Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF
NORLIGHT TELECOMMUNICATIONS, INC.

Norlight Telecommunications, Inc. ("Norlight") submits the following comments in response to the Notice of Proposed Rulemaking issued in the above captioned proceedings on December 20, 2001.[1]

I. Introduction & Summary

Norlight is a competitive telecommunications provider headquartered near Milwaukee, Wisconsin. Norlight was founded in 1972 as Midwestern Relay Co., offering microwave transmission services through Wisconsin. Over the years, Norlight has expanded its service capabilities and its network. Its network now includes a SONET ring protected fiber optic system that will soon span six Midwestern states. With recent investments in ATM and DWDM technology, Norlight's expansion has helped improve the quality and depth of the communications infrastructure in the region. Through this network, Norlight now provides

[1] *See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98 & 98-147, FCC 01-361, Notice of Proposed Rulemaking (rel. Dec. 20, 2001) ("NPRM").

broadband and advanced services to various markets, including several tier 2 and tier 3 cities, as well as rural and other underserved markets throughout the Midwest.

One of Norlight's primary businesses is dedicated, broadband data transmission between government agencies, universities, and small to midsize businesses with multiple office locations. For this and other services, Norlight is able to rely to a significant extent on its extensive fiber-based network. In order to do so, however, Norlight must, in most cases, rely on local loop and transport facilities from the incumbent LEC to bridge the "last mile" between Norlight's network and the end user customer. Affordable access to this "local access" piece of the network is critical to Norlight's ability to competitively utilize its own fiber-based network and to provide competitive broadband services to end users throughout the Midwest and beyond.

Norlight has traditionally been forced to obtain local access as tariffed, ILEC special access circuits. To date, Norlight has generally been able to develop a successful, broadband-based business model using these special access facilities. As markets develop, however, Norlight is increasingly squeezed by the high cost of these tariffed services, leaving Norlight with difficult questions about its future ability to compete and grow as a facilities-based, broadband services provider. This squeeze also potentially leaves Norlight's customers, particularly those in the secondary markets, with even fewer options.

In the *UNE Remand Order*,[2] the Commission opened an important door for Norlight to explore additional service options and more effectively and competitively utilize its substantial network investments. In short, the Commission ordered ILECs to offer existing combinations of loops and transport at cost-based UNE prices. In doing so, the Commission eliminated a substantial and prejudicial cost barrier to effective competition in the advanced services and

[2] *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 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

other telecommunications service markets. With this ruling, Norlight's options would conceivably no longer be limited to inflated ILEC access rates or prohibitive costs to, in many cases, unnecessarily duplicate a ubiquitous, pre-existing local network. Instead, the Commission set the stage for a level and streamlined competitive playing field that freed Norlight's resources to explore, expand, and extend broadband and other services and facilities to end user customers.

Within three weeks of opening this door for Norlight and other facilities-based competitors, the ILECs convinced the Commission to (at least temporarily) slam it back shut in a *Supplemental Order* and, thereafter, a *Supplemental Order Clarification*.[3] The Commission found that it had "underestimated the extent of the policy implications" of allowing competitors to use ILEC loop and transport combinations to provide exchange access services. The Commission credited its second thoughts to post-*UNE Remand Order* ILEC *ex parte* letters in which ILECs argued that use of unbundled loop and transport combinations for exchange access would increase ILEC local rates, undermine universal service, or both. The Commission noted, however, that the ILECs had made the same argument in *ex parte* filings several months before the *UNE Remand Order* was released.

In sum, Norlight believes that the Commission got it right the first time. First, the Commission should again require ILECs to provide unbundled access to local loop and transport facilities individually, in combination, and without regard to capacity. Second, the Commission should again not limit a competitor's use of loop and transport combinations. Moreover, even if the Commission limits a competitor's use of these circuits, that limit should, at a minimum,

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) ("*Supplemental Order*"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183 (rel. June 2, 2000) ("*Supplemental Order Clarification*").

clearly preserve a competitor's right to use unbundled loop and transport combinations for broadband data transmission (e.g., frame relay, ATM, IP) and other advanced services.

As a regional provider of high-speed, secure data services with significant operations in tier 2 and tier 3 cities, Norlight is in a strong and unique position to enhance competition, generate value for its customers, and grow its business, all as a result of the Commission's actions in this regard. Through this proceeding, the Commission truly has the opportunity to foster the provision of broadband and advanced services by competitive carriers and to overcome a major obstacle to competition in underserved markets.

II. Discussion

A. Unbundled Loops and Transport

In the *UNE Remand Order*, the Commission determined for both loops and transport that viable competitive alternatives do not exist for competitors and that competitors are impaired without cost-based access to these ILEC facilities. Norlight maintains that the Commission's determination is still true in the Midwestern markets in which it now operates.

In most markets, rural or urban, Norlight still does not, in many cases, have a competitive, viable local access alternative to the ILEC. In these markets, the ILEC still holds bottleneck control of these critical last mile pathways, forcing Norlight (as both an economical and practical matter) to rely on these facilities. This is true even with regard to the high capacity local access facilities that are vital to Norlight's effective utilization of its extensive fiber-based network and its provision of broadband and other advanced services offerings.

In the areas served by Norlight, the market for local access facilities simply has not matured to a level that provides Norlight viable options to the ILEC. Indeed, in many places, the ILEC is essentially Norlight's only option (outside of cost-prohibitive self-deployment) to extend

the broadband capabilities of Norlight's network to end user customers. The Commission should again require ILECs to provide access to unbundled local loops and transport regardless of capacity.

B. Loop and Transport Combinations

The success of Norlight's continued deployment of facilities-based, broadband and advanced services does not only rely on the availability of unbundled loops and transport individually; it relies also on the ready availability of loop and transport combinations.

As noted above, Norlight has to date relied primarily on special access circuits purchased from ILEC tariffs to connect its network with end user customers. In essence, this critical local access piece of Norlight's broadband service platform is a dedicated combination of local loop and transport running from the end user to one of Norlight's network points of presence.

While Norlight has thus far been able to successfully utilize special access circuits, the inflated cost of these tariffed offerings is a substantial barrier to the continued growth, extension, and innovation of Norlight's broadband offerings. The ability to utilize these same circuits (i.e., combinations of loops and transport) at cost-based, UNE rates would effectively remove this artificial barrier, freeing Norlight to expand its broadband service capabilities. Indeed, the ability to obtain cost-based local access would allow Norlight and other similarly situated competitive providers to implement the Commission's marquee policy goal of fostering competitive broadband deployment throughout the entire country.

The Commission should, therefore, ensure that facilities-based, broadband providers like Norlight have ready access to combinations of unbundled loops and transport. In doing so, Norlight encourages the Commission to pursue the following two paths:

1. Combination Obligations

Initially, the Commission should reaffirm its general requirements for ILECs to provide UNE combinations. At a minimum, this means that the Commission should retain the requirement that an ILEC may not separate UNEs that the ILEC currently combines. This common sense requirement was created by the Commission in its original interconnection rules, affirmed by the U. S. Supreme Court, and reaffirmed by the Commission in the *UNE Remand Order*. There is still no valid reason to let an ILEC take apart its network simply to force a competitor to put it back together again. The Commission should, therefore, preserve Norlight's ability to convert existing loop and transport combinations (currently obtained as special access circuits) to UNE combinations without unnecessary constraints, cost, or delay.

Beyond converting existing combinations, Norlight encourages the Commission to follow the lead of a number of state commissions and, indeed, its own instincts in the *UNE Remand Order*, to re-institute obligations requiring an ILEC to affirmatively combine network elements on behalf of competitive providers that are ordinarily combined in the ILEC's network. As these state commissions, as well as the Commission itself, have recognized, the Supreme Court's decision in *AT&T v. Iowa Utils. Bd.* inherently undercuts any questions about the Commission's authority to impose UNE combination obligations beyond simply preserving existing UNE combinations. The Commission should, therefore, use this opportunity to empower broadband providers like Norlight to have ILECs put together new combinations of loop and transport that the ILECs ordinarily put together for themselves.

In Norlight's experience, re-instituting the full measure of the Commission's original UNE combination obligations is very important. It will facilitate the deployment of broadband services and facilities by Norlight, as well as similarly situated providers, by allowing them to

extend their growing broadband networks to end user customers with efficient, cost-based local access facilities. Additionally, the re-institution of national combinations standards will coordinate state commission regulatory efforts. In the wake of the uncertainty surrounding the Commission's UNE combination rules for the past few years, state commission regimes have become increasingly divergent, making it extremely difficult for multi-state competitors like Norlight to fashion uniform strategic and operational plans for the deployment of broadband and other advanced services facilities.

Finally, in Norlight's mind, perhaps the most practical reason for the Commission's re-institution of its UNE combination obligations is the competitive impracticality and inefficiency of collocation. Although the Commission has devoted substantial effort to making collocation as accessible as possible, these efforts cannot completely address the inherent inefficiency of requiring extensive arrangements to create a presence in an ILEC wire center in lieu of having the ILEC create what is essentially a routine connection between network elements. The fact is, effective local market coverage through the establishment of multiple collocations is a cost prohibitive venture. Moreover, Norlight has found that while touting the necessity of collocations to combine UNEs, the ILECs simultaneously are making collocation (whether by design or circumstance) an overly complex, costly, and dilatory process. For example, in establishing collocations with Ameritech, Norlight has encountered, among other problems, the rejection of applications based on inaccurate information provided by Ameritech, lost applications, billing errors that continue for months, billing for collocation that has not been completed, and billing for collocation charges that were ultimately withdrawn when Norlight was forced to ask for, and Ameritech was unable to produce, any supporting documentation for the charges. Other collocation requests were turned away due to lack of available space.

In sum, Norlight should no longer be burdened with the unavailability of efficient, cost-based local access solutions because of uncertainty, inefficiency, or arguments designed to facilitate ILEC delay tactics. The Commission should re-institute its UNE combination obligations to enable facilities-based, broadband providers like Norlight to reach end user customers with growing competitive broadband networks.

2. Combinations Use Restrictions

In order to ensure that facilities-based, broadband providers like Norlight have ready access to combinations of unbundled loops and transport, it is imperative that the Commission eliminate the local usage restrictions imposed in the *Supplemental Order* and *Supplemental Order Clarification*. In requiring unbundled loop and transport combinations to carry a pre-determined amount of local exchange traffic, the Commission inflicted a substantial blow to facilities-based, broadband providers by effectively precluding providers of predominantly data services from obtaining critical local access facilities at cost-based, UNE rates. While this effect was ostensibly unintended, it is nevertheless real. Indeed, it is also not supported as a matter of law or policy.

As an initial matter, in considering whether a competitive provider is any more or less impaired when it intends to use a combination of loops and transport for exchange access, rather than local exchange service, the Commission is pursuing a phantom distinction. While there are obviously differences between the local exchange and exchange access service markets, there is no difference in the aspect of these markets that feeds the "impairment" analysis: the availability of alternatives outside of the ILEC's network. In the *UNE Remand Order*, the Commission looked primarily to the availability of loops and transport deployed by competitive providers and the cost and availability of self-provisioning loops and transport, and found that neither option

eliminated a provider's competitive impairment without access to unbundled ILEC loops and transport. These factors do not change based on whether the facilities are used for local exchange or exchange access service. Competitive providers face the same prohibitive self-provisioning costs. There is also the same limited amount and availability of competitor-deployed facilities whether these facilities are used for local exchange or exchange access service. In short, a competitor's loop and transport options (outside of the ILEC's network) do not change based on whether local exchange or exchange access services are or can be provided over those facilities.

Any attempt to distinguish facilities used for local exchange from facilities used for special access outside of the ILEC's network is simply a pretext to re-litigate the Commission's impairment decisions in the *UNE Remand Order*. Indeed, the inquiry about competitor impairment does not even logically flow from the concerns about the impairment of universal service that prompted the *Supplemental Order* in the first place. Norlight urges the Commission not to confuse these two inquiries or use one to bootstrap a complete reevaluation of thoughtful and reasoned determinations that have already been made. Competitive providers, like Norlight, are no less impaired without access to unbundled loop and transport combinations for exchange access service than they are impaired without access to the same combinations for local exchange service.

With regard to ILEC claims about universal service, Norlight believes again that the ILECs have misdirected the Commission into another unfounded detour in order to protect (or simply delay losing) an inflated and monopolistic special access revenue stream. The ILECs' concerns about special access are not directly about universal service; they are about the ILECs' bottom line and preserving an inflated cash flow that effectively requires competitors to

subsidize the ILECs' local exchange and other service offerings. Norlight also agrees with parties who have told the Commission that the ILECs' claims of revenue losses and the impact on universal service are overstated. Indeed, by eliminating artificial cost and price barriers for competitors, Norlight believes that the Commission will create a more market-driven, streamlined competitive market that will actually improve universal service, including increased service quality and options for all telecommunications consumers.

The Commission should not impose any local service or similar restriction on the use of unbundled combinations of loops and transport. In the event the Commission does, however, limit the use of these combinations, the limitations should be as narrowly tailored as possible. Indeed, the only limitation, if any, which addresses the primary concern over diminished special access revenues is one based solely and clearly on circuit switched traffic. The majority of special access circuits implicated by potential UNE conversions are those devoted to circuit switched exchange services. As stated by the Commission, "today, both incumbent LECs and requesting carriers are at the early stages of deploying innovative technologies to meet the ever-increasing demand for high speed, high-capacity advanced services."[4] The availability of these new and innovative technologies should not be stunted by sweeping broadband data and advanced services circuits into any limitation that the Commission may devise to curtail conversions of special access circuits to UNE combinations. Indeed, to do so cuts against the Commission's stated policy directive of fostering and facilitating competitive broadband deployment.

The Commission should, therefore, make clear that special access circuits devoted to the provision of broadband data transmission and advanced services (including, but not limited to, xDSL, frame relay, ATM, and IP services) are available as unbundled loop and transport

[4] *See UNE Remand Order* at ¶ 14.

combinations. Moreover, it is important that the Commission also provide appropriate guidance regarding the conversion of existing dedicated circuits to preclude seemingly inevitable ILEC barriers and delays in provisioning these critical local access facilities.

III. Conclusion

Norlight is an emerging facilities-based carrier that seeks to utilize its network and resources in a manner that will provide end user customers, many of which are located in tier 2 and tier 3 cities and other underserved markets, with innovative, high-quality, broadband telecommunications services. While Norlight continues to expand and evolve its fiber-based network and service capabilities, it is still faced with a market in which it must rely, in most cases, on loop and transport facilities of the ILEC. In these cases, Norlight should not have to subsidize the service offerings of the ILEC (i.e., a competitor) through inflated special access rates to reach customers. Norlight should also not have to sacrifice valuable financial resources that it otherwise can and desires to expend on developing and expanding its service offerings to compete with the very carrier that is reaping the benefit of these lost resources – the ILEC.

For the small to medium businesses and similar entities in markets where the impact of local access costs alone on the overall price of the service offerings can be prohibitive, it is imperative that the Commission advance rules that facilitate the availability of competitive services, not take clear steps backward. In the *UNE Remand Order*, the Commission fashioned an effective tool to eliminate competitive pricing barriers for loops and transport. The Commission now appears poised to abandon this tool altogether and return to ILEC pricing based on historical monopoly market power, not competition or efficiency.

The Commission should not limit the availability of unbundled combinations of loops and transport based on capacity thresholds or the services offered over those facilities.

Alternatively, to the extent the Commission does modify ILEC UNE obligations, any limitations should be as narrowly tailored as possible to achieve the protection desired by the Commission, and at a minimum should clearly and expressly establish that unbundled loop and transport combinations may be used to provide data transmission and other advanced services.

Respectfully submitted,

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