B. The Supreme Court's Decision Does Not Limit Significantly the Commission's Discretion in Construing the "Necessary" and "Impair" Tests.

Regardless of how the Commission resolves the question of the applicability of the "necessary" and "impair" standards, it must comply with the Supreme Court's charge to "giv[e] some substance" to those requirements. Although the Court did not give the Commission much guidance as to the proper construction of "necessary" and "impair," the language it used and the examples it chose to illustrate its criticisms of the Commission's decision on this issue confirm that complying with the Court's mandate does not require a dramatic change in the Commission's reading of the statutory standards.

The majority cited only two specific faults with the Commission's implementation of section 251(d)(2). First, the Commission applied the necessary and impair standards without considering the availability of network elements from non-ILEC sources.[53/] The Court did not, however, make "availability from non-ILEC sources" a separate element in the section 251(d)(2) analysis. It merely held that the Commission, in conducting the necessary and impair inquiry, may not "disregard[] entirely the availability of elements outside the [ILEC's] network."[54/] The Court's ruling does not mean that an ILEC is absolved of its obligation to unbundle a network element simply because that element is available somewhere else. The Commission must still consider whether, for example, a CLEC's ability to offer service would be impaired if it must secure a desired UNE from an alternative source, rather than from the ILEC.

53/ *AT&T Corp.*, 119 S.Ct. at 725.

54/ *Id.*

Second, the Court rejected "the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by a denial of a network element" constitutes an impairment.[55/] The Court's holding in no way suggests that a "substantial" cost penalty is required.[56/] That conclusion follows from the numerical example that the Court used to make its point: "An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been 'impaired' in its ability to amass earnings, but has not *ipso facto* been 'impaired . . . in its ability to provide the services it seeks to offer.'"[57/] The Court's selection of the smallest possible integer (*i.e.*, 1) out of 100 possibilities[58/] to represent an "non-impairing" percentage profit loss begs for the inference that an "impairing" reduction would be much closer to one percent than to 100 percent.

55/ *Id.* (emphasis in original).

56/ *See* BellSouth's Comments at 11.

57/ *AT&T Corp.*, 119 S.Ct. at 735. *See also id.* at 735 n.11 (firm's ability to provide service has not been impaired "when the business receives a handsome profit but is denied an even handsomer one"). Several ILECs cite with approval the Court's discussion of ladders and light bulbs, but mischaracterize the Court's conclusion. *See* Ameritech Comments at 13 ("If entrants could change the bulb using their own (or someone else's) ladder, even if they had to stretch their arms to full extension, . . . failure to obtain access to [the ILEC's] ladder would not 'impair' the entrants' ability to offer the services they seek to provide."); BellSouth's Comments at 11 ("The Court's analogy was that as long as the light bulb could still be changed, the incumbent's longer ladder was neither necessary nor would its absence impair the CLEC."). What the court actually said was: "the proper analogy . . . [is] the presence of a ladder tall enough to enable one to do the job, but not without stretching one's arm to its full extension. A ladder one-half inch taller is not . . . 'necessary,' nor does its absence 'impair' one's ability to do the job." Thus, the Court simply concluded that a one-half inch difference was of no more significance than a one percent decrease in profits. The Court did not even intimate that larger differences in length (or reductions in profits) would likewise be of no consequence.

58/ The profit reduction cannot, of course, exceed 100 percent.

As the Court recognized, moreover, even the smallest increase in costs or reduction in quality may impair a firm's viability in a highly competitive market in which all firms are providing service at marginal cost.[59/] Although the local exchange market is not an example of perfect competition at work, for a new entrant it is also not the Court's posited Shangri-La where anticipated profits approach 100 percent of investment. As AT&T points out, a CLEC trying to gain a foothold in the local exchange faces substantial cost disadvantages that will deny it the hope of "handsome" profits, let alone "handsomer" ones.[60/] The pressures on CLECs to price at the margin will likely increase over time as new entry occurs and the ILECs respond to that entry. Thus, while the local exchange is not an "ideal world" where any cost differential can be devastating, for newcomer CLECs it is a place where even small disparities in cost, quality, or time to market can "impair" their ability to compete.

In short, the Court's ruling does not significantly limit the Commission's discretion in implementing section 251(d)(2). Carefully read, the controlling opinion reveals that the Court had no fundamental objections to the Commission's interpretation of section 251(d)(2). In the Court's eye, the Commission erred not by trivializing a stringent standard, but by effectively nullifying a relatively lenient one.[61/]

59/ *AT&T Corp.*, 119 S.Ct. at 735.

60/ AT&T Comments at 6-10. *See AT&T Corp.*, 119 S.Ct. at 735 n.11.

61/ Put another way, although section 251(d)(2) "requires the Commission to apply *some* limiting standard," *AT&T Corp.*, 119 S.Ct. at 734 (emphasis in original), the standard need not be *too* limiting. The Court held only that the Commission cannot compel the ILECs to comply with every CLEC request for network elements. It did not bar the Commission from requiring an ILEC to satisfy most of them.

C. "Necessary" and "Impair"

In the absence of any statutory definition of the operative words in section 251(d)(2), the Commission should give them their ordinary and common meaning.[62/] It should also seek so far as possible to construe those terms in a way that advances the procompetitive goals of the 1996 Act, including the promotion of efficient facilities-based competition.[63/] The Commission must also accommodate the fact that the necessary and impair criteria apply to proprietary elements.[64/] It should not therefore conflate the two standards by importing notions of "impairment" into the definition of "necessary."[65/] That would, in effect, render the impairment standard superfluous.[66/]

62/ *See, e.g.*, *Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 207 (1997); *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 476 (1994).

63/ *AT&T Corp.*, 119 S.Ct. at 734 (limiting standard that Commission adopts pursuant to section 251(d)(2) must be "rationally related to the goals of the Act").

64/ *See supra* Section III.A. *See also* Ameritech Comments at 38-39; GTE Comments at 11-12. The Commission has already developed a definition of "proprietary" that has not been challenged. NTIA therefore believes that it would be reasonable for the Commission to retain that interpretation and focus its attentions on crafting appropriate definitions of "necessary" and "impair."

65/ *See, e.g.*, *Local Competition Order*, 11 FCC Rcd at 15641-15642, ¶ 282 (network elements are essential if "without such elements, [CLECs'] ability to compete would be significantly impaired or thwarted"); Comments of SBC Communications Inc. at 14 ("the 'necessary' standard itself is not fundamentally different, . . . from the 'impair' inquiry") (SBC Comments). Conversely, the Commission should rebuff efforts to make necessity or essentiality a part of the "impair" test. *See* GTE Comments at 3-4 (inability to obtain a desired UNE "impairs" a CLEC "only where the element is essential to competition and there is convincing evidence that CLECs cannot effectively compete using substitutes for the element available from alternative sources").

66/ *See Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1879) ("a legislature is presumed to have used no superfluous words").

NTIA believes that the Commission can preserve the distinction between the two words, by bearing in mind the different purpose that each was intended to serve. "Necessary" pertains to the relationship between the element requested (and its associated "features, functionalities, and capabilities") and a service that the CLEC seeks to offer. Recall that section 251(c)(3) permits a CLEC to request UNEs "for the provision of a telecommunications service."[67/] Thus, the general language seems to require unbundling whenever there is *any* plausible connection between UNE and service. In mandating that proprietary elements be "necessary," Congress plainly meant to require a closer nexus between a requested UNE and the proposed service, doubtless to ensure that the unbundling regime did not unduly restrict ILECs' incentives to innovate.[68/]

The impairment standard, on the other hand, seems designed to address the economic and competitive effects for a CLEC if it must acquire a particular UNE, or a substitute for it, from a non-LEC (or if the CLEC may only secure a substitute UNE from the ILEC). The impair standard applies to proprietary elements because although Congress did not wish to give CLECs relatively unfettered access to such elements, it recognized that CLECs may need access to proprietary UNEs in some circumstances if competition were to develop.[69/] Indeed, if CLECs can obtain proprietary elements only when strictly necessary, ILECs might

---

67/ 47 U.S.C. § 251(c)(3) (Supp. II 1996).

68/ *See* BellSouth's Comments at 18-21; GTE Comments at 25-27; USTA Comments at 29.

69/ *See* Ameritech Comments at 37 (strict reading of proprietary could deny CLEC access to a UNE "even if a reasonably efficient competitor could not, as a practical matter, compete without a particular proprietary element").

attempt to create such elements in order to limit their unbundling obligations.[70] For all of these reasons, NTIA believes that the relationship between the necessary and impair standards described above both reflects the statutory text and promotes its underlying purpose.

1. "Necessary"

In ordinary usage, the word "necessary" means essential or indispensable.[71] Thus, NTIA believes that a CLEC should gain access to a proprietary UNE only if that UNE is essential to the provision of a telecommunications service. The relevant question is simply this: Is it possible to provide service without the requested element or a functional substitute for it?[72] If the answer is yes, the ILEC need not provide the proprietary element. If the answer is no, the ILEC must make that element available if the impairment standard is satisfied -- that is, if CLEC's ability to provide service would be hindered by its inability to obtain that element (and its associated features, functions, and capabilities) from the ILEC.

70/ *See* 141 Cong. Rec. S8072 (daily ed. June 9, 1995) (statement of Sen. Pressler) (noting that the government's initial antitrust complaint against AT&T alleged, among other things, that the company had obstructed "competitive equipment providers through the maintenance of proprietary standards"). To NTIA's knowledge, Senator Pressler's comments provide the only public congressional rationale for section 251(d)(2). As the principal sponsor of the bill of which that provision was a part, the Senator's remarks provide evidence as to the meaning and purpose of that provision.

71/ *See, e.g.*, *The Oxford English Dictionary* vol. X, at 276 (2d ed. 1989) ("Indispensable, requisite, essential, needful; that cannot be done without"); *The Random House Dictionary of the English Language* 1284 (2d ed. 1987) ("being essential, indispensable, or requisite"); *Webster's New Universal Unabridged Dictionary* 1200 (2d ed. 1983) ("that which cannot be dispensed with; essential; indispensable"); *The American Heritage Dictionary* 834 (2d College ed. 1982) ("1. Absolutely essential; indispensable. 2. Needed to achieve a certain result or effect; requisite.").

72/ *See* US West Comments at 23.

2. "Impair"

The word "impair" generally means "[t]o diminish in strength, value, quantity, or quality."[73] BellSouth contends that "impair" is a "strong word" intended to "create a high threshold" for unbundling.[74] To the contrary, the ordinary meaning of the word "impair" is highly elastic and thus gives the Commission considerable freedom of interpretation, provided that it heeds the Supreme Court's admonition that *any* diminution cannot be deemed an impairment.

NTIA recommends that, with respect to proprietary elements, the Commission should identify a more stringent definition of impairment -- *e.g.*, by requiring that a CLEC's inability to obtain a proprietary UNE from an ILEC must impose a substantial penalty on the CLEC's

---

73/ *The American Heritage Dictionary* 644 (2d College ed. 1982). *See also Black's Law Dictionary* 752 (6th ed. 1990) ("To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner"); *The Oxford English Dictionary* Vol. VII, at 696 (2d ed. 1989) ("To make worse, less valuable, or weaker; to lessen injuriously; to damage; injure"); *The Random House Dictionary of the English Language* 958 (2d ed. 1987) ("to make or cause to become worse; diminish in ability, value, excellence, etc.; weaken or damage"); *Webster's New Universal Unabridged Dictionary* 910 (2d ed. 1983) ("to make worse, less weaker, etc.; to deteriorate; to diminish in quality, value, or excellence; to lessen in power; to weaken; to enfeeble").

74/ BellSouth's Comments at 9. Ameritech demonstrates that if one searches long enough, it is possible to find a definition of any word that better suits one's interests -- in this case, to argue that "impair" requires a material diminution. Ameritech Comments at 33 (citing *Webster's Ninth New Collegiate Dictionary*). A less result-oriented exploration reveals that materiality is not generally considered to be a necessary condition for impairment.

Ameritech also tries to make something of the fact that the only Justice who supported the Commission's interpretation of impair, Mr. Justice Souter, conceded that the Commission construed the term in its "weak" sense. Ameritech Comments at 33 n.83. But, as noted above, the Court majority objected to the Commission's "weak" reading only insofar as it was used to find that *any* increase in cost or reduction in quality constitutes an impairment.

ability to offer service, in terms of cost, quality, or time to market.[75/] That approach would give CLEC access to "necessary" proprietary elements without unduly reducing the ILECs' incentives to develop and deploy innovative facilities, features, and capabilities.

With respect to nonproprietary elements, it would better advance the goals of the 1996 Act for the Commission to prescribe a relatively low threshold for finding impairment.[76/] As noted above, Congress' fundamental objective in enacting that legislation was to promote competition in all telecommunications markets by creating entry opportunities for new service providers.[77/] It recognized that new entrants would likely need assistance in their efforts to breach the local exchange monopoly because of the considerable costs of entry.[78/] Congress also understood that competitors would likely need help to overcome "any unfair competitive advantages accrued by companies that have benefitted from government-sanctioned

---

75/ The 100 percent cost penalty alluded to in the *Notice* is well beyond any reasonable impairment standard, even for proprietary elements. *Notice* ¶ 26 ("[i]f the cost of obtaining a network element from the incumbent LEC is half the cost of obtaining it from another source, should the incumbent be required to unbundle it?").

76/ Because the statute does not specify separate impair standards for proprietary and nonproprietary elements, the ordinary assumption is that Congress intended the same test to apply to both categories of UNEs. *Cf. National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 501 (1998) ("similar language contained within the same section of a statute must be accorded a consistent meaning"). The Commission could reasonably "consider," however, that society's interest in preserving and promoting innovation warrants a different, and stiffer, impair standard for proprietary elements. *See* 47 U.S.C. § 251(d)(2).

77/ *See supra* note 16 and accompanying text.

78/ *See, e.g.*, CONFERENCE REPORT at 148, 1996 U.S.C.C.A.N. at 160 (Congress "recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant").

monopolies [*i.e.*, the ILECs]."[79/] To that end, Congress created "fairly generous," even "promiscuous" unbundling rights for the benefit of prospective local entrants.[80/] The Commission should construe the word impair to accomplish that end.

ILECs urge that the Commission must interpret "impair" to require material or substantial differences in cost, quality, or time to market because it is only those disparities that restrict a CLEC's "ability" to provide service, as opposed to simply amassing profits.[81/] The Commission should not adopt such a cramped reading of the phrase "ability to provide service." In ordinary usage, "ability" means "the power, mental or physical, to do something, and usually implies doing it well."[82/] Like impair, "ability" has many shades of meaning and, thus, the Commission has considerable latitude to select an interpretation that serves the goals of the 1996 Act.

The Commission could reasonably conclude that relatively small differences in costs, quality, or time to market will impair a CLEC's ability to provide service. To the extent that the inability to obtain a UNE from an ILEC increases a CLEC's costs (for example, by forcing it to purchase a more expensive substitute or by denying the CLEC the economies of

---

79/ Pressler Policy Paper, *supra* note 43, at 12.

80/ *AT&T Corp.*, 119 S.Ct. at 738; *Iowa Utils. Bd.*, 120 F.3d at 811.

81/ *See, e.g.*, Ameritech Comments at 33-34. *See also AT&T Corp.*, 119 S.Ct. at 735 (firm that suffers small loss in profits "has perhaps been 'impaired' in its ability to amass earnings, but has not *ipso facto* been 'impair[ed] . . . in its ability to offer the services it seeks to offer'").

82/ *The American Heritage Dictionary* 67 (2d Coll. ed. 1982).

scale, scope, or density associated with the ILEC UNE), the resulting diminution in profits will reduce the internal funds available to extend and upgrade the CLEC's network and service offerings. It will also hinder the CLEC's ability to attract outside capital for the same purposes. Similarly, decreases in quality and delays in the introduction of CLEC services caused by the unavailability of ILEC UNEs would give the ILEC valuable time to entrench itself with existing customers, to use its unique access to most customers to gain a foothold in new markets and, in markets where services may be offered pursuant to long-term contracts (*e.g.*, DSL and other advanced data services), to "lock up" customers in advance of competitive entry. Over time, all of these disparities will impair a CLEC's ability to offer services that consumers view as alternatives to the ILEC's offerings.[83/]

For these reasons, NTIA recommends that the Commission establish a relatively low threshold for determining impairment with respect to nonproprietary elements. Thus, the Commission should conclude that the unavailability of such network elements from an ILEC impairs a CLEC's ability to provide service if the CLEC's self-provisioning of that element, or its securement from another source, imposes a nontrivial penalty in terms of cost, service

---

83/ The Court's discussion of ladders and light bulbs does not address this essential point (and, of course, overlooks the fact that ladders are more readily available than network elements). A CLEC that requests a "ladder" from an ILEC is not trying to replace a single light bulb. It is in the *business* of changing light bulbs. As such, it will need to change many light bulbs at many different job sites. It competes, moreover, against an ILEC whose ladders enable its workers to do their jobs with maximum ease and comfort. If the CLEC's inability to use the ILEC's ladders relegates it to using ladders that are shorter, heavier, less sturdy, the CLEC's workers will likely be slower, less productive, and more accident-prone than their ILEC counterparts. Over time, those differences will surely impair the CLEC's ability to compete in the bulb changing business.

quality, time to market, etc.[84/] The Commission should treat as nontrivial any delay in service provisioning in excess of six months (as compared to the time it would take for a CLEC to begin provisioning a service using ILEC UNEs) and any cost increase in excess of ten percent.

Under this impairment standard, for example, the Commission or a State commission could reasonably conclude that, as long as a CLEC can obtain from an ILEC loop facilities and collocation space on reasonable terms and on a timely basis, its ability to provide a competing DSL service would not be impaired by the CLEC's inability to obtain digital subscriber line access multiplexers (DSLAMs) from the ILEC on an unbundled basis. As NTIA has previously noted, such equipment appears to be readily available to ILECs and competitors alike. In many switching offices, provisioning of DSLAMs does not appear to be characterized by such economies of scale as to prevent a competitor from deploying such equipment over a limited customer base at a cost comparable to that faced by an ILEC.[85/] Accordingly, it would not be unreasonable for the Commission to conclude that DSLAMs need not be provided by ILECs as UNEs in market areas where competitors have fair and reasonable access to loops and collocation space.

84/ Put another way, the Commission should accept the Supreme Court's implicit invitation to select an impairment standard rather close to the one that the Court overturned.

85/ *See* Letter from Larry Irving, NTIA, to Chairman William Kennard, CC Docket No. 98-147, at 12-13 (July 17, 1998) (NTIA July 17 Letter).

IV. THE COMMISSION SHOULD SPECIFY A MINIMUM LIST OF UNBUNDLED ELEMENTS AND CREATE A "BEST PRACTICES" APPROACH THAT WILL PERMIT APPROPRIATE ADDITIONS TO THAT LIST OVER TIME WITHOUT THE NEED FOR COMMISSION ACTION.

NTIA strongly supports the Commission's tentative decision "to identify a minimum set of network elements that must be unbundled on a nationwide basis."[86/] The 1996 Act arguably requires as much, given that section 251(d)(2) charges the Commission with "determining what network elements should be made available for purposes of subsection [251](c)(3)."[87/] The Commission has also detailed the ways in which the specification of a national UNE list would further the procompetitive purposes of the 1996 Act.[88/] Although the Supreme Court disagreed with the way in which the Commission arrived at its initial list of seven UNEs, it did not question the Commission's authority to do so.

A. Specification of the National UNE List

The decisional question concerns what factors or standards that the Commission must consider in fashioning such a national list. The Supreme Court has held, of course, that in so doing the Commission must "giv[e] some substance to the 'necessary' and 'impair' requirements" of section 251(d)(2).[89/] However the Commission chooses to define those

---

86/ *Notice* ¶ 14.

87/ 47 U.S.C. § 251(d)(2) (Supp. II 1996). *See also AT&T Corp.*, 119 S.Ct. at 736 (section 251(d)(2) "requires the Commission to determine on a rational basis *which* network elements must be made available") (emphasis in original).

88/ *Local Competition Order*, 11 FCC Rcd at 15624-15627, ¶¶ 241-248. *See also Notice* ¶ 13.

89/ *AT&T Corp.*, 119 S.Ct. at 735.

terms, section 251(d)(2) requires only that the Commission "consider" those criteria in determining what network elements should be made available.[90/] The Commission suggests that this "means only that [the agency] must 'reach an express and considered conclusion' about the bearing of a factor, but is not required 'to give any specific weight' to it."[91/] More importantly, the statute directs the Commission to consider the necessary and impair standards "at a minimum," plainly indicating that the Commission may regard -- and give weight to -- other factors.

NTIA believes that one additional factor the Commission must consider is the extent to which Congress may have mandated provision of particular network elements on an unbundled basis. The evidence demonstrates that Congress did more than simply specify the standards that the Commission (and, to a lesser extent, State commissions) must use to identify particular UNEs. In several instances, Congress appears to have applied those standards itself and concluded that ILECs ought to provide unbundled access to certain network elements. Thus, the Conference Report states that the "term 'network element' was included [in the 1996 Act] to describe the facilities, such as local loops, equipment, such as switching, and the features, functions, and capabilities that [an ILEC] must provide for certain purposes under other sections of the Act]."[92/]

90/ 47 U.S.C. § 251(d)(2) (Supp. II 1996).

91/ *Notice* ¶ 29 (quoting *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995).

92/ CONFERENCE REPORT at 116, 1996 U.S.C.C.A.N. at 127. *See also id.* at 148, 1996 U.S.C.C.A.N. at 160 (noting that central office switching "will likely need to be obtained

(continued...)

The best evidence of Congress' intent to require the unbundling of particular network elements, in NTIA's view, is the so-called "competitive checklist" in section 271(c)(2)(B). To be sure, ILECs contend that the checklist "applies only to those BOCs that choose to apply for authority to provide in-region interLATA services,"[93/] and thus "does not create a minimum list of network elements to be unbundled under Section 251."[94/] Those arguments misperceive the intended relationship between sections 251 and 271 and the common purpose they were meant to serve.

That common purpose, of course, was to open the ILECs' monopoly local exchange networks to competition.[95/] Because section 251(c) and the competitive checklist were

---

92/ (...continued from preceding page)
from the [ILEC] as network elements pursuant to new section 251"). Virtually all parties appear to agree that loops must be unbundled under most circumstances. *See, e.g., Local Competition Order*, 11 FCC Rcd at 15684, ¶ 368; Ameritech Comments at 100; Bell Atlantic Comments at 38-39; SBC Comments at 23; Illinois Commerce Commission Comments at 11; Iowa Utilities Board Comments at 6-7.

93/ US West Comments at 20. *See also* Ameritech Comments at 51; Bell Atlantic Comments at 19. These BOCs thus concede that they must provide or be prepared to provide each and every checklist item in order to qualify for interLATA entry. It also merits notice that a BOC's obligation to provide checklist items is not limited by the standards in section 251(d)(2), whatever they might be.

94/ Bell Atlantic Comments at 19. *See also* Ameritech Comments at 50-53; US West Comments at 19-21.

95/ *See, e.g.*, SENATE REPORT at 5 (Senate bill requires ILECs "to open and unbundle network features and functions to allow any customer or carrier to interconnect with the [ILEC's] facilities"); HOUSE REPORT at 48, 1996 U.S.C.C.A.N. at 11 (House bill "promotes competition in the market for local telephone service by requiring [ILECs] to offer competitors access to parts of their networks"); *id.* at 81, 1996 U.S.C.C.A.N. at 47 ("primary objective of Title I [of the House bill, which included both the unbundling requirement and the competitive checklist] is to foster competition for local exchange and exchange access
(continued...)

designed to further the same procompetitive ends, they contemplate similar obligations. Under the House bill, those requirements were coextensive. Section 242(a)(2) imposed upon local exchange carriers "[t]he duty to offer unbundled services, elements, features, functions, and capabilities whenever technically feasible, at just, reasonable, and nondiscriminatory prices and in accordance with" the Commission's implementing regulations.[96] Section 245(b)(2) specified that in order to gain authorization to provide in-region interLATA services, a BOC would have to certify that it "provides unbundled services, elements, features, functions, and capabilities in accordance with" section 242(a)(2) and the Commission's regulations.[97] Indeed, not only were the unbundling and checklist obligations the same, because the House bill contained no provision comparable to current section 251(d)(2), those obligations were limited only by considerations of technical feasibility and by the requestor's willingness to pay the costs of the elements requested.[98]

95/ (...continued from preceding page)
service"); 141 Cong. Rec. H8464 (daily ed. Aug. of Rep. 4, 1995) (statement of Rep. Fields) ("[w]hat we have attempted to do is open [the local network] in a sensible and fair way to all competitors. Consequently, we created a checklist on how that loop is opened."); *id.* at H8284 (daily ed. Aug. 2, 1995) (statement of Rep. Hastert) (House bill "provides the formula for removing the monopoly powers of local telephone exchange providers to allow real competition in the local loop"); *id.* at S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler) (Senate bill requires ILECs "to open and unbundle their local networks, to increase the likelihood that competition will develop for local telephone service").

96/ H.R. 1555, 104th Cong., 1st Sess., § 101(a) (1995), *reprinted in* 141 Cong. Rec. H9979 (daily ed. Oct. 12, 1995) (adding new section 242(a)(2) to the Communications Act).

97/ *Id.* §101(a), 141 Cong. Rec. at H9981 (adding new section 245(b)(2) to the Communications Act).

98/ *See id.* § 101(a), 141 Cong. Rec. at H9981 (adding new section 242(b)(4)(D) to the Communications Act).

Under the Senate bill, the unbundling obligations were, at least potentially, broader than the checklist requirements. In describing the latter requirements, the Committee report emphasized that:

> [t]he Committee does not intend the competitive checklist to be a limitation on the interconnection requirements contained in section 251. Rather, the Committee intends the competitive checklist to set forth what must, at a minimum, be provided by a [BOC] . . . before the FCC may authorize the [BOC] to provide in region interLATA services.[99/]

The principal sponsor of the Senate bill, Senator Pressler, described the relationship between the checklist and the general unbundling provision in similar terms:

> The competitive checklist . . . is intended to be a current reflection of those things that a telecommunications carrier would need from a [BOC] in order to provide a service such as telephone exchange service or exchange access service in competition with the [BOC]. This competitive checklist can best be described as a snapshot of what is required for these competitive services now and in the reasonably foreseeable future. In other words, these provisions open up the local loop from a technological standpoint as [current section 253] opens up the local loop from a legal barrier to entry standpoint. Section 251's "minimum [interconnection and unbundling] requirements" permit regulatory flexibility and are not limited to a "snapshot" of today's technology or requirements.[100/]

Plainly, the Senate contemplated that the Commission would have the authority under section 251 of the Senate bill to prescribe unbundling obligations for ILECs that exceed those that the

---

99/ SENATE REPORT at 43.

100/ 141 Cong. Rec. S8469 (daily ed. June 15, 1995).

competitive checklist mandated for the BOCs. If the Senate intended for the Commission to have that broader authority under section 251, it follows that the Senate must have meant for the Commission to have the lesser implied power to impose the checklist's unbundling requirements on all ILECs.

The language and structure of the House and Senate bills thus substantiate the view that the Commission has authority under section 251(c)(3), at a minimum, to require ILECs to give competitors unbundled access to any network elements listed in the bills' respective competitive checklists. In the absence of evidence to the contrary, one must assume that the House and Senate conferees incorporated that common understanding into the compromise bill that became the 1996 Act.

The BOCs find that evidence in the fact that the section 271 checklist contains both a cross-reference to the general unbundling requirements in section 251(c)(3) and the requirement that a BOC provide several specified network elements.[101/] Why would Congress do that, they ask, if not to indicate that "a proper application of sections 251 and 252 might not yield the unbundling of *all* network elements that Congress thought necessary" under section 271?[102/] The companies answer their own question, however, when they note Congress' understanding that a BOC could have applied for section 271 relief before the

---

101/ *See* 47 U.S.C. § 271(c)(2)(B)(ii), (iv)-(vii), (x) (Supp. II 1996).

102/ US West Comments at 20 (emphasis in original). *See* Ameritech Comments at 51.

Commission issued its rules implementing the market-opening requirements of section 251(c).[103/] To foreclose the possibility that BOCs could gain interLATA entry before fully opening their local markets, Congress likely intended the specific items listed in the checklist to serve as a minimum threshold for interLATA entry pending Commission action under section 251(c)[104/]

Thus, the preferred reading of section 251 and 271 is that the Commission has authority, at a minimum, to designate the elements identified in the competitive checklist as UNEs under section 251(c)(3).[105/] Further, Congress' conclusion that provision of "checklist UNEs" is essential to "open up the local loop [to competitive entry] from a

---

103/ *See* Ameritech Comments at 51; SBC Comments at 9.

104/ The BOCs also argue that if Congress had wanted to create a minimum list of UNEs, it would have done so in section 251(c)(3), which applies to all ILECs, rather than section 271, which pertains only to the BOCs. *See, e.g.*, Ameritech Comments at 50-51; Bell Atlantic Comments at 19. On the other hand, because the checklist was meant to specify the minimum standards that a certain group of firms -- the BOCs -- must comply with in order to gain a particular form of regulatory relief -- freedom to offer interLATA services -- it makes sense to include that specification in the provision of the 1996 Act that governs the granting of such relief to those carriers -- section 271. That would be true even if the checklist requirements were intended to have more general applicability. Congress also may have opted for a general statement of the ILECs' unbundling obligations in section 251(c)(3) out of concern that a listing of particular UNEs, even coupled with more general unbundling language, could create an inference that the Commission had only limited authority to designate others. *Cf. United States v. Espy*, 145 F.3d 1369, 1371 (D.C. Cir. 1998) ("Where a general term follows a list of specific terms, the rule of *ejusdem generis* limits the general term as referring only to items of the same category.").

105/ NTIA believes that the Commission's authority to designate particular UNEs also gives it considerable latitude in defining the scope of the ILECs' unbundling obligations with respect to that network element. Thus, for example, the Commission's power to identify loops as UNEs carries with it the authority to indicate which loops must be provided and how. *See, e.g.*, *First Section 706 Order*, 13 FCC Rcd at 24036-24038, 24079-24080, ¶¶ 52-56, 152-153.

technological standpoint" strongly suggests that those elements should also be designated under 251(c)(3) which, after all, is designed to serve the same market-opening purposes. The Commission must "consider" that as it applies section 251(c)(3) and section 252(d)(2) to determine what network elements should be made available nationally.

NTIA believes that the place to start in compiling a national UNE list is with the elements that are either specifically mentioned in the competitive checklist or are logically related to them. The seven items identified in the *Local Competition Order* satisfy that standard. Five of those elements -- loops, local switching, interoffice transmission facilities, signaling and call-related databases, and operator services and directory assistance -- are checklist items.[106/] A sixth element -- the network interface device -- is properly considered part of the loop and should be provided on an unbundled basis whenever the loop itself must be unbundled.[107/] Finally, even ILECs concede that CLECs must have unbundled access to ILEC operations support systems because those systems are the irreplaceable mechanism by which CLECs obtain the UNEs to which they are entitled.[108/]

The Commission could reasonably require that those seven items must be made available immediately nationwide, without any need for subsequent proceedings, either at the Federal or State level, to confirm that those UNEs satisfy the "necessary" and "impair" test or

---

106/ 47 U.S.C. § 271(c)(2)(B)(iv)-(vii), (x) (Supp. II 1996).

107/ *See* US West Comments at iii.

108/ *See, e.g.*, GTE Comments at 71; SBC Comments at 56. *See also* Comments of the Iowa Utilities Board at 7 (Iowa Comments).

the other requirements of the 1996 Act. In concluding that the listed items are necessary to open the local exchange network to competition, Congress arguably applied the statutory standards, determined that the items specified complied with those requirements, and therefore required their provision on an unbundled basis.[109/] Alternatively, as the comments in the local competition rulemaking and this proceeding demonstrate, the Commission can readily conclude that, for the foreseeable future, nationwide provision of the seven UNEs identified in the *Notice* satisfies the general requirements of section 251(c)(3) and any reasonable construction of section 251(d)(2).[110/]

B. A "Best Practices" Model for Additions to the National UNE List

Although the 1996 Act charges the Commission, at least in the first instance, with determining which network elements should be unbundled,[111/] the statute also expressly preserves State commissions' authority to impose additional access requirements that are

---

109/ *See* Comments of Qwest Communications Corp. at 56-57 (Qwest Comments).

110/ *See, e.g.*, Comments of AT&T Corp. at 59-136; Comments of the Competitive Telecommunications Ass'n at 30-47; Comments of the Illinois Commerce Commission at 11-14 (Illinois Comments); Iowa Comments at 6-9; Comments of MCI WorldCom, Inc. at 37-84; Qwest Comments at 56-88.

If the Commission is reluctant to mandate nationwide availability of the seven UNEs, it should at least create a presumption that all ILECs must offer those elements everywhere upon request. *See* Comments of the New York Department of Public Service at 2. ILECs would then have an opportunity in specific arbitrations to demonstrate by clear and convincing evidence that an item on the presumptive national list should not be made available to a requesting CLEC because such provisioning would not meet the requirements of sections 251(c)(3) and (d)(2), as construed herein.

111/ 47 U.S.C. § 251(d)(2) (Supp. II 1996).

consistent with the Federal regime.[112] Although the specification of a minimum national set of UNEs has many benefits, it also has limitations. Most important is the risk that over time, the national minimums might become a ceiling, or a shield that ILECs can use to ward off additional unbundling obligations until the Commission moves to expand the national norms.[113]

For that reason, NTIA commends the Commission's decision to continue to permit State commissions to add network elements to the Commission's minimum national list.[114] State commissions ought to be allowed to specify additional UNEs, at a CLEC's request, if the CLEC can demonstrate that requiring unbundled access to that network element would satisfy the statutory requirements. If, however, (1) a State commission orders an ILEC to provide a particular UNE, or (2) an ILEC voluntarily agrees to provide it, the Commission should create a rebuttable presumption that such UNE should be made available nationwide.

112/ *Id.* § 251(d)(3).

113/ *See* NTIA Reply Comments at 9. *See also* NTIA July 17 Letter at 14 (suggesting that this problem has arisen as a result of the Commission's collocation policies).

114/ *Notice* ¶ 14. On the other hand, if the Commission has mandated that one or more UNEs be provided nationwide, as NTIA believes that it should, the Commission should not permit State commissions to remove items from that list. *Id.* ¶ 38. The statute would seem to bar State commission from doing so on their own initiative. Section 251(d)(3) authorizes State commission to prescribe additional unbundling obligations on ILECs only if those requirements (1) are consistent with section 251 and (2) and "do[] not substantially prevent implementation" of section 251 and its underlying purposes. 47 U.S.C. § 251(d)(3)(B), (C) (Supp. II 1996). In order for the Commission to designate a UNE for provisioning nationwide, it must determine that such action is consistent with the statute and its goals. The plain language of section 251(d)(3) would thus bar State rulings to the contrary. Further, even assuming the Commission has authority to delegate to the States its power to remove UNEs from the national list, there are sound policy reasons why it should not exercise that authority. *See* Illinois Comments at 3-4.

The burden would then be on the ILEC to show that the provision of that UNE to another CLEC or in another jurisdiction or geographical area would be inconsistent with the terms of the Act and the Commission's implementing regulations. NTIA believes that this "best practices" framework would bring the combined expertise of Federal and State regulators to bear on the question of which unbundling requirements can best promote the procompetitive goals of the 1996 Act. As importantly, it would create a dynamic process that would allow developments throughout the industry to drive unbundling policies forward.[115/]

V. THE COMMISSION SHOULD ESTABLISH PROCEDURES AND STANDARDS FOR REMOVING UNBUNDLING OBLIGATIONS WHEN THEY BECOME UNNECESSARY.

Although Congress imposed broad-ranging unbundling obligations on ILECs, it did not require that those obligations be either immutable or perpetual. As the market-opening provisions of the 1996 Act succeed in stimulating more and more competition, the point may come when the costs of the unbundling (which are not insignificant) outweigh the incremental benefits. NTIA therefore believes that the Commission should establish procedures and standards for modifying the unbundling requirements under appropriate circumstances.

The Commission should not, however, "sunset" those obligations upon the mere passage of time.[116/] Indeed, it lacks authority to do so. The text of the 1996 Act reveals

---

115/ The Commission should reinforce the process by revisiting its national minimum requirements periodically.

116/ *See Notice* ¶ 39. *See also* GTE Comments at 91-94 (requirements should sunset in two years); USTA Comments at 17 (same).

that when Congress wished to impose an obligation only for a period of months and years, it knew how to draft the appropriate sunset language.[117/] The absence of a sunset provision in section 251 can only mean that Congress did not want one.[118/]

Section 10 of the Communications Act does give the Commission broad discretion to forbear from applying any provision of the Act if it determines that continued enforcement of that provision is not necessary to (1) ensure just, reasonable, and nondiscriminatory charges and practices, (2) protect consumers, and (3) promote the public interest.[119/] The only specific limitation on the Commission's forbearance authority under section 10 appears in subsection (d), which provides that "the Commission may not forbear from applying the requirements of section 251(c) and 271 . . . until it determines that those requirements have been fully implemented."[120/] The *Notice* solicits comments on the meaning of that provision and the extent to which it may constrain the Commission's ability to limit the section 251(c) unbundling requirements for ILECs.[121/]

117/ *See, e.g.*, 47 U.S.C. §§ 272(f), 273(d)(6), 274(g)(2) (Supp. II 1996).

118/ *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

119/ 47 U.S.C. § 160(a) (Supp. II 1996).

120/ *Id.* §160(d).

121/ *Notice* ¶ 40. Section 10(d) was also the subject of considerable debate in the Commission's recent section 706 proceeding. *See First Section 706 Order*, 13 FCC Rcd at 24044-24048, ¶¶ 69-79.

The text of section 10(d) does not reveal its meaning, and the associated legislative history simply paraphrases the text.[122/] On the other hand, the statute does suggest what it does not mean. Section 10 cannot reasonably be read to permit forbearance from applying section 251(c) to follow automatically from a BOC's compliance with section 271 and its entry into the interLATA market.[123/] Section 10(d) excuses Commission enforcement of sections 251(c) and 271 only if the Commission determines that "those requirements have been fully implemented." It does not say that implementation of one provision warrants nullification of the other.[124/] Section 271, moreover, requires at most only modest local competition as a precondition for interLATA entry.[125/] Consequently, the level of competition that would warrant grant of a BOC application under section 271 would not be sufficient, in most instances, to justify forbearance under section 10.[126/]

122/ *See* CONFERENCE REPORT, at 185, 1996 U.S.C.C.A.N. at 198; SENATE REPORT, at 50.

123/ *See Notice* ¶ 37. Conversely, a Commission decision pursuant to section 10 to refrain from applying a section 251(c) requirement cannot reduce a BOC's obligation to comply fully with section 271 in order to gain interLATA entry. *See, e.g.*, 47 U.S.C. § 271(d)(4) (Supp. II 1996) ("Commission may not, by rule *or otherwise*, limit or extend" the section 271 competitive checklist) (emphasis added). *See also* Letter from Larry Irving, NTIA, to Chairman William Kennard, CC Docket No. 98-147, at 6 n.26 (Jan. 11, 1999) (NTIA January 11 Letter).

124/ This conclusion is consistent with Congress' understanding that while section 271 sets the minimum prerequisites for BOC provision of in-region interLATA services, section 251 establishes broader interconnection obligations that would continue even after interLATA entry. *See* notes 99-100 and accompanying text.

125/ *See, e.g.*, Office of Policy Analysis and Development, National Telecommunications and Information Administration, *Section 271 of the Communications Act and the Promotion of Local Exchange Competition* 35-38 (NTIA Staff Working Paper Jan. 1998).

126/ Of course, if a BOC's interLATA application is granted, and includes the presence of robust competition in a portion of a State, grant of that application could provide the

(continued...)

Section 10(d), however, does not preclude the Commission from taking reasonable steps to loosen the ILECs' unbundling obligations under section 251(c) in appropriate circumstances. NTIA has argued, for example, that the Commission could relax unbundling requirements with respect to advanced data services such as DSL if it found that ILECs are giving competitors "timely and nondiscriminatory access to *all* of the network elements that they need to deploy competitive services."[127/] NTIA recommends that the Commission explore further the scope of its forbearance authority, with a view towards identifying the conditions under which it would be appropriate to forbear from applying the unbundling requirements in section 251(c)(3).

An important aspect of that inquiry is how the Commission should exercise whatever forbearance authority it might possess. NTIA suggests that the Commission establish a forbearance process that will permit relaxation of section 251 unbundling requirements when market conditions warrant. One possible approach would be to allow greater flexibility in pricing particular UNEs, rather than attempt to determine which portions of the ILECs' networks should no longer be identified as UNE. As more and more UNEs become available from non-ILEC sources, market forces should exert downward pressures on the prices for those UNEs, thereby reducing the need for strict price regulation of UNEs provided by

---

126/ (...continued from preceding page)
Commission with a basis for forbearing from enforcing section 251(c)(3) obligations in that same part of the State.

127/ NTIA January 11 Letter at 6 (emphasis in original). *See also* NTIA July 17 Letter at 8-11.

ILECs.[128/] Appropriate price signals are essential if CLECs are to make efficient and socially beneficial choices among the entry choices made available to them by the 1996 Act. Pricing of telecommunications services is a complex process that may not produce rates that replicate the prices that would prevail in a competitive market. NTIA therefore recommends that, when circumstances justify forbearance, the Commission consider reducing the ILECs' unbundling responsibilities under the Act by relaxing the pricing standards applicable to UNEs.

As for the circumstances that could justify forbearance, the Commission should seek to craft standards that are clear, certain, and predictable. ILECs and CLECs alike must be able to determine what level of unbundling is required/available in particular markets so that they can rationally plan their businesses. In NTIA's view, the essential precondition for forbearance is the presence within the relevant market area of sufficient competition to ensure that loosening of the unbundling requirements will not harm competition or consumers. The comments in this proceeding have identified a number of factors that should be considered in determining whether adequate competition exists. The most important of those factors

---

128/ It is also worth noting, in this regard, that the ILECs' objections to the Commission's unbundling rules appear to stem not from unbundling *per se* but rather from unbundling at TELRIC-mandated rates. *See, e.g.*, Ameritech Comments at 24, 26; Bell Atlantic Comments at 10, 11, 13; SBC Comments at 5, 6. *See also Iowa Utils. Bd.*, 120 F.3d at 816 (ILECs' arguments against Commission's unbundling rules "are generally based on the assumption that [those rules] would operate in conjunction with the Commission's proposed pricing rules"). It also may be no accident that Justice Breyer's criticisms of the Commission's unbundling regime immediately followed his expressed reservations about the pricing methodology selected. *AT&T Corp.*, 119 S.Ct. at 752-754 (Breyer, J., concurring in part and dissenting in part).

concerns supply conditions within the relevant market: Whether there are non-ILEC suppliers of UNEs in the market; Whether those suppliers have facilities in those parts of the market where CLECs seek to offer service; Whether alternative suppliers are willing and able to supply the UNEs that CLECs request and in sufficient quantities to enable competitors to deploy their desired services to their chosen customer base;[129/] Whether the costs, quality, and provisioning intervals of those UNEs comparable to elements obtainable from the serving ILEC.

The Commission cannot reasonably determine the state of competition in the market by simply counting the number of competitors. In particular, the presence of a single competitive provider of a particular UNE cannot *ipso facto* justify relaxation of an ILEC's obligation to provide that UNE upon request, as most ILECs contend.[130/] The operative principle cannot be: If one CLEC provides its own element somewhere within a market area, other CLECs must do so everywhere. That is not only antithetical to basic notions of competitive markets, but also is inconsistent with Congress' conclusion that UNEs are a

---

129/ The Commission should bear in mind that some competitors may choose not to make their facilities available to other competitors to forestall the removal of unbundling obligations on the serving ILEC. Where such regulatory gamesmanship occurs, the Commission should not allow it to influence the Commission's forbearance analysis.

130/ *See, e.g.*, Bell Atlantic Comments at 14 ("fact that at least one competitor is using its own element to provide competing telecommunications service is sufficient proof that it can be done and that competitors do not need that element from incumbents"); USTA Comments at 33 ("[i]f at least one CLEC is supplying the element in question," ILECs should not be required to furnish it); US West Comments at 12 ("[e]vidence that one or more CLECs are obtaining an element in a geographic market from non-ILEC sources conclusively demonstrates that mandatory unbundling of that element is not appropriate in that market").

necessary springboard for competitive entry because the costs of facilities-based entry are excessive for most new providers.[131/]

On the other hand, if in serving a particular market segment or customer group (*e.g.*, business subscribers), a significant number of CLECs (*e.g.*, three or more in addition to the serving ILEC) are providing a certain network element on a facilities-basis within a market area, one may question whether society should continue to incur the costs involved in ensuring that those elements are also available from an ILEC. Linking forbearance to the presence of multiple self-providing CLECs will provide greater assurances that removal of the ILECs' unbundling obligations for specific UNEs will not occur without evidence that self-provisioning is a feasible option for a variety of CLECs, not simply the largest or best-capitalized. Requiring multiple CLECs may also increase the likelihood that a wholesale market for particular UNEs will arise before the ILECs' duty to provide them terminates.

Another important part of the foregoing competition analysis is the availability of reasonable and timely collocation opportunities for CLECs. CLECs' ability to acquire certain UNEs from non-LEC sources will not enable CLECs to provide competing telecommunications services unless they can connect those self-provided elements to the

---

131/ *See, e.g.*, CONFERENCE REPORT, at 148, 1996 U.S.C.C.A.N. at 160 ("it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant"); HOUSE REPORT, at 49, 1996 U.S.C.C.A.N. at 13 ("inability of other service providers to gain access to the local telephone companies equipment inhibits competition that could otherwise develop in the local exchange market").

UNEs that they must obtain from the ILECs. Collocation -- whether physical or virtual -- is the congressionally designated mechanism by which CLECs gain access to ILEC network elements.[132/] Consequently, the Commission should not grant any ILEC forbearance petition unless the ILEC demonstrates that it is in full compliance with its collocation obligations under the 1996 Act, the Commission's regulations, and any State commission requirements.

132/ *See* 47 U.S.C. § 251(c)(6) (Supp. II 1996). Congress concluded that collocation was necessary to ensure reasonable and nondiscriminatory access to ILECs' networks because "the risk of discriminatory interconnection grows the farther one gets away from the [ILEC] central office." HOUSE REPORT, at 73, 1996 U.S.C.C.A.N. at 39. The statute plainly makes virtual collocation the preferred alternative when demonstrated space limitations prevent the ILEC from providing physical collocation.

VI. CONCLUSION

For the foregoing reasons, NTIA respectfully requests that the Commission adopt the recommendations contained herein.

Respectfully submitted,

Larry Irving
Assistant Secretary for
Communications & Information

Kelly Levy
Acting Associate Administrator
Alfred Lee
Tim Sloan
Office of Policy Analysis
and Development

Kathy Smith
Acting Chief Counsel

Milton Brown
Attorney

National Telecommunications
and Information Administration

U.S. Department of Commerce
Room 4713
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230
(202) 482-1816

August 2, 1999