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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport	)	

JOINT COMMENTS OF BROADSLATE NETWORKS, INC., NETWORK PLUS, INC., RCN TELECOM SERVICES, INC., AND TELERGY, INC.

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EXECUTIVE SUMMARY

In November, 1999, after applying its impair test and considering all other relevant factors, the FCC determined that incumbent local exchange carriers ("ILECs") must unbundle loops and transport, including high-capacity loops and transport. The FCC also found that in order to provide certainty for competitors purchasing unbundled network elements ("UNEs"), building a business plan, and seeking capital for those plans, it would not revisit this determination for three years.

By filing their Petition a mere 14 months after being required to make some of the new UNEs available, RBOC Petitioners are requesting, in substance, reconsideration of the triennial UNE review process. Because periodic *ad hoc* review of the national UNE list was considered and rejected in the *UNE Remand Order*, RBOC Petitioners' request is untimely filed. The FCC should have exercised its discretion not to place the Petition on public notice. Since it was placed on public notice, the FCC should now affirmatively reject and refuse to entertain the Petition, or any similar petitions to reduce elements subject to unbundling. The FCC should follow the triennial review rule it adopted in the *UNE Remand Order*.

Even if the FCC determines it is appropriate to consider the Petition, it cannot find in favor of RBOC Petitioners. RBOC Petitioners purport to apply the FCC's "impair" test to the "factual" information they contend has changed dramatically in the 20 months since the *UNE Remand Order* was released. But rather than relying on factual information gathered directly from LECs and reported by the FCC, the Petition largely relies on third-party sources; selected quotes from securities filings, press releases and court cases; and anecdotal information as supporting "evidence." One such third-party

source is the United States Telecom Association ("USTA") Report prepared by an attorney. This so-called "Fact Report" is riddled with analytical errors. It overstates the availability of alternative fiber facilities by failing to distinguish between long-haul and local facilities and counting fiber that is not actually available. It overstates the number of buildings served by CLECs by double counting buildings served by more than one LEC and undercounting the total number of buildings containing potential customers for high capacity services. Finally, it understates the number of potential customers for high capacity services by drawing inappropriate analogies to RBOC special access services. The Petition also grossly understates the cost and time it takes to deploy alternative loops and dedicated transport, two of the key factors the FCC cited in the *UNE Remand Order* as reasons for requiring the unbundling of those elements.

In addition to relying on analytically flawed "facts," RBOC Petitioners recycle many of the arguments presented to and rejected by the FCC in the *UNE Remand Order*. As noted above, they draw comparisons between special access and UNEs that the FCC has already rejected. They also claim the wire-center-by-wire center ubiquity analysis for dedicated transport required by the *UNE Remand Order* is unnecessary. From the existence of some alternative transport and high capacity loops, they extrapolate the ubiquitous availability of alternatives to those elements. While denying competitive fiber providers access to their central offices, they claim that the existence of such fiber "nearby" those offices is sufficient evidence of alternatives. RBOC Petitioners ignore the fact that without access to ILEC transport, enhanced extended loops will disappear too. They also conveniently omit to mention that if their Petition is granted and alternative high capacity loops and transport are not available, they will be able to increase their

competitors' costs (if their competitors are still in business) at least five-fold by selling special access services instead of UNEs.

RBOC Petitioners' impair test argument shows the absurdity of their fallback argument. On the one hand, they argue that CLECs are not impaired without access to high capacity loops and dedicated transport. On the other hand, they argue that these elements should not be unbundled because unbundling discourages facilities-based competition. While RBOC Petitioners' statistics are not reliable, it is clear that facilities-based competition is developing in local markets. If the FCC were to grant the Petition and remove dedicated transport and high capacity loops from the list of network elements that must be unbundled, it is also clear that competition in local markets would suffer. Joint Commenters, who together serve small and medium business and residential customers in tier I, II, III, and IV cities and the suburbs, would be materially impaired in their ability to serve many of their customers and may be forced to discontinue providing service to some of their customers altogether if the Petition were granted. The FCC should categorically reject the Petition and make clear that when it begins the triennial UNE review, it will follow the precedent set forth in the *UNE Remand Order* and rely on market information that is based in fact and not conjecture and innuendo.

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JOINT COMMENTS OF
BROADSLATE NETWORKS, INC., NETWORK PLUS, INC.,
RCN TELECOM SERVICES, INC., AND TELERGY, INC.

Broadslate Networks, Inc. ("Broadslate"), Network Plus, Inc. ("Network Plus"), RCN Telecom Services, Inc. ("RCN"), and Telergy, Inc. ("Telergy") (together, "Joint Commenters"), pursuant to the Public Notice issued April 23, 2001,[1] file these comments in opposition to the Petition of BellSouth, SBC, and Verizon (together, "RBOC Petitioners") for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport ("Petition").

I. Joint Commenters' Interest in the Proceeding

Joint Commenters are competitive local exchange carriers ("CLECs") that provide telephone and other telecommunications services to customers using unbundled local loops, including high capacity loops, and dedicated interoffice transport purchased from incumbent local exchange carriers ("ILECs"). If the FCC were to grant the Petition and remove dedicated transport and high capacity loops from the list of network elements that must be unbundled, Joint

[1] *Common Carrier Bureau Grants Motion for Extension of Time for Filing Comments and Reply Comments* on *BOC Joint Motion Regarding Unbundled Network Elements*, CC Docket No. 96-98, DA 01-1041 (rel. April 23, 2001).

Commenters would be forced to discontinue providing service to many of their customers. As such, Joint Commenters have a direct and substantial interest in this proceeding.

Broadslate provides broadband Internet access and high speed data communications services to small and medium sized businesses in tier II, III, and IV cities. Broadslate is focused on deep market coverage in 50 current/future markets in ten Mid-Atlantic and Southeast states. Broadslate utilizes symmetrical digital subscriber line ("SDSL") and DS1 high capacity circuits to provide service to its customers. As shown in the attached declaration of Tom Whitaker, Vice President of Operations, Broadslate uses DS1 loops to reach customers and high capacity transport obtained from ILECs to connect its hundreds of ILEC central office collocation arrangements. In almost every case, the ILEC is the only source of these loop and transport facilities in the markets in which Broadslate operates and self-provisioning of high capacity loop and transport facilities is not economically justified.[2] Accordingly, Broadslate would be unable to provide its services without unbundled access to ILEC high capacity loops and transport.

Network Plus is an established integrated competitive local exchange and interexchange service provider headquartered in Randolph, Massachusetts. Founded in 1990, Network Plus began as a provider of long distance service. Following the 1996 Act, Network Plus expanded its service offerings and began to provide service as a facilities-based CLEC. Network Plus is now an integrated communications provider of local and long distance voice and data services. Network Plus serves over 50,000 customers, mostly small and medium-sized businesses, representing in excess of 192,000 local and 285,000 long distance access lines. Network Plus typically enters a local market by using the unbundled network element platform ("UNE-P") or, where UNE-P is not available, by reselling the services of the ILEC, and later migrates its

[2] Broadslate Declaration at ¶¶ 3-4.

customers to unbundled local loops connected to its switches or Network Plus' loop facilities. Network Plus believes that operating its own network results in higher long-term operating margins, greater control and enhanced service quality. Network Plus owns over 25,973 long-haul and metropolitan fiber miles in its target markets. At this time, however, Network Plus still relies heavily on unbundled local loops, including high capacity loops, and unbundled dedicated interoffice transport purchased from ILECs to serve the majority of its customers. In the attached Declaration of Lisa Korner Butler, Vice President Regulatory and Industry Relations, Network Plus provides information concerning its network and operations in order to assist the FCC in evaluating the facts relevant to this proceeding. As Network Plus' Declaration and these comments show, the "evidence" in the Petition is flawed and CLECs would be impaired without access to unbundled high capacity loops and dedicated transport.

RCN's parent corporation, RCN Corporation (Nasdaq: RCNC), is the nation's first and largest facilities-based competitive provider of bundled phone, cable and high speed Internet services delivered over its own fiber-optic local network to consumers in the most densely populated markets in the U.S. RCNC has more than one million customer connections and provides service in the Boston, New York, Philadelphia, Lehigh Valley, Chicago, San Francisco, Los Angeles, and Washington D.C. metropolitan markets.

RCNC's Megaband(TM) Network is a unique broadband fiber-optic platform capable of offering a full suite of communications services – including fully featured voice, video and high-speed Internet – to residential customers. The network employs SONET ring backbone architecture, and localized nodes built to ensure RCNC's state-of-the-art fiber optics travel to within 900 feet of RCNC customers, with fewer electronics and lower maintenance costs than existing local networks. RCNC's high-capacity local fiber-optic networks target densely populated areas

comprising 44% of the U.S. residential communications market spread over just 6% of its geography. Joseph Kahl, Directory of Regulatory Affairs for RCN also provides a Declaration concerning RCN's network and operations in support of these Comments.

Telergy, Inc., through its operating subsidiaries, is a facilities-based provider of advanced optical network solutions in the northeastern United States and Canada. Telergy's "OpticalNet" suite of services is delivered over its network which integrates last-mile private network builds with local metropolitan rings and long distance telecommunications facilities. Telergy is building its network on contiguous rights-of-way in its region, primarily using access rights granted by major utility companies.

II. Background

RBOC Petitioners ask the FCC to remove high-capacity loops[3] and all dedicated transport,[4] including dark fiber,[5] from the list of UNEs that ILECs must lease to CLECs at cost-based

[3] Although RBOC Petitioners seek to remove "high-capacity loops" from the UNE list, they do not cite a specific rule that defines which loops they seek to exempt from unbundling obligations. The FCC rule governing unbundling of the local loop (47 C.F.R. § 51.319(a)(1)) defines the local loop element as follows:

> a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. The local loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to, *dark fiber*, attached electronics (except those electronics used for the provision of advanced services, such as Digital Subscriber Line Access Multiplexers), and line conditioning. *The local loop includes, but is not limited to, DS1, DS3, fiber, and other high capacity loops.*

(Emphasis supplied.) Since the applicable rule refers to dark fiber as a category separate from "DS1, DS3, fiber, and other high capacity loops," and RBOC Petitioners have only identified "high capacity loops" in their Petition, if the Commission determines it is appropriate to consider the Petition (*see* Section III, below), it should require RBOC Petitioners to amend their Petition if they seek to end the unbundling requirements for dark fiber loops.

[4] FCC rules define dedicated transport as "incumbent LEC transmission facilities, including all technically feasible capacity-related services including, but not limited to DS1, DS3, and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers." 47 C.F.R. § 51.319(d)(1)(A).

[5] FCC rules define dark fiber transport at "incumbent LEC optical transmission facilities without attached multiplexing, aggregation or other electronics." 47 C.F.R. § 51.319(d)(1)(B).

rates under Sections 251(c)(3) and 252(d)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"). The Petition defines "high capacity" as any facility at a DS-1 speed and higher.

In the *UNE Remand Order*,[6] the FCC determined that loops and transport are non-proprietary UNEs and therefore applied the "impair" test (but not the "necessary" test) to determine whether ILECs should be required to provide loops and transport as UNEs at cost-based rates. The FCC described the impair test in the *UNE Remand Order*:

> We conclude that the failure to provide access to a network element would "impair" the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer.[7]

As part of this fact-intensive inquiry, the FCC considers the totality of circumstances and evaluates cost, timeliness, quality, ubiquity, and operational factors.[8] Alternatives to ILEC-provided UNEs must be "actually available" (as opposed to "theoretically available") whether through self-provisioning or third parties.[9]

The FCC also considers other factors when determining whether a particular element should be unbundled. These other factors include how best to promote the rapid introduction of competition, facilities-based competition, investment, and innovation; how to reduce regulation

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[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) ("*UNE Remand Order*"), *review pending sub nom. United States Telecom Ass'n et al. v. FCC*, Nos. 00-1015 & 00-1025 (D.C. Cir.).

[7] *UNE Remand Order* at ¶ 51.

[8] *Id.*

[9] *Id.*

where it is unnecessary; how to promote certainty in the market; and whether the rules it adopts are practical to administer. In November, 1999, after applying its impair test and considering all other relevant factors, the FCC determined that ILECs must unbundle loops and transport, including high-capacity and dark fiber loops and transport.[10] The FCC also found that in order to provide certainty for competitors purchasing UNEs, building a business plan, and seeking capital for those plans, it would not revisit this determination for three years.[11]

RBOC Petitioners contend that the world has changed dramatically in the 20 months since the FCC issued its *UNE Remand Order*. Relying on a "factual" report prepared by outside counsel for the United States Telecom Association ("USTA"), RBOC Petitioners argue that alternatives to dedicated transport and high capacity loops are "actually available" and that removing these elements from the UNE list would not "materially impair" a CLEC's ability to provide telecommunications services. Although they disagree with the FCC's interpretation of the "impair" test required by Section 251(d)(2), RBOC Petitioners purport to apply that test[12] to evaluate the "factual" information presented in the USTA Report. For instance, RBOC Petitioners allege that alternative fiber reaches approximately one out of every four commercial buildings in the country, there are 635 fiber networks owned by non-ILEC providers, CLECs have access to 218,000 non-ILEC fiber miles, alternative fixed wireless providers have "proliferated," the existence of carrier hotels minimizes the need for ILEC transport facilities, and the high collocation levels in BOC central offices show that dedicated transport facilities are ubiquitously

[10] *Id.* at ¶¶ 162-201, 322-68.

[11] *Id.* at ¶ 151.

[12] *See, e.g.,* Petition at 18 ("the UNE Remand Order appears to have been predicated on a fundamental misunderstanding of the ILEC's networks").

available where demand is likely.[13] RBOC Petitioners further assert that the costs of deploying fiber are "manageable"[14] and the time it takes to deploy fiber has significantly decreased since November, 1999.[15] RBOC Petitioners allege that taken together, their "factual" information shows alternatives to ILEC-provided dedicated transport and high-capacity loops are "actually available" on a timely and cost-effective basis. Thus, they argue, the existence of these alternatives precludes the FCC from requiring ILECs to unbundle these network elements. RBOC Petitioners' fallback argument is that even if these network elements continue to meet the impair test, they should be removed from the UNE list because of other policy considerations, such as promoting facilities-based competition in the local exchange market.

As shown below, however, the Petition does little more than repackage and trivially "update" data that the FCC previously rejected as irrelevant to the question of whether CLECs are impaired without access to ILEC loops and transport. Further, the principal "evidence" developed in the USTA Report – the extent of competitive local fiber deployment and the number of CLEC "on-net" buildings – is grossly inaccurate. For these and other reasons explained herein, the FCC should reject the Petition.

III. <u>The FCC Should Reject the Petition As An Untimely Request for Reconsideration</u>

In the *UNE Remand Order*, the FCC considered and rejected proposals to entertain *ad hoc* petitions such as the one filed by RBOC Petitioners to "de-list" UNEs.[16] Instead, the FCC determined it would review the national list of UNEs every three years,[17] and explicitly consid-

[13] *See, e.g.*, Petition at 3-5.

[14] Petition at 14.

[15] Petition at 25-27.

[16] *UNE Remand Order* at ¶¶ 148-52.

[17] *Id.* at ¶ 151.

ered and rejected alternative proposals that ranged from two years to five.[18] Acknowledging the rapid changes in technology, competition, and the economic conditions of the telecommunications market,[19] the FCC nevertheless determined that a triennial review process was appropriate and could begin after approximately two years of experience in order to be completed within the three-year interval.[20] Although petitions for review of the *UNE Remand Order* are pending on appeal before the U.S. Court of Appeals for the District of Columbia Circuit and parties have challenged whether certain network elements must be unbundled, no party has challenged the FCC's adoption of the triennial UNE review rule.

In an effort to circumvent both the judicial review process and the triennial UNE review rule, RBOC Petitioners request FCC "action" on the basis of changed circumstances. It is telling that RBOC Petitioners do not cite the procedural rule under which they assert that the FCC may take action on their Petition. RBOC Petitioners have not styled their Petition as a request for rulemaking, declaratory ruling, forbearance,[21] or waiver. In its Motion to Dismiss (filed April 25, 2001), NewSouth Communications persuasively argues why the FCC should dismiss the Joint Petition for failing to comply with the FCC's procedural rules. Joint Commenters support NewSouth's motion and submit that there is another reason the FCC should deny the Petition,

[18] *Id.* at ¶¶ 150, n.266, 151, n. 269. The triennial UNE review rule can be contrasted with the FCC's access pricing flexibility rules that permit the RBOC Petitioners to request pricing flexibility at any time. *See* 47 C.F.R. § 1.774.

[19] *UNE Remand Order* at ¶ 148.

[20] *Id.* at ¶ 151, n.269.

[21] In their response to NewSouth's motion to dismiss, RBOC Petitioners contend that the FCC could treat the Petition as a petition for forbearance. To the contrary, the FCC should not treat the Petition as a petition for forbearance because it does not meet the requirements of the FCC's forbearance rules. 47 C.F.R. § 1.53. The FCC should also reject RBOC Petitioners' suggestion that it may forbear from enforcing regulations adopted to implement Section 251(c), notwithstanding that the express terms of Section 10 of the Act prohibit forbearance if Section 251(c) has not been fully implemented. RBOC Petitioners' circular argument is again a thinly veiled attempt to disguise an untimely petition for reconsideration. Unless and until the D.C. Circuit vacates Rule 319, the FCC may not forbear from enforcing it.

independent of NewSouth's motion. By filing their Petition a mere 14 months after being required to make some of the new UNEs available,[22] RBOC Petitioners are requesting, in substance, reconsideration of the triennial UNE review process.[23] Because periodic *ad hoc* review of the national UNE list was considered and rejected in the *UNE Remand Order*,[24] RBOC Petitioners' request is untimely filed.[25] The FCC should have exercised its discretion not to place the Petition on public notice. Since it was placed on public notice, the FCC should now affirmatively reject and refuse to entertain the Petition, or any similar petitions to reduce elements subject to unbundling. The FCC should follow the rule it adopted in the *UNE Remand Order* and begin, in February 2002, gathering information that can be used in a Notice of Proposed Rulemaking for its triennial review, with the goal of concluding the rulemaking by February 2003.

IV. The Commission Cannot Rely on the "Factual" Information in the Petition and USTA Report Because It Is Anecdotal and Contains Significant Analytical Errors

Rather than rely on factual information gathered directly from LECs and reported by the FCC, the Petition largely relies on third-party sources; selected quotes from securities filings,

[22] Although many of the rules adopted in the *UNE Remand Order* became effective on February 17, 2000, some, including dark fiber transport, did not become effective until May 18, 2000. *UNE Remand Order* at ¶ 526.

[23] *See e.g., Federation of American Health Systems Petition for Declaratory Ruling, Or in the Alternative, Petition for Waiver*, 9 FCC Rcd 3303 (1994) (petition for declaratory ruling seeking relief the FCC had considered and rejected in rulemaking one year prior to petition was in substance an untimely petition for reconsideration).

[24] It makes no difference that only one, rather than "numerous," petitions for *ad hoc* review of the list have been filed since the *UNE Remand Order*. In adopting the triennial review process, the FCC rejected *ad hoc* review of any single petition. Further, if the FCC were to grant the Petition, it would surely encourage others to file similar petitions, thus undermining the purpose of the triennial review rule.

[25] The *UNE Remand Order* was published in the Federal Register on January 18, 2000. Under FCC rules, the date of Federal Register publication is the date of public notice. 47 C.F.R. § 1.4(b)(1). Section 405 of the Act provides that a petition for reconsideration must be filed within thirty days of the date of public notice, in this case, February 17, 2000. Because the time period for filing is prescribed by statute, the FCC may not, except in extraordinary circumstances not presented here, waive or extend the filing period.

press releases and court cases; and anecdotal information as supporting "evidence."[26] One such third-party source is the USTA Report prepared by an attorney. This so-called "Fact Report" is riddled with analytical errors. The Report overstates the availability of alternative fiber facilities by failing to distinguish between long-haul and local facilities and counting fiber that is not actually available. It also overstates the number of buildings served by CLECs by double counting buildings served by more than one LEC. Finally, by understating the total number of large commercial buildings in the United States, the Report further overstates the national percentage of CLEC building penetration. In this Section, Joint Commenters note some of the major flaws of the USTA Report and show why the FCC should not rely on it.

The USTA data are derived largely from statistics reported in the *CLEC Report 2001*, prepared by the New Paradigm Resources Group ("NPRG Report"). However, the NPRG data does not measure local fiber deployment, the purpose for which RBOC Petitioners rely on the NPRG Report. The table on which the Petition relies is titled "Size of Competitive Networks – Route Miles," and makes no distinction between local and long-haul fiber. To the contrary, the NPRG data includes both long haul and local fiber in one aggregated measure for several, if not most, of the companies on the list. For example, the NPRG Report states that Winstar is the largest provider of competitive fiber, with 22,000 miles of fiber deployed around the country. However, according to that company's March 10, 2000 Form 10K, only 6,000 miles of these facilities are local, intra-city. The statistics for the second largest provider, McLeodUSA, are also erroneous. The NPRG data indicates that McLeod has deployed 21,622 route miles of fiber.

[26] Even in instances where the ILECs provide statistics from their own operations, they fail to include the level of detail or back-up information necessary to evaluate their claims.

The Company, however, reports that only one-quarter of its total fiber are local facilities.[27] Review of several other companies included in the table suggests that the problem is pervasive. For example, the 16,000 route miles reported for Level 3, cited by NPRG as the eighth largest provider, are intercity miles and do not include *any* local facilities.[28] Similarly, the 1,500 route miles cited for Telergy's network includes substantial long-haul fiber in the total figure.[29] Ignoring these distinctions, RBOC Petitioners repeatedly cite the USTA Report for the proposition that CLECs have deployed 218,000 miles of local fiber that may substitute for unbundled local loops and dedicated transport.

The RBOC Petitioners also exaggerate the availability of wholesale local fiber, claiming that "[i]n the past few years, there has been a dramatic increase in fiber supplied by alternative wholesale suppliers, which typically sell or lease dark fiber to other carriers, but do not themselves engage in the provision of telecommunications services."[30] One need only read the USTA Report carefully to realize that most of these wholesale networks are planned but not yet deployed and those that are operational cover between two and 26 cities, depending on the provider.[31] In Network Plus' experience, these wholesale providers do not have fiber in the markets

[27] *See* http://www.mcleodusa.com/html/ir/presentations.php3 (March 30, 2001 presentation to Morgan Stanley Global Communications Conference – slide titled "One Functional Network) (visited May 30, 2001). One of McLeodUSA's subsidiaries is an incumbent LEC, and it is possible that the NPRG data includes this company's local fiber miles as well.

[28] *See* http://www.level3.com/us/info/network/networkmap (reporting that the company plans to build a 16,000 mile *intercity* network (corresponding to the figure reported by NPRG).

[29] *See* http://www.telergy.net/about_us/network/ (for a map of Telergy's network) and http://www.telergy.net/news_room/detail/index.cfm?pk=314 (for fiber miles).

[30] USTA Report at 14.

[31] *See* USTA Report at 17-20. MFN is operational in 11 cities, Fiberworks in two, Yipes and Telseon in 20, Telergy in four, and NEON in 26.

where Network Plus provides service.[32] In short, most of their alternative fiber is only "theoretically available," not "actually available." Of the nine wholesale providers "profiled" by USTA, three are planning or building networks but do not have them up and running.[33] Furthermore, two of the "wholesalers" USTA cites as providers of alternative facilities – Yipes and Telseon – even according to USTA do not construct any network facilities – they assemble them from other carriers.[34] In addition, many of these providers may also rely on RBOC facilities to complete their networks.[35] Again, notwithstanding the co-mingling of planned and operational fiber, RBOC Petitioners repeatedly rely on the USTA Report as proof that 218,000 miles of fiber is actually available as substitutes for unbundled local loops and dedicated transport. Obviously, RBOC Petitioners' reliance on the USTA Report in this regard is misplaced.

[32] Network Plus Declaration at ¶¶ 6, 9.

[33] *See* USTA Report at 17-20. American Fiber Systems "is *in the process of installing* dark fiber optic rings." Fiber Technologies "*plans* to build over 40 local metro networks." Looking Glass is "currently building" fiber networks in the top 25 markets.

[34] USTA Report at 18-19.

[35] Network Plus Declaration at ¶ 9.

As evidence that alternative high capacity loops are actually available, RBOC Petitioners claim that CLECs "reach" 25 percent of all commercial office buildings.[36] However, as AT&T demonstrated in the EELs proceeding, the USTA Report grossly exaggerated the percentage of "on-net" large office buildings that CLECs serve, both by over-estimating the number of large buildings that CLECs actually serve, and by under-counting the total population of eligible office buildings that are attractive candidates for high capacity facilities.[37]

USTA derives its estimate by adding the number of buildings served by each LEC individually, as reported by NPRG. This use of the NPRG data is inappropriate because it fails to account for the fact that multiple CLECs often serve the same building.[38] USTA assumes that each building "penetrated" by a CLEC is served by that CLEC *only*, which is clearly incorrect. As AT&T explains: "the small number of buildings that are open to competition are often served by multiple competitive LECs."[39] Rather than totaling the number of buildings served by each CLEC, RBOC Petitioners must show how many buildings alternative networks serve. One independent analyst has estimated this number at "roughly 30,000" nationwide, a far cry from the 175,000 claimed by USTA.[40] Furthermore, even if RBOC Petitioners had calculated the numerator and denominator correctly, a network that reaches only 25% of commercial office buildings located solely in downtown metropolitan areas is hardly ubiquitous. Without access to

[36] Petition at 11.

[37] *See* Reply Comments of AT&T Corp. on Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket No. 96-98 (filed April 30, 2001) at 24-26.

[38] *Id.* at 24.

[39] *Id.*

[40] Jonathan Atkin and David Coleman, *City Light: An Investor's Guide to Metropolitan Optical Services* 6 (Dain Rauscher Wessels, March 22, 2001) ("*City Light Investors Guide*").

ILEC loops, CLECs such as Joint Commenters that provide service in suburban areas could be forced to terminate service to their suburban customers.[41]

The UTSA Report also significantly underestimates the number of consumers who are likely candidates for service using high capacity loop facilities. Two analytical flaws undermine the analysis. First, as AT&T points out, the USTA Report underestimates the number of addressable buildings by excluding some buildings categorized as office buildings by the U.S. Department of Commerce.[42] Specifically, the Report excludes all hospitals, schools, restaurants, warehouses and manufacturing facilities from the potential candidates for high capacity services. Since both Network Plus and RCN provide service to customers in these categories,[43] Joint Commenters believe it is inappropriate to exclude these facilities from any calculation of commercial office buildings CLECs would like to serve using DS1 loops, since this erroneously increases the percentage of buildings served by CLEC fiber.

This erroneous calculation of buildings "reached" underscores another flaw in the USTA Report, which permeates the entire Petition. Despite findings by the FCC that such comparisons are inapposite under the impair test,[44] RBOC Petitioners continue to rely on special access data and access pricing flexibility triggers. For instance, by analogy to their special access data, they claim that users of "high capacity" services are exclusively large businesses clustered in a few

[41] Broadslate Declaration at ¶ 3; Network Plus Declaration at ¶ 6.

[42] AT&T EELs Comments at 25-26.

[43] Network Plus Declaration at ¶ 2; RCN Declaration at ¶ 5.

[44] *See e.g., UNE Remand Order* at ¶¶ 131-32 ("It is not appropriate to use these types of [access pricing flexibility] triggers to determine whether alternative sources of network elements are actually available as a practical, economic, and operational matter."); ¶ 185 (using Special Access Pricing Zones to define where loops must be unbundled would give ILECs discretion to define their own 251(c) obligations) and ¶ 341, n.673 (satisfying access pricing flexibility triggers does not mean an element fails the impair test).

downtown office buildings.[45] This in not consistent with Joint Commenters' market experience. For instance, RCN provides service to customers in Allentown, Easton, and Bethlehem, Pennsylvania, in part using high capacity loops and transport purchased from the ILEC.[46] Broadslate provides services to small and medium businesses using DS1 loops in tier II, III, and IV cities such as Hendersonville, North Carolina and Carlisle, Pennsylvania.[47] Network Plus also uses high capacity loops to provide service in its tier II and suburban markets.[48]

The Petition and USTA Report most likely suffer from other significant analytical errors not noted above. Because they contain summary statistics and do not provide the underlying data supporting their conclusions, Joint Commenters have not had a meaningful opportunity to examine and refute all of the conclusions of the Petition and USTA Report.[49] Therefore, the FCC should reject the annecdotal, high-level overview of local competition presented in the Petition. Rather, as it did in the *UNE Remand Order*, the FCC should rely on information reported by individual companies that actually provide service in local markets.

V. CLECs Would Be Materially Impaired without Access to Unbundled High Capacity Loops

The Petition recycles many of the arguments presented to and rejected by the FCC when it determined in the *UNE Remand Order* that high capacity loops meet the impair test and must be unbundled. As noted in Section IV above, RBOC Petitioners rely on faulty data to support

[45] Petition at 11.

[46] RCN Declaration at ¶¶ 4, 13.

[47] Broadslate Declaration at ¶¶ 2-3 .

[48] Network Plus Declaration at ¶ 5.

[49] *See e.g. Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157 and consolidated cases, Memorandum Opinion and Order, FCC 99-365, ¶ 25 (rel. Nov. 22, 1999) (rejecting BOC petitions for special access pricing flexibility because the petitioners "failed to provide the Commission and interested parties a meaningful opportunity to examine the conclusions contained in the Quality Strategies' market reports.").

their claims that alternative local loops are actually and ubiquitously available and that CLECs serve one in four commercial buildings. In addition, the Petition grossly understates the cost and time it takes to deploy alternative loops, two of the key factors the FCC cited in the *UNE Remand Order* as reasons for requiring the unbundling of loops.[50]

A. Availability and Ubiquity

RBOC Petitioners do not purport to measure the number of high capacity local loop facilities CLECs either build or lease from third-party alternative providers.[51] Rather, they cite to 218,000 alternative local fiber miles without distinguishing between long-haul, local transport, and local loop miles or planned versus operational fiber; 635 alternative local fiber networks in the top 150 Metropolitan Statistical Areas ("MSAs") (again without distinguishing between transport networks and local loops); and CLEC service to 25% of the nation's commercial buildings.[52] As shown above, however, RBOC Petitioners' statistics are not reliable.

In Joint Commenters' experience, alternative providers rarely have excess local loop capacity they are willing to lease to third parties. Broadslate and Network Plus use DS1 loops to reach their small and medium business customers. In almost every case, the ILEC is the only source of these loop facilities in the markets in which they operate.[53] Thus, contrary to RBOC Petitioners' claims,[54] a "vibrant wholesale market" does not exist for high capacity loops.

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[50] *UNE Remand Order* at ¶¶ 182-86.

[51] Although the FCC recently reported that CLECs provide service to 35% of their end users over the CLECs' own local loop facilities, even the FCC questioned whether this data was accurate. *See* Local Telephone Competition: Status as of December 31, 2000, 1, n.2 (May 2001) ("Local Telephone Competition").

[52] Petition at 3-4.

[53] Broadslate Declaration at ¶ 3; Network Plus Declaration at ¶ 6.

[54] Petition at 3.

According to the most recently published FCC statistics, at the end of 1999, ILECs had 790,145 DS1 fiber terminations at customer premises and 247,066 fiber terminations at speeds of DS3 or higher.[55] The total number of high capacity loops are likely much higher, as these statistics do not include the fiber terminations ILECs added in 2000 or copper terminations used for DS1 and above facilities. Regardless of which central offices serve these high capacity loops, if the Petition were granted, CLECs would be denied unbundled access to at least 1,037,211 ILEC loops and, unless alternative last mile facilities were available, the customers served by them.

The FCC expressly rejected ILEC arguments that because some CLECs "have successfully provisioned [high capacity] loops to certain large business customers," the FCC should refrain from unbundling such loops altogether.[56] As the FCC explained:

> Building out any loop is expensive and time-consuming, regardless of its capacity. That some competitive LECs, in certain instances, have found it economical to serve certain [large] customers using their own loops suggests to us only that carriers are unimpaired in their ability to serve those particular customers. This evidence tells us nothing about the customer the competitor would like to serve but cannot because the cost of building a loop from the customer premises to the competitive LEC's switch is prohibitive.[57]

RBOC Petitioners attempt to limit improperly their ubiquity analysis by making comparisons to special access services. According to RBOC Petitioners, CLECs can easily make the targeted investment needed to serve customers using high capacity loops because such customers are concentrated in approximately 20-25% of ILEC central offices representing the majority of

[55] Infrastructure of the Local Operating Companies, Table 2.1 (October 2000) ("Infrastructure Report").

[56] *UNE Remand Order* at ¶ 184.

[57] *Id.* (footnotes omitted).

ILEC special access revenue.[58] They ignore the fact that high capacity loops may terminate to each and every ILEC central office. Even if RBOC Petitioners' special access analogy were accurate, it would not justify removing all high capacity loops from the UNE list, including those served by the remaining 75-80% of ILEC central offices.

Joint Commenters' experience is inconsistent with RBOC Petitioners' claim. Using DS1 loops, Broadslate can expand its broadband customer base by overcoming the distance limitations and continuous copper loop requirements inherent in DSL.[59] For Broadslate, self-provisioning of high capacity loop and transport facilities is not economically justified at this point in its business development.[60] As a provider of service to small and medium sized businesses in suburban markets, Network Plus uses ILEC DS1 or higher capacity loops to provide local service to many customers located outside of dense metropolitan areas.[61] In order to reach its customers in suburban markets without ILEC loops and transport, Network Plus would not only have to build a suburban fiber ring, it would also have to build 30 to 40 miles of fiber to connect that ring to its point of presence in the metropolitan area.[62] Similarly, RCN has provisioned local service using DS1 loops to educational and health care institutions, which are often located in more suburban areas, and would be unable to reach such customers without access to ILEC loops and transport.[63] Further, both Network Plus and RCN have deployed services using DS1 loops even where a customer does not need the full 24 voice grade lines provided by a

[58] Petition at 11.

[59] Broadslate Declaration at ¶ 3.

[60] Broadslate Declaration at ¶ 4.

[61] Network Plus Declaration at ¶ 5.

[62] Network Plus Declaration at ¶ 6.

[63] RCN Declaration at ¶¶ 5, 13.

DS1.[64] Thus RBOC Petitioners' special access analogy is inaccurate. Without access to high capacity loops, CLECs would be materially impaired in their ability to provide service to customers in suburban markets and competition would be limited to downtown areas where density may justify the cost of deploying new local loops.

B. Cost and Timeliness

Building fiber to the customer premises is still the most capital intensive way of installing local broadband capacity. The *City Light Investor's Guide* estimates that fiber deployment costs $100,000 to $300,000 per mile for placing fiber underground, $50,000 per mile for placing fiber on poles, and $10,000 to $60,000 per mile for placing fiber in pipelines.[65] These figures are in most instances far greater than the $30,000 per mile cost cited in the Petition[66] and the $46,680 per mile cost the FCC cited in the *UNE Remand Order.*[67] Moreover, construction costs are only one of the many costs providers must consider when determining whether to deploy their own fiber. In addition to construction costs, a CLEC must consider the permitting and rights-of-way fees it must pay to local jurisdictions and entities such as Southeast Pennsylvania Transit Authority ("SEPTA") in Philadelphia, for example,[68] and the costs of installing or accessing intra-building wiring.[69] Moreover, deploying local loop plant still may embroil CLECs in lengthy franchising or rights-of-way disputes resulting in material delays of greater than six months to one year. Many cities have moratoriums on digging up streets during certain times of

[64] Network Plus Declaration at ¶ 6; RCN Declaration at ¶ 14.

[65] *Id.* at 24.

[66] Petition at 14.

[67] *UNE Remand Order* at ¶ 184, n.343.

[68] RCN Declaration at ¶ 7.

[69] RCN Declaration at ¶ 12.

the year, such as Manhattan and Boston where moratoriums can last through an entire winter (from Thanksgiving until April 1).[70] Even without digging moratoriums, the process for considering and approving franchises may unduly delay construction. For example, certain cities in Ohio have failed to process a CLEC's applications to attach its fiber optic cable on existing utility poles, some of which have been pending for more than one year.[71] Such delays satisfy the FCC's six month to one year material delay requirement.[72]

Nor, contrary to RBOC Petitioners' claims, is it cheap and relatively easy to extend fiber that is "nearby" into a building to bring new customers "on net."[73] Unlike the "Field of Dreams" analogy made by RBOC Petitioners,[74] CLECs do not own the land on which, or buildings in which, they need to build their facilities. The *City Light Investor's Guide* estimates that it costs approximately $50,000 to $100,000 to enter a new building.[75] This is because, in addition to the construction and permitting costs referenced above, CLECs that wish to bring new buildings on net also incur costs to negotiate and purchase building access from building owners.[76] The negotiations with building owners can last for months, if not years, as many landlords attempt to extract a premium for CLEC building access. As the FCC recently found:

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[70] RCN Declaration at ¶ 10.

[71] *See City Signal v. Cleveland Heights*, CS Docket 00-253, Petition for Declaratory Ruling, at 2 (Oct. 18, 2000).

[72] *UNE Remand Order* at ¶ 89 (delays of six months to one year materially diminish a CLEC's ability to provide service). The fact that ILECs may experience similar delays when building new plant (Petition at 27) has no bearing on the question of whether a CLEC is materially delayed by being forced to construct its own network.

[73] Petition at 14.

[74] Petition at 12.

[75] *City Light Investor's Guide* at 25.

[76] RCN Declaration at ¶ 11.