

**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 THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

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ENTERPRISES
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The Association of Communications Enterprises (“ASCENT”),¹ through undersigned counsel and pursuant to Section 1.415 of the Commission’s Rules, 47 C.F.R. § 1.415, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 01-361, released December 20, 2001, in the captioned proceeding (“*NPRM*”). With the *NPRM*, the Commission has “initiate[d its] first triennial review of the Commission’s policies on unbundled network elements (UNEs),” with the stated objective of determining “the circumstances under which incumbent local exchange carriers (LECs) must make parts of their network available to requesting carriers on an unbundled

¹ ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

basis pursuant to sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 (1996 Act).”² As part of this triennial review, the Commission has called for comment on a range of potential deregulatory stratagems ranging from “a more targeted approach to unbundling” which might “take into consideration specific services, facilities, and customer and business considerations” to an assignment of decisional weights to the factors which comprise the statutory “‘impair’ standard” and/or “the many important goals of the Act” to the “appropriate role of state commissions.”³ Consideration of these matters should, the Commission has correctly recognized, be informed by “experience with both the 1996 Act and the rules adopted in the *UNE Remand Order*,” be guided by “the lessons learned from this experience,” and account for “changes [that] have taken place in the market since 1996.”⁴ Ultimately, however, resolution of these matters, as the Commission has further recognized, must “be faithful to the Act and promote[] its goals.”⁵

² NPRM, FCC 01-361 at ¶ 1.

³ Id. at ¶¶ 2, 16.

⁴ Id. at ¶¶ 2, 11.

⁵ Id. at ¶ 16.

In addressing these myriad issues, ASCENT shares the concerns voiced by Commissioner Copps that the *NPRM* appears to reflect “a predetermined agenda to remake the competition framework” based upon a misplaced “zeal to deregulate before meaningful competition develops.”⁶ ASCENT also shares Commissioner Copps conviction that “setting competition policy is the exclusive jurisdiction of Congress and that it is not for the Commission to “question [-- much less remake --] the statutory competitive framework.”⁷ While ASCENT does not share Commissioner Copps’ optimism that “the Commission will show proper restraint,”⁸ it will nonetheless offer its views on a number of the many proposals identified by the *NPRM*, initially accepting the Commission’s invitation to comment upon lessons learned in the six years following enactment of the 1996 Act.

1. The Commission Should Not Hinder
Mass Market Local Competition

While the 1996 Act has not been an absolute failure, neither has it been a resounding success. Despite six years of aggressive market entry by literally hundreds of competitive providers

⁶ Separate Statement of Michael J. Copps released in CC Docket No. 01-338 on December 12, 2001.

⁷ Id.

⁸ Id.

fueled by expenditures in excess of two trillion dollars,⁹ incumbent LECs retain a share of the local telecommunications market in excess of 90 percent.¹⁰ The limited competitive inroads are attributable in some part to flaws in the 1996 Act, but in far greater part to a failure of regulation and abuse of the judicial process.

⁹ Blumenstein, Rebecca, "Telecom Industry Leaders Struggle with Growing Debt, Overcapacity," The Wall Street Journal (March 13, 2002).

¹⁰ Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001, p. 1 (February 2002).

In enacting the 1996 Act, Congress intended to “open[] all telecommunications markets to competition.”¹¹ To achieve this end, Congress crafted two principal tools, embodied in Sections 251(c) and 271,¹² thereby “provid[ing] the blueprint . . . for ensuring that all markets are open to competition.”¹³ The former provided the mechanism for introducing local competition, while the latter provided the largest incumbent providers with what Congress believed would be sufficient incentive to open long-held monopoly markets to competitive entry. As described by the Commission, “Congress sought to foster . . . [local] competition by fundamentally changing the conditions and incentives for market entry and by attempting to open any remaining local service bottlenecks.”¹⁴ “[B]ecause of the central importance of the requirements in section 251(c) and 271 to opening local markets to competition,” these provisions are considered the “cornerstones of the

¹¹ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) .

¹² 47 U.S.C. §§ 251(c), 271.

¹³ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011, ¶ 1 (1998) (*subsequent history omitted*).

¹⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696, ¶ 253 (1999) (*subsequent history omitted*).

framework Congress established in the 1996 Act.”¹⁵ While Congress also expressed a desire to ensure the timely and reasonable deployment of advanced telecommunications capability,” it directed the Commission to achieve this result by “promoting competition in the telecommunications market” – *i.e.*, through implementation and enforcement of Sections 251(c) and 271.¹⁶

¹⁵ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶ 76.

¹⁶ 47 U.S.C. § 157 note.

Section 271 has proven to provide inadequate incentives for the former Bell operating Companies (“BOCs”) to fully open their local markets to competitive entry, in large part because of the BOC’s ability to game the regulatory, judicial and legislative processes. Section 251(c) has proven to be in part wholly ineffective and in part ingenious. Section 251(c)(4) is fundamentally flawed.¹⁷ Network replication, in whole or in part, has not proven to be a viable means of reaching the mass market. Fortunately, however, as the *NPRM* grudgingly concedes, “the statute contemplates three modes of entry.”¹⁸ And the UNE-Platform, despite persistent efforts by incumbent LECs in regulatory and judicial forums to limit its effectiveness, has proven, where it has been properly implemented and priced, to be the tool competitors need to provide workable, ubiquitous competitive alternatives for the mass market.

¹⁷ 47 U.S.C. §§ 251(c)(4).

¹⁸ NPRM, FCC 01-361 at ¶ 3.

While resale can, as the Commission has repeatedly acknowledged, provide a meaningful competitive alternative,¹⁹ it constitutes a viable competitive tool only if margins between wholesale and retail prices are adequate to support profitable operations. As Congress recognized in mandating statutory discounts, market forces are wholly inadequate to produce adequate margins for the resale of local exchange service. The mechanism provided in Section 252(d)(3),²⁰ as implemented by the Commission²¹ and certainly as reinterpreted by the U.S. Court of Appeals for the Eighth Circuit,²² unfortunately does not produce statutory discounts adequate to support a viable local service resale offering. Further undermining resale as a local entry strategy were the Commission's decisions to preclude resale of exchange access²³ and voice mail service,²⁴ as well as recent Commission actions effectively foreclosing resale of DSL-based advanced services.²⁵ Resale, accordingly, has become principally the province of prepaid local service providers who can exact higher prices and hence adequate profit margins. Recent Commission data confirms this

¹⁹ Resale and Shared Use of Common Carrier Services, 60 F.C.C.2d 261, 298-99 (1976) (*subsequent history omitted*)

²⁰ 47 U.S.C. §§ 252(d)(3).

²¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶¶ 907 - 34 (1996) (*subsequent history omitted*).

²² Iowa Utilities Board v. Federal Communications Commission, 219 F.3d 744 (8th Cir. 2000) (*subsequent history omitted*)

²³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶¶ 980 - 84.

²⁴ Federal-State Joint Board on Universal Service (Report to Congress), 13 FCC Rcd. 11501, ¶ 75 (1998).

²⁵ Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Service in Arkansas and Missouri (Memorandum Opinion and Order), 16 FCC Rcd. 20719, ¶¶ 78 - 84 (November 16, 2001) (*subsequent history omitted*).

assessment, revealing that the number of resold lines nationwide are declining sharply.²⁶

Facilities-based competition was to driven in large part by cable companies, with Congress anticipating that because “cable services are available to more than 95 percent of United States homes,” “meaningful facilities-based competition is possible,” including “the sort of local residential competition that has consistently been contemplated.”²⁷ This promise has never been realized, as less than one percent of access lines are currently provided over coaxial cable.²⁸ While cable companies are eager to provide cable modem service, they appear relatively uninterested in the lower margins associated with traditional voice service.

²⁶ Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001 at Table 4.

²⁷ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 148.

²⁸ Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001 at Table 5.

Full facilities-based competition, accordingly, was provided by new market entrants deploying their own fiber or fixed wireless capability. Because of the highly capital intense nature of such endeavors, such carriers tended to concentrate their service in urban markets and serve predominantly medium and large businesses.²⁹ The same tends to be true, to a greater or lesser extent, of the partial facilities-based providers – *i.e.*, those carriers that rely upon UNE loops and transport, but utilize their own switching capability. Growth in this market segment has substantially stalled and appears headed towards decline.³⁰ Full and partial facilities-based providers constitute the large majority of the bankruptcies that have plagued the competitive LEC community with increasing frequency. While nearly two dozen publicly-traded competitive LECs filed for bankruptcy in 2000, more than three dozen did so in 2001. And this year has already witnessed the bankruptcies of such major facilities-based providers as McLeodUSA, Inc., and Network Plus Corp., with other competitive LECs such as XO Communications, Inc., and Mpower Communications

²⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶ 255. Fifty-five percent of switched access lines provided by competitive LECs were utilized by medium and large businesses, institutional and government customers. Access lines provided through resale and the UNE-Platform constitute slightly less than one half of competitive LEC provided switched access lines. Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001 at Tables 2, 4.

³⁰ Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001 at Table 4.

Corp. warning of like actions, and questions being raised about the financial health of others such as Allegiance Telecom, Inc.³¹

³¹ “Despite Allegiance’s Strength, Wall Street Expresses Doubt,” Telecommunications Reports, p. 16 (February 25, 2002).

While it might be the ultimate end game, facilities-based competition has generally proven to be too costly to support with revenues generated by operations, even when limited to high margin customers in densely populated areas. Continuing infusions of new equity and debt capital have been necessary to prop-up both full and partial facilities-based competitors, and when the sources of such capital dried-up, these providers have often been forced into bankruptcy, which more often than not has culminated in liquidation. The growth rate of competitive LEC provided loops has slowed precipitously as capital has become scarce, and in all likelihood will begin to decline as the impact of bankruptcies filed in late 2000 and early 2001 are reflected in year end 2001 data.³² Likewise the growth rate for UNE loops has also slowed, declining from nearly 50 percent in the latter half of 2000 to less than 30 percent in the first half of 2001.³³

³² Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001 at Tables 4.

³³ Id.

Congress got it right, however, in providing for the unbundled availability of the various network elements necessary to provide local telephone service at cost-based rates. And the Commission got it right in implementing Section 251(c)(3) by providing for end-to-end combinations of unbundled elements and setting UNEs rates in accordance with total element long run incremental cost (“TELRIC”) pricing guidelines.³⁴ If the facilities utilized by a regulated monopoly cannot be readily replicated by competitors, competition, particularly ubiquitous competition, requires the shared availability of those facilities at rates devoid of monopoly rents. Unlike the other two entry vehicles provided by Congress, the number of switched access lines provided by competitors making use of the UNE-Platform is increasing dramatically, which is all the more remarkable when one considers the limited availability of the UNE-Platform, not to mention the operational, regulatory,³⁵ and judicial³⁶ obstacles that have been and, in many cases, continue to hinder its usage. Moreover, competitors utilizing the UNE-Platform are serving such mass market customers as residential and small business consumers and doing so outside of major urban areas. The UNE-Platform alone among the multiple entry vehicles identified by Congress is “providing the sort of local residential competition that has consistently been contemplated,” as well

³⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶¶ 328 - 41, 618 - 740.

³⁵ *E.g.*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶ 276 - 99.

³⁶ *E.g.*, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1998)

as bringing the benefits of local telephone competition to small businesses and outlying areas.

What lessons drawn from the experience of the last six years then should inform the Commission's decision as to when, where and to what extent incumbent LECs must continue to provide unbundled access to their networks in a manner faithful to the Act and consistent with its goals? Absent a fundamental change in the manner in which statutory discounts are computed, resale is not a viable competitive vehicle outside of certain niche markets. Full facilities-based competition will generally be restricted to high-end business customers in densely-populated markets and will be provided by a shrinking universe of carriers. Switch-based provision of local service in conjunction with UNE loops likewise will not address the needs of the mass market in the foreseeable future. The answer to realization of the Congressional vision of a fully competitive local telecommunications market lies with the UNE-Platform. The UNE-Platform brings the benefits of competition to the mass market and generates efficient investment. In short, the UNE-Platform, if not dismantled by the Commission in this proceeding, will achieve the ends identified by Congress, as well as the Commission.

II. The Commission Should Retain Intact Its Existing Unbundling Analysis

A. The "Impairment" Analysis Need Not Be Modified

The *NPRM* queries whether in undertaking its impairment analysis, the Commission should "assign more or less weight" to any of the factors applied in determining whether lack of unbundled access to any given network element materially diminishes a competitor's ability to

provide the local services it seeks to offer.³⁷ Comment is also sought in the *NPRM* as to whether the Commission should reverse its analytical approach by identifying impairments first and defining network elements to address such impairments rather than defining network elements and determining whether impairment would result from a lack of unbundled availability to such elements.³⁸ ASCENT submits that such modifications would produce no benefit while contributing to the continuing pervasive sense of uncertainty that has plagued the competitive industry.

³⁷ NPRM, FCC 01-361 at ¶ 19.

³⁸ Id. at ¶ 21.

In responding to the U.S. Supreme Court's remand of its local telephony rules, the Commission identified a series of factors to be considered in discerning whether material differences between use of an incumbent LEC's unbundled network elements and network elements available from other sources would effect a competitor's ability to provide competitive services. These factors included cost, timeliness, quality, ubiquity, and operational matters.³⁹ Having identified these factors, the Commission specifically declined to "look at each element in isolation," recognizing that reasoned decision-making required consideration of "the totality of the circumstances."⁴⁰ As the Commission explained, the purchase cost of equipment, for example, could not be looked at in isolation because "other [cost] factors, including the costs and delays associated with collocation arrangements, as well as additional costs and operational impediments associated with the manual processes used to interconnect certain network elements, . . . [might] make it impossible as a practical, economic and operational matter for a competitor to provide services in the local market quickly and on a wide-spread basis."⁴¹

³⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶¶ 62 - 100.

⁴⁰ Id. at ¶¶ 62 - 63.

⁴¹ Id. at ¶ 63.

Assigning particular weights to individual factors would compromise the holistic approach heretofore applied by the Commission. Rather than considering the totality of the circumstances and assessing the impairment that would result from the lack of unbundled availability of a given network element, the Commission would be hamstrung by a rigid formulaic approach which could mask the aggregate impact on competitors. As the Commission has recognized, “[d]iscerning the practical, economic, and operational viability of self-provisioning or obtaining alternative elements from third party providers is technical, complex, and subject to considerable uncertainty.”⁴² In such a circumstance, flexible exercise of administrative judgement is critical to reasoned decision making. Arbitrary weights that must be applied in all circumstances when assessing the various impairment factors restricts this essential flexibility.

**B. In Applying the “At a Minimum” Analysis
The Commission Should Not Sacrifice
Key Statutory Goals**

The *NPRM* proposes to elevate encouragement of facilities investment and broadband deployment above all other objectives of the 1996 Act, including such other essential ends as “rapid introduction of competition in all markets, . . . market certainty, and administrative practicality.”⁴³ In so doing, the *NPRM* lends strong credence to Commissioner Copps’ concern that

⁴² Id. at ¶ 66.

⁴³ NPRM, FCC 01-361 at ¶ 21.

the Commission is intent on reworking “the competitive framework that Congress adopted in the 1996 Act.”⁴⁴ ASCENT urges the Commission to exercise the restraint advocated by Commissioner Copps and “not presume to question the statutory competitive framework.”⁴⁵

⁴⁴ Separate Statement of Michael J. Copps released in CC Docket No. 01-338 on December 12, 2001.

⁴⁵ Id.

As the Commission has recognized, “Congress . . . emphasized that a major goal of the 1996 Act . . . [was] to accelerate the development of local competition.”⁴⁶ Indeed, the central goal of Section 251(c) was to bring competition to local telecommunications markets “as quickly as possible.”⁴⁷ “[B]ecause the investment necessary is so significant,” Congress understood that competition would not emerge rapidly if new entrants were forced to build duplicative networks.⁴⁸ “The inability of other service providers to gain access to the local telephone companies[‘] equipment,” Congress recognized, would “inhibit[] competition that could otherwise develop.”⁴⁹ Congress, accordingly, required each incumbent LEC “to share its network with competitors” so as to “facilitate market entry.”⁵⁰ In particular, Congress, pursuant to Section 251(c)(3), required that the constituent elements of existing networks be made available for lease by any requesting carrier on an unbundled basis.

As the Commission has acknowledged, “Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy.”⁵¹ What Congress did express a preference for is the generation of as much competition as feasible as quickly as possible in whatever form might be workable. Hence, Congress’ identified multiple entry strategies each of which might work

⁴⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶ 107.

⁴⁷ H.R.Rep.No. 104-204, p. 89 (1995).

⁴⁸ H.R.Rep.No. 104-458, p.1489 (1996).

⁴⁹ H.R.Rep.No. 104-204 at p. 49.

⁵⁰ AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 371 (1999).

⁵¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 12.

more effectively at different times and in different markets. The Commission, as the *NPRM* recognizes, is, “therefore, statutorily bound to require incumbents to permit both facilities-based and non-facilities-base entry.”⁵² Accordingly, the Commission can not, consistent with the either the letter or the spirit of the 1996 Act, hinder competitors’ reliance upon UNEs with the intent of

⁵² NPRM, FCC 01-361 at ¶ 3.

promoting full or partial facilities-based competition, particularly if such action slows the emergence of local exchange/exchange access competition across the Nation.

Moreover, the Commission need not eliminate, in whole or in part, the UNE-Platform to promote full or partial facilities-based competition. Competitors have powerful incentives to build facilities. Self-provisioning minimizes the risks inherent in relying upon a dominant competitor, including delays in gaining access to unbundled elements and degradation of the quality of such elements. Self-provisioning also reduces the competitively sensitive information a competitor must share with the incumbent LEC. Competitive LECs, accordingly, will utilize the UNE-Platform for only so long as practical, economic and operational constraints require them to do so.

Nor can the Congressional goal of accelerating the development of local competition be sacrificed in order to spur the deployment of advanced telecommunications capability. Yes, Congress directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” but it directed the Commission to do so by, among other things, utilizing “measures that promote competition in the local telecommunications market.”⁵³ Indeed, Congress mandated that if the Commission were to determine that advanced telecommunications capability was not being deployed to all Americans in a reasonable and timely fashion, it should accelerate deployment of such capability by “promoting

⁵³ 47 U.S.C. § 157 note.

competition in the telecommunications market.”⁵⁴

⁵⁴

Id.

Putting aside that the Commission has consistently found that advanced telecommunications capability is being deployed in a reasonable and timely manner,⁵⁵ the Commission cannot negate the Congressional mandate embodied in Section 251(c)(3) to speed the availability of advanced services. As the *NPRM* acknowledges, the Commission must “balance the goals of sections 251 and 706 by encouraging broadband deployment through the promotion of local competition.”⁵⁶ And Congress has made clear that local competition must be promoted in part through implementation of Section 251(c)(3). Affirmatively limiting incumbent LECs’ unbundling obligations in order to encourage broadband deployment does not strike the appropriate balance; to the contrary, to borrow from Commissioner Copps, it “undermines the competitive framework that

⁵⁵ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 (Third Report), CC Docket No. 98-146, FCC 02-33 (February 6, 2002).

⁵⁶ NPRM, FCC 01-361 at ¶ 23.

Congress adopted in the 1996 Act.”⁵⁷ Limiting unbundling to existing network infrastructure and old technology might or might not encourage new investment that would not otherwise have been made, but it will hinder competitor’s efforts to provide viable competitive alternatives.

⁵⁷ Separate Statement of Michael J. Copps released in CC Docket No. 01-338 on December 12, 2001.

Also directly contrary to Congressional mandates is the manner in which the *NPRM* proposes to take intermodal competition into consideration in the unbundling analysis.⁵⁸ While intermodal competition has previously been factored into the Commission's unbundling analysis, the Commission has heretofore never suggested that the availability of a "service over alternative technological platforms" would justify relaxation of the Section 251(c)(3) unbundling obligations.⁵⁹ A legitimate intermodal inquiry must be limited to the availability of alternative sources for the network components a competitor would otherwise secure from an incumbent LEC on an unbundled basis. It matters not in an unbundling inquiry that cellular service can be substituted for voice service provided over a copper pair, if facilities replicating the copper pair are not available to competitive providers.

The one statutory goal which would further the Congressional goal of bringing competition to local telecommunications markets "as quickly as possible,"⁶⁰ is one to which the Commission pays lip service, but repeatedly fails to act upon. That goal, as articulated by the Commission, is uniformity and predictability. As the Commission has acknowledged, "uniform and predictable unbundling rules will provide financial markets with reasonable certainty so that

⁵⁸ NPRM, FCC 01-361 at ¶ 27, fn. 73.

⁵⁹ Id. at

⁶⁰ H.R.Rep.No. 104-204, p. 89 (1995).

competitive LECs can attract the investment capital they need to execute their business plans.”⁶¹

The Commission must share a good portion of the blame for the lack of equity and debt capital available to competitors utilizing the UNE-Platform. These entities have been unable to attract investment capital in large part because of investor concerns regarding the longevity of the UNE-Platform.

⁶¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶ 114.

**C. A More Targeted Approach to Unbundling
Is Neither Permissible nor Good Policy**

The *NPRM* suggests that it may be appropriate “to apply the unbundling analysis in a more granular way,” characterizing such an approach as “more sophisticated and refined.”⁶² Specifically, the *NPRM* queries whether unbundling requirements should differ as applied to “specific services and specific geographic locations,” to “differing facilities,” and/or to “categories of customers . . . [and] carriers.”⁶³ Differentiation by service, customer category or carrier is not permissible under the 1996 Act. Differentiation by location or technology would not constitute good public policy.

The mandate of Section 251(c)(3) is clear and unequivocal. Section 251(c)(3) unambiguously imposes on incumbent LECs the “duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis.”⁶⁴ The sole limitation thus imposed by Section 251(c)(3) is that unbundled network elements can only be used to provide “a telecommunications service.” Section 251(c)(3), accordingly, requires application of the unbundling analysis on a

⁶² NPRM, FCC 01-361 at ¶ 34.

⁶³ Id. at ¶¶ 34, 42.

⁶⁴ 47 U.S.C. § 251(c)(3).

functionality-by-functionality basis, not on a service-by-service, or customer-by-customer, or carrier-by-carrier basis. Indeed, the Commission has previously recognized that the conclusion that

Section

251(c)(3) permits only a functionality-by-functionality unbundling analysis “is compelled by the plain language of the 1996 Act.”⁶⁵

⁶⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 356.

The Commission is charged by Section 251(d)(2) with “determining what network elements should be made available for purposes of subsection (c)(3).”⁶⁶ A network element is defined by the 1996 Act as a “facility or equipment” used in the provision of a telecommunications service,⁶⁷ which as the Commission has recognized, precludes defining UNEs as “specific services.”⁶⁸ Thus, Section 251(d)(2), read in tandem with Section 251(c)(3), limits the authority delegated to the Commission to determine only “which network elements must be made available, taking into account the objectives of the Act.”⁶⁹ Congress did not authorize the Commission to determine what particular telecommunications services a network element could be utilized to provide, what customers any such services could be provided to, or which telecommunications carriers could utilize network elements. And, it goes without saying that the Commission is not free to unilaterally expand the scope of a Congressional delegation of authority beyond the express terms of that delegation.⁷⁰ Congress focused regulatory attention upon network elements rather than services, or categories of either customers or telecommunications carriers, because it recognized that individual elements could be utilized to provide any number of services, serve a wide variety of customers, and facilitate service provision by a host of different telecommunications carriers. Alternatives to a given network element are either available or they are not, and the

⁶⁶ 47 U.S.C. § 251(d)(2).

⁶⁷ 47 U.S.C. § 153(29).

⁶⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 264.

⁶⁹ AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 391-92 (1999).

⁷⁰ American Bankers Association v. National Credit Union Administration, 271 F.3d 262 (D.C. Cir. 2001); Halverson v. Slater, 129 F.3d 180, 186-87 (D.C. Cir. 1997).

contemplated service to be provided using the facility or the customer to which the service is to be provided is completely irrelevant to the impairment analysis. If a network element is available only from an incumbent LEC to provide one service or to serve one customer, it will also only be generally available from the incumbent LEC to provide another service or to serve another customer. Attempting to parse an impairment analysis on a service-by-service or customer-by-customer basis would not only be pointless, but destined to produce wholly arbitrary distinctions.

A location-by-location unbundling analysis would be theoretically permissible under Sections 251(c)(3) and 251(d)(2). The problem inherent in the Commission's application of such approach is that it must necessarily produce arbitrary results. This is because the Commission will be applying any such location-by-location approach on a national basis. Market characteristics vary region to region and state to state. State regulatory apparatus and incumbent LEC infrastructure impact competitive conditions as much, if not more, than population density or such competitive "triggers" as collocations or installed switching capability. Attempting to impose national locational standards would, accordingly, negate the purpose of undertaking a more granular unbundling analysis.

ASCENT submits that in order to achieve the sought after benefits of location-by-location granularity, any such analysis should be undertaken initially by state regulatory commissions with ultimate determination by the Commission. As the *NPRM* acknowledges, "State commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdictions."⁷¹ State regulatory commissions are also better suited to conduct the detailed hearings necessary to ensure the development of full and complete records. The recommendations of state regulatory commissions would be informed by such hearings, as well

⁷¹ NPRM, FCC 01-361 at ¶ 76.

as the expertise of the state regulators with the various markets within the state, the carriers serving those markets, and the state regulatory apparatus. Commission review of such recommendations would ensure consistency with national competitive policies.

III. The Commission Should Retain Existing Unbundled Network Elements

Proper application of Section 251(d)(2)'s "necessary and impair" standard, informed by the lessons learned over the past three years and faithful to the goals of the 1996 Act, compels retention, and, indeed, expansion in key segments, of the current list of network elements incumbent LECs must make available upon request to competitors. Retention of the list as a whole is justified both by the impairment competitors would suffer absent the availability of individual network elements, as well as by the loss of the availability of the UNE-Platform if certain network components were removed from the list.

A. Switching

The *NPRM* queries whether, in light of "changed circumstances," the Commission should continue to require incumbent LECs to make available on an unbundled basis "local switching capability" and "tandem switching capability," and if so, whether it "should modify these requirements or the existing definitions for these network elements."⁷² Specifically, the *NPRM* calls for comment on the limitations previously imposed on the unbundled availability of local circuit switching, including the geographic and customer components of the "switch carve-out," as well as the availability of enhanced extended links ("EELs") as a precondition to its implementation, and

⁷² *Id.* at ¶ 76.

the general lack of unbundled availability of “packet switching capability.” ASCENT submits that “changed circumstances” have not diminished the force of the Commission’s earlier conclusion that competitors would be impaired in their ability to provide service without access to unbundled local circuit switching, but have confirmed that the switch carve-out should be eliminated and that packet switching capability should be made available on an unbundled basis.

In applying its revised impairment standard to unbundled local circuit switching, the Commission concluded that “lack of access to unbundled local switching materially raises entry costs, delays broad-based entry, and limits the scope and quality of the new entrant’s service offerings.”⁷³ While noting that “the costs and operational delays of self-provisioning switching . . . [did] not preclude requesting carriers from serving [‘large business customers or other users with substantial telecommunications needs’],” the Commission determined that a lack of access to unbundled switching would impair the ability of competitors to serve all other customers, including both residential and less sizeable business consumers.⁷⁴ In undertaking its impairment analysis, the Commission emphasized that cost differentials extended far beyond mere facilities acquisition costs, ranging from a lack of scale economies to the costs associated with facilities installation, provisioning and operation, including the costs of distance-sensitive transport, collocation and

⁷³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶ 253.

⁷⁴ Id. at ¶ 255.

associated loop conversions.⁷⁵ The Commission also detailed the “material delays” that “collocation and the coordinated loop cutover process impose[d] . . . on competitive LECs that offer services using self-provisioned switches” and the “material limits” imposed on “the scope of customers a requesting carrier . . . [could] serve quickly.”⁷⁶

⁷⁵ Id. at ¶¶ 259 - 66.

⁷⁶ Id. at ¶¶ 267 - 71.

These “circumstances” have changed only for the worst. The epidemic of competitive LEC business failures among those carriers that opted for the switch-based provision of service confirm that the impairment identified by the Commission was understated. Commercial experience allows for a less theoretical and more practical perspective. One need only tally the bankruptcy filings, the equipment salvage sales, and the empty collocation bays to confirm that without unbundled access to local switching competitors are impaired in their ability to provide service. As to costs associated with self-provisioned switches, repeated attempts by incumbent LECs to dramatically increase hot-cut charges confirm that cost will continue to be a highly adverse factor. Verizon, for example, recently raised its hot charges in New York and New Jersey, with the blessing of the New York Public Service Commission and the New Jersey Board of Public Utilities, to levels which would require customer retention for a year or two simply for a competitor to recover the costs of migrating a customer to a self-provisioned switch -- i.e., ranging from \$160 to over \$300 per hot cut, depending upon the need for a premises visit, manual intervention or expedited provisioning.⁷⁷ And delays and limitations associated with collocation and loop conversions have not materially decreased, nor has the reliability of the hot cut process materially improved.

The question then is not whether incumbent LECs should be relieved of their obligation to unbundle circuit switching capability, but whether the “switch carve-out” should be eliminated and whether packet switching capability should be added to the list of unbundled network elements. The switch carve out was unlawful and unjustified when adopted and is no less so today.

⁷⁷ Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements (Order on Unbundled Network Element Rates), Case 98-C-1357 (January 28, 2002).; In the Matter of the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey, Inc. (Decision and Order), Docket No. TO00060356 (NJBP March 6, 2002).

As discussed earlier, Sections 251(c)(3) and 251(d)(2) do not authorize the Commission to impose limits on the telecommunications services a network element may be utilized to provide or to what customers any such services may be provided. Congress delegated to the Commission the authority to determine only “which network elements must be made available, taking into account the objectives of the Act.”⁷⁸ Moreover, even if such limitations were permissible, parsing an impairment analysis such that a carrier is deemed impaired to the extent it serves a three line customer, but not so if that customer adds another line, or, as suggested by the *NPRM*, such that a carrier is deemed impaired serving a three-line residential customer, but not so when serving a two line business customer, is inherently, and indefensibly, arbitrary.

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AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 391-92 (1999).

Putting aside the legality of the switch carve-out or any new permutation thereof, limitations on the availability of unbundled circuit switching have hindered the development of mass market local competition. The evidence of this adverse impact can be seen in the far greater competitive inroads achieved in states which have embraced the UNE-Platform than in states which have not. New York is the most obvious example. Market penetration by competitors in New York dwarfs that in other states, having reached 23 percent in mid year 2001.⁷⁹ More tellingly, the percentage of lines provided by competitors in New York to residential and small business consumers exceeds that in any other state.⁸⁰ And even more consequentially, an overwhelming percentage of new lines served by competitors in New York are provided over the UNE- Platform. Texas, Pennsylvania and Illinois – all states which have embraced the UNE-Platform – follow immediately behind New York in competitive market penetration, and also evidence high percentages of mass market competition, as well.⁸¹ In short, unbundled circuit switching and the

⁷⁹ Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001 at Table 6.

⁸⁰ Id. at Table 9.

⁸¹ Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone

UNE-Platform drive local exchange/exchange access competition.

Competition: Status as of June 30, 2001 at Tables 6 and 9.

With respect to the unbundled availability of packet switching capability, ASCENT urges the Commission to revisit its decision not to order the unbundling of such facilities as a general matter. In opting not to mandate the unbundled availability of packet switching capability, the Commission relied heavily upon deployment by the likes of Covad Communications Company, Rhythms Netconnections, Inc., and Northpoint Communications, Inc. of extensive network facilities in concluding that competitors would not be impaired without access to unbundled packet switching.⁸² The bankruptcies of all of these providers demonstrates that the Commission's impairment analysis was flawed. The costs and delays associated with deployment of packet switching capability proved to be too great to allow for profitable operation.

B. Loops and Transport

Loops, including high-capacity loops, and shared transport are critical components of the UNE-Platform. As such, it is imperative that these network elements continue to be available on an unbundled basis. Loops being the quintessential monopoly element, no entity has made any serious argument that they should not be made available on an unbundled basis, although it has been suggested that high capacity loops should be exempted from the loop unbundling requirement because some competitors have deployed limited fiber networks. As the Commission has previously reasoned, however, “[t]hat some competitive LECs, in certain instances, have found it economical to serve certain customers using their own loops suggests to us only that carriers are unimpaired in

⁸² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶¶ 306 - 07.

their ability to serve those particular customers.”⁸³ That this assessment remains true is confirmed by a recent market analysis undertaken by the New York Public Service Commission (“NYPSC”), which concluded that even in “Southern/Midtown Manhattan” – generally acknowledged to be the most competitive local telecommunications market in the Nation -- the incumbent LEC remains the

⁸³ Id. at ¶ 184.

“dominant provider” of high-speed facilities.⁸⁴ Thus, for example, the NYPSC found that Verizon had fiber or copper facilities present in “virtually all” of the over 220,000 “mixed use, commercial, or public institutions” in New York City, while competitors had brought fiber to “a maximum of 900” such premises.⁸⁵ And outside of New York City, the NYPSC found that Verizon still controlled 88 percent of the market.⁸⁶ Accordingly, the NYPSC concluded that Verizon “continues to occupy the dominant position in the Special Services market and by its dominance is a controlling factor in the market.”⁸⁷

⁸⁴ Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc./Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, Case Nos. 00-C-2051, 92 - C - 0665, Opinion No. 01-1, pp. 6 - 10 (NYPSC June 15, 2001).

⁸⁵ Id. at pp. 7 - 8.

⁸⁶ Id. at p. 7.

⁸⁷ Id. at p. 9.

The Commission's assessment of the continuing need to maintain unbundled access to shared transport also has survived the passage of time. As described by the Commission, "[w]ithout access to unbundled shared transport, a requesting carrier would have to self-provision or purchase dedicated transport from the incumbent, which would materially increase the costs and quality of service the requesting carrier could provide, and would materially limit the carrier's ability to serve a broad base of customers."⁸⁸ In two short years, ubiquitous transport alternatives have not materialized; incumbent LECs remain the only ubiquitous source of transport facilities. Shared transport, in conjunction with unbundled switching remains the only economical vehicle for serving customers whose traffic volumes do not justify use of dedicated transport – i.e., residential and small business customers.

C. General Unbundling Issues

Among the "general unbundling issues" upon which the *NPRM* seeks comment is "the relationship between 'services,' including both retail services and wholesale services(governed by sections 251(c)(4) and 251(b)(1)), and 'network elements' (governed by sections 251(d)(2) and 251(c)(3))."⁸⁹ In particular, the *NPRM* queries whether a competitor utilizing the UNE-Platform to provide voice service to a customer should be able to secure xDSL-based advanced services from the incumbent LEC for resale to that same customer.⁹⁰ ASCENT submits that the answer is clearly yes.

⁸⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶ 374.

⁸⁹ NPRM, FCC 01-361 at ¶ 69.

⁹⁰ Id.

Section 251(c)(4) requires incumbent LECs to make telecommunications services available at statutory discounts for resale and to refrain from imposing on such wholesale offerings any unreasonable or discriminatory conditions or limitations. The Commission having determined that xDSL-based advanced services are telecommunications services, incumbent LECs have a statutory obligation to make them available at wholesale rates for resale.⁹¹ Given that it is technically feasible to provide resold DSL service over a loop provided as part of the UNE-Platform, the competitive LEC accessing the DSL service in the same way Verizon provided line sharing to its advanced services affiliate when it provided DSL services through such an affiliate, any restriction imposed on the availability of DSL service would by definition be unreasonable and discriminatory.

⁹¹ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011 at ¶ 22 .

The *NPRM* also asks for comment on the “co-mingling restrictions” which currently preclude carriers from connecting loop-transport combinations to an incumbent LEC’s tariffed services, and from combining loop network elements or loop-transport combinations with tariffed special access services.⁹² ASCENT submits that such “co-mingling restrictions” constitute unlawful use restrictions. As ASCENT demonstrated earlier, Sections 251(c)(3) and 251(d)(2) do not permit the Commission to dictate how network elements obtained on an unbundled basis may be used so long as they are being used to provide a telecommunications service.

**IV. State Regulatory Commissions Should be Afforded
An Opportunity to Address New Unbundling Requirements**

⁹² NPRM, FCC 01-361 at ¶ 70.

ASCENT concurs with the Promoting Active Competition Everywhere (“PACE”) Coalition proposal that individual state regulatory commissions should be afforded the opportunity to determine whether any reduction or limitation on existing incumbent LEC unbundling requirements adopted by the Commission in this proceeding should take effect in their states.⁹³ Under the PACE proposal, the unbundling obligations adopted here would constitute the minimum requirements a state regulatory commission could adopt, but would not become effective until state regulators had determined that circumstances in their markets did not require greater unbundling requirements. State commissions would be entitled to evaluate the baseline requirements adopted by the Commission within the context of their regulatory infrastructure, and in light of market and carrier characteristics unique to their states before any relaxation of the unbundling obligations heretofore applicable in their states would take effect. And if a state regulatory commission determined that additional unbundling obligations were required to ensure the competitive provision of local telecommunications service in its state, it would be free to impose such additional obligations.

As PACE points out, a procedure pursuant to which state regulatory commissions retain the ability to decide whether minimum federal requirements should take effect in their states “would ensure that federal and state regulators work together to achieve Congress’ intent that local markets be opened to competition.”⁹⁴ While Congress delegated to the Commission the obligation to implement Section 251(C0(3), PACE is correct that “the states are in the best position to judge

⁹³ Petition of the Promoting Active Competition Everywhere Coalition filed on February 6, 2002 in CC Docket No. 01-338.

⁹⁴ Id. at 2.

the competitive needs of their markets.”⁹⁵ As PACE explains, “[s]tate regulators (a) have access to the detailed real-world information that is essential to reasoned decision-making on this issue, (b) employ procedures (such as discovery and cross examination) that are most compatible with fact-finding and verification, and (c) are in the best position to balance competitive policies with the regulatory/deregulatory framework that governs the incumbent local exchange carrier . . . in their state.”⁹⁶ ASCENT, accordingly, concurs that because state regulatory commissions are best able to “comprehensively consider the effect of any potential reduction in ILEC unbundling obligations on the consumers and small businesses within their borders,” they should be free to determine -- indeed,

⁹⁵ Id. at 4.

⁹⁶ Id.

should be required to determine -- “whether any reduction in federal minimums should be implemented in their jurisdiction.”⁹⁷

**V. Any Relaxation of Unbundling Requirements
Must Provide for an Adequate Transition Period**

In the event that the Commission ultimately elects to relieve incumbent LECs of their obligation to unbundle one or more network elements or imposes service, geographic or customer limits on any retained unbundling obligations, it must afford competitors making use of the impacted network elements to serve their customers adequate time and opportunity to address the changed circumstance if adverse consumer and competitive impacts are to be avoided. Loss of a key component of the UNE-Platform would require competitors making use of the UNE-Platform to secure alternate facilities through self-provisioning or from third party sources, if available. Migration of customers served by means of the UNE-Platform to resale would generally not be a viable option because of the serious adverse financial consequences associated with significant reductions in operating margins, as well as the loss of revenue sources such as exchange access and reciprocal compensation.

If the impacted network element cannot be readily obtained from a third party supplier and self-provisioning is required, the lead time will be substantial. For example, acquisition, installation and provisioning of multiple switches to serve an existing customer base, with the attendant multi-site collocation needs and enormous loop conversion requirements, could easily require upwards to two years. And if self-provisioning is not a realistic alternative due to

⁹⁷ Id.

capital

constraints, either additional financing must be secured or exit strategies developed and implemented, both of which alternatives will likely require equally significant lead time.

ASCENT, accordingly, recommends that a two year transition period be adopted for removal, in whole or in part, of a network element from the Commission's existing list. During this transition period, incumbent LECs would be required to continue to make the impacted network elements available to competitors that had been making use of the elements to serve customers. The impacted network elements would be available to serve both existing and new customers to allow competitors to implement existing business plans, and would be available to entities which acquired either the competitors or their customer bases to allow for implementation of necessary exit strategies. Incumbent LECs would, however, be relieved of the impacted unbundling obligations with respect to new market entrants.

With respect to other implementation issues raised by the *NPRM*, ASCENT strongly opposes adoption of any sunset period for lifting unbundling obligations. As the Commission has previously recognized, it would be impossible to predict the date on which the unavailability of a given network element would no longer impair competitors' ability to provide service.⁹⁸ Given the complexity of the analysis required in applying the impair standard, the selection of a sunset date would represent the height of arbitrary judgments. Given that regulatory certainty is essential to not only business planning, but, as previously noted, securing essential funding, ASCENT agrees with the Commission's earlier assessment that a "quiet period" within which requests for relief from unbundling obligations will not be received is essential. As the Commission recognized,

⁹⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696 at ¶ 152.

“[e]ntertaining, on an ad hoc basis, numerous petitions to remove elements from the list, either generally or in particular circumstances, would threaten the certainty . . . necessary to bring competition to the greatest number of competitors.”⁹⁹ “Periodic reviews,” accordingly, are a necessary evil, but should be spaced as far apart as is statutorily permissible.

VI. Conclusion

By reason of the foregoing, the Association of Communications Enterprises strongly urges the Commission, consistent with these comments, to retain existing network unbundling requirements.

Respectfully submitted,

**ASSOCIATION OF COMMUNICATIONS
ENTERPRISES**

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⁹⁹ Id. at ¶ 150.