts to narrow competitive access to their networks and adopt a national minimum list of UNEs as identified in CoreComm's initial Comments.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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