

three percent market share since the Act passed, despite the “entry” of scores of CLECs. 29/ Clearly, “entry” has little to do with actual competition.

In their comments, the ILECs state with great fanfare that the purpose of the 1996 Act is not to prop up competitors; rather, it is to promote competition. 30/ Yet, by evaluating competition only on whether competitors are able to *enter* the local market -- not necessarily compete broadly or successfully in it -- the ILECs propose to do just that: measure competition by the mere appearance of potential competitors rather than by the existence of vigorous, broad-based competition.

B. The Record Reflects a Recognition That the ILECs Cramped Tests Are Flawed.

The vast majority of non-ILEC commenters reject the narrow approach to Section 251(d)(2) advocated by the ILECs. Most state commissions favor a broad view of UNE availability. For example, the Kentucky Public Service Commission states that “[r]equiring a competitor to purchase . . . UNEs from a provider other than the ILEC would contradict . . . Section 251(c)(3)” and could lead to network degradation for CLECs. 31/ The New York Department of Public Service states

29/ Local Competition Report at 12, Tab 2.1.

30/ See, e.g., SBC at 7 (“[t]he proper purpose of any unbundling requirement is to promote competition, not to aid individual competitors”) (citations omitted); Ameritech at 19 (“[t]he whole point of competition is to spawn greater efficiency and innovation . . . [not promote] regulatory policies that prop up, or even create weak competitors”).

31/ Kentucky PSC at 2; see also Illinois Commerce Commission at 10 (“[t]he ICC believes that the availability of a network element outside of the incumbent’s

that UNEs should be made available to competitors unless and until the ILECs show that there are “commercially viable alternatives” that render ILEC unbundling unnecessary -- a concept similar to the wholesale market test advocated by Qwest and others. 32/ This is a far cry from the hardware-focused test of mere “physical availability” proposed by the ILECs. 33/

Competitive carriers also reject the inflexible, limiting standards proposed by the ILECs. 34/ The sheer variety of the needs identified by CLECs filing in this record shows that competition and innovation would be shifted by a narrow view of impairment. In sum, the weight of the record is against the ILECs’ interpretation of Section 251(d)(2).

network, in and of itself, should not exempt an incumbent LEC from its unbundling duties under § 251(c)(3)”.

32/ New York DPS at 2. See also Vermont PSC at 11 (stating that “access to an alternative provider should not merely be a theoretical [possibility], but a practical [possibility] as well”); Texas PUC at 4 (arguing that the Commission should “focus on an analysis of the overall market rather than on the capabilities of the individual CLECs”).

33/ See Section II. A., supra.

34/ See, e.g., KMC Telecom at 7 (stating that the Commission should adopt “a flexible approach to market entry that permits a variety of competitive business plans and recognizes the differing economic realities facing different competitors in the market”); Excel at 3 (stating that the ILEC approach is “plainly wrong”); see also Level 3 at 5-6.

III. THE FCC SHOULD ADOPT THE WHOLESALE MARKET TEST TO GUIDE THE UNBUNDLING PROCESS.

A. The Record Overwhelmingly Supports the Adoption of the Wholesale Market Test.

There is a considerable consensus on the part of new and potential entrants to the local market that the wholesale market test represents the best method of achieving the goals of Congress as set forth in Section 251(d)(2). Both CompTel and ALTS propose this test for impairment, including the need for interchangeability of elements as a prerequisite. CompTel notes, for instance, that a requesting carrier or new entrant will always be impaired by lack of incumbent unbundling “until a functioning wholesale market develops for network elements.” 35/ Other commenters, including the Competition Policy Institute (CPI), Allegiance, Covad, Excel, and NorthPoint all propose that a wholesale market exist for a network element before it can be taken off the mandatory list. 36/ These carriers, and others, have been on the front lines of battling for the provision of UNEs for more than three years. Their experience and understanding of what constitutes impairment therefore deserves substantial weight.

As Qwest and others explained in their initial comments, under the wholesale market test, impairment would exist for a particular element unless the

35/ CompTel at 15.

36/ See, e.g., Allegiance at 9-10; Covad at 15-18; Excel at 9-10; NorthPoint at 7; see also ALTS at 20, 28.

Commission finds that a wholesale market for that element exists in a particular geographic area (we propose MTAs). 37/

The rationale behind this test is simple and grounded in the language and purpose of the Act. The Act provides that competitors have a right to access ILEC UNEs so that they will be able to enter *and* compete for customers anywhere. 38/ Competitors will be impaired in this endeavor if they are not able to employ, in whole or in part, the ILEC network. If there is a wholesale market for a UNE, then new entrants will be able to avail themselves of alternative sources of supply for that network element at competitive rates. If there is no wholesale market, however, the only place where new entrants will be able to obtain the network elements they need in order to compete is from the ILECs. In short, the absence of a wholesale market, the lack of access to ILEC UNEs will “impair” the ability of competitors to provide local service to the public within the meaning of Section 251(d)(2).

Determining whether a wholesale market exists for each network element would require the Commission to evaluate two things. First, it would have to determine whether competitively supplied network elements are “interchangeable” with ILEC network elements such that there is no material

37/ Qwest at 13-36.

38/ 47 U.S.C. § 251(c)(3) (“[Each ILEC] has . . . the duty to provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory”).

reduction in quality, speed of service, or cost if the new entrant takes from that market. 39/ The ALTS and CompTel proposals embody this concept of interchangeability. Second, assuming an element is shown to be interchangeable, the Commission would have to determine that a sufficient number of wholesale providers exist to produce an effectively competitive market for that network element. This second criterion is important because it guards against the possibility of the market lapsing back into a monopoly if there is only one wholesale provider. 40/

B. The Wholesale Market Test is Workable.

As Qwest and others pointed out in their initial comments, the wholesale market test we propose not only is consistent with the plain language of Section 251(d)(2) and the purpose, goals, and structure of the Act, it also is a *workable* test that provides a streamlined and efficient method of determining which network elements have to be unbundled, and where. The wholesale market

39/ See, e.g., Level 3 at 5 (citing “timeliness, cost, quality of service, and ubiquity” as elements the Commission should consider when determining interchangeability); e.spire/Intermedia at 6 (indicating that an “alternative network element” is substitutable only if it “results in no material decrease in quality, increase in cost, limitation in scope, or delay in bringing a competitive service offering to market”); Rhythms Netconnections at 8.

40/ If the wholesale market is serviced by only the ILEC and one new competitor, then there is a strong possibility that it will lapse back into a monopoly because the ILEC will be able to withdraw its provision of UNEs once the alternative source becomes available. This will leave competitors back where they started -- with only one wholesale UNE provider -- and forestall competition in the retail market for local services.

test has many characteristics that commend it, in contrast to the cramped tests offered up by the ILECs:

- It gives the proper meaning to the statutory term “impairment;”
- It promotes the statutory goals of encouraging broad-based local competition, lowering entry barriers, and promoting the development of competitive local networks;
- It gives the ILECs and the Commission a way to take elements off the list while ensuring robust local competition and low entry barriers.
- It recognizes the economies of scope, scale, and connectivity of the ILEC network that led to the UNE provision in the first place, while recognizing that technology and markets do change.
- It does not require fine distinctions to be made on the basis of price of competitively supplied elements.
- It encourages ILECs to remove impairments to the development of a wholesale market for network elements.

In sum, the wholesale market test is fully in line with the statutory goals of the 1996 Act. It will encourage investment, provide a streamlined approach to unbundling, create a workable market for network elements, and perpetuate a cycle of new entrants. The wholesale market test, therefore, will not only create competition in today’s local market, it will serve as the platform for continued local exchange competition in the years to come.

C. The Wholesale Market Test Will Promote Facilities-Based Competition.

The ILECs vigorously contend that giving CLECs wide access to the ILECs’ network elements would interfere with the development of facilities-based competition, because (they contend) it would allow CLECs to take a free ride on the

ILECs' network rather than having to construct their own. We already have exposed the fallacy of this assertion above, in Section I.B., above. Access to network elements will enable competitors to make their offerings more quickly and widely available, thus making investment justifiable and enabling them to build the customer base necessary to make further investments.

The wholesale market test, in particular, would promote facilities-based competition and investment in alternative networks. This is so because the goal of the test is to enable the development of a wholesale market for network elements so that competitors need no longer rely on the ILEC as a source of elements. The test emphasizes "interchangeability" because that is what *enables* a competitively provided element to substitute for the ILEC's element in a meaningful way, so that it is useful to the CLEC making the facilities investment and is useful to another CLEC that would be a potential wholesale customer.

In this way, the wholesale market test puts the ILEC in significant control over when a network element comes off the list, because the test emphasizes the removal of *impairments to interchangeability* (e.g. operational reforms such as collocation, database access, OSS, access to customized routing, software-based cross-connections, etc.) that the ILEC has the power to eliminate. As interchangeability becomes possible through ILEC operational reforms, the demand for these alternatively supplied network elements will develop, thereby encouraging CLECs to make investments and attract carrier-customers to use their facilities on a carrier's-carrier (wholesale) basis. This is precisely what happened in the long

distance market, where there are now multiple nationwide networks and additional regional ones, all of which have robust wholesale sales activity.

In sum, far from inhibiting the development of local facilities construction, the wholesale market test will *promote* that construction. It is telling that the industry association representing “facilities-based” CLECs (ALTS) has embraced the wholesale market test, including the concept of interchangeability. 41/

D. The Wholesale Market Test Is Consistent with Congressional Intent to Promote Broad Local Competition and Reduce Barriers to Entry.

The wholesale market test would do more than any other test proposed to move the local market toward competition. It recognizes that because of the economies of scale, scope, and connectivity of the ILEC network, broad-based local competition depends upon the availability of ILEC network elements to competitors until competing networks are built and a wholesale market develops for those elements. It is clear that the ILECs’ tests, in contrast, envision a world in which competition is marginal, where only certain customers will enjoy choices of local providers, and where volume is essential to entry and survival in the local market.

The framework created by the wholesale market test is also the most logical way of creating real facilities-based competition, contrary to the mythology perpetrated by the ILECs. As discussed above in Section I, a central tenet of the

41/ ALTS at —.

ILECs' interpretation of Section 251(d)(2) is that Congress preferred facilities-based competition over any other kind of competition, and indeed that Congress contemplated that entrants should be forced to install their own facilities unless that was impossible. We explained why this is a false assumption both about Congressional intent and about the way local competition will proceed.

But even assuming that Congress hoped that facilities-based competition would become the norm, making UNEs widely available would promote that goal, not interfere with it. It should be obvious that carriers new to the local market, who have no market share and are competing with an incumbent with well over 95 percent of the market, will need to lease ILEC network elements in order to provide competitive local service. 42/ As these carriers grow their local customer base, they will accrue the revenues and economies of scale that could permit them to invest in facilities.

Indeed, this is the story of long distance competition. MCI began by leasing AT&T private lines and reselling AT&T long distance services, and only gradually built its own nationwide network. The same is true of many other long distance companies that today have their own networks. Nor is competition in the long distance market limited to those carriers that own their own intercity networks. Hundreds of long distance companies provide service by leasing the facilities of other long distance carriers. The same can happen in the local market -- but not overnight.

42/ FCC Local Competition Report at 12, Table 12.1.

As local competitors begin to build their own facilities and as ILECs undertake operational reforms, the need for ILEC UNEs may diminish and wholesale providers may begin to develop (as they did in the long distance industry). Thus, at the end of the cycle, various carriers will be competing, a wholesale market for network elements sufficient to service the next generation of competitors will have developed, and ILECs will no longer have to unbundle as many network elements as they have to now.

While the ILEC data show the potential for the development of a wholesale market, the data also show that such a market does not exist today. For example, while the ILEC UNE Fact Report shows that a number of CLECs have installed interoffice transport facilities, it does not suggest that any CLEC is offering ubiquitous dedicated transport in any geographic area over its own facilities. 43/ This is because no CLEC has this kind of network in place today. The ILEC UNE Fact Report acknowledges, for example, that even its model (which equates collocation with the existence of a CLEC transport facility) contains holes, even in those areas in which local competition has been in progress the longest. 44/

In short, the ILECs' tests do not answer the question of whether CLECs have realistic alternative sources of supply for network elements. Their tests, effectively, say that so long as one competitor has installed a facility in a

43/ United States Telephone Association (USTA), Attachment (Tab 3) ("UNE Fact Report").

44/ See UNE Fact Report at Section II (Transport), 6-18.

geographic area, then other carriers should have to do it too -- regardless of what differences there may be between these carriers, the customers they choose to serve, their volumes, and their business plans. Congress would not have meant to nip competition in the bud so severely by dropping the curtain on the network element provision the moment that one CLEC invests in facilities.

IV. THE ILECS' TESTS DO NOT ACKNOWLEDGE THE IMPORTANCE OF INTERCHANGEABILITY AMONG NETWORK ELEMENTS.

An essential aspect of the wholesale market test is the prerequisite that a competitively supplied or self-supplied element be "interchangeable" with the ILECs' element. As indicated by a number of commenters, if a network element is available from another source (e.g., an equipment vendor or another CLEC), but that network element is not comparable to the ILEC's network element in terms of functionality, ease of operation, speed to market, quality or price, then it is not "interchangeable" with the ILEC's network element. 45/ Even the CLECs that did not use this terminology recognize what it entails. 46/

45/ See, e.g., ALTS at 27-31; CompTel at 14-16; Rhythms Netconnections at 8; Level 3 at 5 (stating that "timeliness, cost, quality, and ubiquity should measure the availability of alternatives to incumbent network elements"); see also Qwest at 22-25.

46/ See, e.g., MediaOne at 8-9; KMC Telecom at 5-6; CoreComm at 19-20. See also CPI at 10 ("at bottom . . . the Commission should examine whether the market for an unbundled network element is competitive in order to decide whether the absence of the element would impair the ability of a carrier requesting the element to offer telecommunications service"); CPI at 9.

A. Commenting CLECs Recognize the Importance of Interchangeability.

Interchangeability is important because it is the prerequisite for competitive choice of suppliers of network elements. If an alternatively supplied network element is not interchangeable with the ILEC's network element, then using it in conjunction with other network elements (either self-provisioned or ILEC-supplied) will not generate the same efficient, integrated and ubiquitous service that the ILECs are able to provide.

Both CompTel and ALTS make this point clearly. 47/ For example, CompTel states that interchangeability is the key to ensuring a level playing field in the local market. According to CompTel, interchangeability means "not only that it is *possible* to interconnect and use an external element with ILEC elements, but also that the network architecture and provisioning systems are such that it is as easy to connect and use UNEs with the ILEC network as it is to connect and use the ILEC's element itself." 48/ ALTS makes a similar point, noting that "network elements are interchangeable if their use imposes no material decrease in quality, increase in cost, limitation in scope of availability, or delay in bringing competitive service offerings to market." 49/ Covad, for example, calls for a "seamlessly interchangeable substitute" standard. 50/

47/ See CompTel at 14-16; ALTS at 27-31.

48/ CompTel at 15.

49/ ALTS at 28.

50/ Covad at 14.

B. The ILECs Fail to Take Into Account the Importance of Element Interchangeability in Evaluating Impairment.

In making their case that alternatives to ILEC network elements exist, the ILECs fail to acknowledge and address differences between ILEC network elements and competitively supplied network elements. Instead, they assume that as long as there is some alternative -- regardless of whether it would integrate seamlessly into a competitor's network, and regardless of its cost -- then the ILEC is off the hook. For instance, Bell Atlantic states that competitors should not have access to an ILEC network element in a particular region if it can be shown that others have deployed or are able to access alternative UNEs from other sources in that region. 51/ GTE's comments are littered with similar assertions, each based on an assumption that there is no need to unbundle an ILEC network element if "substitute" or "alternative facilities" are available. 52/

The problem with these statements is that they stop far short of a full analysis. While the availability of a plain substitute -- e.g., another switch, another loop, another NID, etc. -- in a particular geographic region is an important first step on the road to creating a competitive wholesale market for that element, the mere existence of that substitute is not enough. 53/ The substitute must be able to

51/ Bell Atlantic at 9.

52/ GTE at 17-18, 21; see also Kahn Affidavit at 7-8.

53/ Bell Atlantic recognizes that the deployment of alternative network elements can eventually lead to a wholesale market. See Bell Atlantic at 15 (stating that "the fact that a competitor has deployed its own network element also demonstrates that a *wholesale* market can develop for that element") (emphasis in original).

provide the same features, functions and capabilities in the same cost-effective way as the incumbent's network element in order to be a true substitute for competitors. In other words, the alternative must be able to perform at the same level and in the same manner as the incumbent's facility. This will only be true of if the alternative network element is *interchangeable* with the incumbent's network element.

C. The ILECs Ignore the Lack of Availability on a Wholesale Basis of Facilities Already Installed by CLECs.

The ILECs also fail to address the fact that while some CLEC facilities exist, they may not be available to other CLECs, for operational or capacity reasons, or because the CLEC with the facilities does not choose to lease those facilities to other carriers. The wide deployment of ILEC network elements renders them the standard in the local market. While CLECs are beginning to install their own facilities in limited areas, there is no indication that, even if these network elements are made available to competitors, they could be used seamlessly and efficiently with components from the ILEC network. Giving competitors no choice but to use CLEC facilities would therefore result in competitors having to create a loose patchwork of network elements that would be an inferior alternative. This would place CLECs at a significant disadvantage vis-à-vis their ILEC competitors.

V. THE RECORD CLEARLY SHOWS THAT THE ESSENTIAL FACILITIES TEST SHOULD NOT BE IMPORTED INTO SECTION 251(D)(2)

One of the key arguments presented by the ILECs for why the list of network elements required to be unbundled and leased to competitors should be limited is that most network elements would not qualify as "essential facilities"

under the antitrust laws. In its initial comments, Qwest illustrated how substituting the “essential facilities” test for the “necessary” and “impair” standards of Section 251(d)(2) would violate the intent of Congress, as well as improperly restrict the number and types of network elements that competitors have a right to access under the 1996 Act. 54/ On closer inspection, the ILECs’ arguments only strengthen our position.

Significantly, the majority of parties who commented on this issue, including most state commissions, agree that the essential facilities doctrine has no place in the analysis here.55/ For example, the Iowa Utilities Board states that “the doctrine provides a standard that is too restrictive for this context, where Congress intended to encourage competitive entry.” 56/ Another CLEC commenter (CoreComm) correctly observed, had Congress intended for the essential facilities test -- a standard that has been around since the early part of the 20th Century -- to apply in the context of determining those UNEs to which CLECs should have access, it would have expressly stated so in the statute. 57/

54/ Qwest at 48-50.

55/ See, e.g., Level 3 at 8-11; AT&T at 47-48; CoreComm at 23-24; Texas at 9 (“the [essential facilities] doctrine as developed by the courts does not properly fit the goals of the [1996] Act or the express provisions of § 251(d)(2)”).

56/ Iowa Utilities Board at 4-5; see also Oregon PUC at 2 (“the essential facilities doctrine does not apply in the case of [S]ection 251”); Vermont PSC at 6 (“the currently transitional market for local exchange services is not appropriately measured against antitrust standards”).

57/ CoreComm at 23.

None of the comments filed in this proceeding -- including those filed by the ILECs -- show why Congress would have intended to graft this antitrust doctrine into a statutory standard that uses entirely different language. Although they each state it differently, the ILECs consider the essential facilities test to be relevant to Section 251(d)(2) because, in their view, both standards contemplate equivalent approaches to opening the telecommunications market to competition. 58/ There are at least two problems with this argument. First, Congress was not writing on a clean slate. It recognized the importance of access to ILEC network elements because such access had already been ordered by several cutting-edge states, who understood that without such access, local competition would not be possible. Congress was *not* relying on antitrust cases applying the essential facilities doctrine when it wrote Section 251(c)(3).

Second, the plain language of the statute will not bear the weight the ILECs would like it to. The words “impair” and “essential” -- as well as the standards they create -- mean two totally different things. 59/ Level 3 makes this point clearly:

[T]he “impairment” standard established by Section 251(d)(2)(B) for non-proprietary elements cannot be reconciled, even on a strictly grammatical basis, with the “essential facilities” doctrine . . . The essential facilities doctrine requires a showing that the facility is “essential

58/ See, e.g., GTE at 15; Ameritech at 30; US West at 6; see also BellSouth at 12-21.

59/ The American Heritage College Dictionary (Third Edition) defines the word “impair” as follows: “to cause to diminish, as in strength or quality.” In contrast, it defines the word “essential” as “basic or indispensable; necessary.”

to the plaintiff's survival in the market" and is "not available from another source or capable of being duplicated by the plaintiff or others." By contrast . . . "impair" [means] "to make, or cause to become, worse; diminish in value . . . weaken or damage." 60/

Thus, applying the essential facilities doctrine to Section 251(d)(2) would improperly constrict the number and types of UNEs that the ILECs are required to unbundle and provide to new entrants under the 1996 Act.

Recognizing the limitations in analogizing the essential facilities doctrine to the text of Section 251(d)(2), a number of ILECs optimistically cite any mention of the phrase "essential facilities" in the legislative history -- without regard to form or context -- in the hope of illustrating that Congress meant for Section 251(d)(2) to constitute an essential facilities test.

For instance, GTE and Ameritech refer to an isolated sentence in the House Commerce Committee Report on H.R. 1555, a precursor to the 1996 Act, which states that, "because of their government-sanctioned-monopoly status, local providers maintain bottleneck control over the *essential facilities* needed for the provision of local phone service." 61/ This haphazard selection of the phrase "essential facilities" from among thousands of pages of Congressional reports proves little about the intent of Congress in drafting legislation that preceded the 1996

60/ Level 3 at 10 (citations omitted).

61/ See GTE at 15 (citing H.R. Rep. No. 104-204, at 49 (1995)) (emphasis added); Ameritech at 31 (same). It is impossible to draw any conclusions from this statement in the legislative history for another reason: it was made at a time when it was legally prohibited duplication of the ILEC network

Act, much less about what the unbundling provisions mean in the current law. Moreover, this statement merely describes the position of the ILECs before passage of the 1996 Act. The Commission cannot base conclusions about the place of the essential facilities test in Section 251(d)(2) on this isolated and inapposite statement.

Some ILECs even go as far as to make the erroneous statement that the Court's opinion in AT&T v. Iowa Utilities Board requires the Commission to use the essential facilities test in interpreting and implementing Section 251(d)(2). 62/ Others spend a lot of time citing Justice Breyer's partial concurrence and partial dissent to argue that the Court somehow endorsed the use of the essential facilities doctrine in this context. 63/

The fact is, the Court in no way endorsed -- or even hinted -- that the appropriate approach to implementing Section 251(d)(2) is through an application of the essential facilities doctrine. The majority only cited the doctrine as something *the ILECs* argued. 64/ Moreover, Justice Breyer merely stated that Section 251(d)(2) requires the Commission to provide some "convincing explanation" of why unbundling should take place "where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are

62/ 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").

63/ See, e.g., GTE at 18-19; SBC at 5.

64/ AT&T v. Iowa Utilities Board, 119 S.Ct. at 734.

available.” 65/ He in no way instructed the Commission to undertake an essential facilities analysis for each element. In any event, Justice Breyer’s opinion carries little weight. As aptly stated by AT&T, it is axiomatic that a Justice writes a separate opinion precisely because he or she wishes to express a view that the majority did *not* adopt. 66/

The rampant parsing of the essential facilities test by all of the parties in this proceeding suggests that, above all else, the controversial antitrust doctrine would provide a poor benchmark for determining when a particular network element should be unbundled. Adopting an essential facilities standard would create an opportunity for ILECs to litigate on a case-by-case basis the “essentiality” of each UNE in every relevant market or region. 67/ This would cause the evaluation of UNEs to grind to a halt at both the federal and state level. As explained more fully in the next section, it is vital that the Commission avoid this and similar results by selecting an approach to unbundling that is streamlined, efficient and workable throughout the country, and that is related to promoting competition, not deterring it. Only by doing so will the Commission succeed in speeding the process of competitive entry into the local market.

65/ AT&T at 47-48 (citing AT&T v. Iowa Utilities Board, 119 S.Ct. at 753 (Breyer, J., concurring in part and dissenting in part)).

66/ Id. at 47.

67/ Level 3 at 11; see also CPI at 13 (citing the policy goal of “making regulation effective and efficient by avoiding costly case-by-case determinations”).

VI. A LACK OF ACCESS TO ILEC UNES FOR BUSINESS CUSTOMERS WOULD SIGNIFICANTLY IMPAIR THE ABILITY OF CLECS TO SERVE SUCH CUSTOMERS.

Contrary to the suggestions of some parties in this proceeding, 68/ competitors would be just as impaired by a lack of access to UNEs to serve business customers -- whether large, medium, or small -- as they would be to serve other customers. 69/ This is so for a number of reasons.

A. CLECs Need Access to ILEC UNEs in Order to Serve Multi-Location Business Customers.

Competitors need access to ILEC UNEs in order to provide service to multi-location business customers. Business customers of all sizes often have multiple office locations, both regionally and within a given state. Most of these multi-location business customers would like to use a single service provider for all of their office locations. Indeed, according to Bell Atlantic, 68 percent of large business customers want to standardize their local provider across geographic locations.70

68/ See, e.g., BellSouth Comments at 17, 29, 50, 62, 64; Ameritech Comments at 65-66; Bell Atlantic Comments at 39.

69/ Indeed, even large business customers make clear that CLECs will be impaired without access to all seven of the original Rule 319 UNEs. Ad Hoc Comments at i-iii, 3.

70 Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control, CC Docket no. 98-184, Joint Declaration of Jeffrey C. Kissell and Scott M. Zimmerman, filed on behalf of the Joint Applicants at ¶ 6.

Even in situations in which a CLEC can economically serve a single location of a large business customer using its own facilities, the CLEC still may need access to UNEs in order provide service to that business customer's other locations. Those locations may involve small offices, and they may be situated far from a CLEC's facilities, or may include large offices in a distant city not served by a particular CLEC. The ILEC will be able to sell such customers local exchange service for all of the customer's locations without any difficulty. By contrast, even if a CLEC finds it cost justifiable to install facilities in one office location, the CLEC may not find it either cost justifiable or feasible to install facilities in all of the customer's other office locations.

Access to ILEC UNEs would enable the CLEC to match the ILEC's multi-location service offer. A lack of access to ILEC UNEs, conversely, would require the CLEC to construct facilities, obtain collocation, and so on, in every branch location, just to be able to compete for the company's business -- and could, as a practical matter, prevent a CLEC from competing for that customer's business. For example, a CLEC with facilities in Pennsylvania but not New Jersey might not be able to compete for the business of a customer with offices in both Pennsylvania and New Jersey if ILEC UNEs are not available to the CLEC in New Jersey.

Many ILECs already have large multi-state footprints, and the pending mergers of Bell Atlantic-GTE and SBC-Ameritech would make those footprints even larger. Bell Atlantic has stated that a major reason for its merger with GTE is to strengthen Bell Atlantic's ability to pursue a "national/local strategy," through which it would seek to provide local service to customers on a

national basis. Specifically, Bell Atlantic and GTE have stated in justifying their merger that

[t]he merger positions the combined company to be able to offer packaged services on a nationwide scale to these [large business] customers who have operations and communications needs all across the country.⁷¹

Rather than competing as CLECs do for out-of-region local customers, these companies have chosen to compete as ILECs -- by merging with another large incumbent.

For CLECs to compete with a post-merger Bell Atlantic or SBC to serve a nationwide local customer, they must have access to UNEs. Without access to UNEs, they would be forced to construct their own facilities in every location where that customer has an office. Bell Atlantic has far less need for such multi-location build-outs because it has the advantage of being the incumbent and thus having an established network throughout a wide part of the country.

B. CLECs Need Access to ILEC UNEs in Order to Serve Multi-Product Business Customers.

Competitors also need access to UNEs in order to serve multi-product businesses. Many -- if not most -- business customers demand a full complement of communications services, including local services, ranging from advanced broadband services to basic local exchange voice. The ILECs' established networks and vast economies of scale and scope enable an ILEC to offer such customers a full

⁷¹ Joint Application of GTE Corporation and Bell Atlantic Corporation, Before the California Public Utilities Commission ("California Joint Application"), filed December 2, 1998, page 13.

complement of services with little difficulty. Competitors, by contrast, face considerable difficulties in bringing a full complement of services to such customers.

Some competitors, for example, have deployed facilities designed primarily to carry voice traffic. To win or keep a customer that demands a full complement of services, including advanced services, the CLEC must have access to ILEC UNEs in order to provide advanced services quickly and at a cost comparable to that of the ILEC. The same is true for competitors that have deployed facilities primarily to carry data traffic, and for competitors that have deployed no facilities at all.

A lack of access to ILEC UNEs to serve multi-product business customers would impose substantial costs and delays on competitors because there currently are no alternatively-supplied network elements that are interchangeable with ILEC network elements. As discussed below in Section IX, the manual connections necessary to use non-ILEC network elements would force competitors to incur substantial additional costs and delays that the ILEC would not incur. The record in this proceeding also is replete with examples of the costs and delays caused by the need to collocate, construct alternative transport facilities, obtain rights-of-way, and so on. The ILEC, in comparison, could provide a full complement of services to any customer almost immediately.

C. Competitors Need Access to ILEC UNEs in Order to Serve Medium and Small Business Customers.

Access to ILEC UNEs also is critical to the ability of competitors to serve medium and small business customers. 72/ Even if competitors can cost-justify deployment of facilities in some locations necessary to serve some of these business customers, it may not be cost-justified to deploy facilities in every location necessary to serve such customers. This could be true because of the geographic location in which the facilities would need to be deployed, or because the revenue a carrier can obtain from a medium or small business will not cover the costs of the competitor's investment, or for other reasons. Indeed, even where a competitor has installed a switch, it may not be cost-justifiable to use that switch to serve some customers. First, the added costs of manual conversions may not be justifiable for some customers. 73/ Second, the farther a customer is from the switch, the higher are the transport costs to serve that customer, and the bigger the customer needs to be to enable a CLEC to recover those costs. For these reasons, CLECs will be impaired in their ability to serve medium and small business customers if they cannot make use of ILEC UNEs.

72/ See, e.g., CompTel Comments at Appendix B, "Estimated Profitability Analysis: Multi-Line Business Customer -- New York."

73/ See Section IX below.

D. Without Access to Network Elements Competitors Could Not Provide Customers with Speedy and Ubiquitous Service at Commercial Volumes.

Without access to ILEC UNEs, particularly the UNE platform, competitors also could not provide services to large volumes of customers quickly and on a ubiquitous basis. This is true for all types of customers -- large business, medium business, small business, and residential.

ILECs can provide customers with service rapidly and seamlessly and at high volumes because they use automated customer conversion processes. CLECs, by contrast, cannot provide service quickly to customers or convert large volumes of customers to their networks without access to ILEC network elements, particularly switching. This is so because the current lack of interchangeability between ILEC network elements and alternatively-supplied network elements means competitors must manually connect all of their own network elements with the ILEC's network elements. Manual connections and conversions both slow the deployment process and limit the rate at which customers can be converted to CLEC facilities. Manual conversions also increase the risk of service interruptions when converting customers because they introduce the possibility of human error and require close coordination with ILEC personnel. These problems are discussed in detail in Section IX below, regarding switching and the problems that carriers encounter when transferring customer loops from ILEC switches to CLEC switches ("hot cut" problems).

By comparison, the use of ILEC UNEs -- particularly local switching combined with ILEC loops and shared transport -- enables CLECs to provide service