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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

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

CC Docket No. 96-98

REPLY COMMENTS OF BELLSOUTH CORPORATION

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EXECUTIVE SUMMARY

Applying section 251(d)(2) as a rational, limiting standard governing unbundling incumbent LEC network elements requires the Commission to analyze the ability of CLECs to obtain network elements from alternatives to incumbent LECs and the ability of CLECs to self-provision network elements. Incumbent LECs have given the Commission a factual record on which to do this. CLECs have chosen to ignore the facts and pound the table instead.

BellSouth is filing joint reply comments with Ameritech, SBC Communications, Inc. and the United States Telephone Association that address CLECs' misplaced objections that section 251(d)(2) is not the rational, limiting standard that the Court expressly held it was. In these Reply Comments, BellSouth replies to more particular CLEC claims that every element of the incumbent LEC network should be unbundled under section 251(d)(2).

As an initial matter, BellSouth shows that there is no factual record that would support an unbundling obligation founded on perceived incumbent LEC economies of scope, density and connectivity. Even the HAI model created by AT&T and MCI shows that CLECs can achieve economies that place them on at least level footing with incumbent LECs. CLECs need not build large networks to realize these efficiencies. In fact, the limited urban areas they now serve are of sufficient scale.

BellSouth also demonstrates that the contentions of CLEC economists regarding the disincentives to investment -- both CLEC and incumbent LEC -- from an unbundling are misplaced, as are their measures of impairment.

CLECs that focus on deploying DSLAMs and offering xDSL service do not advocate that incumbent LEC DSLAMs be unbundled. The competition between different networks to provide advanced services creates the alternatives and self-provisioning possibilities that make a finding of impairment without access to unbundled incumbent LEC network elements used to deliver advanced services impossible.

CLECs admit that there are alternatives to incumbent LEC transport services in particular areas. AT&T, for one, acknowledges that it has substantial alternatives, to the extent that 20 percent of its local transport is provided through alternative facilities. BellSouth provides fiber maps that, although they cannot capture all the alternatives available to CLECs, demonstrate that sufficient alternatives exist across the larger cities in BellSouth's region that CLECs could not be impaired without access to unbundled incumbent LEC transport.

As to switching, there can hardly be any debate. Some facilities-based CLECs argue affirmatively that switching should not be unbundled except in a few locations. ALTS and other facilities-based CLECs do not attempt to make a case that switching can be legitimately unbundled under section 251(d)(2). Other CLECs have provided no factual information that would contradict the factual record supplied by the incumbent LECs. BellSouth provides additional information demonstrating that CLEC switch deployment is proceeding rapidly. CLECs are fast approaching the number of BellSouth switches deployed on a city-by-city basis in large and medium sized cities across BellSouth's entire region. The loop cutover process is no barrier to CLEC switch deployment. That process is working well today in BellSouth's region.

CLECs have simply refused to step up to the plate with factual information on local loop alternatives. Incumbent LECs have demonstrated what the Commission has long acknowledged, CLECs can, and are, creating alternatives to the incumbent LEC loop for larger business customers. Where telephony is being offered over cable services, there is an alternative to the incumbent LEC local loop, and the loop no longer meets 251(d)(2) requirements. Wireless service provides a second alternative to the incumbent LEC local loop.

CLEC contentions that alternative providers of operator services and directory assistance are not adequate do not reflect the facts.

The Commission's merger and non-dominance orders provide the analytical tools to conduct a pro-competition, pro-consumer analysis of the costs and benefits of unbundling under section 251(d)(2). Incumbent LECs have supplied the necessary factual record. Applying those analytical tools to conduct a market-by-market analysis of unbundling will result in the limited amount of unbundling that will best serve consumers and competition.

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REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation, on behalf of itself and BellSouth Telecommunications, Inc. (BellSouth) hereby files these Reply Comments in connection with the Commission's recent Notice in CC Docket No. 96-98.¹ These Reply Comments address the application of section 251(d)(2) to individual network elements. BellSouth is also filing joint reply comments with Ameritech, SBC Communications, Inc. and the United States Telephone Association addressing the overall limiting standard of section 251(d)(2).

I. INTRODUCTION

BellSouth's specific comments on whether particular network elements can properly be unbundled under section 251(d)(2) are set out, element-by-element, below. The two sections immediately following this introduction address more general issues raised by CLECs. Section II shows that vague contentions that incumbent LEC

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98. *Second Further Notice of Proposed Rulemaking*, FCC 99-70, released April 16, 1999 ("Notice").

economies of scale can provide a basis for unbundling are wrong. Section III refutes various contentions made by certain CLEC economists.

II. THE COMMISSION CANNOT RELY ON THEORETICAL INCUMBENT LEC EFFICIENCIES TO UNBUNDLE NETWORK ELEMENTS UNDER SECTION 251(d)(2)

The Commission's Notice sought comment on incumbent LEC economies of "density, connectivity and scale." Notice at ¶ 26. A number of commenters responded with unsupported assertions that incumbent LECs enjoy "tremendous" economies that CLECs could not duplicate. *See, e.g.*, AT&T Comments at 19; MCI WorldCom Comments at 48-49. The Commission previously relied on similar generalized notions of incumbent LEC network efficiencies to justify unbundling requirements. In fact, the *First Report and Order*² assumed that the Act required the sharing of incumbent LEC economies of "density, connectivity and scale." *First Report and Order* at ¶ 11.

There are at least three problems with concluding that economies provide a basis for required unbundling under section 251(d)(2). First, there is no evidence in the record to demonstrate the amount of these economies, the geographic areas they might be tied to, and whether they attach to any particular network element. Just as the network elements under consideration here vary tremendously, from loops provided in a myriad of different local geographic markets to signaling provided in a single national market, so economies of density, connectivity and scale are likely to vary tremendously.

² *In the Matter of 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 (1996) ("First Report and Order"), modified on reconsideration, 11 FCC Rcd 13042 (1996), vacated in part, *Iowa Utilities Bd v. FCC*, 120 F.2d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

Second, even where economies exist, the Court has rejected the Commission's original assumption that the Act generally requires sharing. *AT&T v. Iowa Utilities Board*, 119 S. Ct. 735. Section 251(d)(2) imposes a rational, limiting standard on unbundling. Sharing economies may be required only where failing to share would impair an efficient CLEC's meaningful opportunity to compete, or where sharing a proprietary element is necessary. No CLEC has made any attempt to demonstrate that denying them an entitlement under section 251(d)(2) to share in incumbent LEC efficiencies in the operation of any particular network element would equate to a denial of an efficient CLEC's opportunity to compete.

Finally, as the attached affidavit of Jamshed K. Madan and Michael D. Dirmeier makes clear, there is every reason to believe that CLECs are capable of matching or exceeding incumbent LEC economies by building out their own facilities. They conclude that "CLECs can match or exceed ILEC economies over the areas that CLECs typically are serving" and that the evidence "does not support general unbundling of ILEC network elements on any premise that the economies of ILEC networks cannot be matched by the economies of CLEC facilities." Attachment A, Declaration of Jamshed K. Madan and Michael D. Dirmeier at ¶ 2.

By using the HAI model, to which AT&T and MCI have long subscribed, it is possible to estimate the costs of an efficient CLEC network.³ In order to make the estimation particularly relevant, the model was applied to areas where CLECs are today competing for customers and installing their own switches, transport and loops. Thus, the

³ BellSouth does not subscribe to the fundamental accuracy of the model or the HAI default inputs used in this analysis. See Madan and Dirmeier Affidavit at ¶ 8. However, the model should be useful to illustrate any relative difference in economies of scale and scope that come from serving smaller versus larger geographic areas.

model was run for the Atlanta metro area, and areas representing northern, central and southern Atlanta. The HAI model produces separate cost estimates for each of the Commission's original unbundled network elements.

The HAI model demonstrates that network efficiencies can generally be realized without serving an entire state, or even an entire large city. That is, a CLEC using its own modern network to serve just parts of the metro Atlanta area will enjoy operations that are as efficient or more efficient than a forward-looking network covering the entire city or the entire state. Madan and Dirmeier Affidavit and Affidavit Attachment 1 (comparing cost estimates element-by-element). Thus, whether the network element is transport, switching, signaling or loops, CLECs can self-provision elements and networks that are as efficient as forward-looking incumbent LEC networks, if they have not done so already in urban areas.

These comparisons based on the HAI Model may understate CLEC advantages considerably. The comparisons above compare a forward-looking most efficient CLEC network to a forward-looking most efficient incumbent LEC network. While modern CLEC networks probably approximate forward-looking networks, incumbent LEC networks may not. CLECs are not limited by historical wire centers, LATA boundaries or circuit switched technology. In fact, AT&T and MCI regularly argue that incumbent LEC networks contain embedded elements that make them models of inefficiency. Of course, given competition from other networks, like cable telephony, wireless and Internet Protocol networks, an inquiry into only the relative economies of traditional circuit-switched wireline networks would not fully address whether an efficient CLEC could be impaired without a sharing entitlement. An inquiry limited to solely the

wireline would also absolutely fail to reflect the competitive realities of telecommunications markets today.

There is no evidence that suggests that incumbent LEC economies of "density, connectivity, and scale" relating to any network element rise to the level that an efficient CLEC would be impaired without an entitlement to share those elements under section 251(d)(2).

III. THE HAUSMAN AND SIDAK REPLY AFFIDAVIT

The Hausman and Sidak reply affidavit, Attachment B to these Reply Comments, rebuts several CLEC arguments concerning the standard and presumptions the Commission should bring to bear on analysis under section 251(d)(2). These CLECs arguments are generally summed up in the Hubbard, Lehr, and Willig affidavit (Hubbard Affidavit) attached to AT&T's Comments. The Hausman and Sidak reply affidavit explains how the thinking of AT&T's economists runs afoul of the Act, the Court's opinion, and basic tenets of economic analysis.

Perhaps the two most important points made in the Hausman and Sidak affidavit are the following. First, unbundling, especially under the Commission's TELRIC price model will affirmatively discourage investment in telecommunications facilities by both CLECs and incumbent LECs. Hausman and Sidak Reply Affidavit at ¶¶ 10-14 . Second, the Hubbard Affidavit gives no substantive economic meaning to section 251(d)(2) "impair" standard because it depends on an unrealistically one dimensional analysis. Thus, the Hubbard Affidavit would assume a CLEC is impaired by a higher-priced alternative to an incumbent LEC element even though the alternative element may be of a

higher quality or may have some other attribute that allows the CLEC to compete effectively despite the higher price.

A CLEC's ability to compete is, at a minimum, two-dimensional: It makes no sense to ask whether restriction of a UNE would raise the CLEC's cost in and of itself or lower the CLEC's quality in and of itself.

Hausman and Sidak Reply Affidavit at ¶ 20. Thus, a CLEC, like any firm, can trade off inputs along "production possibility frontier." Less of one input may be remedied by more of another. Thus, evaluating whether a CLEC is impaired without an incumbent LEC network element depends on evaluating the whole range of options available to the CLEC. Hausman and Sidak Reply Affidavit at ¶ 21.

In addition, the Hubbard Affidavit gives no way to measure the impairment that a CLEC may suffer.

A CLEC must be impaired relative to a predetermined set of options. Again, without specifying what options are available to the CLEC and hence what it could achieve without mandatory unbundling, it is meaningless to ask whether a CLEC's inability to lease a particular network element at a TELRIC price would impair the CLEC's ability to compete.

Hausman and Sidak Reply Affidavit at ¶ 22 . Without attempting to measure the degree of impairment in some way, no conclusion can be made as to whether the impairment could harm competition or consumers. Certainly, without an impairment yardstick, no conclusion of impairment could pass muster under the Court's explicit instructions that a simple reduction in CLEC profits could not meet section 251(d)(2)'s impair test.

IV. **ADVANCED SERVICES ELEMENTS**

BellSouth's Comments and the *UNE Fact Report* spelled out just how new and how competitive the market for providing high-speed, advanced services is. BellSouth Comments at 32-47; *UNE Fact Report: Advanced Services* at VI. By rights, and aiming at regulatory parity, the Commission should not even consider unbundling network elements used to deliver advanced services.

No one has stated the case better than AT&T that regulating this market is likely to harm investment, competition and consumers. As AT&T explains, the market is highly competitive now—the market leading cable companies face competition from "RBOCs, CLECs, ISPs, wireless providers, satellite companies and others, who are investing billions of dollars to deploy broadband facilities and compete for customers."⁴ AT&T's and TCI's economists state that "it is impossible to predict from today's vantage point who the leading competitors will be and how the competitive uncertainties concerning technologies, qualities and design of services, availabilities and prices will resolve."⁵

AT&T and TCI take the position that the "[c]ompetition between [cable companies] and ILECs will promote consumer welfare."⁶ The competition between these

⁴ *In the Matter of Joint Application of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and its Affiliates Or Subsidiaries*, AT&T's and TCI's Joint Reply To Comments And Joint Opposition To Petitions To Deny Or To Impose Conditions, CS Docket No. 98-178, at 34-35 (Nov. 13, 1998)(*AT&T-TCI Joint Reply*)(footnotes omitted).

⁵ Ordover and Willig Affidavit, Attached to *AT&T-TCI Joint Reply* at ¶ 23.

⁶ *Id.* at ¶ 27.

two networks is sufficient to ensure access to "broadband networks," presumably of any type, "so long as that access is efficient and consistent with consumers' demands"⁷

Given the degree of competition to provide advanced services, AT&T concludes that

far from promoting the widespread availability of advanced services, subjecting new entrants such as TCI [and incumbent LECs are even newer entrants] to the unbundling and other obligations" would thwart competition. Forced unbundling with its attendant regulatory uncertainty would likely slow down investment in the development of broadband last mile data transport.⁸

The entire cable industry echoes this advanced services refrain. Although cable providers have a substantial lead in deploying advanced services capabilities, they are confident that any regulatory mandate of access to advanced service elements will discourage or eliminate the prospect of further investment, reduce innovation and harm consumers.

requiring a particular provider of Internet access to make its facilities available to other Internet service providers would only stifle innovation, the development of facilities-based alternatives and the growth of the Internet....Mandating access to an Internet service provider's facilities, however, would not encourage competition because it would reduce substantially the incentives for competitors to develop additional facilities-based alternatives.

Cox Communications, Inc. 706 Comments at 3-4.⁹

⁷ *Id.* at ¶ 50.

⁸ *Id.* at ¶ 49. AT&T and TCI doubt whether it is even administratively possible to regulate access to advanced services facilities. *AT&T-TCI Joint Reply* at 49.

⁹ Comments of Cox Communications, Inc., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Dkt No. 98-146 (filed October 8, 1998). Cites to other comments filed in this round of the 706 proceeding are referred to by the name of the commenter followed by "706 Comments."

Imposing unbundling and resale obligations on cable operators for the benefit of entities that chose not to construct their own networks would turn section 706 on its head by suppressing cable's incentives to invest in new broadband capability.

National Cable Television Association 706 Comments at 25.

One of the most durable barriers to new entry into telecommunications markets is the prospect that new entrants will be subject to burdensome regulation.

Comcast Corporation 706 Comments at 12.

Of course, AT&T's and the cable industry's comments set out above were made in other proceedings. Only AT&T has reversed course.

A. Section 251(d)(2) Can Be Stretched No Farther Than To Require Incumbent LECs To Provide Local Loops And Collocation To Aid CLECs In Providing Advanced Services Through xDSL Technology

The debate over whether to unbundle network elements used by incumbent LECs to provide advanced services cannot go beyond collocation and loops.¹⁰ Where collocation is available to allow CLEC xDSL competition over incumbent LEC local loops, an entitlement to free ride on incumbent LEC investment in DSLAMS could never meet section 251(d)(2)'s limiting standard. As described by AT&T and cable companies above, any such requirement could never be in the interests of competition or consumers. No such decision could be squared with the absence of an unbundling requirement for network elements used to provide the same advanced services over cable networks. Regulatory parity is a simple goal that would enable greater competition.

CLECs are using incumbent LEC local loops and collocation to compete very successfully today. "As a general matter, the collocation of DSLAMs in an ILEC central office is not an expensive, capital intensive exercise." Information Technology Industry Council Comments at 7. As set out in BellSouth's Comments, the process has worked well enough that CLECs can claim to have a substantial advanced services lead over incumbent LECs. CLECs predict that this lead will continue. BellSouth Comments at 41. In fact, "ILECs have no legacy advantage with respect to the installation and use of advanced services electronics ... ILECs must now acquire and install new equipment just like their advanced services competitors." Information Technology Industry Council Comments at 6-7.

¹⁰ Of course, cable operators are not required to offer, and do not provide, similar access to their facilities.

CLECs focusing on the advanced services market agree that the availability of collocation and loops is all that is required from incumbent LECs. Unbundled DSLAMs and packet switching are not. Northpoint sums this up.

To date, all of the competitive LECs have entered the advanced services market by installing their own DSLAMs in central office collocation cages purchased from the incumbent LECs. Where competitive LECs enjoy access to loops and collocation, any competitive LEC can provide the necessary infrastructure (DSLAMs and packet switches) required to provide advanced services.

Northpoint Comments at 18; Rhythms Comments at 12; Covad Comments at III; Information Technology Industry Council Comments at 6-8.

Northpoint concludes that only where “loops and collocation are unavailable” should the incumbent LEC “be required to provide competitive LECs with access to unbundled DSLAMs. Northpoint Comments at 19; Information Technology Industry Council Comments.

Of course, whether there is competition between xDSL providers should not be the issue. As described above, competition between advanced services networks exists. Focusing only on one technology is not the genuine look at alternatives that the Court ordered. Focusing on competition among DSL providers to the exclusion of competition from other networks is fundamentally identical to excluding PCS carriers from the wireless service market.¹¹

Nonetheless, BellSouth provides loops and collocation. Where conditioned loops are available, BellSouth makes them available to CLECs. Where they are not, BellSouth will condition them for CLECs. There are about 1,000 CLEC collocation arrangements already in place or in progress in BellSouth’s region. Of BellSouth’s approximately

¹¹ The Commission does not define wireless markets so narrowly. *Third CMRS Report*.

1,600 central offices, 251 have at least one completed collocation, and 99 more offices have arrangements in progress. Shortly, 350 BellSouth offices will have at least one collocation arrangement. Of course, CLEC collocation is occurring in the central offices that serve disproportionately high numbers of lines, so the competitive reach of CLEC collocation is very substantial.

The *Advanced Services Order*¹² provides CLECs more flexibility in collocating and creates additional options for reducing collocations costs substantially. BellSouth provides CLECs the ability to collocate DSLAMs in the field. For example, BellSouth allows CLECs to collocate DSLAMs adjacent to BellSouth remote terminals.

To the extent collocation could possibly be still viewed as impairing CLEC opportunities to compete, the right approach is to address the collocation issue, not to unbundle DSLAMs. In markets depending on risky, new investment unbundling requirements are all but certain to reduce investment and harm innovation and consumers.¹³

Some CLECs, particularly AT&T and MCI WorldCom, argue that they should be allowed to free ride on new incumbent LEC investment in new DSLAMs.¹⁴ AT&T

¹² *In the Matter of Deployment of Wireline Services offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-48, released March 31, 1999, (*Advanced Services Order*).

¹³ See, e.g., Kahn Declaration at ¶ 7.g. Information Technology Industry Council Comments at 8 ("the elimination of unbundling obligations for ILEC advanced service equipment would encourage ILECs to deploy advanced services technologies").

¹⁴ BellSouth's Comments pointed out that BellSouth has just begun deploying DSLAMs. Only 147 had been installed by the end of March. Thus, any unbundling requirement will in fact apply principally to future incumbent investment. Unbundling investment dollars is not the goal of section 251(d)(2). The potential return of that new investment would be

makes no mention of its directly opposing views on unbundling cable network elements used to provide advanced services. This is not a matter of different statutory contexts, AT&T is arguing exactly opposite policy points -- unbundling incumbent LEC advanced service elements will be pro-competitive while unbundling cable network advanced service elements will be anti-competitive. Or, in the alternative, market forces are strong enough to guarantee that cable providers will grant access to their facilities where it would benefit consumers, but those same competitive forces will have no effect on incumbent LECs. AT&T's arguments here are so directly counter to its cable positions that they cannot carry any weight.

MCI WorldCom chooses to argue that it needs unbundled incumbent LEC DSLAMS at risk-free TELRIC prices even though DSLAMs are "affordable." MCI WorldCom Comments at 50 (DSLAMs cost \$8,000-20,000 apiece and serve from 200-300 lines). It argues that collocation costs make deployment of DSLAMs "uneconomic." MCI WorldCom Comments at 50. This unsupported assertion not only runs counter to the actual experience of CLECs that are deploying DSLAMs (and CLECs have deployed DSLAMS in urban and rural areas),¹⁵ and to BellSouth's analysis of collocation costs attached to its Comments, but also gives no credit to the Commission's recent *Advanced Services Order*, which will further reduce collocation costs.¹⁶ That order "further

severely limited by an unbundling requirement at TELRIC prices. See Kahn Declaration at ¶ 7.g; Hausman and Sidak Reply Affidavit; *T&T-TCI Joint Reply*, Ordover and Willig Affidavit at ¶ 49.

¹⁵ See, e.g., Information Industry Technology Council Comments at 7 ("collocation of DSLAMs in an ILEC central office not an expensive, capital intensive exercise").

¹⁶ MCI WorldCom's argument illustrates the Court's caution that a return lower than one a CLEC could imagine cannot support a finding of that a CLEC's opportunities to compete would be impaired. No doubt providing advanced services over an incumbent

erode[s] arguments for requiring ILECs to offer the electronics associated with their advanced services." Information Industry Technology Council Comments at 9.

MCI WorldCom also argues that it should get unbundled access to DSLAMs because in rural areas revenue opportunities would make deployment by MCI WorldCom "difficult to justify." MCI WorldCom Comments at 50-51. This argument is belied by the market fact that other CLECs can justify rural deployment, as evidenced by their deploying in rural areas. The deployment by these CLECs shows that an efficient CLEC can operate in rural areas too.

MCI WorldCom's argument demonstrates the dangers of unbundling described by Professor Kahn and in the Jorde, Sidak and Teece Affidavit attached to USTA's Comments. In MCI WorldCom's example, a CLEC is free to make a risky investment in providing advanced services in rural areas, but does not view it as likely to be sufficiently profitable. An incumbent LEC may weigh the situation differently, and decide to invest. The CLEC could then claim the right to use the incumbent LEC's investment at TELRIC prices. This illustrates nicely the point that unbundling obligations reduce CLEC incentives to invest and will discourage incumbent incentives as well. The example also illustrates how unbundling obligations create regulation rather than competition. That, is real facilities-based competition that could have existed in MCI WorldCom's example is replaced with regulated access to the incumbent LEC's DSLAM. CLECs that have the opportunity to invest in providing services are not impaired if they choose not to.

LEC's network would be more profitable if collocation were free or DSLAMs grew on trees, but that is hardly the point.

V. TRANSPORT

The *UNE Fact Report* presented the Commission with a detailed factual record on the presence of transport alternatives in local geographic markets and the ability of CLECs to self-provision. Unfortunately, CLECs have not stepped up to the plate with the detailed factual information that would further inform the analysis of alternatives and self-provisioning. The "facts" CLECs have provided to-date on local transport could not support any factual finding that incumbent LEC transport should be unbundled.¹⁷

As a general matter, CLECs admit the presence of transport alternatives. They have chosen to stake their claim to impairment on an argument that because there may be no alternative to incumbent LEC transport in some areas, the Commission should order incumbent LEC transport unbundled in all areas. CLECs have opted for this approach rather than submit facts that pinpoint where and how they might be impaired without unbundled incumbent LEC transport. The Commission has a factual record that demonstrates the presence of transport alternatives in many local markets and that allows it to distinguish areas where there are transport alternatives from areas where there may not be any.

¹⁷ Covad argues that the absence of reliable factual information from CLECs on their facilities should lead the Commission to adopt a "high presumption" that CLECs have no alternative facilities to an incumbent LEC's. Covad Comments at II.B. The information that is lacking is information from CLECs like Covad. Adopting any sort of presumption like Covad's would simply guarantee that CLECs would continue to refrain from providing real information about their facilities, as they have done here and in the past. *Local Competition Survey* at 3. Market facts are necessary to perform the analysis of necessary and impair set out in the Court's opinion. The Commission should adopt evidentiary presumptions that create incentives for parties to provide market facts, not hide them. Thus, unless CLECs can show how and where they might be impaired without access to an incumbent LEC network element at cost-based prices, the element should not be unbundled. BellSouth Comments at 28-29.

The Court rejected turning a blind eye to the presence of alternatives to incumbent LEC facilities once already. This, however, is exactly what CLECs would have the Commission do by urging a one-size fits all national approach despite the considerable variation among local markets. Ignoring market differences would substitute regulation for competition in markets where competition is working, contrary to the Court's opinion and Congress's intent. The decision for the Commission is not "all or nothing." Rather, the Commission must responsibly choose and apply an approach that acknowledges competitive market alternatives, fits the markets involved and meets section 251(d)(2)'s impair standard.

A. All Parties Agree That There Are Alternatives To Incumbent LEC Transport Facilities

The parties agree that there are alternatives to incumbent LEC transport. Cable company CLECs profess no need at all for unbundled incumbent LEC transport. Media One Comments at 11; Cox Communications Comments at 5. Most CLECs simply admit that transport is available in some areas, but not everywhere else. ALTS Comments at 51; CoreComm Comments at 44-45 ("some" alternatives available); Nextlink Comments at 32(incumbent LECs source of "most" transport).

MCI WorldCom provides a little more "detail" when it notes that it can self-provision transport to 400 incumbent LEC end offices and use other CLEC transport facilities to reach another 1,200. MCI WorldCom Comments at 64. For perspective, there are about 1,600 end offices in BellSouth's entire serving territory. Given that the 1,600 end offices MCI WorldCom is reaching will be clustered in urban areas, transport alternatives in those areas are almost certainly adequate.

AT&T grudgingly admits that CLECs have deployed transport between "some" incumbent LEC end offices. AT&T Comments at 121. "Some" turns out to mean that about 20% of AT&T's local transport is provided by alternative providers. AT&T Comments at 122.¹⁸ AT&T provides no explanation of how it arrived at this figure, although it appears to be a national one. A national transport number will far understate the amount of transport AT&T procures from non-incumbent LECs in particular markets. AT&T's acquisition of Teleport, for example, gave AT&T in 1998 local CLEC assets in

¹⁸ Covad, a relatively small and new entrant, currently obtains about 15 percent of its local transport from incumbent LEC alternatives. Covad Comments at III.B.

66 major markets, over 9,000 fiber route miles and 41 local switches."¹⁹ AT&T further predicted that by early 1999 those 66 major markets would grow to 100 and over 300 communities would be served.²⁰ In those cities, AT&T use of alternative transport is likely to be far greater than 20 percent. Without AT&T's submitting more detailed, verifiable information, the Commission could legitimately conclude that at least in urban areas, AT&T obtains very substantial amounts of transport from non-incumbent LECs.²¹ Where transport alternatives are not present, AT&T states that it takes an average of 10 to 12 months to self-provision local transport. AT&T Comments at 115. This is well under the *Merger Guidelines*' two year standard for judging competitive entry to be timely.²²

AT&T also admits that where other CLECs have excess local capacity, "they have offered to lease that capacity to other carriers." AT&T Comments at 122. There is enough CLEC local transport capacity today to lead at least one CLEC CEO to conclude

¹⁹ AT&T Press Release, issued July 23, 1998, available at <<http://www.att.com/press/0798/980723.chb.html>>.

²⁰ *Id.*

²¹ AT&T also provides a list of horribles suggesting that building local transport is all but impossible. The facts simply belie this. As set out in the *UNE Fact Report*, many CLECs have built local transport facilities in urban areas across the country. All but one of the top 150 MSAs have at least one alternative sources of local transport. The largest MSAs generally have several. AT&T and MCI are using these alternative facilities every day.

²² Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, Issued April 2, 1992 (*Merger Guidelines*) at § 3.1.

that there is a capacity "glut" in Tier One cities.²³ A wholesale market for local transport alternatives exist now.²⁴

AT&T's complaints that dedicated transport made available by alternative providers cannot be sufficient because they are not subject to sections 251 and 252 are symptomatic of AT&T's Comments. AT&T Comments at 111. Of course, *all* LECs are subject to the requirements of section 251(a) and (b). And, AT&T's approach would mean that no number of alternatives to incumbent LEC transport would ever be adequate until they were all price-regulated under section 252. This invitation to regulation instead of competition is antithetical to the Act and to the Court's opinion.

B. The Commission Cannot Turn A Blind Eye To Alternative Transport Facilities Given The Record In This Proceeding

Those CLECs arguing for transport unbundling have staked their claim that they are impaired without access to unbundled incumbent LEC transport on general allegations that incumbent LECs are the only transport providers present in every market. This argument is founded on an implicit admission that alternatives exist in particular markets. Arguments that incumbent LECs collectively may be the only source of ubiquitous local transport are not relevant to assessing whether there are competitive alternatives to incumbent LEC transport facilities in particular markets. As set out in

²³ Royce Holland, CEO of Allegiance Telecom, W.T. Scott, et al, ING Baring Furman Selz LLC, Investext Rpt. No. 2787890, Telecommunications/Fiber vs. Fiberless (Sept. 30, 1998)

²⁴ *UNE Fact Report: Transport* at II-4. AT&T complains that it can take from two months to two years, or even more to reach an agreement with an alternative provider. AT&T Comments at 123. This should help put AT&T's complaints about alleged incumbent LEC foot-dragging in some perspective.

BellSouth's *Comments* at pp. 13-15, the Court's opinion, Commission precedent and antitrust law principles all require that assessing local transport alternatives be done on a geographic market basis. *See, e.g.* Declaration of Alfred E. Kahn at ¶¶ 12-18, attached to Bell Atlantic's *Comments* ("[t]he assessment of competition and of the availability of necessary inputs from sources other than the ILEC clearly requires an assessment element-by-element and market-by-market (or group of markets)").

The facts in the record and the competitive reality they reflect preclude the Commission from treating all local transport markets alike. BellSouth has developed additional information responsive to CLEC comments on the presence of CLEC local transport alternatives. Attachment A contains maps showing CLEC fiber facilities in 12 BellSouth cities. Although these maps are accurate as far as they go, BellSouth does not believe that these maps completely capture the competitive dynamic.²⁵ The maps do not always include cable company fiber facilities that are either telephony ready or in the process of being up-dated for telephony or utility company fiber that may be very broadly deployed.

The tremendous pace at which CLECs have been placing fiber means that any map will soon be outdated. Also, these maps also do not reflect the use of any wireless facilities to provide local transport. As detailed in the *UNE Fact Report*, wireless facilities already provide real alternatives to incumbent LEC transport facilities. *UNE*

²⁵ One CLEC highlights the fact that CLECs are deploying local fiber at a fast rate by noting that "attempting to identify interoffice transport competition on a city-by-city basis is a moving target." Rhythms *Comments* at 20. CLECs have the information to fill out the record of transport alternatives, but have chosen not to provide it.