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OFFICE OF THE SECRETARY

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July 15, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

RE: Notice of Ex Parte meeting
Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Ms. Roman Salas:

On Wednesday July 14, 1999 Richard Rubin, C. Michael Pfau, and I, of AT&T, and Peter Keisler of Sidley & Austin met with Jake Jennings, Claudia Fox, Sanford Williams, Bill Sharkey, Chris Libertelli , David Kirschner, and Anthony Mastando of the Common Carrier Bureau's Policy and Program Planning Division and Jerry Stanshine of the Commission's Office of Engineering and Technology to discuss AT&T's Initial and Reply Comments filed in this docket. Attached hereto is a bullet-point summary of those comments which was distributed at and used during the meeting.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

Robert W. Quinn Jr.

Attachment

cc: J. Jennings
C. Fox
B. Sharkey
C. Libertelli
S. Williams
D. Kirschner
A. Mastando
J. Stanshine

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UNE Remand - Key AT&T Positions

General Principles

- National rules are critical to the development of local competition; a "presumptive" or other approach that leaves the final decision with State PUCs would result in massive litigation and delay. Thus, the Commission should look at

  — national, rather than regional opportunities to obtain substitutes and

  — the ability of CLECs in general (not specific CLECs) to obtain substitutes

- The FCC must adopt a minimum set of UNEs; States may add to, but not subtract from, the national list

- The FCC's rules must preserve all three forms of entry prescribed by the Act -- interconnection, access to UNEs (including UNE-P) and resale – for all CLECs.

- The "impair" standard is satisfied if lack of access to a network element would materially reduce a CLEC's ability to provide a service as broadly, effectively or economically as it could if the element were available as a UNE at cost-based rates

  — This is not a simple "reduced profitability" test but one that assesses impairments of the CLECs' ability to offer competitive services

- The "necessary" standard applies only to "proprietary" elements; because the ILECs do not propose many valid cases of elements that are legitimately "proprietary," this standard is relatively unimportant here

- The "necessary' and "impair" standards must be based on evidence in today's marketplace, not some estimate of possible future CLEC capabilities

- Any review of a specific UNE must recognize that all UNEs are building blocks that are used in combination with other network elements to provide a service, regardless of who provides the other elements; thus

  — UNEs cannot be viewed in isolation

  — factors such as the costs of extending loops to CLEC switches and the ILECs' limited ability to perform hot cuts must be considered

- Combinations of UNEs are vital to support broad-based competition, especially in the mass market

- Any fixed "sunset" of UNEs would be arbitrary and unlawful; however:

— future reviews of the CLECs' need for specific UNEs are appropriate, provided any future removal of a UNE is accompanied by a reasonable transition plan

- The FCC's rules here should ensure that CLECs have an opportunity to effectively and immediately offer one-stop shopping to customers, in competition with incumbent LECs. Otherwise, CLECs' ability to provide service will have been "impaired" within the meaning of section 251(d)(2)

- Any material change in the UNE list developed in the First Report and Order will require a significant reassessment of the FCC's 271 requirements and access reform rules

Specific UNEs

- Except for standalone signaling and OS/DA (when customized routing and access to ILEC DA data are available), all of the original UNEs identified by the FCC are needed at this time to permit CLECs an opportunity to compete effectively, especially for mass market customers

- The current definitions of the Loop and NID should be modified to ensure that CLECs have a nondiscriminatory opportunity to access the non-ILEC wires that serve customers in office buildings and MDUs

- In order to support competition for advanced services, CLECs must have access to

  — conditioned loops ("clean copper") in all cases and

  — equipped loops (i.e., loops that include DSLAM electronics) whenever they cannot effectively obtain access to a conditioned loop and when they are providing a UNE-P based service for voice customers

- In contrast, CLECs do not need access to ILEC packet switching or data transport, except insofar as they are needed solely to route data traffic to the CLEC's network

- The Commission should not require line sharing

1. The FCC Should Adopt National Unbundling Rules, Not Merely Guidelines

The FCC's tentative conclusion to adopt national unbundling rules is clearly correct

The plain terms of the Act contemplate that the FCC will determine which UNEs will be made available

The Supreme Court did not criticize the First Report & Order for adopting national definitions of UNEs

- The Court only required the FCC to apply a proper test of the "necessary and impair" requirements of section 251(d)(2); it did not criticize the Commission's application of its UNE rules on a national basis
- The Court's decision indicates that it *expected* the Commission to issue a list of UNEs that would be available on a national basis (e.g., it would be "surpassing strange" for a federal program to be "administered by 50 independent state agencies;" there is a "presumption" against any such scheme)

Adoption of national rules is fully consistent with the pro-competitive purposes of the Act. As the FCC found in the First Report & Order, national rules will

- Provide certainty and uniformity on a national scale; decisions that are based on the availability of alternatives in localized areas or for specific customer groups do not consider the impact of such decisions on the ability of a CLEC to enter on a nationwide basis
- Avoid interminable litigation and unnecessary costs
- Promote investment in competitive facilities

National rules are especially important to support competition in the mass market

National rules are also important to preserve the three different market entry vehicles provided for in the Act (interconnection, resale and UNE-based entry)

- The Commission has already correctly held that the Act does not create any hierarchy among entry strategies and that all three must be preserved
- There is no basis for the ILECs' claims that only rules that support facilities-based entry by CLECs deserve attention; all consumers are entitled to receive the benefits of competition as soon as possible

- There is also no basis for the ILECs' assertion that if unbundling obligations are "too broad" CLECs will seek a free ride on the ILECs' facilities; all CLECs have acknowledged that they would *prefer* to use non-ILEC alternatives if they were available in a true wholesale market

National rules are needed to promote national entry by CLECs

- No CLEC has the capital to enter on a national basis using only non-ILEC facilities
- Even facilities-based CLECs will need to lease UNEs as they enter the market

Many State PUCs (Illinois, California, Connecticut, Washington and Kentucky) support such rules

ILEC arguments that FCC should only issue "guidelines" or "presumptive rules" that must be applied on an element-by-element and market-by-market basis should be rejected, because:

- Adoption of guidelines or presumptions will undo all the benefits of national rules and enable ILECs to engage in an endless stream of litigation over their UNE obligations
- Such litigation would likely lead to inconsistent results, even in neighboring states, based on differing regulatory philosophies rather than different facts (compare Illinois and Ohio PUCs' views)
- ILEC data regarding differences in current deployment/availability of substitutes for UNEs is, in many ways, inaccurate or misleading
- Even if the ILEC data were taken at face value, they at best show limited options are available to CLECs in limited circumstances, and that CLECs generally do not have viable substitutes for ILEC UNEs

2. Federal and State Roles in Identifying and Removing UNEs

Unlike other portions of the Act, section 251(d)(2) unambiguously requires "the Commission" -- not the States -- to make the determinations under the "necessary and impair" test

Section 251(d)(1) also directs the Commission to make such determinations in a nationwide rulemaking proceeding that is binding on the States in arbitrations (see section 252(c))

Thus, the Commission should not, and may not, defer its duty to decide minimum national unbundling rules to the States

Similarly, because the Commission is vested with the authority under section 251(d)(2), it, and not the States, must decide if (and when and under what circumstances) any UNE may be removed from the national list; otherwise, all the benefits of national rules could be lost

The Commission properly has indicated that it will adopt *minimum* national rules regarding unbundling; thus, PUCs are not precluded from adding to the list of UNEs, under federal law, based on the specific facts applicable to their jurisdictions

The Act also preserves the States' right to adopt pro-competitive state rules; thus, contrary to the ILECs' assertions, it does not preempt States' rights, under State law, to adopt additional unbundling requirements

- The Act does not preempt the field, leaving many areas open for the States to adopt complementary requirements (e.g., sections 261(c), 251(d)(3), 252(e)(3), 601(c)(3))
- There is clearly opportunity for States to adopt requirements that do not conflict with or frustrate Federal requirements

In cases where States have imposed additional unbundling requirements on ILECs, they should also be permitted to determine when, and under what conditions, such requirements expire

3. Definition of the "Necessary & Impair" Tests Under Section 251(d)(2)

The "Impair" Test

Because the "necessary" test of section 251(d)(2)(A) applies only to "proprietary" elements, for practical purposes, the "impair" test is the more important here

The ordinary (dictionary) meaning of "impair" is "to make worse, to diminish in quantity, value, excellence, or strength"

Thus, section 251(d)(1)(B) means that a CLEC would be "impaired" if the lack of access to a UNE would reduce its ability to provide a service as broadly, effectively or economically, and at the same level of service quality, as it could if it had access to that UNE

- This standard responds directly to the Supreme Court's decision, because it reflects a CLECs' ability to offer a service, not merely its ability to make the same profit

Consistent with this definition of "impair," in assessing whether a CLEC would be impaired by lack of access to a UNE, the Commission must consider a number of factors relating to any proposed substitute for a UNE, including:

- cost
- timeliness
- scope of service that can be offered
- service quality (as perceived by customers)

In contrast, the "impair" test cannot be interpreted to require that the Commission apply the "essential facilities" doctrine of antitrust law or other antitrust law principles, such as the DOJ/FTC Merger Guidelines, as the ILECs propose

- The plain meanings of "impair" and "essential" cannot be squared with each other; "impair" is a much less stringent term, and, contrary to ILECs' claims, there is no statutory basis for assuming that the "impair" test must be "stringent" to comply with the Act
- When applied to lawful monopolies such as those the ILECs possess, antitrust principles only place limits on monopolists' ability to *extend* their monopoly power; indeed, the essential facilities doctrine itself assumes that a monopolist will *continue* to operate its monopoly in its base market

- In contrast, the Act is expressly intended to break up the ILECs' entrenched monopolies and open local markets to competition; the ILECs' proposals would only preserve and prolong their local monopolies

It would also be incorrect to graft a "meaningful opportunity to compete" standard onto the "impair" test in the manner that many ILECs propose

- The ILECs argue that the "impair" test is not satisfied if a *single* CLEC could, within some *extended* time period (up to 2 years), profitably offer *some* service to *some* customers using alternatives to a UNE; this "one is enough" view is *not* the statutory standard: the Act envisions a broadly competitive market with multiple CLECs using any of the three entry strategies in any area
- Sections 251(d)(2) and 251(c)(3) require the Commission's analysis to be applied to *any* CLECs *current* ability to provide *any* telecommunications service it seeks to offer (We do not oppose the application of an "efficient" qualification on a CLEC)
- The overall goals of the Act further require, as the Commission held in the First Report, that the market be open to *many* CLECs using *many* different entry strategies
- Thus, the activities of a *single* CLEC (especially a hypothetical one) cannot be dispositive and foreclose other CLECs' opportunity to access UNEs

The "Necessary" Test

The "necessary" standard applies only to "proprietary" network elements

The Commission's definition of "proprietary" in the First Report is correct, i.e., it applies only to

- proprietary protocols developed specifically by the ILEC and otherwise entitled to some form of protection under intellectual property law (and not to the intellectual property of third parties) and
- certain types of proprietary information, but not information or other property acquired by virtue of the ILECs' monopoly position

If CLEC access to proprietary elements (and particularly proprietary information) is mediated, the issue is resolved and only the "impair" test need be applied

Even if mediation does not resolve issues relating to specific ILEC proprietary protocols, as some ILECs contend, CLECs are still entitled to access to such elements if it is necessary for them to compete effectively

The "necessary" test is similar to, but more stringent than, the "impair" test and is judged by application of the same criteria

The comments assert only a very few instances in which UNEs are proprietary, and in nearly every instance the claim is meritless

- Ameritech's claim that the routing tables in its switches are proprietary is not asserted by any other ILEC and is obviously makeweight -- routing tables are not the result of Ameritech's insight and acumen; rather, they are a result of the information it gained by virtue of its monopoly position – exactly the type of asset the Act intended must be shared with CLECs
- In all events use of routing tables (but not access to the data used to create such tables) is "necessary" for CLECs that purchase unbundled switching, because those tables are integral to the operation of the switch itself, which is otherwise non-proprietary

4. Application of the "Necessary & Impair" Tests

Application of the "necessary and impair" tests must be made on the basis of the *current* facts in the marketplace and CLECs' *current* ability to obtain substitutes for ILEC UNEs and to compete using any such substitute. Any other view, such as the two year view advocated by some ILECs, would

- be speculative and
- would harm consumers by preventing CLECs from meeting current demand for competitive alternatives

In assessing whether a substitute would provide a viable option to a UNE under either test, the Commission must consider information regarding how the substitute can be integrated into a CLEC's network, because network elements, by definition, must be used in combination to provide service

- Section 251(c)(3) requires that UNEs must be provided in a manner that allows carriers to combine them to provide telecommunications service
- Section 153(45) defines a "network element" as "a facility or equipment used in the provision of a telecommunications service"
- Claims by some ILECs that UNEs must be reviewed "in isolation" under section 251(d)(2) are thus both inconsistent with the ordinary way in which network elements interact with each other and the express terms of the Act

In particular, SBC's claims in this regard are inconsistent

- On the one hand SBC claims that switching must be judged in isolation and that other costs CLECs must incur to use their own switches should be ignored
- On the other hand, SBC correctly admits that "signaling is a servant to switching"

Factors that must be considered in applying the "necessary" and "impair" tests include:

- additional equipment and other costs incurred to connect a substitute to the CLEC's network, compared to the cost of using a UNE
- additional time, labor and administrative effort needed to integrate a substitute into the CLEC's network
- other factors relating to the quality of service and scope of the planned service offering that are affected by use of a substitute

These tests are *comparative*, measuring a CLEC's ability to provide service with and without access to the unbundled element at cost-based prices

- ILEC claims that UNEs can be compared against available ILEC "services" at higher prices were properly rejected in the First Report and affirmed by the 8th Circuit

Section 251(d)(2) only requires the Commission to "consider" necessity and impairment, thus:

- the Commission is not required to accord these factors any specific, much less dispositive, weight, as long as they are duly considered; indeed, on appeal the ILECs admitted they are not dispositive
- the Supreme Court's directive to develop meaningful "limiting principles" in light of the Act's purposes entitle the Commission to consider other factors, particularly the Act's overriding purpose to promote competition in local markets
- there is no basis for ILEC claims that the "necessary" and "impair" tests create an "irreducible minimum" for the Commission here

5. CLECs Need Access to UNE Combinations, Including UNE-P

Section 251(c)(3) expressly provides that CLECs must have access to UNEs in a manner that enables them to be combined to provide services

In many circumstances, the UNE-P combination is the only means CLEC can use to serve some customer groups, especially mass market customers

The use of combinations such as UNE-P can spur competition in ways other entry strategies cannot

- In a four-month period in New York, MCI was able to provide UNE-P based service to about twice the total number of customers served by UNE-P over the last three years – even though BA-NY's OSS systems are not yet fully operational

CLECs also need ILECs to combine UNEs for them

- Rule 315(b) requires ILECs to provide combinations of UNEs they "currently combine;" this should include cases in which a CLEC requests a "new" loop as part of a UNE-P combination
- As a matter of simple non-discrimination ILECs must provide CLECs with all combinations they actually use to provide service to customers; this clearly covers the "new loop" situation described above
- The 8th Circuit's rationale for vacating Rules 315(c)-(f) was completely undermined by the Supreme Court's holding that "unbundling" refers only to separate pricing, not physical separation of elements
- The 8th Circuit's assumption that ILECs would prefer to have CLECs combine UNEs rather than do it themselves has been refuted by the ILECs' consistent refusals to permit access to their equipment so that CLECs to do so in an efficient manner
- Thus, the Commission should reinstate Rules 315(c)-(f), as well as Rules 305(a)(4) and 311(c) permitting CLECs to request (at rates that will reimburse ILECs for their costs) superior quality access and interconnection

6. Cable Telephony Will Not Eliminate the Need for UNE-P

Contrary to ILEC claims, the emergence of cable telephony cannot eliminate the need for UNE-P

Cable telephony is just emerging as a technological capability, is only being trialed in limited market areas and will take significant time and investment to implement – at least several years

Customer acceptance of cable telephony will also take time

The availability of UNE-P will not create disincentives for cable telephony, but rather is a stepping stone to this and other forms of facilities-based competition, where such competition is otherwise economically feasible

At best, the entry of a cable telephony provider only creates a single competitor in an area; the Act, in contrast, requires that local markets be open to multiple providers using all three market entry strategies provided for in the Act

The emergence of one cable telephony provider in an area does not demonstrate that *other* CLECs' ability to provide service is not impaired; thus, it is not a sufficient reason to deny other CLECs access to UNEs

Moreover, cable providers are not ubiquitous; their footprints limit their ability to provide service outside their cable territories; thus, even CLECs that offer cable-based telephony in some areas need alternatives in areas where they do not have cable properties

7. "Sunset" Provisions Are Arbitrary and Should Be Rejected

Contrary to the ILECs' arguments, there is no reason to establish a firm "sunset" date by which the Commission's rules here will expire

Establishment of any date certain simply provides ILECs with an incentive to slow roll CLEC requests for UNEs

A period of certainty is needed to foster competition

There is no reason to believe at this time that the CLECs' need for access to any UNE or UNEs will "expire" at a date certain; indeed, any such assumption would be inherently arbitrary

Given the dynamic nature of the industry, it would be appropriate for the Commission to review and possibly revise the unbundling rules after a reasonable period, e.g., three years

- Note however, that the only basis for removing a UNE is that substitutes are available at comparable levels of cost, quality and timeliness and in sufficient quantities to support consumer demand (e.g., if a truly competitive wholesale market developed)
- Thus, the Commission's rules should not be revised until they are no longer commercially necessary because the market has developed interchangeable alternatives to ILEC UNEs; at such time, the UNE requirements would be superfluous, and CLECs would not be relying upon them

In order to avoid customer and market disruption, any decision to remove a UNE from the minimum Federal list (or any additional UNEs required by States under Federal or State law) should incorporate a reasonable transition plan for customers being served by a "retired" UNE

8. Material Changes in the Prior UNE Unbundling Rules Would Require Substantial Alteration to Current FCC Requirements

Many of the Commission's decisions since 1996, particularly its decisions relating to BOC 271 applications and access reform, have relied on the assumption that unbundled elements would be broadly available to CLECs, both individually and in combination

Material changes in the Commission's prior unbundling rules would thus require substantial changes in the Commissions section 271 review and access rules

The First Report correctly held that:

- the Act's primary goal was to open the local market to competition
- CLECs are entitled to use any of the three entry vehicles provided for in the Act
- the Act creates no hierarchy of entry vehicles and
- CLECs can be expected to use a variety of vehicles, either in the same or different geographic areas

The Commission's section 271 decisions have required that a BOC demonstrate that its local market is "irreversibly open to competition" and that CLECs have a meaningful opportunity to compete

The Commission has correctly recognized that after 271 relief BOCs will have ready access to competitive long distance facilities and the fully implemented and electronic PIC change process that will enable them to acquire millions of long distance customers very quickly

- *Indeed, in the 5 minutes it takes an ILEC to perform one "hot cut" it could acquire multiple long distance customers using the well-established PIC process*

The Commission has also interpreted the "own facilities" portion of the "facilities-based" requirement of section 271(c)(1)(A) to include CLEC use of UNEs

Thus, any decision to deprive CLECs of access to the basic UNEs they need to compete effectively with the BOCs requires a substantial retooling of the Section 271 review process; otherwise, BOCs will be able to extend their monopoly power over the local market into the competitive long distance market

The Commission's access reform rules declined to prescribe cost-based access rates on the assumption that CLECs will have widespread access to UNEs, especially local switching. The availability of UNEs was highlighted as a mechanism that would place market pressure on ILECs to drive access charges toward cost

Failure to require unbundling of UNEs (especially switching) at cost-based rates would require the Commission to take other steps to assure that ILEC access rates do not continue to significantly exceed costs, including the imposition of prescribed cost-based access rates

9. CLECs Would Be Impaired Without Universal Access to ILEC Loops and NIDs, Including Dark Fiber Loops

Virtually all commenters agree with the Commission's tentative conclusion that failure to require ILEC to unbundle loops would impair CLECs ability to compete. No party seriously refutes the fact that ILEC loops represent the quintessential monopoly element that embodies the monopolist ILECs' inherent economies of scale, scope and density

CLECs also need access to dark fiber for use as loop facilities and the ability to use ILEC multiplexing/concentration to connect loops with other UNEs

ILECs urge the Commission to carve out a large exception – loops provided to large business customers from "high density" central offices. These ILEC claims should all be rejected, because the ILEC data shows, at most, that a small proportion of buildings (15% or less) are served by CLEC loops today

Moreover, the ILECs' data is incorrect and misleading:

- The ILECs' assumption that the existence of a competitive fiber ring means that loops are readily available is rebutted by AT&T's showing that
  - Even where it has fiber rings in large cities (LA, Dallas-Ft. Worth, Orlando) it serves very few buildings on those rings (in Tampa there are zero buildings on its ring)
  - Often AT&T loops serve only particular floors of a building, not the entire building (in LA over 2/3 of the 120+ buildings on its fiber ring are only "fiber to the floor")
- Even AT&T's own experience is that it has initially served about 80% of its high-volume customers through the use of ILEC channel terminations, not its own facilities; only later does AT&T install its own facilities in cases where it has obtained the necessary building access and a sufficient customer base to justify a full build-out
- Thus, contrary to ILEC claims, access to ILEC facilities fosters CLECs' ability to build their own facilities

The ILECs' claims also ignore the many asymmetries CLECs face in self-provisioning loops that ILECs do not currently face, including the need to obtain:

- access to rights of way, which can take many months (or even years) and be very costly to obtain, including the payment of franchise fees to municipalities

- building access from landlords, which is not provided for under the Act and is also a very costly and time consuming process to resolve -- if it can be resolved at all in a particular case

The ILECs' assumption that if one CLEC can serve a particular building other CLECs can also serve that building are also wrong, because:

- CLECs have no legal obligation to provide such facilities for others, and
- there is no evidence that CLECs will make such facilities available to others at the TELRIC rate that applies to ILEC loops

Given all of the above, there is especially no reason to believe the ILECs' grand claim: that merely because *one* CLEC provides (or *could* provide) its own loops into one building in an area that it or any *other* CLEC would not be impaired if were denied access to ILEC loops to serve *other* buildings in that same area

The Comments show from actual market experience that the Commission's loop/NID unbundling requirements should be clarified to comply with three principles:

- CLECs must have access to all the ILEC's equipment and facilities up to the privately-owned wiring at the customer's premises (including ILEC smart jacks, channel banks and other cross-connection functionality, including necessary test loop back and electrical protection). These can collectively be construed to represent the NID functionality that is necessary to enable a customer's wires to be connected to the facilities of the serving LEC
- The definition of the loop does not hinge upon the type of media used or the type of service the ILEC carries over the loop
- The termination point of the loop on the network side should be, at the CLEC's option, the physical termination and cross-connection to
  - any other ILEC UNE in the ILEC central office *or*
  - any technically feasible point of interconnection with the CLEC network where the CLEC gains access to the communications the customer places on the loop

ILECs should also be required to provide loop characteristic information to CLECs through their OSS so the CLECs can determine whether the loop can support specific types of services

ILECs should also be specifically required to provide access to NIDs and be prohibited from removing the loop terminations from them when a CLEC purchases a loop

10. CLEC Access to Unbundled Switching and Shared Transport Is Critical to Enabling CLECs to Compete Effectively in Local Markets, Especially for Mass Market Customers

CLECs' ability to offer service, especially to mass market customers, would be significantly impaired without access to the local switching element because they would face

- Significant additional costs and delays associated with extending customers' loops to their own switches that the ILECs' own evidence acknowledges would make it uneconomic for CLECs to serve at least 70% of residential customers and
- CLECs would incur delays and service quality disadvantages resulting from an overloading of the coordinated hot cut process

CLECs that deploy their own switches must incur significant delays and large expenses to extend customers' loops to their own switches, including:

- Collocation costs and delays
- Costs to deploy DLC equipment in collocations
- Hot cut loop provisioning costs (including CLEC costs for monitoring ILEC hot cut performance)
- Transport costs

None of these costs is necessary for CLECs that use unbundled switching in combination with other ILEC UNEs

Critically, ILECs incur none of the above costs to serve their local customers; moreover, after in-region interLATA entry, BOCs, unlike CLECs, would have well-established and fully automated processes available to them that would enable them to serve all long distance customers in their territory

In addition, the capital costs of deploying switches make broad scale (especially national) entry impossible for CLECs in the near term

ILECs claim that *no* CLEC is impaired if *one* CLEC might be able, over time, to deploy a switch in an area and profitably serve a small segment of customers. This argument misses the point

- The Act provides *multiple* entry vehicles that are supposed to be available so that *multiple* CLECs can offer competitive alternatives to the broadest array of customers, including customers in the mass market

ILEC data on the availability of CLEC switching is misleading (e.g., AT&T's use of 4ESS switches to serve a select segment of high end business customers does not mean that it is able to serve most customers in an area)

ILEC data also ignore the obvious: there is no significant facilities-based competition today for mass market customers

Even at face value, ILEC data show only that CLECs have installed about 4% of the switches currently used by ILECs; this hardly heralds the dawn of mass market competition in the near future

- Moreover, deployment of additional switches takes significant time (typically at least 9 months)

ILEC claims regarding the potential "reach" of CLEC switches also ignore

- that expanded reach does not expand a CLEC's total capacity and
- there are significant transport costs to serve distant customers
- even the ILECs' own experts admit that "reach" is governed more by economic than technical considerations

ILEC assertions that switching is available from other CLECs is baseless and absurd

- CLECs are not required to provide UNEs
- there is no evidence that any CLEC is making wholesale switching available at any price, much less at the ILEC's TELRIC
- using a third party switch still requires a CLEC to incur all the costs and delays associated with deploying its own switch

11. CLECs Do Not Have Adequate Substitutes for Unbundled ILEC Transport, Both Shared and Dedicated

Shared Transport

The Commission has already determined that shared transport is "particularly important" for mass market entry (Third Order on Reconsideration) because

- CLECs cannot predict in advance the location or calling patterns of their future customers
- cannot design an efficient transport network
- would face significantly higher costs and reduce competitive entry

CLECs have no substitute that would give them the equivalent of the ILECs' advantages of scale, scope, connectivity and density

Ameritech's last-gasp (and solitary) arguments opposing shared transport are meritless

- AIT's statutory claim that an element must be capable of being purchased separately was flatly rejected by the Supreme Court, which recognized that "unbundled" relates to pricing, not physical separation
- AIT's claim that its routing tables are "proprietary" is unsubstantiated and irrelevant
  - Routing tables are not the result of creativity or skill but rather sweat of the brow work needed to design its network architecture efficiently; thus they are another result of the ILECs' economies of scale, scope and density
  - CLECs do not have access to the underlying information used to develop the routing tables; rather, they only are able to obtain the same economies as the ILEC in the use of the ILEC's network
  - Even if they were proprietary, CLEC use of the routing tables is clearly "necessary" under the Commission's prior findings of fact
- AIT's claim that another "service" is available to replace shared transport violates the 8th Circuit's ruling that ILECs may not avoid unbundling obligations by offering a service at non-cost-based prices and it is not the functional equivalent of shared transport

Dedicated Transport

The fact that *some* CLECs have been able to deploy their own dedicated transport in *some* places to serve *some* customers does not eliminate other

CLECs' need for dedicated transport as a UNE to serve other customers in other locations

CLECs also need access to dark fiber for use as transport

Transport must be made available with associated multiplexing to enable CLECs to interconnect facilities efficiently

ILEC "proof" of the availability of satisfactory alternatives to ILEC transport is rebutted by evidence from many CLEC, including AT&T, Sprint and Covad, that in *a large majority* of cases they do not have any viable alternative to ILEC transport, even in large metropolitan areas and "dense wire centers"

- ILEC data on the alleged "fiber frenzy" relates to the availability of long-haul fiber optic systems and loops, not fiber to serve *local transport* needs
- At best, ILEC data shows that ILECs control 89% of all capacity and nearly 100% of the available capacity on routes where CLECs need it

Limitations on alternatives are a result of many factors, including

- cost and delay related to facility construction – note that the economic justification for building facilities is in part a function of the ILECs' pricing umbrellas which may be reduced over time and in response to competitive activity
- cost and delay caused by the need to obtain collocation
- cost and delay caused by the inability to negotiate and obtain necessary rights of way – an increasing problem for CLECs

Availability of alternatives from non-ILEC sources is also limited because dedicated transport requires that facilities be between *specific* end points; otherwise alternative capacity, even if it exists, is useless to a CLEC

ILEC special access services are not a substitute for unbundled dedicated transport

- as a matter of law, higher priced services cannot be made a substitute for UNEs
- access prices are typically significantly higher than UNE prices – as much as 900%

12. If CLECs Have Access to Customized Routing for OS/DA and Full Access to ILEC DA Data as a UNE, OS/DA Can Be Eliminated as a UNE

Substitutes for ILEC OS/DA *services* are available; however, OS/DA service cannot be eliminated as a UNE if CLECs do not have an effective means to route OS/DA traffic from ILEC switches to the OS/DA platform that serves their customers

Customized routing through either an AIN-based or Line Class Code solution is necessary to enable CLECs to route their OS/DA traffic to alternative platforms; if such capability is demonstrated and actually available, CLECs will be able to provide their own OS/DA services

In contrast, there is no substitute for the DA data that ILECs compile and use to provide DA services; thus, ILEC DA data must be made available as a UNE at cost-based rates

- DA data qualify as a network element under the statutory definition, which specifically includes "subscriber numbers" and "databases"
- ILEC DA data are of demonstrably higher quality (i.e., more accurate and complete than any alternative), because all other sources are comparatively stale and less complete, and they are not updated with the same frequency as the ILEC DA data
- ILEC charges for access to their DA data are prohibitively expensive for CLECs that want to compete in offering such services
- Discriminatory ILEC restrictions on the use of DA data (e.g., prohibitions on use of such data for Internet-based listings) must also be eliminated

13. CLEC Access to ILEC OSS Is Critical to the Development of Local Competition

All parties, including ILECs, acknowledge the critical nature of OSS and agree that OSS must be available

However, ILEC claims that OSS is needed only to support UNEs the Commission orders them to unbundle are overstated, because CLECs need access to pre-ordering information regardless of the entry strategy they use

The comments also identify areas in which current ILEC OSS capabilities must be expanded, including the ability to:

- identify areas (and customers) served by IDLC facilities
- identify availability of xDSL capable and xDSL equipped loops to support CLEC needs relating to advanced services

14. CLECs' Ability to Compete Would Be Impaired Without Access to xDSL Conditioned Loops and, in Certain Circumstances, xDSL Equipped Loops

Even most ILECs agree that the key to CLECs' ability to provide consumers with competitive advanced services is access to the loops necessary to provide such service

The Commission has correctly determined that loops used to provide advanced services are indistinguishable from loops used to provide other telecommunications services

This principle properly applies both to

- conditioned loops and
- equipped loops (in those cases where lack of access to such loops would impair CLECs' ability to provide service)

The conditioning of loops is an ordinary activity that ILECs perform in maintaining their networks, not, as some ILECs claim a "superior service"

- Thus, ILECs must be required to provide conditioned loops for CLECs and their customers at cost-based rates, whether or not they are currently making xDSL services available to their own customers in the area the CLEC wishes to serve

Contrary to some ILECs' claims, DSLAMs are *not* separate network elements but are equipment used to condition a loop for certain purposes, just like bridge taps and repeaters

- Thus, equipped loops are no different from any other type of loop and benefit from the same economies of scale, scope and density as the ILEC's general loop plant

Nondiscriminatory access to xDSL capable loops requires that ILECs provide CLECs with:

- access to all information necessary to determine if it is possible to provide xDSL service to a specific customer, including the physical properties of the incumbent's loop and other facilities serving a customer (i.e., loop qualification information); otherwise, CLECs will not be able to market such services or respond to consumers' requests for service
- the ability to access customers using all-copper facilities, including the ability to obtain either (1) an all-copper loop to an ILEC central office that supports equal end user service quality to the existing loop or (2) the ability to collocate in or near a remote DLC terminal, including installation of a line card in the incumbent's rack

- non-preferential spectrum management and equipment qualification practices

In addition to access to cost-based conditioned loops, CLECs will not be able to compete effectively until the collocation requirements of the Commission's Advanced Services Order are fully implemented

There are also two circumstances in which CLECs ability to offer service would be impaired in the absence of access to equipped loops, i.e., loops equipped with DSLAMs, when the ILEC has made such capabilities available in an area:

- when a CLEC cannot practically obtain a conditioned loop to serve a customer (i.e., where a CLEC cannot access a conditioned loop using its own DSLAM)
- when a CLEC is serving a customer using the UNE-P combination and is not using its own facilities to provide voice grade service to the customer

In such cases -- and especially in the residential market where CLECs will have to rely heavily on UNE-P as a market entry strategy -- the ILEC has deployed its advanced services capabilities relying on the scope and scale of its existing monopoly network and will be able to provide their customers with a bundle of traditional and advanced services

CLECs do not have the same economies to deploy advanced service capabilities as will not be able to compete on an equal footing in such cases

- Thus, if CLECs are denied access to equipped loops, they will not be able to provide the same service options as ILECs and customers will be less likely to choose the CLEC as a service provider

Even in these cases, however, CLECs do not require access to the ILEC's data transport and data switching, except insofar as the ILEC itself has chosen to use them to enable it to deliver CLEC data traffic to the first network point where such traffic can be segregated and passed to the CLEC for processing over its own data network

ILEC claims that unbundling would reduce incentives for investment are wrong

- Indeed it is the threat of CLEC deployment of advanced services that has caused ILECs to rapidly expand their own plans to deploy advanced services
- The limited unbundling of equipped loops requested by AT&T would not change those incentives

There is also no need to require spectrum unbundling because it raises significant policy and operational issues, including

- loop pricing
- responsibility for loop testing and maintenance
- risk of freezing the development of DSL technical innovation at the current level

15. AT&T's Comments Envision a Reduction in the Number of UNEs

AT&T's comments do not seek a simple and unprincipled reinstatement of the UNEs required in the First Report; rather,

- The limiting principle AT&T proposes is fully consistent with the Act's text and underlying purposes and
- AT&T recognizes that the unbundling requirements should be adjusted over time to reflect market realities

AT&T, for example, does not seek access to standalone unbundled signaling, because alternatives are available to CLECs that have their own switches[1]

AT&T also recognizes that other sources of OS/DA services are available and only seeks access to OS/DA as a UNE in cases where the ILEC does not provide the customized routing that a CLEC must have to route OS/DA traffic efficiently to its own OS/DA platform[2]

AT&T also does not seek access to many ILEC functionalities used to provide advanced services. In particular, AT&T does not request

- ILEC equipped loops (i.e. loops attached to DSLAMs) except when there is no practical opportunity for a CLEC to obtain access to a conditioned ("clean copper") loop or when a customer is served through the UNE-P combination for voice services
- ILEC data networking or switching even when using an equipped loop, except as necessary for the ILEC to deliver to a CLEC its customers' data traffic at the first point such traffic can be segregated in the ILEC's network

AT&T also agrees that it would be appropriate to schedule a review of the Commission's unbundling rules three years after the effective date of the rules adopted in this proceeding, to determine whether market changes have made it unnecessary to continue to require unbundling of some UNEs in some circumstances

- This type of schedule balances CLECs' need for certainty with the Commission's obligation to adjust its requirements as circumstances dictate

[1] Access to unbundled signaling is technically required, however, when a CLEC purchases unbundled switching, because even the ILECs acknowledge that a single switch can only effectively be served by one STP pair and one signaling system.

[2] In contrast, no source of DA information matches the ILECs', making such information indispensable if CLECs are to have an equal opportunity to compete in this area.