

**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
MOLINE DISPATCH PUBLISHING COMPANY, L.L.C.
AND THE
COMPETITIVE COMMUNICATIONS GROUP**

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Summary

The Parties urge the Commission to retain its current national list of UNEs in order to encourage investment in and to avoid delays in the deployment of competitive telecommunications services. Retreating from the national list at this time will merely undermine the emerging competitive telecommunications industry and create more uncertainty in severely constrained financial and capital markets. Although facilities-based competition is generally desirable, it is not always readily achievable or technically or economically viable. Utilizing UNEs provides a transitional or complementary platform to allow competitors, such as wireless providers, to enter a market and to obtain geographic ubiquity without the expense of deploying duplicative facilities that cannot be economically justified. Instead, resources can be invested in developing new services and service packages that provide consumers with diversity and choice.

Nor should the Commission place overly much significance on the presence of nascent intermodal platforms in formulating its facilities unbundling policies. The 1996 Act seeks to foster both intermodal and intramodal competition. The presence of the former does not negate the Commission's obligation to encourage the latter by opening the local loop to competition. The degree of actual competitive overlap between the core markets of ILECs, cable companies, satellite service providers and terrestrial wireless services is relatively narrow and does not warrant a retreat from current unbundling obligations.

The presence of intermodal competitors is also of marginal relevance in determining whether self-provisioning is feasible. Wireless infrastructure costs, whether satellite or terrestrial, have no relationship to the costs of provisioning local wireline distribution facilities

and the infrastructure costs supporting the cable industry's foray into high speed Internet access and cable telephony have been borne by a captive audience for video programming services.

Finally, the Commission's *Cable Modem Decision* reaffirms that intermodal competition cannot be viewed as a provisioning alternative to ILEC facilities for either narrowband or broadband services.

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COMMENTS

Moline Dispatch Publishing Company, L.L.C. (“MDP”) and the Competitive Communications Group (“CCG”) (collectively the “Parties”) hereby respectfully submit these comments in response to the above-captioned *Notice of Proposed Rulemaking* released by the Federal Communications Commission (“FCC” or “Commission”) on December 20, 2001.¹ The Parties urge the Commission to retain its current national list of unbundled network elements and to refrain from sacrificing the continued development of intramodal competition based on the perceived presence of intermodal competitors.

MDP, headquartered in Moline, IL, has been an Internet Service Provider since 1994 and was the successful bidder for Local Multipoint Distribution Service licenses in the

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, FCC 01-361, 67 FR 1947 (rel. Dec. 20, 2001) (“Notice”).

Davenport-Moline and the Rockford (IL) Base Trading Areas (“BTAs”). MDP provides dial-up and fixed wireless Internet service to several thousand business and residential customers in the Davenport-Moline MSA. The company also is a Qwest Megacentral reseller of DSL service in the MSA. MDP is a member of the Small Newspaper Group, Inc. (“SNG”) family of companies. MDP’s sister company, SNG Communications, L.L.C., is certified as a Competitive Local Exchange Carrier (CLEC) in Illinois and Eastern Iowa, and was created to provide bundled advertising, information and telecommunication services in those areas. SNG Communications, L.L.C. also is certified as a long distance reseller in the listed areas as well as in Southern Minnesota and North Central Indiana, where SNG newspapers operate.

CCG is a full service telecommunications consulting firm with over 200 small LEC and CLEC clients in 30 states. CCG services include regulatory assistance, engineering, market analysis, financial planning and strategic services.

I. INTRODUCTION

Following passage of the Telecommunications Act of 1996 (“1996 Act”) a tremendous amount of public and private sector resources have been devoted to implementing the statutory mandate to create competition in the “last mile.” Numerous rulemaking proceedings, clarifications and court proceedings have yielded a regulatory framework which is beginning to do just that. The FCC’s semi-annual *Local Telephone Competition Report*, released just a few short weeks ago, indicates that, during the first half of 2001, CLECs served 17.3 million U.S. access lines, or about 9 percent of the nation’s 192 million lines, a modest increase of 16% from the previous year.² The report also indicates that 33 percent of these lines were

² *Local Telephone Competition, Status as of June 30,2001*, Industry Analysis Division, Common Carrier Bureau (February 2002) (“*Local Telephone Competition Report*”) at p. 1.

provided over the CLECs' own facilities, 44 percent provided using unbundled local loops, and 23 percent provided via resale.³ In this respect, the report reflects the efficacy of the statutory scheme established by Congress which establishes three alternative yet complementary strategies for promoting local competition: construction of new facilities; unbundling; and resale.

II. ARGUMENT

A. THE COMMISSION SHOULD RETAIN ITS CURRENT NATIONAL UNE LIST

Pursuant to its statutory mandate to promote local competition through unbundling, the Commission has established a national list of unbundled network elements (“UNEs”) which Incumbent Local Exchange Carriers (“ILECs”) must provide to requesting CLECs. The FCC adopted the list using an approach that identifies the specific elements without access to which a CLEC would be impaired in its ability to provide the telecommunications services it seeks to offer. In the *Notice*, the FCC requests comment on whether it should replace or revise its national list of unbundled network elements based on an approach that first identifies the impairments to requesting carriers’ abilities to provide service and then defines network elements that address those impairments.⁴ Although it is not clear from the *Notice*, the Parties are concerned that the FCC or other commenters may contemplate conducting such an impairments-first analysis on a case-by-case or market-by-market basis. The Parties believe that such an approach would be undesirable for a number of reasons.

³ *Id.* at pp. 1-2.

⁴ *Notice* at ¶ 20.

First, such an approach would create regulatory uncertainty, thereby further hindering the ability of CLECs to raise capital for their operations in an already constricted financial market. The current national list provides competing carriers with much-needed certainty in formulating their business plans and raising capital. Knowing in advance which UNEs can be purchased from the incumbent carrier gives the new market entrant flexibility to allocate limited capital resources in ways that will allow it to provide innovative new services and devise more efficient ways to deliver existing services in a competitive fashion. Basing the national list on specifically identified UNEs also provides a clear delineation of the responsibility that the incumbent carrier has in dealing with competitors.

Second, an approach which identifies impairments first, particularly on a market-by-market basis, would be administratively unworkable. Impairments may vary from carrier to carrier, market to market, and service to service. Impairments may be unforeseen or unanticipated. Impairments may change as market conditions change. An approach which first requires an identification of impairment will, of necessity, be so highly fact specific as to require a substantial, and potentially overwhelming, commitment of the Commission's limited resources.

Third, using an impairments-first approach would impede the continued development of local competition, perhaps irreversibly so, by delaying the actual deployment of services. Speed to market is oftentimes critical to the success or failure of a new service offering. Requiring an identification of an impairment before a competitor can get access to needed network facilities will inevitably inject disputes and delays into what already can be a lengthy provisioning process.

B. SAFEGUARDING COMPETITIVE ACCESS TO UNEs PROVIDES A TRANSITIONAL OR COMPLEMENTARY PLATFORM TO FACILITIES-BASED COMPETITION

In the *Notice*, the Commission expressed its view that facilities-based competition is preferable to competitive strategies based upon unbundling or resale.⁵ Throughout the *Notice*, the Commission requests that commenters provide data on whether certain regulatory changes or policies would encourage or discourage CLECs from investing in their own facilities.⁶ The *Notice* also requests comments on whether the presence of facilities-based intermodal communications platforms should be taken into account in determining whether certain network elements are “necessary” for the provision of competitive local services or whether the absence of such elements would “impair” the ability of CLECs to provide competitive services.⁷ Although the Commission reaffirms its statutory obligation to foster market entry through facilities unbundling and resale, the Parties are concerned that the *Notice* has subtly shifted the presumptions underlying Section 251 by directing the focus of the Commission’s inquiry away from breaking down barriers to local loop competition, which is the main thrust of Section 251, towards ensuring that competitors do not become overly dependent on the use of incumbent facilities.⁸

⁵ See *Notice* at ¶¶ 9, 24-25.

⁶ See *Notice* at ¶¶ 22-25, 45-46. The *Notice* also seeks comment on policies that would encourage additional facilities investment by ILECs, especially with respect to facilities that are capable of providing advanced telecommunications services and high speed Internet access.

⁷ See *Notice* at ¶ 28.

⁸ See *Notice* at ¶ 3.

There is little argument that investment in competitive facilities is desirable. ILECs complain of burdens and costs incurred as a result of facilities sharing. CLECs as well would prefer to use their own facilities when it makes economic sense to do so in order to free themselves from the burdens of lengthy interconnection agreements, avoid delays in provisioning and deploying their services, and control recurring costs. This is born out by the *Local Telephone Competition Report* which indicates that fully one-third of the CLEC lines are provided over CLEC facilities.⁹ Self-provisioning, however, is not always possible or even desirable.

In some cases, access to UNEs from the incumbent is necessary for a competitor to achieve geographic ubiquity, such as where high costs or low densities render the economics of duplicative facilities unworkable and economically undesirable or where technical limitations of an intermodal competitive technology require augmentation with some UNEs. This is particularly true for a CLEC whose market entry incorporates a wireless strategy. Whether it be for narrowband voice or advanced broadband services, there are instances where the technical limitations of a wireless solution will have to be augmented with wireline services in order to achieve universal availability of service within a given market area because of the terrain and bandwidth limitations of today's wireless technologies.¹⁰

⁹ *Local Telephone Competition Report* at pp. 1-2.

¹⁰ The Parties also support the comments of various CMRS providers who argue that wireless switching centers, including Mobile Switching Centers, and wireless base stations are the functional equivalent of wireline central offices and wire centers, and that wireless providers should be allowed to purchase dedicated transport between and among these facilities on an unbundled basis. *See Notice* at ¶ 61. Currently, the cost of backhauling traffic from cells or hubs represents a significant expense for wireless carriers.

In other cases, access to the unbundled local loop elements or combinations is a valid and prudent transitional strategy that allows a market entrant to begin offering services, build a customer base and generate revenues that will be reinvested in new facilities and new services as they prove successful. In this regard, the availability of the UNE platform (“UNE-P) has been particularly valuable in reducing the barriers to entry that competitors face when seeking to provide competitive local exchange services. In contrast, the bankruptcy courts are packed with examples of companies that overextended themselves by investing millions of dollars on the construction of new networks before they had a customer base in place to recover those costs and support their operations. Indeed, given the severely constrained capital markets in the telecommunications sector, it will be very difficult, if not impossible, to serve mass markets if new entrants are required to fully construct their own facilities from the outset.

Access to UNEs, and especially the UNE-P, fosters both local competition and the rapid deployment of advanced networks. These are not inconsistent policy goals. Such access removes barriers to market entry and allows competitors to establish a market presence more quickly than they would otherwise be able to without such access. It also allows competitors to invest revenues received from those services into the development of innovative new services that will both differentiate their products from those of the incumbent and other competitors, and better meet the needs of consumers by increasing diversity and choice.

Innovation and diversity also require that the Commission allow CLECs to combine access to UNEs with resale.¹¹ The Act clearly provides both options and does not require a new market entrant to make an election between one mode of entry or the other. A competitor

¹¹ *Notice* at ¶ 69.

may well desire to augment its UNE-based self-provisioned services with resold telecommunications offerings to offer an attractive bundle or package of services that can be more competitively marketed to customers. By not having to self-provision the services which are resold, capital is freed up to develop and improve innovative new services.

With CLECs achieving a market share of only 9 percent of the nation's access lines, a retreat from the current regulatory scheme which establishes a national list of network elements that must be made available to competitors on an unbundled basis is not warranted. The listing of UNEs has provided a clear starting point for the delineation of the obligations of both competitors and incumbents. In a few short years, it has succeeded in creating a bridgehead for the development of local telecommunications competition. To substantially revise or abandon this policy now runs the risk of reversing the hard won gains that are beginning to bear fruit.

C. THE COMMISSION SHOULD NOT ACCORD UNWARRANTED SIGNIFICANCE TO NASCENT INTERMODAL COMPETITORS

In the *Notice*, the Commission indicates its desire to balance its obligations to both foster local competition and encourage the deployment of advance telecommunications capabilities. The Commission questions whether the presence of intermodal competition in particular markets militates in favor of reducing ILEC unbundling obligations.¹² While intermodal competition may well be relevant (although not necessarily dispositive) in determining whether ILECs should be considered dominant in the provision of certain services, the Parties urge the Commission not to attach too much significance to intermodal competition for purposes of this proceeding. The 1996 Act sought to foster both intermodal

¹² *Notice* at ¶¶ 27-28.

and intramodal competition. The presence of the former does not negate the Commission's obligation to encourage the latter by opening the local loop to competition.

The actual degree of competitive overlap between the core markets of ILECs, cable companies, satellite service providers and terrestrial wireless services is relatively narrow. Very few cable companies are presently doing more than experimenting with offering voice services (the core market for LECs) in a few discrete markets.¹³ While this may change over time, the current state of competition provides no basis to abandon or retreat from current unbundling obligations.

The converse is equally true. In its latest *Video Competition Report*, the Commission noted that LECs had largely exited the business of providing video programming services (the core market for cable operators) to their telephone customers.¹⁴ Even in the non-core markets for broadband services, such as high speed data and Internet access, cable serves primarily residential customers while ILECs have largely concentrated on the more profitable business market.¹⁵

Similarly, DBS satellite service is primarily a video programming service while other satellite-based voice and data carriers are more suited to long distance and international traffic and are not really an economic local loop alternative. Terrestrial wireless services, which are

¹³ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, Eighth Annual Report, FCC 01-389, 25 CR 818 (2002) ("*Video Competition Report*") at ¶¶ 50-53.

¹⁴ *Video Competition Report* at ¶ 100.

¹⁵ See *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*, CC Docket No. 98-146, Third Report, FCC 02-33 (rel. February 6, 2002) at ¶ 42.

well suited for local traffic, are still largely an adjunct to rather than a substitute for the wireline network, largely targeting mobile users where wireline service is not available or convenient. While the usage of wireless communications is growing, very few customers have actually replaced their landline connections with wireless service. The Commission itself has acknowledged that neither cable telephony nor mobile phones are reasonable substitutes for wireline local exchange service.¹⁶

The presence of intermodal competitors is also of marginal relevance in determining whether self-provisioning is feasible. Wireless infrastructure costs, whether satellite or terrestrial, have no relationship to the costs of provisioning local wireline distribution facilities. The infrastructure costs supporting the cable industry's foray into high speed Internet access and cable telephony have been borne by a captive audience for video programming services. Until recently, the cable industry has enjoyed a virtual monopoly on the distribution of video programming, especially satellite-delivered cable programming. Even now, cable is still the dominant distributor of video programming with a market share of approximately 78 percent.¹⁷ The substantial capital outlays incurred to upgrade cable facilities for digital communications have been supported by analog video customers, many of whom may never purchase either digital video or high speed Internet access services, yet who continue to experience regular rate increases substantially in excess of inflation.¹⁸ The cable

¹⁶ See *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, 15 FCC Rcd 3696 (1999) (“*UNE Remand Order*”) at 3782, ¶¶ 188-189.

¹⁷ *Video Competition Report* at ¶ 5.

¹⁸ Cable rates for non-basic services, the most popular programming, have been deregulated as of March 31, 1999. 47 U.S.C. §543 (c) (4). It is no coincidence that this happens to coincide

industry's unique ability to leverage both its existing video distribution facilities and its existing customer base make it an unsuitable proxy for determining the ability of CLECs to self-provision their facilities.

Nor can cable facilities be seen as a provisioning alternative to ILEC facilities for either narrowband or broadband services. In its recent *Cable Modem Ruling*, the Commission clearly held that the unbundling and equal access requirements of its *Computer II* decision were not applicable to cable companies, even those that provide telecommunications services. To the extent that such requirements would otherwise be applicable, they were waived.¹⁹ Although the FCC requested comment on whether and on what basis cable companies should be required to open their cable modem platform to unaffiliated Internet Service Providers ("ISPs") there clearly is no present requirement that they do so and, in the absence of such a requirement, the cable modem platform cannot be viewed as a provisioning alternative to local exchange facilities.

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with the massive upgrade of cable plant to support cable modem, cable telephony and digital video services. Arguments that rising programming costs are responsible for repeated rate increases substantially in excess of inflation is belied by the fact that the rates for DBS service, which contains the same programming, have remained flat. Additionally, wireline video competitors often complain that incumbent cable operators respond to competition by drastically lowering prices. See, e.g., *Armstrong Communications, Inc.*, 16 FCC Rcd 1039 (January 19, 2001); *Complaint Against Adelphia Communications Corporation*, CSR-5862-R (filed March 1, 2002). Either the incumbents are pricing their services below cost to drive out competition or they are disgorging the profits that they might otherwise use to fund system upgrades.

¹⁹ *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (Released March 15, 2002) ("*Cable Modem Ruling*") at ¶¶ 42-45.

III. CONCLUSION

The Commission should maintain its current national list of UNEs in order to encourage investment in and to avoid delays in the deployment of competitive telecommunications services. Retreating from the national list at this time will merely undermine the budding competitive telecommunications industry. Although facilities-based competition is generally desirable, it is not always readily achievable or technically or economically viable. Utilizing UNEs provides a transitional or complementary platform to allow competitors, such as wireless providers, to enter a market and to obtain geographic ubiquity without the expense of deploying facilities throughout the market. Finally, the Commission should not place undue significance on nascent intermodal competitive technologies.

For all of the foregoing reasons, the Parties respectfully request that the Commission maintain its current national UNE list and continue to support the development of both facilities based and non-facilities based intramodal competition.

Respectfully submitted,

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