

**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**

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**COMMENTS**

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively “BellSouth”), submits the following comments in response to the *Notice of Proposed Rulemaking* in these proceedings.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The FCC should reduce the current list of unbundled network elements (“UNEs”) because current marketplace evidence shows that alternatives are available in specific geographic areas, demonstrating that carriers are not impaired without access to UNEs in those markets. Marketplace evidence further counsels the FCC to adopt a strong presumption against a finding of impairment wherever alternative facilities have long been or feasibly can become available. The Commission should not require the unbundling of elements used in the provision of

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<sup>1</sup> *In the Matter of 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 and 98-147, *Notice of Proposed Rulemaking*, FCC 01-361 (rel. Dec. 20, 2001) (“*NPRM*”).

interexchange, wireless and advanced services. The existence of alternative facilities within specific geographic markets; the decline in incumbent local exchange carrier (ILEC) access lines and revenue growth; and the corresponding increase in access lines and real revenue growth of competitive local exchange carrier (“CLEC”) competition and successful telephone exchange service competition from CLECs, wireless providers and providers of cable telephony and cable broadband services all compel these conclusions.

The evidence demonstrates that in the three years since the *UNE Remand Order*, the number of ILEC-served access lines (including residential access lines) and ILEC revenue growth, have suffered unprecedented declines. During the same period, marketplace evidence demonstrates that the CLECs’ customer base has more than tripled and that ILECs are losing roughly an equal number of lines to both wireline CLECs and to intermodal competitors in the form of wireless and cable networks.<sup>2</sup> Unlike ILECs, CLEC, wireless and cable telephony and broadband providers have experienced real access line and revenue growth since the *UNE Remand Order*<sup>3</sup> and the combined revenues of wireless and broadband data service providers are now close to matching, and will soon surpass, the total revenues of traditional local voice service.<sup>4</sup> Marketplace evidence show that network elements that were required to be unbundled in 1996 and again in 1999 are now being supplied competitively in substantial amounts. Local switching, interoffice transport, and high capacity (DS1 and higher) loop elements are being self-

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<sup>2</sup> UNE Fact Report 2002 at I-1, Prepared and Submitted by BellSouth, SBC, Qwest, and Verizon, April 2002 (“2002 UNE Fact Report”). An electronic version of the 2002 UNE Fact Report is attached to and submitted with these comments which are also submitted electronically. It is identical in content to copies submitted by SBC, Qwest and Verizon.

<sup>3</sup> *Id.* at I-5 – I-6.

<sup>4</sup> *Id.* at I-15.

provisioned or are available from third-party suppliers in substantial quantities.<sup>5</sup> In some markets, the presence of wireline or intermodal competitors (or both) makes a compelling case for limiting the availability of unbundled loops used for “plain old telephone service” (“POTS”). Market developments since 1999 also call into question the current scope of unbundling requirements for elements such as dark fiber, subloops, network interface devices (“NIDs”), and signaling networks. Finally, market evidence demonstrates conclusively that interexchange carriers and wireless providers are not impaired without access to ILEC network elements and that any unbundling requirements will stifle the deployment of advanced services.

During the latter half of the last triennium, the telecommunications and technology sectors of the world economy have experienced a malaise in terms of both investment and facilities-based innovation, and have been forced to come to terms with potential security vulnerabilities. A targeted impairment analysis that considers both the economic and social costs of continued or further unbundling is therefore necessary in order to promote the deployment of facilities-based competitive alternatives to local exchange service, with its attendant advantages of service differentiation and increased security through network redundancy. Capital investment will follow business plans where the reward for undertaking business risk is commensurate with that risk. However, the potential business reward is limited for all market participants when success is based on short-term regulatory arbitrage or where a company’s capital investments are required, by regulation, to insure the business risk, financial return, and indeed, the economic viability, of competitors.

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<sup>5</sup> Declaration of Howard A. Shelanski, J.D., Ph.D. (Apr. 5, 2002) (“Shelanski Decl.”) at 3. An electronic version of the original Shelanski Declaration, which is being submitted into the record of this proceeding through the Comments of SBC, is attached.

The Commission must recalibrate its current regulatory framework for conducting the “at a minimum” impairment analysis required by statute. It must give dispositive weight to the actual existence of self-provisioning and competitive alternatives within a geographic-specific market. Wherever these conditions exist, actual competitive there is no need to undertake a “material diminishment” analysis, because competitors are obtaining necessary facilities without recourse to ILEC network elements.

When there is no evidence of self-provisioning or competitive alternatives within a specific geographic market area, or a subset of that area, that the Commission should consider whether it is feasible for self-provisioning or competitive alternatives to become available. In this context it would be proper for the Commission to consider the five factors it has previously identified for its “material diminishment” analysis, properly recalibrated, in determining feasibility.

The impairment analysis is the “minimum” required of the Commission by statute. If it makes an impertinent finding, the Commission should then consider whether additional statutory goals would be served by unbundling element at issue. The goals that should be considered are (1) the promotion of facilities-based competition, investment and innovation in the market for telephone exchange service, (2) public safety, national security and network integrity; (2) reduced regulation; (3) administrative practicality; (4) the social costs of unbundling, and (5) the deployment of advanced services. An unbundling obligation imposed or retained after this analysis must be limited in duration until the next biennial review, at which time unbundling proponents have the burden of convincing the Commission that perpetuating the rule is in the public interest and necessity.

Having moved well beyond the initial phase of local competition implementation, and with over half a decade of experience, including inconsistent state determinations with regard to UNE availability, the Commission should remind the states that the 1996 Act limits state action that is inconsistent with Commission action with respect to UNEs. While states are currently free under Commission rules to undertake an impairment analysis for elements that the FCC has not considered, the FCC must clarify that states are not at liberty under the statute to “restore” or “re-list” FCC de-listed elements, such as the current unbundled local switching exemption, because the FCC has already made a prior impairment determination in that area. Prospectively, the Commission should articulate a national policy, based on six years of experience, that the current list of UNEs exhaustive. In keeping with the deregulatory policies of the 1996 Act and in order to promote facilities-based competition and the continued deployment of advanced services, the Commission should further announce that it is the policy of the FCC that the current list of UNEs may only be decreased. States, therefore, should continue to provide critical input into the actual existence of self-provisioning and competitive alternatives in geographic markets that lie within their jurisdictional boundaries, but should not have the ability to modify the national list of UNEs in any way.

## **II. THE PURPOSE OF SECTION 251 IS TO PROMOTE FACILITIES-BASED COMPETITION IN TELEPHONE EXCHANGE SERVICE MARKETS**

The essential elements of unbundling, the “*who, what, where, when and why,*” are relatively straightforward, but bear revisiting.<sup>6</sup> The “who” comprise those subject to potential network unbundling – incumbent local exchange carriers (ILECs) that provided telephone

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<sup>6</sup> The unbundling obligations are found in section 251(a) of the Telecommunications Act of 1996, “General Duty of Telecommunications Carriers.”

exchange service as of the date of enactment of the 1996 Act<sup>7</sup>-- and requesting carriers, identified in the Commissions previous unbundling proceedings or competitive local exchange carriers (CLECs).<sup>8</sup> The “what” are the network elements themselves, defined by statute,<sup>9</sup> and established in subsequent orders by this Commission and numerous state commissions,<sup>10</sup> as well as the specific service for which UNEs were intended to be provisioned: telephone exchange service.<sup>11</sup> The “where” is the “technically feasible point” where UNEs are to be provided.<sup>12</sup> The

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<sup>7</sup> 47 U.S.C. § 251(h)(1)(A).

<sup>8</sup> Unbundled network elements (UNEs) may be made available to “requesting carriers.” 47 U.S.C. § 251(c)(3). While the term “requesting carrier” is not defined in section 251, it is clear from the context of section 251, and specifically the definition of “incumbent local exchange carrier” for the purpose of section 251, that a requesting carrier must both be seeking to provide “telephone exchange service” and be “impaired” in the provision of telephone exchange service without access to the ILEC’s UNEs. *E.g.*, “The standards and unbundling obligations that we adopt in this Order are designed to create incentives for both incumbent and competitive LECs to innovate and invest in technologies and services that will benefit consumers through increased choices of telecommunications services and lower prices.” *In the Matter of 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, 3700, ¶ 5 (1999) (“*UNE Remand Order*”) (emphasis added).

<sup>9</sup> A network element is a facility or is equipment used to provide telecommunications service, including the features, functions and capabilities provided through the facility or equipment. 47 U.S.C. § 153(29).

<sup>10</sup> In 1996 the Commission established a list of network elements subject to unbundling that was ultimately vacated by the United States Supreme Court. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (“*Iowa Utils. Bd.*”). On remand, and in one other subsequent proceeding, the Commission modified the list in 1999 so that it now includes at a national level (1) high capacity loops; (2) dark fiber; (3) line conditioning; (4) the high frequency portion of the loop; (5) POTs loops; (6) sub-loops; (7) network interface devices; (8) local circuit switching, with some exceptions; (9) limited packet switching; (10) shared interoffice transport; (11) dedicated interoffice transport; (12) signaling networks; (13) call-related databases; and (14) operations support systems. *UNE Remand Order*, 15 FCC Rcd at 3779-87, ¶¶ 181, 187, 191, 196, 205, 232, 253, 313, 321, 323, 332, 369, 383, 402, 433; *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, *Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98*, 14 FCC Rcd 20912, 20921, ¶ 13 (1999) (“*Line Sharing Order*”). States have added additional elements creating a patch work of requirements. CLECs bring litigation across the country in different states in order to achieve UNEs that the Commission has declined to add to the national list.

<sup>11</sup> *Supra* n. 7.

<sup>12</sup> 47 U.S.C. § 251(c)(3).

“when,” although defined by statute and elucidated by the Supreme Court, remains the core issue of this proceeding – UNEs are to be made available *only when* “the failure to provide access . . . would *impair*” the requesting carrier’s ability to provide services.<sup>13</sup> The “why” of UNEs – the promotion of facilities-based competition for local telephone exchange service through extraordinary and therefore directionally limited, temporary, transitional measures must guide the Commission’s analysis in this proceeding.

It remains for the Commission to implement the unbundling provisions of the statute on a prospective basis through a regulatory construct that is both faithful to the law and is “commensurate” with “market conditions.”<sup>14</sup> The Commission’s initial implementing regulations were biased toward certain policy choices favored by the previous Commission. It is critical that this Commission understand that critical policy choices have already been made by Congress, and are expressed in the statute and its legislative history. The Commission should not adopt policies inimical to those choices, but instead enact a prospective deregulatory framework that encourages investment and innovation and facilities-based competition.

**A. The Rules Promulgated During the Initial Implementation Phase Were Meant to “Correct,” Rather Than “Correspond With,” Congress’s Assumption Regarding the Markets for Telephone Exchange Service in 1996.**

Congress expressly rejected the assumption that local telephone service is a natural monopoly in the 1996 Act.<sup>15</sup> Yet, the Commission’s initial unbundling rulemaking was animated by a passionate belief that, notwithstanding the Act’s express preemption of all state

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<sup>13</sup> 47 U.S.C. § 251(d)(2)(B). (emphasis added).

<sup>14</sup> “Recognizing that *market conditions would change and create a need for commensurate changes to the unbundling rules*, the Commission determined to revisit its unbundling rules in three years . . . .” *NPRM*, ¶ 1. (emphasis added).

<sup>15</sup> Brief of Petitioners and Supporting Intervenors at 26, *citing* S. Conf. Rep. No. 104-230, at 148 (1996) (concluding that “meaningful facilities-based competition is possible.”), and 57, *United States Telecom Ass’n v. FCC*, Nos. 00-1015 & 00-1025 (D.C. Cir.) filed June 1, 2001 (“Petitioners’ Impairment Brief” or “Petitioners’ Brief”).

and local exclusive franchise laws,<sup>16</sup> ILECs (and the Bell operating companies (“BOCs”) in particular) were monopolies.<sup>17</sup> Despite the Act’s express market opening provisions, and the Commission’s own perception of a general statutory “tilt toward the local phone companies,” the Commission was determined to use its “broad authority” to exercise its “discretion in writing the implementing regulations:”

Indeed, like the modern engineers trying to straighten the Leaning Tower of Pisa, we could aspire to provide the new entrants to the local telephone markets a fairer chance to compete *than they might find in any explicit provision of the law*.<sup>18</sup>

What the Commission originally perceived as a “general tilt” toward the local telephone companies is actually the statutory construct that the Commission has a duty to implement<sup>19</sup> As the *NPRM* correctly points out, Congress thought that competitors would, in the initial phases of local telephone exchange service competition, be capable of duplicating some, but not all, accepting telephone exchange service facilities.<sup>20</sup> Thus, Congress established a limited, cost-

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<sup>16</sup> 47 U.S.C. § 253(a).

<sup>17</sup> Reed E. Hundt, *You Say You Want a Revolution* (Yale, 2000) at 153, 155.

<sup>18</sup> Hundt, *supra*, n. 17, at 154 (emphasis added). Former Chairman Hundt does make clear that the relevant markets to be considered are the “local telephone markets.”

<sup>19</sup> The general rhetoric of the *UNE Remand Order* is more balanced than that of the *Local Competition Order*. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499 (1996) (“*First Report and Order*” or “*Local Competition Order*”). The Commission recognized that it was “Congress’s expectation that new competitors would use unbundled elements from the incumbent LEC until it was practical and economically feasible to construct their own networks,” *UNE Remand Order*, 15 FCC Rcd at 3701, ¶ 6, and stating that “the unbundling rules we adopt in this proceeding seek to promote the development of facilities-based competition.” *Id.* Nevertheless, the Commission paid lip service to this statutory framework by requiring unbundling even where it acknowledged that CLECs were self-provisioning their own elements and by subsequently expanding the list of available elements beyond what was in the *Local Competition Order*, including an element used to provide advanced telecommunications service, not local telephone exchange service.

<sup>20</sup> *NPRM*, ¶ 1 (“Recognizing that incumbent LECs control bottleneck *facilities*, Congress adopted section 251 of the 1996 Act in order to permit competitors to overcome the obstacles posed by that control.”). *See also* Petitioners’ Brief at 26, *citing* S. Conf. Rep. No. 104-230 at 148 (Congress recognized that competitors may, at least at first, need to obtain “some facilities and capabilities from the incumbent LEC”).

based unbundling requirement, separate and distinct from the Act's "retail price/avoided cost" wholesaling requirements.<sup>21</sup> Like the "modern engineers" then at work on the Pisa *campanile*, the Commission "straightened" this "general tilt" of the act in two profound ways: it refused to limit competitive access to network elements and it established prices for UNEs at rates "no real-world carrier could ever hope to equal."<sup>22</sup>

The Commission's determination on both of these issues (e.g. meaningful limitations on ILEC UNE access and the rates for such access) have been appealed and are subject to possible vacature by appellate courts.<sup>23</sup> In its *Notice*, the Commission states that it is not suggesting that any of its analysis in its prior decisions is incorrect, but it does seek comment on how it should read the Act on a prospective basis.<sup>24</sup> BellSouth believes that some of the Commission's prior analyses were incorrect and inconsistent with congressional intent. On a prospective basis, however, the Commission has a golden opportunity to "move past" the "initial phase of [its] implementation of the statute" in order to establish a "framework to reflect comprehensively the technological advances and marketplace changes that have taken place during the interim."<sup>25</sup>

**B. In the Context of the Current Economic Climate, the Next Phase of Implementing Rules Should Promote Facilities-Based Competition and Encourage Investment and Innovation.**

In order to construct an effective prospective regulatory framework, it is instructive to look at the results of the Commission's initial implementation of the statute. There can be no

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<sup>21</sup> The duty to offer services for resale at wholesale rates is established in 47 U.S.C. § 251(c)(4). The pricing distinctions are at § 252(d)(1)(A)(i) (UNEs) and § 252(d)(3) (resale).

<sup>22</sup> *Supra*, n. 17; Petitioners' Impairment Brief at 33.

<sup>23</sup> *United States Telecom Ass'n*, D.C. Cir. Nos. 00-1015 & 00-1025 (filed Jun. 1, 2000) (challenging UNE impairment analysis in *UNE Remand Order*) and *Verizon Communications Inc., et al. v. FCC*, U.S. Sup. Ct. No. 00-511 (filed Oct. 4, 2000) (challenging UNE TELRIC pricing).

<sup>24</sup> *NPRM* n.48.

<sup>25</sup> *Id.* ¶ 15.

doubt that the Commission's initial implementation efforts succeeded in jump-starting local exchange competition. FCC statistics indicate that the number of local telecom service providers competing with incumbent LECs increased at least 488% from 109 in 1996 to 532 in 2000.<sup>26</sup> The Commission, with help from state PSCs, accomplished this in part by "setting" the prices for UNEs low enough to offset any competitive advantage that the ILECs might have enjoyed by virtue of their perceived economies of scale and scope.<sup>27</sup> The process set rates for individual UNEs and for UNE-P at well below ILEC "cost" and "reasonable profit" as mandated by statute.<sup>28</sup>

<sup>26</sup> Jim Lande & Katie Rangos, *Carrier Locator: Interstate Service Providers* (FCC, IAD, Nov. 1997), Table 1 ("Total Carriers by Class"); Katie Rangos & Kenneth Lynch, *Telecommunications Provider Locator* (FCC, IAD, Nov. 2001) Table 1 at 3 ("Total: All Competitors of ILECs").

<sup>27</sup> "We would dictate for the country a range of prices that the local phone companies could charge to their new competitors for leasing the use of the existing companies' networks. The states would set specific prices within the range. I considered that a compromise with utility commissions." Hundt, *supra* n. 17 at 156.

<sup>28</sup> 47 U.S.C. § 252(d)(1)(A)-(B). This action has clearly discouraged investment and innovation, the Commission's stated goal in the UNE Remand Proceeding, *UNE Remand Order*, 15 FCC Rcd at 3699, ¶ 2, as demonstrated in the following table prepared by Anna Marie Kovacs:

UNEP Prices in Relation to the RBOCs Financial Books

	BellSouth	Qwest	SBC	Verizon
Basic UNEP	\$ 20.97	\$ 26.80	\$ 19.88	\$ 24.14
Basic UNEP + features	\$ 21.67	\$ 28.79	\$ 20.96	\$ 24.20
Full UNEP	\$ 26.61	\$ 29.49	\$ 22.10	\$ 24.31
Average Revenue per line*	\$ 62.65	\$ 56.45	\$ 57.37	\$ 57.55
Average cash cost per line*	\$ 31.79	\$ 32.76	\$ 32.59	\$ 33.26
Average depreciation and amortization per line	\$ 13.22	\$ 11.77	\$ 12.55	\$ 11.50
Average total operating cost per line*	\$ 45.01	\$ 44.52	\$ 45.14	\$ 44.76
Full UNEP as % revenue	42%	52%	39%	42%
Full UNEP as % total operating cost	59%	66%	49%	54%

The unprecedented appeal of UNE rates; the rapid growth of the Internet and data traffic; and ready access to equity and debt capital coincident with the run-up in information technology stocks from 1997 until 1999, made it relatively easy for new entrants to finance start up costs. From a technological standpoint, the practical result was a corresponding and unprecedented increase in new network capacity (at least on certain intercity routes in those areas of metro markets where businesses are located) as total capital spending by all carriers jumped from \$42 billion (18% of sales) in 1996 to \$117 billion (36% of sales) in 2000.<sup>29</sup> Because a disproportionately large portion of telecom revenues and earnings remain concentrated in business districts of larger metro markets, many CLECs overbuilt their networks to gain access to these same business customers.<sup>30</sup>

Capital expenditures were always somewhat disproportionate to revenues, and this trend became more severe after the *UNE Remand Order* became effective in the first quarter of 2000.<sup>31</sup> Widespread non-facilities based CLEC use of UNEs in general, and UNE-P in particular,

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Anna Marie Kovacs, et al., *Status and Implications of UNE-P in Bell Markets*, Commerce Capital Markets (Nov. 12, 2001) at 5.

<sup>29</sup> Adam Quinton, et al, *The Telecommunicator: U.S. Service Provider Capex Update – Close to Bottoming Out in 2003*, Merrill Lynch (Nov. 7, 2001) at 12. A good deal of new network capacity was constructed by new carriers like Level 3, Williams, and Metropolitan Fiber Systems that entered the core long haul (i.e., intercity) transport market in anticipation of continuous high growth in bandwidth demand caused by concomitant growth of the Internet. New entrants actually built out new facilities based stand alone networks in this segment of the market in part because the major incumbent long distance carriers – AT&T, WorldCom and Sprint – were not required to wholesale available capacity at non-compensatory rates. Much of that capacity remains underutilized today in large measure because the availability of and demand for broadband applications in local telecom markets did not develop rapidly enough to utilize much of the additional bandwidth that new core network carriers like Level 3 deployed in the late 1990s.

<sup>30</sup> 2002 UNE Fact Report at I-13, IV-1-IV-5.

<sup>31</sup> From 1996 to 2000, capital expenditures by all telecom carriers rose at an average annual rate of 29% versus a far more modest 10% annual increase in revenues. Blake Bath, *Telecom Sea Change Creates Overcapitalization*, Lehman Brothers (Sept. 20, 2000) at 5.

substantially shifted market share away from ILECs to CLECs. This was not based on technological innovation, however, because CLECs were limited in their ability to differentiate service offerings from those of the ILECs.<sup>32</sup> By limiting the alternative carrier's ability to add value to consumers (and incremental revenue to themselves) by differentiating their service offerings from the ILECs' widespread use of UNE-P had the practical effect of "commoditizing" telecom service markets, forcing many carriers to compete predominately on the basis of price, while driving down revenues.<sup>33</sup>

The Commission's TELRIC pricing requirements effectively imposed an upper limit on what facilities-based carriers could charge, without losing customers to non-facilities based UNE-P carriers. Regulators purposefully kept TELRIC rates low enough to allow new entrants to compete with the ILECs in retail business markets. Yet, those rates made it that much more difficult for facilities-based CLECs to recover the cost of constructing new network capacity of their own. Heightened price competition for business customers in major metro markets;

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<sup>32</sup> Since both ILEC and CLEC use the same ILEC network, both necessarily provide similar types of service.

<sup>33</sup> As new carriers entered telecom markets, price competition for larger business customers that many CLECs targeted intensified as rival carriers sought to take advantage of high degrees of operating leverage (i.e., high ratio of fixed to total costs) that characterize local telecom networks. High operating leverage implies that the marginal cost of carrying additional increments of traffic tend to be very low. A carrier's profitability, therefore, largely depends on how fully its network is utilized which enables it to spread fixed network costs over larger volumes of traffic. As it does, the average cost per call or bit declines and earnings increase, all other things being equal. Faced with these circumstances, carriers, particularly new entrants and those in financial difficulty, are often compelled to cut rates in an effort to acquire market share and the added traffic volume and operating income that comes with it. Other carriers, however, are remiss to cede market share to rivals since the loss of traffic volumes raises their average unit costs and reduces earnings. Thus, once one carrier of consequence reduces rates, others generally follow suit. Current UNE arrangements proper BOCs into the same downward spiral. *See also* M. Crossman, *Wireless Services/Incumbents: The Bells: Consolidation?* J. P. Morgan (Mar. 21, 2002) ("Core voice margins should continue to deteriorate despite potential changes to the wholesale platform. Under UNE arrangements the Bells are forced to provide competitors with elements of their network at anywhere from a 50% to an 80% discount to their retail price. Yet between 85% and 95% of the Bells costs are fixed. The loss of retail lines to wholesale competitors thus significant pressure on overall wireline margins.")

difficulty adding value through service differentiation; market behaviors constrained by TELRIC prices; and the failure of Internet access and transport revenues to materialize as rapidly as many new entrants had hoped, all combined to have the practical effect of keeping revenue growth rates well below growth in capital expenditures by carrier groups throughout the industry.

In turn, growing disparities between growth of capital spending and revenues also caused industry-wide returns on capital to deteriorate.<sup>34</sup> On February 8, 1996, the day the 1996 Act became law, the common stocks of all publicly traded CLECs in the U.S. – excluding AT&T and WorldCom – had a market value of just under \$ 2 billion. By March 2000, a mere 49 months later, the total market cap initialization (“market cap”) of this segment of the telecom market reached an all time high of \$100 billion. That same spring, Wall Street began to raise serious concerns about the effects of these trends on the industry’s future profitability, leading to a major slump in telecom stock and bond prices. Today, the market cap of all publicly traded CLECs in the U. S. stands just above \$4 billion, double what it was at enactment of the 1996 Act, but nearly 96% lower than the March 2000 peak.<sup>35</sup>

The downturn in CLEC stock prices, coupled with a slowdown in the general economy and in business spending on telecom services in particular, prompted creditors to quit lending to new telecom carriers well before many became cash flow positive. A round of bankruptcies have ensued.<sup>36</sup> A portion of the \$500 billion or so that the CLEC industry borrowed has been spent

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<sup>34</sup> Analysts at Lehman Brothers recently estimated that return on equity for the entire telecom services industry declined from 13.8% in 1996 to 5.9% and 3.7% in 2000 and 2001 respectively. Blake Bath, *Wireline Service Industry Update: 2001 – An Inflection Year for Return On Capital*, Lehman Brothers (Apr. 3, 2001) at 3.

<sup>35</sup> Roberts & Carrier, *Telecom Services” Fresh Look at RBOCs*, Dresdner Kleinwort Wasserstein Research (Mar. 8, 2002). During the same period, the loss of line growth and the losses of lines to competitors might have erased \$14 billion in market capital from the BOCs. *Id.*

<sup>36</sup> More may reasonably be expected in the months ahead unless debt capital somehow becomes more accessible to new carriers. Early last year, *Barron’s* reported that losses in telecom debt would eventually exceed \$300 billion, rivaling the amount that the federal

on new network facilities that either have been or can be salvaged by another competitive carrier-- at a fraction of book costs.<sup>37</sup>

Regardless of its “correctness,”<sup>38</sup> the Commission cannot discount the conclusion that the initial network unbundling and TELRIC pricing requirements that were in effect during this period contributed to the downturn by inducing many CLECs to acquire underlying network capacity from ILECs at costs below what they would incur by building their own facilities.<sup>39</sup> Diminished returns on capital; weakness in the general economy (which may have caused the general slow down in demand for telecommunications services);<sup>40</sup> heightened price competition (which caused industry revenue and earnings growth to slow); growing questions about the viability of CLECs that built business models around UNE-P; other market-distorting regulatory arbitrage opportunities, such as reciprocal compensation and terminating access; and questions

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government had to make up as part of the bailout of the savings and loans collapse during the early 1980s. Jacqueline Doherty, “Telecom Tightrope,” *Barrons* (Jan. 8, 2001). Since then, estimates of the total amount of debt capital that will eventually be lost as a result of telecom carriers defaulting on loans has increased considerably and may exceed \$500 billion. Bloomberg Financial Services, Interview with Leo Hindrey ( Oct. 30, 2001).

<sup>37</sup> Most CLEC debt was used to finance day-to-day operating expenses and capital costs on items like operations support systems (OSS) that could not be obtained from the ILECs at TELRIC rates. Since many of these non-ILEC capital components are comprised of computer software, microprocessors and related electronics, they have relatively short economic lives and, thus, minimal salvage value.

<sup>38</sup> *NPRM* n.48.

<sup>39</sup> “Theirs was a risky bet to begin with, but Washington’s hobbling of last-mile regulation was and remains a big reason why it didn’t pan out.” *Broadband Blues*, Wall St. J. (Feb. 21, 2002) at A18.

<sup>40</sup> Former FCC Commissioner Harold Furchtgott-Roth has made the case that federal bankruptcy law cushioned the downside risk for companies like Global Crossing, Teligent, Winstar, NorthPoint, PSINet and Rhythms NetCommunications, and that these bankruptcies have less to do with the economic recession and more to do with the actual supply of fiber networks outstripping actual demand. Harold Furchtgott-Roth, *Managers Journal: Global Crossing’s Bankruptcy is a Success Story*, Wall St. J. (Feb. 5, 2002) at A18.

about the propriety of the accounting practices of some carriers have all contributed to a general perception that investing in the telecom market is fraught with risk.<sup>41</sup>

Somewhat ironically, the telecommunications industry is in considerable financial turmoil at a time when information technology advancement, including the Internet, is placing more and more demand on the nation's telecommunications networks – not just in terms of available long-haul bandwidth, but in terms of reliability, security, redundancy, diversity, throughput and ubiquity. In order to stimulate investment in facilities based competition, thus encouraging service differentiation and innovation, it is imperative that the Commission take prospective steps to remove, or at least mitigate, the uncertainty that the Commission's unbundling rules contribute to any perceived investment risk.<sup>42</sup>

### **III. BUILDING A GENERAL THRESHOLD ANALYSIS: THE STATUTE, THE SUPREME COURT, AND RECALIBRATING THE COMMISSION'S CURRENT IMPAIRMENT ANALYSIS TO BE CONSISTENT WITH THE LAW AND THE MARKET.**

While the its *UNE Remand Order* and subsequent filings by different parties are indeed the “building blocks” of this proceeding<sup>43</sup> the most important building blocks are, the statute itself and the Supreme Court's clarifying instructions. The FCC must stay true to the statute by establishing meaningful limitations to its impairment analysis that are rationally related to the

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<sup>41</sup> “The combination of: the sector's anemic growth outlook, the cannibalizing competitive mega-trends of wireless substitution, voice to data migration, Bell entry into long distance combined with local competition, and the bubble-induced excesses in debt and over capacity, all create a powerful wealth destroying dynamic.” Scott C. Cleland, *Telecom's Debt Spiral*, Precursor Group (Feb. 5, 2002).

<sup>42</sup> The Commission's unbundling and TELRIC pricing requirements are not solely responsible for the industry turmoil that has occurred since the passage of the 1996 Act. Nevertheless, analysts note that “[p]olicy makers throughout the Government remain largely oblivious to both the magnitude and the implications of the telecom-tech meltdown, and the destructive role government competition policy has played in helping precipitate this market debacle.” Scott C. Cleland, *Telecom's Debt Spiral*, *supra*.

<sup>43</sup> *NPRM*, ¶ 15.

goals of the Act.<sup>44</sup> First and foremost, the Supreme Court counseled the FCC to take into account alternatives to ILEC elements.<sup>45</sup> Second, the Supreme Court held that cost differences are not dispositive, and that a consideration of costs alone is inappropriate when the evidence demonstrates that a competitive LEC can reasonably provide service using alternative facilities.<sup>46</sup>

In its *NPRM*, the Commission notes that its current rule interprets the impair standard as “requiring the Commission to consider whether taking into consideration the availability of ‘alternative elements outside the incumbent’s network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier’s ability to provide the services it seeks to offer.’”<sup>47</sup> The rule, as written, passes right by the “availability of alternative elements” analysis to allow an ad hoc material diminishment analysis to trump both actual competition and the self-provisioning of alternative elements in the relevant geographic and customer markets. The “totality of the circumstances,” “material diminishment” determination is to be made by considering five factors – cost, timeliness, quality, ubiquity, and operational issues – in order to determine whether alternative elements are available as a “practical, economic and operational matter” notwithstanding of the actual availability of alternative elements in any given geographic market.<sup>48</sup>

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<sup>44</sup> *Iowa Utils. Bd.*, 525 U.S. at 388.

<sup>45</sup> *Id.* at 389 (“The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent’s network”).

<sup>46</sup> *Id.* at 390 (stating that an entrant whose anticipated profits are reduced a percentage point has “perhaps been ‘impaired’ in its ability to amass earnings, but has not *ipso facto* been ‘impaired ... in its ability to provide the services it seeks to offer’”).

<sup>47</sup> *NPRM*, ¶ 19.

<sup>48</sup> 46 C.F.R. ¶ 51.317(b).

The *NPRM* seeks comment on whether the Commission should assign more or less weight to any of these factors; whether cost should be afforded less weight than other factors; and whether it should look at its impairment analysis and identify impairments and then define ILEC elements that specifically address those impairments.<sup>49</sup> The Commission must stay true to the Supreme Court’s mandate by first considering and giving dispositive weight to both meaningful competition for telephone exchange service and the actual availability of alternative elements in the relevant geographic and customer market. Only when there is no meaningful competition, and no actual self-provisioning or alternative element availability present in any defined geographic area, should the Commission embark on a material diminishment analysis, and only then in order to determine whether self-provisioning or competitive alternatives can feasibly become available.

The *NPRM* correctly notes that, even under its current rule, a finding of impairment does not mean automatic listing as a UNE; rather, the Commission next looks at each element considering the five factors it identified as furthering the goals of the Act which are: 1) rapid introduction of competition in all markets; 2) promotion of facilities-based competition, investment and innovation; 3) reduced regulation; 3) market uncertainty and 5) administrative practicality.<sup>50</sup> As with the five factors it previously identified as comprising its “material diminishment” analysis, the Commission seeks comment on whether the list is complete and the relative weight that should be assigned to different factors.<sup>51</sup> Some of these factors must be recalibrated to take into account market reality and must be applied in a manner consistent with the limited purposes of section 251.

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<sup>49</sup> *NPRM*, ¶¶ 19, 20.

<sup>50</sup> *NPRM*, ¶ 21.

<sup>51</sup> *Id.*, see also ¶ 33, asking whether issues of public safety, national security or network integrity be explicitly considered in implementing unbundling requirements.

**A. The Commission and Unbundling Proponents Should Have the Burden of Demonstrating the Necessity of Unbundling.**

The Commission, in the *UNE Remand Order*, created a national UNE list based on the pre-1999 competitive landscape.<sup>52</sup> It has initiated this review in order to undertake a “comprehensive evaluation of [its] unbundling rules.”<sup>53</sup> Based upon a dramatically different post-1999 factual record, the Commission must now assess *de novo* which network elements must be unbundled. Proponents of continued unbundling suggest that those proposing a reduced UNE list bear the burden of justifying the removal of an element from the list.<sup>54</sup> This view is inconsistent with: (1) the requirements of the Act; (2) the purpose of this review, (3) the dramatic changes in the marketplace since 1999; and (4) the competitive harm of retaining an unneeded element on the list.

The Act allows the Commission to require unbundled access to a network element *only* if the Commission affirmatively concludes that a lack of access “would impair” competing carriers’ ability to provide service.<sup>55</sup> The statute thus contemplates that the proponents of unbundling demonstrate impairment, not that the ILECs establish non-impairment. The opposite

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<sup>52</sup> *UNE Remand Order*, ¶ 121.

<sup>53</sup> *NPRM*, ¶ 1. The Commission describes this proceeding as a “comprehensive evaluation” of its regulatory framework in order make the “appropriate changes” in the review and application of its necessary and impair standards to ensure a regulatory framework that is “current,” “faithful to the pro-competitive, market-opening provisions” of the Telecommunications Act of 1996, 47 U.S.C. § 151, et seq. (the 1996 Act) that will result in a more “targeted” impairment analysis that takes into account “marketplace changes.” *NPRM*, ¶¶ 1, 2, 6, 15.

<sup>54</sup> CompTel suggests that the “three-year review is not a *de novo* inquiry into all national UNEs.” Rather, CompTel contends that “[a]ny party seeking to remove or scale back a UNE bears the burden of proof to show, by a preponderance of record evidence, that the requested relief is justified.” CompTel Petition at i-ii, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 filed (Nov. 26, 2001).

<sup>55</sup> 47 U.S.C. § 251(d)(2).

conclusion would be inconsistent with the deregulatory focus of the Act<sup>56</sup> as well as the limiting standard required by the Supreme Court, which held that section 251(d)(2) “requires the Commission to determine on a rational basis which network elements must be made available.”<sup>57</sup>

In order to satisfy its statutory obligation, the Commission has “recognize[d] that due to changes in the market and new technologies, the national list will likely be modified over time.”<sup>58</sup> The mechanism selected by the Commission to keep the UNE list current, and thereby consistent with the statutory obligation, is the Triennial Review.<sup>59</sup> Accordingly, this review builds upon the *UNE Remand Order*, but it is not confronted by the findings of impairment made in that decision.

As demonstrated here and in the 2002 UNE Fact Report, the competitive marketplace has changed dramatically since 1999, let alone 1996. The Commission has recognized that this review is vital precisely because of these “rapid changes in technology, competition, and the

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<sup>56</sup> See 47 U.S.C. § 161 (requiring the FCC to review its regulations every two years and “repeal or modify any regulation it determines to be no longer in the public interest.”).

<sup>57</sup> *Iowa Util. Bd.*, 525 U.S. at 391-92.

<sup>58</sup> *UNE Remand Order*, ¶ 130.

<sup>59</sup> *UNE Remand Order*, ¶ 151; see also Separate Statement of Chairman Michael K. Powell at 2, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, CC Docket No. 01-338 *et al.* (“Powell NPRM Statement”) (“The purpose of this triennial review would be to keep those decisions current with ongoing market and regulatory developments.”). At the time of the *UNE Remand Order*, CLECs concurred that a periodic review process was vital: MCI WorldCom Comments at 15 (“[T]he Commission itself should reexamine, after a fixed period of time, its decisions to require particular network elements to be unbundled nationwide.”); KMC Comments at 33 (“[T]he best way for the Commission to determine in light of changed market or technical conditions whether UNEs should be added to, or removed from, the national list, is through periodic reviews of the list based on a record gathered from industry comments. This would permit the Commission to update the list under the appropriate statutory standards.”); McLeod Comments at 3 (“[T]he rules adopted in this docket should not be expected to be the ‘final word’ on unbundling. As circumstances change, the Commission’s rules on unbundling can, and should, be revisited.”). Rather than a triennial review, however, the Commission’s unbundling rules should be limited in duration until the next biennial review, at which time proponents of continued unbundling must prove that it is in the public interest and necessity to retain them.

economic conditions of the telecommunications market.”<sup>60</sup> Failing to take a fresh look at each network element would arbitrarily assume that the market conditions in 1999 continue to prevail.<sup>61</sup> Consequently, the CLECs, and ultimately the Commission, must bear “the burden of demonstrating that each network element is unbundled only to the extent that, without it [CLECs] could be impaired from providing service” in today’s market, and in the market that exists at any subsequent review.<sup>62</sup>

Parties seeking to force ILECs to demonstrate non-impairment fail to recognize the unique nature of this review. Unlike a petition for rulemaking, in which the moving party has the burden to justify the modification of existing rules, this reexamination was specifically initiated by the Commission in order to “take stock of the lessons we have learned so far and make any changes that may be necessary to ensure that our rules remain faithful to the statute.”<sup>63</sup> Accordingly, the burden is the same as it was in 1999, with the onus on the Commission to determine whether CLECs would be “impair[ed]” if access to a specific network element were denied.

Finally, the Commission risks damaging competition if it fails to properly reevaluate the UNE list. Overbroad unbundling will discourage competitors from investing in alternative facilities, devalue the competitive investments that already have been made, and deter innovation

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<sup>60</sup> *UNE Remand Order*, ¶ 148; *see also NPRM*, ¶ 1 (“Recognizing that market conditions would change and create a need for commensurate changes to the unbundling rules, the Commission determined to revisit its unbundling rules in three years ....”).

<sup>61</sup> The Court explicitly warned that presuming that the impairment standard is met just because a CLEC has requested access to a UNE would improperly “allow[] entrants, rather than the Commission, to determine ... whether the failure to obtain access ... would impair the ability to provide service.” *Iowa Utils. Bd.* at 389.

<sup>62</sup> Press Statement of Commissioner Powell, dissenting in part, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, at 1 (Sept. 15, 1999)(“Powell NPRM Statement”).

<sup>63</sup> Powell NPRM Statement at 3.

and investment by the ILECs as well.<sup>64</sup> The risks to the fundamental goals of the Act of an element's wrongful inclusion on the list are as grievous, if not more so, than the risks of noninclusion.<sup>65</sup> As the Commission has acknowledged, its "unbundling rules will need to change in order to maintain the *proper balance* between requiring incumbent LECs to unbundle their facilities and encouraging other carriers to invest in alternatives."<sup>66</sup> This delicate balance requires the Commission to make an independent, bottom-up assessment of each element based on the record in this proceeding without regard to past determinations made under different market conditions.

In sum, the sheer extent of deployment of alternative facilities, and the use of those facilities to provide a wide range of services to both business and residential customers, compel a strong presumption that requesting carriers would not be impaired without access to the vast majority of UNEs in the vast majority of geographic areas. The burden must therefore fall squarely on the proponents of continued unbundling, and ultimately on the Commission, to provide persuasive evidence of impairment under specific circumstances. Requesting carriers cannot just claim impairment and deride the data submitted by the ILECs; they must produce substantial and verifiable evidence of real competitive impairment, when measured against the standard in the Act as elucidated by the Supreme Court.

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<sup>64</sup> Shelanski Decl., ¶¶ 58-59.

<sup>65</sup> *UNE Remand Order*, ¶¶ 124-143 (outlining the key factors "important to further the fundamental goals of the Act": rapid introduction of competition; promotion of facilities-based competition, investment, and innovation; certainty in the marketplace; administrative practicality; and reduced regulation). *See also* the Shelanski Decl. for more on the social costs of an erroneous unbundling policy, ¶¶ 53-59.

<sup>66</sup> *NPRM*, ¶ 45 (emphasis added).

**B. Given the Increased State of Competition, and the Increased Availability of UNE Alternatives, the Number of UNEs Should Decrease.**

The Commission must, in keeping with the deregulatory emphasis of the 1996 Act, work to reduce the current list of UNEs. Since of the *UNE Remand Order*, the market data shows that the scope and scale of self-provisioning, the deployment of elements obtained from third parties, and the growth of intermodal competition has increased substantially, and there is no reason not to expect these trends to continue.<sup>67</sup> The Commission must not seek to add additional UNEs to the list by defining new impairments and then matching hither-to undefined ILEC elements network to match those impairments.<sup>68</sup> The essential building block of this proceeding is the Commission's prior identification of the elements critical to the requesting carrier's provision of local telephone service. Consistent with the deregulatory intent of the Act, the finite list of elements should be subject only to reduction, not expansion.

**C. Actual Competition and Alternate Element Availability in Specific Markets Demonstrate That Carriers are not Impaired Without Access to ILEC Elements in Those Same Markets.**

The Commission should indeed recalibrate its impairment analysis to reflect market reality. Specifically, the Commission should give dispositive weight to evidence of actual CLEC self-provisioning, or third-party procurement of alternative elements and intermodal competition, particularly with regard to wireless substitution, cable telephony and cable broadband build-outs in specific geographic markets. As the Supreme Court points out, a mere "cost" or "profit" impairment does not constitute ipso facto, an impairment in a carrier's ability to provide telephone exchange service.<sup>69</sup> It is clear that a carrier's self provisioning or alternative procurement of elements outside of the ILEC network, in and of itself, proves that requesting

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<sup>67</sup> 2002 UNE Fact Report, *passim*.

<sup>68</sup> *NPRM*, ¶ 20.

<sup>69</sup> *Iowa Utils. Bd.*, 525 U.S. at 389.

carriers are not impaired without access to ILEC elements in those specific geographic and customer markets. The Commission must “fashion a more targeted approach to unbundling that identifies more precisely the impairment facing requesting carriers” by defining a relevant geographic market.<sup>70</sup> In doing so, the Commission should use metropolitan statistical areas (MSAs), a convenient geographic measure it has used to implement regulatory reform in other areas. In the *UNE Remand Order* the Commission took geographic considerations, and specifically MSAs, into account in formulating rules for determining under what circumstances ILECs did not have to unbundle switching.<sup>71</sup> Thus, the Commission should target its “unbundling analysis by expanding the geographic-specific approach to all elements.”<sup>72</sup>

**D. The Commission’s Current “Material Diminishment” Analysis Must be Recalibrated and Should Only Apply In the Absence of Actual Competition or UNE Alternatives, in Order to Determine Whether Alternatives to UNEs can be Feasibly Acquired.**

Only where there is no actual data to indicate the existence of CLEC self-provisioning or sufficient competitive alternatives to ILEC local telephone service offering in a geographic-specific market should the Commission undertake a “material diminishment” analysis, and then only to determine whether alternatives can feasibly become available. Since there are well-documented alternatives to a number of ILEC elements and there is sufficient competition for these elements in most MSAs, the absence of actual alternatives to ILEC elements or of

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<sup>70</sup> *NPRM*, ¶ 2. The *NPRM* states that in the *UNE Remand Order* the Commission revised its interpretation of the “necessary” and “impair” standards “in order to identify *specifically where* requesting carriers are impaired without access to the incumbent’s network, rather than making UNEs available wherever it is technically feasible to do so, as the Commission had done in the *Local Competition First Report and Order*.” *NPRM*, ¶ 7. (emphasis added) However, the *UNE Remand Order* generally did not undertake to define relevant product markets in terms of geographic or customer distinctions, rather, it mostly relied on its various “diminishment” factors and its “totality of the circumstances” standard to effectively treat the entire country and all consumers in it as a single homogenous market that all CLECs everywhere should necessarily strive to serve ubiquitously.

<sup>71</sup> *NPRM*, ¶ 39 and n.95.

<sup>72</sup> *Id.*, ¶ 39.

sufficient local telephony competition in other MSAs could be just as easily explained by the initial unattractiveness of those customer markets to competitors who naturally seek to maximize profit margin.<sup>73</sup> If, after six years of UNE availability at artificially low rates, CLECs continue to target high-margin, business-centric markets in larger MSAs, the Commission should only make UNEs available in smaller MSAs when, in the absence of actual use of ILEC alternatives, CLECs can demonstrate that it is not feasible for them to acquire alternative elements in smaller MSAs as they can in larger MSAs.

If it retains its material diminishment analysis when it analyzes the feasibility of acquiring alternatives to ILEC elements, the Commission should afford cost less weight than the other four factors.<sup>74</sup> The Supreme Court made it clear that the Commission cannot, as a matter of law, conclude that impairment in profitability (which occurs whenever costs of service are incrementally raised without a corresponding increase in service revenues), means ipso facto that the CLEC is also impaired “in its ability to provide the services it seeks to offer.”<sup>75</sup> Moreover, the Commission must bring its current cost analysis into compliance with the statute, and avoid the tautological snare that has resulted in preserving ILEC UNEs in the face of undisputed market employment of non-ILEC alternative elements. The Commission must not assume *prima facie* that CLECs want to or need to match the incumbent’s economies of scale and scope.<sup>76</sup> Six years of documented (and economically rational) cherry picking have rebutted this utopian social construct whose regulatory implementation has only led to market distortions.

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<sup>73</sup> 2002 UNE Fact Report at IV-1-IV-5; Powell Dissent at 3.

<sup>74</sup> *NPRM* ¶ 19, citing *Iowa Utils. Bd.*, 525 U.S. at 389-90.

<sup>75</sup> *Iowa Utils. Bd.*, 525 U.S. at 390 (quoting the proper measure of impairment from the statute itself)

<sup>76</sup> 2002 UNE Fact Report at V-6.

For example, when the Commission considers how expensive it is for a CLEC to self-provision an element or to obtain that element from non-ILEC sources, it must look at the countervailing advantages attendant on the acquisition. The capabilities of the self-provisioned or alternatively procured elements may further enable the CLEC to provide service more efficiently than reliance on the ILEC legacy network elements. The Commission must also consider whether the CLEC may have less expensive non-ILEC alternatives. The Commission must not compare element acquisition costs to the cost of obtaining the legacy element analog from the ILEC at current TELRIC pricing. Current TELRIC pricing is artificially low and completely distorts investment decisions. Comparing the actual cost of provisioning a new element with the cost of obtaining an ILEC network element analog at a price pegged to a hypothetical lowest cost provider of the future results in an Archimedian dilemma of perpetual UNE-fication, the very type of ipso facto cost impairment analysis which the Supreme Court rejected.

Finally, the Commission might consider the cost of transitioning from UNEs to self-provisioning or alternatively procuring network elements only when it considers whether an element should be initially listed – and then only as a factor for not listing an element. It would make no sense to list an element from which there will be no economic incentive to wean requesting carriers. If there are no incentives to transition from UNEs, government mandated, intra-competitor welfare (risk and wealth sharing) will be perpetuated at the expense of true service differentiation and innovation. Likewise, where ILEC alternatives are actually available, or can feasibly become available, the cost of migrating from UNE to non-ILEC facilities must not be a factor used to retain that UNE on the list.

The remaining “material diminishment” factors, as with cost, should only come into play in the context of determining whether UNEs should be made available in markets where no actual alternative ILEC elements have been deployed through self-provisioning or alternative procurement. Using the *UNE Remand Order* as a “building block” in this proceeding,<sup>77</sup> the Commission should not, and cannot, alter its earlier finding (or lack of findings) that CLECs are unimpaired without access to ILEC elements based on any of these factors. The Commission must, however, recalibrate its “ubiquity” factor, and to a certain extent, its “quality factor,” to the extent its “material diminishment” findings are premised upon the assumption underlying its cost analysis that requesting carriers must somehow completely replicate the ILECs’ aggregate economies of scale and scope. Thus, “ubiquity” should not mean nationwide, simultaneous, flash-cut competition with over 1,300 ILECs in each of their various service territories.<sup>78</sup> This merely cloaks the inappropriate cost impairment analysis that the Supreme Court rejected in the mantle of ubiquity. The concept of ubiquity must be targeted and scaled to the precise geographic and consumer market to reflect the actual market experience of the last six years. To the extent that “timeliness,” “quality,” and “operational” factors are flawed in similar ways, these flaws must be corrected.

#### **IV. “IMPAIRMENT AT A MINIMUM” – CONSIDERATION OF STATUTORY GOALS MAY COUNSEL AGAINST UNBUNDLING DESPITE AN IMPAIRMENT FINDING.**

A finding of “impairment” does not end the unbundling inquiry. In the *UNE Remand Order*, the Commission identified five factors that further the goals of the Act for consideration in its unbundling determination: the rapid introduction of competition in all markets; promotion of facilities-based competition, investment and innovation, reduced regulation; market certainty,

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<sup>77</sup> *NPRM*, ¶ 15.

<sup>78</sup> The number of ILECs is derived from Rangos & Lynch, *supra* n. 26 at Table 1.

and administrative practicality.<sup>79</sup> The Commission asks whether the list is complete,<sup>80</sup> what relative weight should be assigned to each factor,<sup>81</sup> whether and how to carry out the separate advanced services mandate contained in section 706 as an explicit factor in unbundling,<sup>82</sup> whether the impairment determination should explicitly take into account other goals of the Act,<sup>83</sup> (including universal service funding and the access charge system)<sup>84</sup> and whether issues such as public safety, national security, or network integrity should be specifically considered in the unbundling rules.<sup>85</sup>

Public safety, national security, and network integrity should be specifically considered in the Commission's unbundling rules. They should be accorded priority, along with "the promotion of facilities-based competition, investment, and innovation" and "reduced regulation,"<sup>86</sup> in determining whether, upon a finding of impairment, an ILEC element nevertheless should not be subject to unbundling.<sup>87</sup> In this context, the Commission must consider the affect that its current network element pricing will have on the promotion of facilities-based competition, investment and innovation, and its consequent impact on public safety, national security and network integrity.<sup>88</sup> The Commission should also give great weight

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<sup>79</sup> *NPRM*, ¶ 21.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*, ¶¶ 31-32.

<sup>85</sup> *Id.* ¶ 33.

<sup>86</sup> The Commission should carefully consider the ongoing administrative costs of maintaining ongoing unbundling pricing rules. Shelanski Decl. ¶5, ¶¶ 23-28.

<sup>87</sup> Public safety, national security and network integrity concerns should tip the balance in any comparative weighting of these three factors.

<sup>88</sup> Shelanski Decl., ¶5. Declaration of Alfred E. Kahn and Timothy J. Tardiff, at 15, 17 Submitted with Comments of Verizon CC Docket No. 01-337 (filed Mar. 1, 2002).

to the factor of administrative practicality.<sup>89</sup> If, within an MSA, there are demonstrated pocket markets where some impairment can be shown, but a location specific analysis within an MSA proves administratively burdensome for the Commission to undertake, the Commission should not mandate unbundling within the sub-market given the availability of the same ILEC elements within the greater surrounding MSA.

The Commission must further refine or define its factors of “rapid introduction of competition *in all markets*” and “market certainty.” The “rapid introduction of competition” is a laudable goal consistent with the Act especially if tempered by the factors favoring the promotion of facilities-based competition and reduced competition. However, the modifier “in all markets” is problematic. It should not be interpreted to mean “simultaneously in all geographic areas” in the sense that requesting carriers must be able to immediately and ubiquitously match the combined scale and scope of over 1,300 ILECs operating in a myriad of local telephone markets nationwide. Nor should it be interpreted to mean “all product or service markets” so that unbundling can be used to promote competition in interexchange service markets,<sup>90</sup> exchange access markets, wireless service markets, advanced services markets, markets for the delivery of multi-channel video programming services, or any market other than a geographic, product or customer specific market for telephone exchange service. This is the sole aim and focus of section 251, to stimulate competition against those incumbent *local exchange carriers* that, as of the date of enactment, provided *telephone exchange service* (not

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<sup>89</sup> *NPRM*, ¶¶ 21, 40.

<sup>90</sup> The special access market is already highly competitive. As the 2002 UNE Fact Report makes clear, it is inappropriate for interexchange carriers to convert their special access circuits to UNEs.

interexchange, exchange access, wireless or advanced services) with respect to an *area*.<sup>91</sup> The Commission should therefore modify this factor to be consistent with the Act as follows: “the rapid introduction of competition *in the relevant local market for telephone exchange service*.” As modified, this factor should be given great weight.<sup>92</sup> If unmodified, the Commission should not afford this factor any weight since it is inconsistent with the specific geographic and product markets expressly identified in section 251, and since rapid introduction of competition in those markets chosen by CLECs has already been achieved through six years of CLEC access to UNEs at TELRIC prices.

“Market certainty” is another elastic term. The Commission appears to have initially employed the term in a way to assure that there would always be some “market” source for the element.<sup>93</sup> The problem with TELRIC pricing is that it is not a “market” price, and therefore government mandated sharing of ILEC facilities at artificially low prices can never be a true “market” source need, continued government-mandated availability of ILEC elements at TELRIC pricing can only discourage the development of a competitive market for alternative sources of the elements.<sup>94</sup> The way the Commission has interpreted “market certainty,” it can never be a true limiting factor – that is, under this interpretation, and with TELRIC pricing, “market certainty” will never be used to limit unbundling once an impairment finding has been made.<sup>95</sup>

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<sup>91</sup> 47 U.S.C. § 251(h)(1)(A) (definition of Incumbent Local Exchange Carrier for purposes of Section 251).

<sup>92</sup> The only reason this factor, as modified, would not be given “greatest” weight is because the nation has already had nearly six years of UNE access at TELRIC pricing and the rapid introduction of competition has already been substantially achieved in the high margin markets targeted by CLECs.

<sup>93</sup> See *UNE Remand Order*, 15 FCC Rcd 3808-12, ¶¶ 253-58.

<sup>94</sup> Shelanski Decl., ¶¶ 58-59.

<sup>95</sup> Kahn Decl. at 16-18.

A better use of the term “market certainty” is for the Commission to consider what effect its regulations and policies will have on markets in general, and capital markets in particular. While the Commission’s initial unbundling rules cannot be deemed the sole cause of the current economic downturn in the telecommunications industry, their impact, on a downward, deflationary spiral, cannot be ignored. In keeping with the deregulatory, forbearing nature of the Act, the Commission should decline to intervene in markets where there is a significant chance that regulatory policies will distort market behavior through the creation of arbitrage opportunities and price-induced risk shifting resulting in a lack of facilities-based competition and service differentiation.

**V. THE EXPANSION OF ILEC UNBUNDLING OBLIGATIONS FROM TELEPHONE EXCHANGE SERVICE TO ADVANCED TELECOMMUNICATIONS SERVICES IS INAPPROPRIATE AND WILL DETER COMPETITION IN ADVANCED SERVICES**

The Commission seeks comment on whether, and to what extent, its’ unbundling analysis should expressly consider the Act’s goal of encouraging the deployment of advanced telecommunications capability. The *sine qua non* of the Commission’s unbundling analysis is, of course, the “necessary” and “impair” analysis that is undertaken pursuant to section 251(d)(2) of the Act; which, according to the Supreme Court, must result in implementing rules that place “clear limits” on unbundling.<sup>96</sup> Unbundling must be undertaken, pursuant to the express terms of the statute, if at all. Section 251(d)(2) requires that impairment be measured against “the services that [the carrier] seeks to offer.”<sup>97</sup> This requires that impairment be measured by a carrier’s ability to offer local exchange services only. Congress created unbundling in 1996 as an entry path into the local exchange market – not into the already competitive, facilities-based

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<sup>96</sup> *Iowa Utils. Bd.*, 525 U.S. at 388, 397.

<sup>97</sup> 47 U.S.C. § 251(d)(2).

access market, or the nascent, but tremendously competitive advanced services market.<sup>98</sup>

“[B]roadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.”<sup>99</sup>

As the Commission notes, Section 706 of the Act states that Congress’s policy is to encourage the deployment of advanced telecommunications capability using “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>100</sup> The phrase “. . .measures that promote competition in the local telecommunications market,” however, is not a license from Congress to graft the market for “advanced telecommunications capability” into section 251, which is specifically designed to create entry paths into the market for local exchange services. Nor is it a license to transplant section 251’s unbundling tools into section 706. This would be inconsistent with Congress’s directive to look at such de-regulatory solutions as price cap regulation and forbearance. BellSouth questions the premise of the question that the Commission poses, namely, whether it “can balance the goals of sections 251 and 706 by encouraging broadband deployment through the promotion of local competition and investment in infrastructure.”<sup>101</sup>

The Commission should not strive to find a “balancing act” where none exists. Congress gave the FCC nothing to “balance” between the goals of sections 251 and 706. Rather, Congress gave the FCC two separate and distinct statutory provisions to implement, which are applicable

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<sup>98</sup> See, generally, 2002 UNE Fact Report, V-22 – V-29.

<sup>99</sup> *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Docket No. 02-33, *Notice of Proposed Rulemaking*, FCC 02-42, ¶ 5 (rel. Feb. 15, 2002).

<sup>100</sup> *NPRM*, ¶ 22, quoting Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157 (47 U.S.C. § 157 nt).

<sup>101</sup> *NPRM*, ¶ 23.

to two separate and distinct markets, with distinct specific (251) and general (706) instructions.<sup>102</sup> If the FCC implements section 251 by using a meaningful impairment analysis, it will be engaging in “measures that promote competition in the local telecommunications market,” which “remove barriers to infrastructure investment.” This is because unbridled access to ILEC network elements, in the absence of a market calibrated impairment finding, creates regulatory distortions in the market that discourage any kind of infrastructure development.<sup>103</sup> Unbridled, impairment-blind access instead creates incentives for certain market participants to reap the short-term windfall of regulatory arbitrage, rather than the long-term benefits of meaningful, facilities-based competition for local services.

On the other hand, when implementing section 706, the Commission would be equally wrong to import section 251’s unbundling tool, which was devised specifically to create an entry path into the local exchange market. Imposing unbundling requirements on incumbent LECs, particularly with respect to innovative, new facilities, will deter investment by both incumbent LECs and others.<sup>104</sup> Any facilities used to provide advanced telecommunications capabilities currently subject to unbundling should become ineligible for any form unbundling. Because the 1996 Act is pro-competition, not pro-competitor, a limiting standard that accords with the “goals of the Act” must, at a bare minimum, bar unbundling where a LEC is both a secondary player in

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<sup>102</sup> Kahn Decl. at 5-6, 15-18.

<sup>103</sup> *NPRM* ¶ 23. Requiring incumbents to unbundle new or upgraded facilities both discourages ILECs from investing in those facilities in the first place, while the availability of ILEC facilities at TELRIC rates discourages competitive carriers and others from investing in or using alternatives to the ILEC networks. *Id.* Because the Commission has recognized these policy concerns to some extent, for instance, by limiting incumbent’s obligations to unbundle transport to existing facilities, including existing ring transport architectures, *Id.*, the Commission should modify its existing unbundling rules to limit ILEC’s unbundling obligations going forward. *Id.*, ¶ 24.

<sup>104</sup> Kahn Decl. At 5-6, 12-13.

a market the FCC has determined to be competitive,<sup>105</sup> and is also subject to asymmetrical regulatory requirements.

Contrary to Congress's direction that the Commission establish limited access to certain existing ILEC network elements based on a finding of impairment in the provision of local exchange services, an advanced services unbundling requirement unbundled ILEC capital, rather than existing network elements that are used to provide local exchange services.<sup>106</sup> The Commission should *encourage* investment by all parties in this market. Unbundling incumbent ILEC investment dollars does not accomplish this. AT&T had it right years ago: “[n]o company will invest billions of dollars to become a facilities-based . . . provider” if other companies “that have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others.”

Unlike declining prices for alternative elements to the analog, circuit-switched network for the provision of telephone exchange service, the deployment costs for network equipment necessary to provide advanced broadband services remains relatively high. As with any investment, risk and reward determine the willingness of a carrier to commit capital resources to innovative network equipment. Requiring ILECs to open their investment to other carriers through unbundling, particularly when no corresponding requirement is placed on the dominant provider in the market, shifts the substantial investment risk from the entrant to the ILECs. This has a stifling effect on ILECs' investments.<sup>107</sup> If ILECs are forced to unbundle their network

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<sup>105</sup> Petitioners' Impairment Brief at 67-68, 70-71.

<sup>106</sup> BellSouth Comments at 32, CC Docket No. 96-98 (filed May 26, 1999) (“BellSouth Comments”).

<sup>107</sup> See Professor Robert G. Harris, “Deployment of Broadband Networks and Advanced Telecommunications” (Dec. 19, 2001), § 4, attached as Exhibit 1 to BellSouth Comments in CC Docket No. 01-337 (filed Mar. 1, 2002) (“BellSouth *Broadband Comments*”), (discussing disincentives for investment in the broadband market) (“Harris Paper”).

investment to other carriers in a nascent market, they may simply, and rationally, choose not to invest.<sup>108</sup> The limited rewards will not justify the investment. As Commissioner Abernathy stated:

*The prior Commission, in my view, was overly focused on the anticipated benefits of unbundling, without considering the costs. Unless properly circumscribed, forced unbundling can impose costs and distort investment incentives. Unbundling requirements that are too broad destroy an incumbent's incentive to invest in facilities. This is because incumbents will avoid risking capital on new infrastructure if rivals can piggy-back on their facilities risk-free. By the same token, new entrants will have diminished incentives to invest in their own facilities if the incumbent's network is readily available at below cost rates. Obviously, pricing is key: If TELRIC rates turn out to be set below realistic cost estimates – which the Supreme Court will soon tell us – then the distortion of investment incentives are significant.*<sup>109</sup>

Of course, the Commission need not and should not wait for the Supreme Court to act – it can and should forbear from forcing voice regulations around broadband services and implement regulatory policy that recognizes the effects unbundling has on investment and innovation in broadband. There are important differences between the effect of unbundling elements used to provide traditional voice telecommunications services and the effects of unbundling new investment used to provide broadband. The risk associated with high technology deployment is greater than that required to deliver traditional voice services. This technology is rapidly evolving and equipment can quickly become obsolete.

In fact, the Commission itself has acknowledged that, “investments in facilities used to provide service to nascent markets are inherently more risky than investments in well established

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<sup>108</sup> In our view, the key to investment by the RBOCs in DSL via DLCs is the lessening of restrictions surrounding of DLCs as so-called ‘unbundled network elements,’ or UNEs.” Adams, Harkness and Hill, Inc. “FCC Comments Positive for AFCI: Regulatory Relief Could Stimulate Investment Cycle, Kedersha & Makris (Feb. 15, 2002)

<sup>109</sup> Commissioner Kathleen Q. Abernathy, Remarks at USTA Annual Convention (Oct. 7, 2001) (first emphasis added).

markets. Customer demand for advanced services is also more difficult to predict accurately than is the demand for well established services . . .”<sup>110</sup> One important reason why the Commission’s reasoning to not unbundle broadband equipment in the past, even though traditional services equipment had been unbundled, was to avoid stifling competition and to encourage innovation.<sup>111</sup> This fact remains all the more relevant today.

Current regulatory policies, coupled with the threat of even more unfavorable regulation, has a chilling effect on the ILECs’ incentives to invest in broadband technologies.<sup>112</sup> Moreover, such policies also negatively affect CLECs in investing in their own facilities. CLECs will have no incentive to invest in broadband equipment if they can ride the backs of, and shift investment risks to, the ILECs. “The [Commission, therefore,] should do its part to remove the requirements that [ILECs] lease network pieces to competitors at super-efficient prices, which discourage both incumbent investment and facilities-based competition.”<sup>113</sup> If the investment disincentives of the existing, as well as possible additional, broadband policies continue, new investment in broadband facilities will cease.

The deterring effect that regulation, particular unbundling, has on the investment decisions of ILECs is unquestionable. “As a matter of economic principles and empirical observation, there can be no doubt that increasing the risks and uncertainties associated with investments decreases incentives to invest. This is especially true of large-scale investments in durable assets, such as investments to extend DSL capabilities into wireline networks.”<sup>114</sup>

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<sup>110</sup> *UNE Remand Order*, 15 FCC Rcd at 3839, ¶ 314.

<sup>111</sup> *Id.* at 3840, ¶ 316. *See also* Commissioner Abernathy Speech at the competition Policy Institute Forum (Dec. 7, 2001), “[t]he FCC appropriately recognized the risk of over-regulation when it declined to force the unbundling of packet switches.”

<sup>112</sup> Kahn Decl. at 12-13; Harris Paper at 15-24.

<sup>113</sup> Commissioner Kevin J. Martin, Remarks at the SUPERnet Conference (Jan. 23, 2002).

<sup>114</sup> Harris Paper at 20.

Indeed, BellSouth has experienced first hand changes in its investment decisions given the unfavorable impact of regulations.<sup>115</sup> BellSouth is currently weighing its investment options while it awaits the outcome of several federal and state regulatory proceedings.<sup>116</sup>

Given today's investment climate, any FCC action that threatens to increase commercial risks almost certainly will cause telecom managers to reassess plans to deploy new network technology. BellSouth is proud of its efforts and commitment to serve its customers and, indeed, believes that it has more aggressively upgraded and modernized its facilities than many other providers of local exchange telecommunications services. Even a company with the financial strength of BellSouth must be mindful of the attitudes of today's investors, however. Investors regard regulation and the potential for increased regulation as posing a serious challenge to a carrier's ability to fully recover its capital cost in a timely manner. The Commission needs to recognize this hard fact and signal the investment community its desire and plan to disengage from trying to manage competition in local exchange markets. At an absolute minimum, the Commission should do this by making it very clear in this proceeding that it will not extend UNE requirements to network facilities that go into the provisioning of broadband services.

**A. There is Vigorous Competition in the Nascent Advanced Services Market.**

Unbundling ILEC facilities that are used to provide advanced services is unnecessary because the market continues to demonstrate that competitive advanced services may be provided equally well, or better, over other networks. Multiple forms of competition exist in

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<sup>115</sup> *See Id.* (“Adding regulatory requirements that increase the cost for the incumbent and/or artificially reduce the cost to competitors will dampen ILEC investment in DSL facilities. Even minimal unbundling requirements increase risk and uncertainty, making DSL investments less attractive. Extensive unbundling dramatically decreases ILEC control over its assets and increases the degree of uncertainty associated with its investments.”).

<sup>116</sup> BellSouth described the impact federal and state regulation will have on its broadband deployment plans in its comments in CC Docket No. 01-337. (Mar. 1, 2002) at 23-24 (“*BellSouth Broadband Comments*”).

broadband. Indeed, competition is more than existent; it is thriving. DSL over ILEC loops is only one of four main last-mile technologies that is currently used to provide broadband services to mass-market consumers. The other three are cable modem, satellite, and fixed terrestrial wireless.<sup>117</sup>

The evidence and level of competition has been documented in numerous studies, including the Commission's recently released *Third Report* on advanced services.<sup>118</sup> In that report, the Commission not only recognizes that numerous carriers are providing broadband over various modes, but that cable modem providers double their next closest competitor in market share.<sup>119</sup> Additionally, the report discusses many developing technologies that "have significant potential for expanding the availability of advanced telecommunications to more Americans."<sup>120</sup> The report goes on to find that "emerging technologies continue to stimulate competition and create new alternatives and choices for consumers."<sup>121</sup>

## 1. Intermodal Competition

Inter-modal competition in this market promises to be vigorous. Over the longer term, the competitive opportunity will center on "the chase for far more bandwidth than existing 'broadband' networks currently offer. The upgrading of cable, telephone, and wireless networks will not end in the foreseeable future . . . Wireless providers will multiply and shrink cells, and

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<sup>117</sup> 2002 Fact Report at IV-18. Both consumers and providers view all four of these various broadband services as interchangeable; two or more of these technologies are frequently available in the same geographic areas. *Id.*

<sup>118</sup> *In the Matter of 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 98-146, *Third Report*, FCC 02-33 (rel. Feb. 6, 2002) ("*Third Report*").

<sup>119</sup> *Third Report*, ¶¶ 44, 49. Cable modem providers have 5.2 million high speed lines while DSL providers have only 2.7 million lines.

<sup>120</sup> *Id.*, ¶ 79.

<sup>121</sup> *Id.*, ¶ 89.

boost capacities, to keep pace. Much of this new infrastructure will have little relation to the old. ILECs will accordingly enjoy no particular advantages over competing carriers in deploying this new infrastructure.”<sup>122</sup>

## 2. Cable Providers

By far, the fastest spreading broadband technology today is cable.<sup>123</sup> Backed by the vast financial resources of the major cable multiple system operators (“MSOs”), cable companies have transformed their cable networks into hybrid fiber-coaxial cable networks that deliver broadband to the mass market, where they can leverage their high multichannel video program distribution (“MVPD”) penetration rates. Embedded cable infrastructure now passes 97.1 percent, and serves 64.4 percent, of homes in the United States.<sup>124</sup> With cable plant passing nearly every home in the country, cable operators are uniquely positioned to offer, and have been vigorously rolling out, a high-bandwidth cable modem solution that completes the local loop for data services.<sup>125</sup>

In the mass market for broadband services, cable modem providers “have used provisioning [of their networks] to gain an advantage over their competitors, one that they will not likely relinquish anytime soon.”<sup>126</sup> As one industry analyst noted,

[i]n terms of a subscriber base, cable modem is the leading broadband connection technology in the United States. AT&T, AOL Time Warner, Comcast, Charter, Cox, Adelphia, and

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<sup>122</sup> 2002 UNE Fact Report at IV-24.

<sup>123</sup> 2002 Fact Report at IV-18 (“Cable is the clear leader in the broadband market today, by a wide and growing margin.”)

<sup>124</sup> See *In the Matter of 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 ¶¶ 17-18 (rel. Jan. 14, 2002), (“*2001 MDVP Competition Report*”).

<sup>125</sup> See *2001 MDVP Competition Report*, ¶ 11 (“Virtually all of the major MSOs offer Internet access via cable modems in portions of their service areas.”).

<sup>126</sup> The Yankee Group, (Oct. 18, 2001). “Broadband provisioning is composed of two basic components: network provisioning and customer-premises provisioning.” *Id.*

Cablevision have connected close to 95% of current cable modem subscribers. . . . Around 50% of U.S. households had cable modem service available at year-end 2000. It is forecasted that by year-end 2005, cable modem availability will have grown to approximately 83% of U.S. households.<sup>127</sup>

This availability has translated into a dominant customer base for cable modem providers. “At the end of the second quarter of 2001, approximately 5.5 million households in the United States subscribed to cable modem service...”<sup>128</sup> This is compared to only 2.5 million DSL subscribers and 100,000 broadband satellite subscribers for the same period.<sup>129</sup> Analysts predict that the total number of cable modem subscribers will reach 15.7 million by the end of 2005 compared to 10.5 million DSL subscribers, and 4.5 million satellite broadband subscribers.<sup>130</sup> These market share projections amply demonstrate that cable modems, not ILEC DSL offerings, have the controlling share of today’s broadband services in the mass market and they will continue this controlling share for the foreseeable future.

Significantly, cable companies are accomplishing this impressive rollout without any regulatory impediments. Cable modem service has never been subject to regulation under Title II, nor has the Commission subjected cable modems to regulation as local exchange service. Moreover, cable companies can freely bundle video, voice and data services into integrated “one-stop shopping” offerings, which gives them a significant edge over ILECs in serving the

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<sup>127</sup> The Yankee Group Report, *Broadband Access Technology: Whose Number Is Up?* Vol. 2, Issue 10 (Sept. 19, 2001). This is by accounts a conservative estimate. Indeed, “[o]ne analyst predicts that by 2003 investment spending is expected to result in the upgrade of substantially all of the U.S. cable infrastructure (more than 99.9 million homes) to enable the delivery of new bandwidth-intensive services.” *Third Report*, ¶ 65.

<sup>128</sup> The Yankee Group (Oct. 18, 2001). *See also*, *Third Report*, ¶44. This equals approximately 54 percent of total high-speed lines.

<sup>129</sup> The Yankee Group (Oct. 18, 2001). *See also*, *Third Report*, ¶ 46, n. 98. (Analysts “estimate that cable modem service would reach 66 percent of U.S. households at the end of 2001, (compared with 45 percent for DSL service).”)

<sup>130</sup> The Yankee Group (Oct. 18, 2001).

mass market.<sup>131</sup> Freedom from regulation is evident in the amount of capital expended and available to cable modem operators. For example, “[i]n 2000, the cable industry spent a total of \$15.5 billion on the construction of new plant, upgrades, rebuilds, new equipment, and maintenance of new and existing equipment. This represents a 45.9 percent increase over the \$10.6 billion spent in 1999.”<sup>132</sup>

Other factors indicate that cable modem service could easily out-distance other broadband competitions. As the Yankee Group stated,

Effectively provisioning their network infrastructure and customer premises has provided cable operators with the following advantages in building and maintaining this lead:

- **First to market with residential high-speed Internet access.** Cable operators launched residential cable modem service often one and a half to two years before competitive DSL offerings.
- **Cable modem service has greater availability.** More than half of U.S. households have access to cable modem service as compared to more than one third of U.S. households that have access to DSL.
- **Qualifying potential DSL subscribers remains a problem for DSL providers.** Though improving, DSL providers still have difficulty qualifying prospective subscribers without a truck roll.
- **Shorter wait periods for cable modem service.** In general, cable operators are installing cable modem service two to five days after the consumer requests service. DSL providers, on

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<sup>131</sup> See *2001 MDVP Competition Report*, ¶ 34 (“Advanced services continue to be deployed at a rapid pace. With most systems able to deliver digital video, and many systems able to deliver cable modem and/or cable telephone service, MSOs are beginning to experiment with the deployment of other advanced service offerings such as video-on-demand (“VOD”) and Internet protocol (“IP”) telephony over cable systems.”)

<sup>132</sup> *Third Report*, ¶ 65.

the other hand, take three to five weeks to install DSL service.<sup>133</sup>

These advantages position cable modem service as the front runner provider of mass market broadband services.

### **3. Wireless Providers**

Although most broadband services are currently provided over wireline networks, wireless providers of broadband have made significant strides and will continue to grow significantly. “There are three major classes of wireless broadband access networks emerging: mobile, fixed and satellite.”<sup>134</sup>

#### **a. Mobile**

Just as with wireline networks, wireless mobile networks were originally designed for analog voice signals, but they have since been converted to handle digital traffic. The next generation of wireless mobile networks, personal communications service (“PCS”) systems, were built for digital signals.<sup>135</sup> Neither, however, is very effective in transmitting large amounts of data at high speed.<sup>136</sup> Two factors, however, will correct this problem: the development of “2.5 G (general packet radio services or GPRS) and 3G broadband digital data networks.”<sup>137</sup> These advanced services currently are being offered in many European countries, and analysts

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<sup>133</sup> The Yankee Group (Oct. 18, 2001).

<sup>134</sup> Harris Paper at 6.

<sup>135</sup> PCS is also used for the provision of fixed wireless broadband services. See discussion in Fixed Wireless section below.

<sup>136</sup> Harris Paper at 6-7.

<sup>137</sup> *Id.* at 7.

predict that major wireless companies in the United States will begin offering such services in the near future.<sup>138</sup>

#### **b. Fixed Wireless**

Fixed wireless services offer providers the opportunity to provide the last mile high-speed Internet services to customers without the need for a wire technology. There are several fixed wireless spectrums used to provide broadband services today. The most prominent licensed spectrum technologies are multichannel multipoint distribution service (“MMDS”) and PCS. Others include local multipoint distribution service (“LMDS”) and wireless communications service (“WCS”). Although faced with challenges in provisioning, new technology is being advanced that will help service providers of fixed wireless. First generation MMDS required line of sight between the transmitting tower and the end-user customer premises equipment (“CPE”). Vendors, however, are working on developing a non-line of sight technology.<sup>139</sup> Additionally, MMDS is in the process of switching “from super-cell to multi-cell architecture that enables service providers to improve availability and reliability of fixed wireless services.”<sup>140</sup>

MMDS, and other technologies, are expected to see a significant increase in customers over the next four to five years. Fixed wireless systems CPE and installation costs range from \$200 to \$600 with an average monthly service charge of \$50.<sup>141</sup> These prices are very competitive with both cable modem and DSL. As the Commission noted in its *Third Report*,

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<sup>138</sup> *Id.* See also 2002 Fact Report at V-27, notes 96-101 and accompanying text (describing recent launches of 3G wireless services, anticipated launches in 2002, and noting analysts predictions that 3G networks will be widely deployed by 2004 or 2005).

<sup>139</sup> The Yankee Group Report, *Fiber-to-the-Curb, Fiber-to-the-Home, Fixed Wireless, and Powerline Communications: Threatening Cable Modem’s and DSL’s Hegemony?* Vol. 18, Issue 13 (Aug. 22, 2001).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

“terrestrial fixed wireless technology accounts for between 50,000 and 150,000 high-speed lines.”<sup>142</sup> Moreover, one analyst “forecasts the residential MMDS subscriber base will grow from roughly 61,000 users in 2001 to nearly 450,000 at the end of 2006.”<sup>143</sup>

#### 4. Satellite Providers

Satellite services can offer inherent technological advantages such as low-cost transmission rates, broad geographic coverage areas, and low operational costs. Despite costly satellite construction and launch, providing the satellite service requires significantly less infrastructure than terrestrial-based systems, which keeps marginal costs low. High-speed broadband service via satellite takes several forms, including direct transmission to small home satellite dishes. For example, Hughes Communications offers high-speed Internet access service (up to 128 kbps upstream and 400 kbps downstream) via satellite to subscribers “anywhere in North America for \$59.99 per month plus hardware through its “DIRECTWAY” offerings.<sup>144</sup> Additionally, StarBand Communications became operational in late 2000.<sup>145</sup> Several satellite providers project deployment of additional systems using the Ka-band that will be capable of providing residential and business advanced services over the next several years.”<sup>146</sup> Industry analysts believe that “Satellite offerings should become increasingly visible over the next 12-18

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<sup>142</sup> *Third Report*, ¶ 55.

<sup>143</sup> The Yankee Group (Aug. 22, 2001). *See also* 2002 UNE Fact Report, IV-21 –22.

<sup>144</sup> See [http://www.hns.com/global/north\\_america/north\\_america.htm](http://www.hns.com/global/north_america/north_america.htm) and [http://dtv.direcway.com/home/order/order\\_now.html](http://dtv.direcway.com/home/order/order_now.html).

<sup>145</sup> *Third Report* at ¶ 77.

<sup>146</sup> *Id.*

months, at first competing effectively in markets underserved by cable and xDSL and, over time, as part of a bundled video offer with strong appeal for certain customer segments . . . .”<sup>147</sup>

Unbundling the ILEX wireline network, while leaving competing cable and other networks free can unbundling obligations, would be a short-sighted, fundamentally anti-consumer act, inapposite to Congress’s express intent because it would substitute regulation for competition instead of the reverse. Ignoring “intermodal” competition is exactly the shortsighted regulatory mistake that led to the deterioration of the nation’s railroads, which labored under regulatory burdens that were not imposed on competitive forms of transportation. The Commission’s analysis of unbundling in the advanced services area must specifically account for the competitive discipline imposed by competing methods of delivering advanced services.

#### **D. The Stifling Effect of Regulation on Future Technologies**

While regulation certainly impacts current investment decisions, it imposes the greatest threat on future technologies. No one doubts the impact that broadband access could have on the future.<sup>148</sup> Its potential to bring life altering resources and applications to everyone is well chronicled.<sup>149</sup> The broadband speeds available to the mass market today, however, are considered by many to be slow. TechNet, the entity that seeks to have 100 mbps broadband connection to 100 million American homes by 2010, believes, “[a]pplications that will likely revolutionize how consumers use the Internet and spur consumer demand will require speeds of

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<sup>147</sup> Harris Paper at 8-9 citing “Broadband 2001,” JPMorgan H&Q, McKinsey, April 2, 2001, p. 7. *See also* 2002 UNE Fact Report at IV-23.

<sup>148</sup> “A National Imperative: Universal Availability of Broadband by 2010,” TechNet, <http://www.technet.org/issues/updates//2002-01-15.69.phtml>, Executive Summary (“The benefits [generated by the widespread adoption of broadband] to quality of life are immeasurable.”) (“TechNet Report”).

<sup>149</sup> *See id. at 4*, (“Broadband will spur new applications, making the Internet a more significant and powerful part of the lives of Americans at home, work and play, and creating unlimited new business opportunities.”)

at least 6 mbps.”<sup>150</sup> TechNet recognizes that current broadband deployment provides connections at “relatively slow transmission speeds [typically 400 kbps or less],” however it sees this as “a foundation for the achievement of an ambitious interim broadband deployment goal” of “speeds of at least 6 mbps from two or more providers to at least 50 percent of U.S. households and small businesses by 2004.” TechNet believes that cable modems providers “may be best positioned to meet an aggressive deployment goal, primarily because the hybrid-fiber coaxial cable that characterizes much of the network can accommodate significant broadband data capacity.”<sup>151</sup> It adds, “with aggressive investment, however, DSL deployment can also reach these goals.”<sup>152</sup>

Thus, to merely obtain the speeds that TechNet contends are necessary to stimulate broadband demand will require significant investment by DSL providers. Moreover, TechNet contends that to reach the goal of 100 mbps to 100 million homes and small businesses “will require network providers to invest hundreds of billions of dollars to upgrade infrastructures and increase bandwidth capacity to the last mile, primarily by providing new fiber connections to homes and offices. Today, virtually no American homes have connections with such bandwidth.”<sup>153</sup>

Clearly, broadband, though it is progressing, remains in its infant stages. No one who speaks of the life-changing opportunities available through broadband believes that such changes will occur with the relatively slow average connection speeds of 400 kbps. Their vision is based on speeds that can deliver videoconferencing to change the way we think of working and the

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<sup>150</sup> *Id.* at 6.

<sup>151</sup> *Id.* at 7.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

need for travel and centralized offices; or, videoconferencing to allow doctors to collaborate with specialists around the world, thus eliminating the patient's need to endure costly travel. These kinds of changes will require the connection speeds that TechNet envisions and the billions of dollars of investment it recognizes will be necessary to make those speeds possible.<sup>154</sup>

Whether this dream will ever be realized rests in large part with the Commission. As demonstrated above, no investor will incur the risk and spend billions of dollars on infrastructure that will then be turned over to one of its competitors at below cost pricing. If the Commission continues to require the unbundling of broadband network elements, it will be effectively telling the ILECs "we do not want you in the broadband market, we are reserving that market for your competitors." Closing the market to one competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability. The Commission must therefore heed the marketplace signals emanating from analysts, technology companies, not to mention the pro-competitive rhetoric of individual Commissioners. It must not require the unbundling of network elements used to provide advanced telecommunications capabilities.

## **VI. WIRELESS PROVIDERS ARE NOT IMPAIRED WITHOUT ACCESS TO UNEs**

The Commission seeks comment on whether Section 251(d)(2) requires it to take into account the type of service a requesting carrier seeks to offer, as well as how the level of competition for a particular service affects the availability of UNEs.<sup>155</sup> Because section 251 provides for limited unbundling of ILEC network elements in order to facilitate competition with incumbent wireline providers of local telephone exchange service where the lack of access to the

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<sup>154</sup> See also the general discussion in 2002 UNE Fact Report, Section V-D.

<sup>155</sup> *NPRM*, ¶ 37. Specifically, the Commission asks "if an element is unbundled for one service, should we limit its availability to that service, or should we permit it to be used for any service?" *Id.* at ¶ 38.

ILEC's elements would impair a requesting carrier's ability to provide service due to a lack of competitive alternatives or the inability to self-provision those elements, the Commission should take into account the type of service that the requesting carrier seeks to offer.

Because multiple wireless service providers have become highly competitive to wireline carriers without prior access to ILEC UNEs, wireless services and are a prime example of services that should not be eligible for access to ILEC UNEs.<sup>156</sup> The Commission must analyze wireless service providers as a class distinct from the facilities-based and non-facilities based CLEC class of wireline service provider that it evaluated in its earlier proceeding.

Fundamentally, the Commission must evaluate, in the first instance, whether wireless providers are impaired in the provision of telephone exchange service without access to existing ILEC UNEs.<sup>157</sup> Because marketplace evidence demonstrates that wireless services have long been and continue to be competitively and successfully provided without access to UNEs, the Commission cannot conclude that these carriers are in any way impaired in their ability to provide service without access to ILEC UNEs.

The Commission has historically treated wireless carriers as a class separate and distinct from wireline carriers. Wireless carriers are governed by separate rules,<sup>158</sup> regulations, and licensing requirements. Neither Congress<sup>159</sup> nor the Commission has ever considered CMRS providers to be "local exchange carriers," with the full panoply of regulatory burdens associated

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<sup>156</sup> While ILEC affiliates rank as robust competitors in wireless markets, unaffiliated wireless carriers are more than holding their own, and serve approximately 40% of the wireless market. 2002 Fact Report at V-20 – 21.

<sup>157</sup> See *BellSouth ex partes* filed June 19, 2001 and August 22, 2001 in CC Docket No. 96-98.

<sup>158</sup> See 47 C.F.R. § 20.1 *et seq.*

<sup>159</sup> 47 U.S.C. § 153(26).

with that status.<sup>160</sup> In its initial phase of UNE implementation, neither the *Local Competition Report and Order* nor the *UNE Remand Order* contemplated access to UNEs by wireless service providers. In both orders the Commission discusses in great detail competition between incumbent LECs and competitive LECs. Absent in both is any analysis of how wireless carriers could or should fit into section 251's unbundling mandate. And conspicuously absent in both proceedings is meaningful participation by any wireless provider (or its trade association) advocating the position that they are impaired without access to ILEC UNEs or are otherwise entitled to ILEC UNEs.<sup>161</sup> Wireless carriers were then and are now functioning and competing on their own without the need of Commission intervention.<sup>162</sup>

In fact, it was not until 2001, well into the current economic downturn described in section II.B above, that BellSouth ever received a request from a wireless carrier for access to UNEs.<sup>163</sup> By this time, wireless penetration, indeed, wireless substitution, had reached substantial and compelling levels.<sup>164</sup> In placing this issue before the Commission in this proceeding petitioners boasted of the success of wireless substitution, "CMRS providers offer true facilities-based competitive alternatives to incumbent LECs. Increasingly, they are viewed

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<sup>160</sup> *First Report and Order*, 11 FCC Rcd at 15995-96, ¶¶ 1004, 1006. Moreover, Congress authorized ILEC wireless affiliates to enter long-distance markets immediately upon passage of the 1996 Act, without waiting for any unbundling or section 271 checklist approval by their wireline affiliates. 2002 Fact Report at V-20. This demonstrates that U.S. wireless markets were robustly competitive and that, unlike competitors in the wireline local telephone exchange market, Congress did not contemplate the possibility that wireless carriers could potentially be at least temporarily impaired without access to ILEC UNEs.

<sup>161</sup> This lack of participation indicates that wireless carriers did not then view ILEC UNEs as essential to the provision of wireless services, and certainly did not see themselves as impaired without access to those UNEs.

<sup>162</sup> CMRS providers have had no difficulty obtaining special access from the ILECs through non-UNE agreements. Shelanski Decl., ¶ 52.

<sup>163</sup> This timing is also coincident with the wireless industry's increasing realization that it will have to incur substantial costs in implementing regulatory mandates such as E-911, local number portability, and thousands-block number pooling.

<sup>164</sup> 2002 UNE Fact Report at II-35 – II-37.

as full-fledged competitors of landline carriers in the provision of telephone exchange service.”<sup>165</sup> The motivation of the wireless carriers is purely economic; the alleged impairment is solely to their ability to continue to amass profits at pre-downturn levels, contrary to the Supreme Court’s instruction on the proper consideration of cost in a section 251 impairment analysis.<sup>166</sup> Wireless carriers, directly and indirectly through the niche CLECs (affiliated or unaffiliated) that serve them, have been successfully engaged in direct competition with ILECs without access to ILEC UNEs. It is understandable that these carriers now seek regulatory leverage to increase profit margins by obtaining UNE pricing to reduce overall cost inputs; that does not mean that such access is mandated by law or marketplace evidence.

There is simply no evidence that a lack of access to UNEs has impaired wireless carriers in their successful conquest of business and consumer markets nationwide. The wireless industry itself has proclaimed, “the only real residential competitors today are wireless carriers. A recent study reported that 10 million Americans had cut the cord and were using wireless instead of having any wireline connection.”<sup>167</sup> The wireless market is a strong, vigorous market that has grown substantially under current market conditions and the FCC’s relatively “light touch” regulatory policies, demonstrating without doubt that wireless carriers are not impaired by not having access to UNEs. For example, as of March 2002, there were over 133 million mobile service subscribers in the United States as compared to the 189 million switched wireline

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<sup>165</sup> Petition for Declaratory Ruling by AT&T Wireless and VoiceStream Wireless Corp. at 3, CC Docket No. 96-98 (filed Nov. 19, 2001) (“AT&T/VoiceStream Petition”).

<sup>166</sup> *Iowa Utils. Bd.*, 525 U.S. at 390.

<sup>167</sup> Letter of Thomas E. Wheeler, President/CEO CTIA to Chairman Michael K. Powell, January 24, 2002.

subscribers, indicating that parity has surely been reached in most, if not all, markets.<sup>168</sup>

Wireline CLECs, whose access line counts range from 20-25% of the total wireless subscribership, are clearly not impaired without access to the types of UNEs now sought by wireless carriers. It makes a mockery of “impairment” for wireless providers, at or near market parity with ILECs in terms of subscribership, to contend that they are “impaired” without access to these same UNEs.

Further, the wireless industry *adds* approximately 20 million additional subscribers, the substantial equivalent of *BellSouth’s total region-wide access line count*, each year.<sup>169</sup> Analysts believe that the significant increase in subscribers is attributed to wireless service being viewed as a “cost effective and compelling alternative to wireline.”<sup>170</sup> Even more compelling is evidence that many wireless subscribers are abandoning use of traditional wireline services all together. “IDC believes that the wireless substitution rate for additional access lines will increase beginning in the 2002-2003 time frame, as wireless pricing continues to drop.”<sup>171</sup> The phenomenal subscriber growth in the wireless industry can be attributed to the decrease in the cost of wireless services as “wireless service pricing is rapidly approaching wireline pricing.”<sup>172</sup> In some cases, with bundled pricing packages that including long distance, wireless carriers offer

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<sup>168</sup> CTIA’s World of Wireless Communications, <http://www.wow-com.com> as of March 31, 2002. See also CTIA’s Semi-Annual Wireless Industry Survey Results, June 1985 to June 2001, [http://www.wow-com.com/pdf/wireless\\_survey\\_2000a.pdf](http://www.wow-com.com/pdf/wireless_survey_2000a.pdf).

<sup>169</sup> See CTIA’s Semi-Annual Wireless Industry Survey Results, June 1985-June 2001. BellSouth had 25.6 million access lines as of Sept. 30, 2001.

<sup>170</sup> S. Ellison, IDC, *Wireless Displacement of Wireline Forecast and Analysis, 2001-2005* (Dec. 2001).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* That wireless costs are actually decreasing is even more reason for the Commission to look skeptically at any claims that wireless carriers are impaired without access to ILEC UNEs.

consumers pricing substantially lower than those for equivalent wireline services.<sup>173</sup> The ability to price competitively was one of the reasons the Commission required the ILECs to unbundle certain network elements.<sup>174</sup> Today, the wireless industry demonstrates that it is able to price competitively, even lower, than ILECs, without the added regulatory benefit of UNEs. Dramatic subscriber growth demonstrates that the wireless industry is not impaired without access to UNEs. The Commission determined that as competitors acquire more customers, reliance on the ILECs' facilities would diminish.<sup>175</sup> To grant wireless providers access to ILEC UNEs in light of the competitive "megatrends of wireless substitution for wireline minutes" that "effectively transfers huge shareholder wealth to consumers" would be to turn that determination on its head.<sup>176</sup>

In the face of demonstrated robust competition and overwhelming industry success, it is extremely difficult, if not impossible, to conclude that wireless carriers are impaired without UNEs. However, despite the impressive growth statistics published by the CTIA, wireless carriers have begun to assert that certain UNEs are necessary for their continued success.<sup>177</sup> These carriers do not explain how an industry that adds more subscribers each year than BellSouth has in its entire region is impaired in its ability to provide the services it seeks to offer. It defies logic and market evidence to assert that a "full-fledged competitor" – as the wireless industry describes itself in relation to ILECs – cannot compete without access to ILEC UNEs.<sup>178</sup>

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<sup>173</sup> 2002 UNE Fact Report at II-37.

<sup>174</sup> *See generally, UNE Remand Order*, 15 FCC Rcd at 3734, ¶ 73.

<sup>175</sup> *Id.*

<sup>176</sup> Cleland, *Telecom's Debt Spiral*, Precursor Group (Feb. 5, 2002).

<sup>177</sup> *See AT&T/VoiceStream Petition.*

<sup>178</sup> *Id.* at 3.

No doubt because of this, when confronted with their own statistics, wireless carriers change their ringing tones and argue statutory “entitlement” rather than actual “impairment.” AT&T Wireless and VoiceStream Wireless now assert that as valid “requesting carriers” they are entitled to UNEs.<sup>179</sup> However, wireless carriers should not be able to avail themselves of UNEs merely because they arguably meet the definition of a “requesting carrier” – this would make a sham of any impairment analysis because it completely overlooks the widespread competition that has occurred without access to UNEs – in fact, it demonstrates and confirms that a pro-competitive, de-regulatory approach (especially compared to current Title II regulation) will actually encourage facilities-based competition, investment and innovation.

Recently, CLECs have sought to purchase new UNEs from BellSouth or convert special access circuits provided by BellSouth to UNEs to in order to serve wireless carriers as their customers. In these cases it is appropriate to consider the particular types of customers that the carrier seeks to serve.<sup>180</sup> Because the ultimate end user of the service is either the wireless carrier or the wireless carrier’s wireless subscriber, UNEs should not be available under these circumstances. Just as the wireless carrier’s putative status as a “requesting carrier” is not enough, absent a finding of impairment, to entitle access to UNEs, neither is the requesting carrier’s status as a “CLEC” (that only serves wireless carriers) alone determinative. The Commission must determine if the wireless carrier served by the CLEC (the ultimate end user here) would be impaired in its ability to provide a particular service.<sup>181</sup> In this case, the Commission must conduct a thorough evaluation of the alleged impairment by the wireless industry. Even a preliminary analysis of individual unbundled network elements demonstrates

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<sup>179</sup> *Id.* at 6.

<sup>180</sup> *UNE Remand Order*, 15 FCC Rcd at 3737, ¶ 81.

<sup>181</sup> *Id.*

why it would not be appropriate for the Commission to require ILECs to unbundle its network to CLECs for the sole purpose of ultimately enabling a wireless carrier, through regulatory leverage, to amass greater profit margins in an already fully ubiquitous and price competitive service at the sole risk and expense of ILECs.

**A. Loops, Subloops and Network Interface Devices (NIDs) Are Inapplicable to the Wireless Service Context.**

The loop, subloop and NID were defined by the Commission as network elements subject to potential unbundling in order to enable requesting carriers to connect their end user customers to the carrier's equipment.<sup>182</sup> Specifically, a loop is defined as a transmission facility between a distribution frame in an ILEC central office and the demarcation point at a customer premises.<sup>183</sup> A subloop is defined as any portion of the loop that another carrier can access at technically feasible points in the ILEC's outside plant.<sup>184</sup> A network interface device (NID) is defined as any means of interconnecting the end user customer premises wiring to the ILEC's distribution plant.<sup>185</sup> In each definition, an interconnection between the end user customer premises and the carrier's facility is contemplated.

In wireless service, the end user "roams" off of a cell site; thus, there is no fixed customer premises. The connection between the end-user subscriber and the wireless network is established through a wireless radio interface and, ipso facto, there is no application, let alone need or impairment, for a wireline landline loop. Some carriers have attempted to argue that the facility between a cell site and an ILEC end office is the functional equivalent of a loop. However, this argument requires the Commission to consider the cell site, rather than the

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<sup>182</sup> *NPRM*, ¶ 49.

<sup>183</sup> 47 CFR §51.319(a)(1).

<sup>184</sup> 47 CFR §51.319(a)(2).

<sup>185</sup> 47 CFR §51.319(b).

subscriber who roams off of the cell site via an air/radio interface, as the actual end user. While the Commission has not specifically defined “end-user” for UNE purposes in its regulations, its common sense use of the term in throughout the *UNE Remand* Order accords with the definition of “end user” that the Commission established long ago in the access arena<sup>186</sup> and that definition is still in effect today.<sup>187</sup> A cell site is simply not an “end-user.” A carrier cannot be considered an end user except when using telecommunications services for administrative services.

In addition to wireless carriers, certain CLECs have argued that they should be able to convert special access or other private line tariffed services to UNEs between cell sites and ILEC end offices or switches because the cell site is simply a customer.<sup>188</sup> This is wrong. The cell site is merely a component facility of the wireless carriers’ network. While wireless carrier may be considered the CLEC’s customer, a “carrier” cannot be considered an end user. A facility between a cell site and an ILEC end office or switch cannot be considered the functional equivalent of a loop because the cell site is merely one hardware component in the overall wireless network. Thus, this facility is, in reality, a point-to-point private line.

In the absence of a fixed customer premises, both subloops and NIDs are similarly inapplicable to the wireless paradigm. In the wireless arena, the “customer premises” is a subscriber’s car, purse, briefcase, belt-clip, coat pocket, backpack or other transient locations.

There are no transmission facilities or premises wires connecting to these locations. For all of

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<sup>186</sup> *In the Matter of WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, CC Docket No. 86-1, *Report and Order*, 59 Rad. Reg. 2d (P&F) 1418 (1986).

<sup>187</sup> 47 C.F.R. §69.2(m) (“*End User* means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an “end user” when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an “end user” if all resale transmissions offered by such reseller originate on the premises of such reseller[.]”).

<sup>188</sup> CLECs are making similar specious arguments in the context of the conversion of broadband service for information service providers. 2002 UNE Fact Report at V.D.

these reasons, wireless providers or CLECs seeking to serve wireless carriers should not be entitled to unbundled loops (including subloop and NID) as the element does not exist in a wireless network.

**B. Wireless Providers are Not Impaired Without Access To ILEC Interoffice Transmission Facilities.**

Wireless carriers have recently argued that they are impaired without access to unbundled dedicated transport.<sup>189</sup> In addition to the established lack of impairment as detailed above, BellSouth and others have asserted that CMRS providers are not entitled to dedicated transport as a UNE for several reasons.<sup>190</sup> The wireless carriers' network configuration illustrates these arguments. First, facilities from cell sites to a mobile switching center or an ILEC end office cannot be considered "dedicated transport" under the Commission's current definition because these facilities are not between switches or wire centers.<sup>191</sup> While the wireless carrier may argue that a base station (which, in fact, are not located on every cell site) performs some switching functions, their arguments that a wireless base station is the equivalent to an ILEC end office or performs the stand alone switching function of an end office are unsupported.<sup>192</sup> Ample evidence in the record of this proceeding refutes these arguments.<sup>193</sup>

Even AT&T Wireless and VoiceStream Wireless concede in their Petition that a base station, unlike an ILEC central office, cannot function alone. "The base station itself cannot

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<sup>189</sup> See AT&T/VoiceStream Petition.

<sup>190</sup> See BellSouth *ex partes* filed June 19, 2001, Aug. 22, 2001 and Oct. 10, 2001, and Verizon Communications *ex parte* filed August. 22, 2001 in CC Docket No. 96-98

<sup>191</sup> 47 C.F.R. § 51.319(d)(1)(i).

<sup>192</sup> Indeed, when evaluating wireless networks, the Commission decreed the Mobile Telephone Switching Office (MTSO), *not* a cell site or base station, as the equivalent of an ILEC end office switch. See *In the Matters of TSR Wireless, LLD, et al., Complainants, v. U.S. West Communications, Inc., et al., Defendants*, File Nos. E-98-13, *et al., Memorandum Opinion and Order*, 15 FCC Rcd 11166, 11179-80, ¶ 23 (2000).

<sup>193</sup> *Supra* n. 32.

perform all of the functions necessary to switch calls between cell sites.”<sup>194</sup> Thus, even when a base station is located at a cell site, the facility between the ILEC end office and the base station is merely a point-to-point private line. Wireless carriers try to overcome the base station’s fundamental lack of functional equivalency to an ILEC central office by bootstrapping its limited functions to a corresponding mobile switching office. These efforts are to no avail. Numerous elements within a carriers network operate in conjunction, thereby creating the “network.”<sup>195</sup> It is ludicrous to assume that the combination of functions can be used to meet the Commission’s very specific defined terms. ILECs simply have no need and therefore do not build DS1/DS3 level transport facilities to remote cell sites; they do so only pursuant to the specific request of wireless carriers under appropriate tariff arrangements.

Second, most wireless carriers have configured their networks based primarily on SONET ring technology. The carriers connect their facilities along a ring, and circuits extending off of the ring connect to cell sites.<sup>196</sup> The Commission has not required the ILECs to provide unbundled access to SONET rings.<sup>197</sup> Specifically, the Commission has not “require[ed] incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.”<sup>198</sup> While wireless carriers would have the Commission believe that the ILECs simply assign or piece together SONET rings with existing wireline facilities, this is not the case in fact.

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<sup>194</sup> AT&T/VoiceStream Petition at 20.

<sup>195</sup> 2002 UNE Fact Report, Section at V-21 , Fig. 4 “CDMA Network Configuration” and accompanying text.

<sup>196</sup> See *BellSouth ex partes filed June 19, 2001 and Aug. 22, 2001 in CC Docket No. 96-98.*

<sup>197</sup> *UNE Remand Order*, 15 FCC Rcd at 3843, ¶ 324.

<sup>198</sup> *Id.* Here again the Commission specifically considers unbundling for “competitive LECs,” not wireless carriers. There is no discernable intent by the Commission, express or implied, that these unbundling obligations extend to wireless carriers.

While an ILEC may use some existing facilities, a SONET ring is not a ring until it is built to the wireless carrier's exact specifications. For example, the wireless carrier must work with the ILEC's systems designers to determine the locations of each and every node on a ring, the location of switches and the necessity for equipment such as multiplexers. None of these electronics are deployed until after a ring is specifically ordered and designed. BellSouth does not offer an "off the shelf" SONET ring product. Each ring is built pursuant to the wireless carrier's definitive request. Further, each ring is a dedicated ring designed to meet the wireless carrier's specific capacity requirements and is used for that individual wireless carrier. Therefore, it is a "custom" service offering. As such, it is not required to be unbundled.<sup>199</sup>

In addition to the fact that these facilities are neither loops nor interoffice facilities, those circuits extending off of a tariffed SONET ring service and connecting to a base station or cell site should not be unbundled pursuant to the Commission's Safe Harbor Rules.<sup>200</sup> AT&T Wireless and VoiceStream Wireless have argued that the Safe Harbor Rules do not apply in this instance because they were intended to prevent interexchange carriers from circumventing special access.<sup>201</sup> However, the Commission has upheld the application of the Safe Harbor Rules to CLECs.<sup>202</sup> Wireless carriers cannot be heard to argue that they should be treated as CLECs for the purpose of being granted access to ILEC UNEs, but should not be treated as CLECs for the purposes of the Safe Harbor rules. Inconsistent application of the Commission's rules will only lead to continued confusion in the industry.

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<sup>199</sup> *Supra*, n. 206.

<sup>200</sup> *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

<sup>201</sup> See AT&T/VoiceStream Petition at 10.

<sup>202</sup> See *Supplemental Order Clarification*, 15 FCC Rcd 9587.

Finally, the wireless carriers have asserted that there are no sufficient alternatives to ILEC tariffed interoffice transmission facilities.<sup>203</sup> This is simply not the case. In the BellSouth region alone, there are multiple true facilities-based CLECs offering service. Further, BellSouth has provided the Commission evidence, including market penetration maps, demonstrating that there are numerous alternatives available to the wireless carriers.<sup>204</sup> And as Economist Howard Shelanski explains, CMRS providers, like interexchange carriers, have had no difficulty obtaining special access from the ILECs through non-UNE arrangements.<sup>205</sup> Thus the Commission should neither extend unbundling to cases where competitive facilities can and do exist, or where regulated or tariffed arrangements between ILECs and wireless carriers eliminate impairment.<sup>206</sup>

Not to be overlooked is the critical fact that experience shows self-provisioning to be a feasible and demonstrable alternative for wireless carriers. Historically wireless carriers constructed their network infrastructure with the use of microwave facilities. Due to the competitive offering provided by ILECs, wireless carriers have migrated from this approach to one that uses ILEC provisioned private line and special access circuits. This migration has been based on both availability and competitive pricing arrangements.

By their own estimate, wireless carriers are offering a substitute for local telephony services at prices that are competitive, or even better than competitive, with ILECs. The success of the wireless industry indicates that wireless carriers are not impaired in their ability to build out their own networks. The wireless industry is adding millions of subscribers each year.

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<sup>203</sup> See ATT/Voice Stream Petition at 7.

<sup>204</sup> See BellSouth *ex parte* filed Aug. 22, 2001 in CC Docket No. 96-98.

<sup>205</sup> Shelanski Decl., ¶ 52.

<sup>206</sup> 2002 Fact Report at V-20.

Requiring the ILECs to offer unbundled network elements to wireless providers, directly or indirectly through CLEC affiliates, merely to enable those carriers to amass greater profits, is both inimical to section 251 and contrary to the Supreme Court's mandate.<sup>207</sup>

## VII. SPECIFIC NETWORK ELEMENTS: LOOPS, SUBLOOPS & NIDS

In the *UNE Remand Order* the Commission found “[t]hat some competitive LECs, in certain instances, have found it economical to serve certain customers using their own loops,” suggesting to the Commission “that carriers are unimpaired in their ability to serve those particular customers”<sup>208</sup> and that “competitive LECs have successfully constructed loops in some circumstances.”<sup>209</sup> The Commission also determined, that the “gradual self-provisioning that such access encourages could lead, in time, to conditions that would permit the eventual elimination of the loop element from the unbundling obligations of the Act.”<sup>210</sup>

The Commission thus determined, in accord with the market evidence, that after the initial three years of access to unbundled loop elements (not including the subloop), CLECs were gradually beginning to self-provision their own loops, and were not impaired, in some markets, without access to ILEC loops. This finding alone should have ended the Commission's inquiry with respect to those types of loops in those particular markets.<sup>211</sup> Nevertheless, the Commission refused to remove those loop elements that CLECs were successfully self-provisioning from the list of elements subject to unbundling in those areas in which the Commission conceded CLECs were not impaired. Contrary to the Supreme Court's admonition, and to the Commission's own

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<sup>207</sup> *Iowa Utils. Bd.*, 525 U.S. at 390; *UNE Remand Order*, 15 FCC Rcd at 3734, ¶ 73.

<sup>208</sup> *UNE Remand Order*, 15 FCC Rcd at 3780, ¶ 184.

<sup>209</sup> *Id.* at 3781, ¶ 186.

<sup>210</sup> *Id.* at 3793, ¶ 215 (discussing subloop unbundling).

<sup>211</sup> The fact that CLECs are in some cases supplying their own facilities demonstrates that competitive provision of the element at issue economically feasible. That in itself weakens any argument for impairment. Shelanski Decl., ¶ 72.

approach taken with respect to circuit switching, the Commission in fact “blind[ed] itself to the availability of elements outside the incumbent’s network”<sup>212</sup> with the fog of an inherently flawed “totality of the circumstances” material diminishment test.<sup>213</sup>

**A. The Commission Should Consider Geographic Markets for Loops as it Did for Switching.**

The Commission took geography into account in formulating the rules for determining under what circumstances incumbent LECs did not have to unbundle switching<sup>214</sup> and for determining special access pricing flexibility. The Commission specifically considered evidence of competitive switch deployment within MSAs, and also considered the difference between business and residential markets in formulating those rules. Inexplicably, having demonstrated both the appropriateness of a geographic and customer market specific element analysis and the Commission’s ability to undertake such an analysis with respect to the switching element, the Commission undertook no such granular analysis with respect to loops despite its similar finding based on evidence in the record that CLECs were, in certain circumstances, self-provisioning loops and thus were unimpaired without access to ILEC loops in those particular markets. Instead, the Commission assumed, contrary to the evidence in the record, that competitive carriers would want to and have to “replicate an incumbent’s vast and ubiquitous network” in the provision of loops, which would be “prohibitively expensive and delay entry.”<sup>215</sup>

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<sup>212</sup> *Iowa Utils. Bd.*, 525 US at 389.

<sup>213</sup> BellSouth addresses specific network elements in the order requested by the Commission in its *NPRM*.

<sup>214</sup> *NPRM*, ¶ 39.

<sup>215</sup> *Id.*, ¶¶ 182, 185. To the extent the Commission determined that overbuilding LEC loops to serve businesses in urban districts would be extremely difficult, *id.*, ¶ 185, this determination simply flies in the face of the Commission’s earlier findings that in some circumstances CLECs are not impaired serving businesses in urban districts with their own loops, *id.*, ¶¶ 54, 83 and 184, as well over 15 years of successful competitive fiber overbuilds. This indeed was the first cherry picked, a decade before the 1996 Act opened all local markets to competition.

The Commission, therefore, rejected BellSouth's proposal in the remand proceeding that it not require ILECs to unbundle larger business loops in Special Access Pricing Zones 1 and 2, ostensibly because the Commission felt that an ILECs ability to "adjust" these zones would provide ILECs with discretion to define their own loop unbundling obligations.<sup>216</sup> However, if the Commission were to adopt the MSA as the relevant geographic market, as it did for circuit switching, it would eliminate this perceived problem. The Commission has demonstrated that an MSA is a workable geographic boundary with which to analyze the deployment of competitive network elements.

The Commission has recognized, and the evidence makes clear, that geographic location is as important as the size of the customer in understanding a target service market, in the provision of alternative facilities to incumbent local loops. An essential component of defining UNE markets will be geographic.<sup>217</sup> It cannot be doubted, as the Commission itself observed in 1999, that CLECs are successfully connecting larger business customers to their networks without incumbent loops. CLECs can and do extend fiber facilities directly to customer premises.<sup>218</sup> Just as businesses are clustered in urban areas and business parks, CLECs have built and extended local loops in those areas and anywhere else business customers are concentrated. The Commission's practice is to aggregate point-to-point markets into larger geographic areas based on the similarity of the competitive choices available within those areas. The MSA is as convenient and appropriate a demarcation as any other.

**B. All Markets for High Capacity Loops are Highly Competitive.**

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<sup>216</sup> *UNE Remand Order*, 15 FCC Rcd at 3780-81, ¶ 185.

<sup>217</sup> Shelanski Decl., ¶ 75.

<sup>218</sup> 2002 UNE Fact Report at IV-1 – IV-5.

On a prospective basis, of course, the Commission must give dispositive weight to evidence of actual CLEC self-provisioning or third party procurement of alternative elements, and intermodal competition, in specific geographic markets and customers. The Commission acknowledged in the *UNE Remand Order* that, as of mid-1999, CLECs were beginning to deploy their own high-capacity loops to business customers,<sup>219</sup> and that large business customers may generate sufficient revenues to allow the requesting carrier to serve the customer using self-provisioned facilities or facilities acquired from third-party sources.<sup>220</sup> By the time of the Joint Petition, the deployment of alternatives to ILEC high-capacity loop UNEs had increased to a point where ILEC alternatives were even more widely available.<sup>221</sup> Today, the market data indicate that there is a significant amount of CLEC fiber miles of high-capacity loops, and corresponding lacunae of CLEC purchase of ILEC high-capacity loop UNEs.<sup>222</sup> High capacity loops began to be provisioned by competitive access providers via fiber networks shortly after the divestiture of the regional Bell companies from AT&T in the mid 1980's.<sup>223</sup>

Although CLECs do not report how many customers they serve or are capable of serving with their own fiber networks, CLECs are able to serve the vast majority of their customers using their own last mile facilities in BellSouth's serving territory.<sup>224</sup>

CLECs serve tens of thousands of commercial office buildings nationwide. Two years after the *UNE Remand Order*, wireline CLECs served over 175,000 commercial office buildings,

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<sup>219</sup> *UNE Remand Order*, 15 FCC Rcd at 3780, ¶ 184 & n.342. A high capacity loop is a loop from a customer to an ILEC central-office that is capable of supporting a service at DS-1 speeds (i.e., 1.544 Mbps) or higher, and are almost always provided to medium or large business customers.

<sup>220</sup> *Id.* at 3726, 3738, ¶¶ 54, 83.

<sup>221</sup> Joint Petitioners' Reply at 23.

<sup>222</sup> 2002 Fact Report at IV-7, Table 3., Shelanski Decl., ¶¶ 27-30.

<sup>223</sup> *Id.*

<sup>224</sup> 2002 UNE Fact Report at IV-2, Table 1.

representing 25% of all commercial office buildings nationwide in 2000.<sup>225</sup> The 2002 Fact Report shows that by year end 2001 a small subset of CLECs served approximately 208,000 buildings.<sup>226</sup> CLEC networks are designed to pass by the largest commercial office buildings, and even the smallest networks can reach a very significant amount of high volume customers.<sup>227</sup> Based on the highly conservative count of lines that CLECs provide over their own facilities, the CLECs now supply at least 20%, and probably closer to 28%, of all business lines nationwide.<sup>228</sup>

On a prospective basis, the Commission should recognize that the relevant class of customers served by high-capacity loops are medium to large business customers in high density areas, and that they can be and are in fact currently served by self-provisioned or procured CLEC high-capacity loops. For all of the reasons of efficiency that are driving down deployment costs as set forth above, length of deployment should not be and in fact is not a material issue to CLEC self-provisioning high capacity loops. Moreover, excess capacity can be leased by CLECs from wireline and wireless capacity wholesalers while facilities are being deployed, thus mitigating any deployment delay.<sup>229</sup>

With respect to high capacity loops, the market data demonstrate that CLECs are not impaired in their ability to provide the service they seek to provide to their targeted markets. With substantial actual facilities deployment, a documented lack of CLEC demand for the high-capacity loop UNE in areas with substantial facilities deployment, ubiquitous availability of facilities, including a flourishing wireline and wireless wholesale market, targeted marketing, the

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<sup>225</sup> Joint Petition at 11.

<sup>226</sup> 2002 UNE Fact Report at IV-3.

<sup>227</sup> 2002 UNE Report at IV-3 – IV-4.

<sup>228</sup> *Id.* at IV-2.

<sup>229</sup> The Commission's unbundling rules, in fact, operate to undermine the whole sale market. *See, e.g., UNE Remand Order* at 183, n. 341. (explaining that there may be no demand for excess CLEC loop capacity when ILEC loop UNEs are available).

minimization of delays inherent in rights-of-way acquisition by mandatory access rights, legal remedies and cooperative trade association efforts, and the Commission's prior determination that there are no impairment concerns with respect to quality or network operations, the totality of the circumstances demonstrates that CLECs are simply not diminished as an operational, economic, or practical matter in their procurement of alternatives to ILEC high-capacity loops.

### **C. Markets for POTS Loops are Increasingly Competitive.**

The availability of competitive alternatives to residential loops continues to grow due to intermodal competition from cable television operators, mobile wireless carriers, as well as fixed wireless providers, and due to targeted ILEC loop overbuilds by both CLECs and non-BOC ILEC's CLEC affiliates.<sup>230</sup> In BellSouth's region, cable telephony is currently being offered by AT&T Broadband in Atlanta, Georgia, Jacksonville and Miami, Florida, and Louisville, Kentucky. Consumers in these areas clearly have a substitute to the local ILEC POTS loop. Furthermore, broadband connections over cable and wireless networks represent yet a third category of competitive alternatives to the local ILEC loop.<sup>231</sup>

Digital wireless technology allows cellular and PCS services to provide a functional equivalent to wireline service. The day has arrived when the downward trend in wireless pricing and expanse of plan packaging has positioned wireless service in full head-to-head competition with wireline local service. If not now in all markets, then soon in all markets,<sup>232</sup> wireless connections are providing or will provide a complete substitute for the wireline local loop. The Commission relatively long ago determined that "wireless and wireline technologies are

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<sup>230</sup> BellSouth uses the terms "POTS," "mass-market," and "residential," to refer to loop plant that is not "high capacity" (DS1 and higher).

<sup>231</sup> Shelanski Decl., ¶ 77.

<sup>232</sup> "Fixed Wireless Service Launched in South Carolina," *Telecommunications Reports*, April 19, 1999 at 25 (Hargray Communications Group launched wireless local loop service in Beaufort, S.C.)

increasingly competing for a single pool of minutes-of-use.... [W]ireless providers can compete for local access by creating pricing plans that encourage their customers to use mobile phones as substitutes for wireline phones.”<sup>233</sup> The 2002 UNE Fact Report documents marketplace evidence that demonstrates that widespread consumer acceptance of wireless service as a wireline substitute, and that wireless service, by the essence of its very mobility, trumps wireless service equivalents in the competitive marketplace.<sup>234</sup>

To the extent competitive overbuilds and edge-outs are occurring in the market place, they are targeted to reach those particular markets that allow the CLEC or non-BOC ILEC’s CLEC affiliate to leverage. These carriers take advantage of the synergy of its ILEC and CLEC operations to enter typically underserved non-urban markets, leveraging the excess capacity on their existing plants to reduce startup and entry costs.<sup>235</sup> In BellSouth’s region, CTC Exchange Services, an incumbent LEC in North Carolina, has formed a CLEC that offers services similar to those offered by the ILEC parent by offering facilities based services while leveraging existing back office and billing operations of its parent.<sup>236</sup> This CLEC does not confine itself to rural areas, however; it provides service in direct competition with BellSouth to commercial property developers at state of the art shopping malls in suburban Atlanta, Georgia and Charlotte, North Carolina, where it has placed its own facilities and currently serves as the only facilities based provider for mall tenants. CTCES is certainly not impaired in their service to large commercial

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<sup>233</sup> *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Third Report*, 13 FCC Rcd 19746, 19776-77 (1998) (“*Third CMRS Report*”).

<sup>234</sup> 2002 UNE Fact Report at IV-14.

<sup>235</sup> 2002 UNE Fact Report at IV-15.

<sup>236</sup> *Id.* at IV-17, Table 4.

end users without access to BellSouth's unbundled loop, as the litany of success stories in their annual report makes clear.<sup>237</sup>

Wireline CLEC overbuilds are not confined to CTCES. As the 2002 Fact Report makes clear, AllTel boasts that it has achieved an 8% market penetration in Charlotte, North Carolina, one of the largest MSAs in the BellSouth region.<sup>238</sup> Moreover, Knology has placed competitive loop facilities in 8 MSAs within BellSouth's region encompassing Huntsville and Mobile, Alabama; Augusta, Columbus, and West Point, Georgia; Charleston, Conway, and Myrtle Beach, South Carolina; Knoxville, Tennessee and Panama City, Florida.<sup>239</sup>

With respect to POTs (or mass-market) loops, substantial competitive pressures indicated that at least in some targeted geographic areas CLECs are not impaired without access to the local loop. The extent of wireless substitution and the rollout of cable telephony, the success of precision edge out strategies and CLEC over builds all point to a ubiquity of alternatives in certain markets. The success of these strategies demonstrates that there are no material issues of timeliness or cost, and there are no material issues of quality or impact on network operations. The Commission should not mandate unbundling of the mass market loop to serve markets served by cable telephony, CLEC overbuilds, or where wireless substitution has achieved an effective penetration rate. In the alternative, the unbundling of local loops should be subject to a sunset period of two years corresponding to the biennial review cycle

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<sup>237</sup> See CTC Communications Annual 2000 Report at 9. Not only is CTCES not impaired without access to BellSouth's network elements, but as the sole facilities-based CLEC provider it has no independent statutory obligation to unbundle its loop or subloop network elements to enable competitive access to these multi-tenant environments to other carriers.

<sup>238</sup> 2002 UNE Fact Report at IV-16.

<sup>239</sup> Conway, Myrtle Beach and West Point are served by ILECs other than BellSouth.

**D. With Competitive Alternatives to ILEC High Capacity Loops and Certain Mass Market Loops Established, A Material Diminishment Analysis Should Only Apply in Those Areas Where There is Insufficient Evidence of Inter- or Intramodal Loop Competition or the Existence of Competitive Alternatives to ILEC Mass-Market Loop Elements.**

As the UNE Fact Report and the economic testimony of Howard Shelanski interpreting that data make clear, the existence of competitive high capacity loop alternatives in all MSAs demonstrates that high capacity loops should not be unbundled in those areas.<sup>240</sup> Moreover, the increasing availability of POTS loop alternatives as well as intermodal or intramodal competition local loop competition in many MSAs demonstrate that unbundling obligations for these elements should be subject to new limitations. In these situations, there is no need to undertake a “material diminishment” analysis because the data show that ILEC element alternatives either actually are, or feasibly can become, available.<sup>241</sup>

For POTS loops in those areas where requesting carriers can demonstrate that there are no competitive alternatives and no effective intermodal competition, the Commission must determine whether alternatives to ILEC POTS loops can feasibly become available without access to ILEC UNEs. The requesting carrier should have the burden of showing that its ability to provide service would be materially diminished if it had to self-deploy or procure alternative network elements. In using the five factors it previously established for use in its material diminishment analysis, the Commission must correct the mistakes it made in the *UNE Remand Order* in assessing operational, practical, and economic impairment.

**1. Cost & Timeliness**

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<sup>240</sup> Because the Commission has already granted pricing flexibility to BellSouth based on a determination of “effective competition,” it makes no sense to find that competitors are impaired without access to BellSouth facilities in those areas where BellSouth has been granted that flexibility.

<sup>241</sup> Shelanski Decl., ¶ 43.

Although cost should be given minimal weight in general, the Commission cited cost and timeliness as the most important loop “impairment” factor because of the inherent expense in replicating the ubiquitous ILEC loop plant and the expense and delay attendant on receiving rights of way approvals from municipalities.<sup>242</sup> This approach ignores the fact that competitive LECs do not have to replicate the ILECs entire loop plant to serve the markets they choose to serve, and that rights of way burdens fall equally on all carriers (if not more heavily on ILECs).

The Commission analyzed the cost and timeliness factors together in the *UNE Remand Order*. The Commission seemed to find two areas of timeliness – an inference that it would take a long time for CLECs to “replicate” ILECs existing networks, and the likelihood that CLECs would become embroiled in “lengthy rights-of-way disputes” in their attempts to overbuild ILECs networks.<sup>243</sup> The Commission must be chary of generalization regarding rights-of-way disputes. In the first instance, CLECs have a mandatory right to access the rights-of-way of ILECs and presumptive rights to access other utility rights-of-way, on rates, terms and conditions that are established by the Commission and subject to the Commission’s enforcement

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<sup>242</sup> *UNE Remand Order* 15 FCC Rcd at 3781, ¶ 186. As demonstrated above, the Commission need not and should not undertake a “totality of the circumstances, material diminishment” analysis for high-capacity loops given the thriving competitive market for these elements. Even if it were to do so, however, the Commission would have to revise its 1999 findings. As the 2002 Fact Report notes, once an initial fiber ring is deployed in a metropolitan area, extending that ring incrementally to new customers is comparatively cheap. IV-4. The costs of building links from an existing ring to new customers are manageable – approximately \$5.25 per foot for trenching and fiber combined, or about \$30,000 for a one mile loops – is confirmed by the regularity with which CLECs build these facilities. Joint Petition at 14. The bigger the network grows, the more economical it becomes to extend it to reach additional, lower-traffic, lower-revenue customers. 2002 Fact Report at IV-4. A robust wholesale market for fiber featuring metropolitan area-wide networks that connect buildings in business districts to ILEC central offices, IXC POPs and ISP facilities ensures a cost effective supply of high-capacity loop alternatives to ILEC network elements. Joint Petition at 14.

<sup>243</sup> *UNE Remand Order*, 15 FCC Rcd at 3779-81, ¶¶ 182-86.

procedures, including Accelerated Docket formal complaint procedures.<sup>244</sup> And while municipalities have statutory rights to assert rights-of-way access conditions that are reasonably related to managing the public rights-of-way, those rights are tempered by the statute's goal of promoting unimpeded facilities based competition and are subject to preemption by the Commission. Finally, most major CLECs are members with BellSouth of the Industry Rights-of-Way Working Group, whose constituent members work cooperatively to reduce the delay and expense associated with securing permission to occupy public rights-of-way.<sup>245</sup> No evidence is more probative of the fact that the cost and timeliness issues associated with rights-of-way acquisition do not uniquely impact CLECs, but rather (1) impact CLEC and ILEC alike, (2) are the costs of doing business in today's United States, and (3) are already adequately addressed by law, regulation, and cooperative association.<sup>246</sup>

## 2. Ubiquity & Quality

In 1999 the Commission found three "ubiquity" factors to keep various loops elements on the unbundling list: (1) the cellular and PCS footprint is not yet ubiquitous; (2) cable telephony is largely restricted to residential customers; and (3) the wholesale market for dark fiber is not yet extensive enough to justify de-listing.<sup>247</sup> The Commission found five "quality factors" that

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<sup>244</sup> As the Commission has pointed out, ILECs are specifically quarantined from the procedural safeguards that apply to telecommunications service providers and cable television operators in their attempts to secure right of way access from non-ILEC utilities.

<sup>245</sup> Adelphia Business Solutions (ABS), ALTS, AT&T, City Signal Communications, CompTel, Global Crossing Ltd. (GC), Global Photon (GP), Level 3 Communications, Inc., Metromedia Fiber Networks (MFN), RCN Corporation, Sprint, Time Warner Telecom, Williams Communication, WorldCom and Velocita have on one or more occasions joined with BellSouth, Qwest, SBC and Verizon to present their concerns to the FCC, and most of the foregoing CLECs consider themselves working members of the Industry Rights-of-Way Working Group.

<sup>246</sup> See, e.g., "Recommended Measures to Promote Rights-of-Way Access, filed by ABS, ALTS, AT&T, City Signal, CompTel, GC, GP, MFN, Qwest, SBC, Velocita, Verizon, Williams and WorldCom, with the FCC (Letter from Martin L. Stern to Magalie Roman Salas, Dec. 18, 2001).

<sup>247</sup> *UNE Remand Order*, 15 FCC Rcd 3782, 3785, ¶¶ 188, 189, 196.

posed a “material diminishment:” (1) the sound quality of cellular and PCS service is not always equal to wireline; (2) fixed wireless providers can serve no more than four lines; (3) fixed wireless cannot support high speed internet; (4) cable television is generally a one way service; and (5) conditioned loops are necessary to support internet access.<sup>248</sup>

The Fact Report demonstrates, through the tremendous growth in wireless subscribership and substitution, that wireless footprint ubiquity and cellular and PCS sound quality are at least as acceptable in the marketplace for the price as wireline equivalencies. The Commission’s *Fifth CMRS Report* makes clear that the concerns which the Commission expressed with respect to fixed wireless alternative loop facilities have been obviated by subsequent technological developments.<sup>249</sup> And as demonstrated before, advanced services related objections are misplaced because the purpose of section 251 is to stimulate competition in the telephone exchange service market, not the advanced services market. The current Fact Report demonstrates the growth in both two-way cable telephony (and broadband based services) and the market for dark fiber. None of these three year old objections are likely to be viable evidence of material diminishment.

Finally, Finally, the Commission did not express any operational concerns with respect to CLEC fiber loops, POTs loops, or any loops used to serve mass market consumers, whether copper, coaxial cable, fiber-optic or wireless, in the UNE Remand Order. As there was no

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<sup>248</sup> *Id.* at None of these factors would, in any event, apply to high-capacity loops. Indeed, the Commission has not expressed any quality concerns with respect to high-capacity loops, which have the same functionality as ILEC fiber loops. Joint Petition at 16-17.

<sup>249</sup> *Id.* In addition, the Commission has already found that “wireless and wireline technologies are increasingly competing for a single pool of minutes-of-use.” *Third CMRS Report*, 13 FCC Rcd at 19817. Wireless service is available throughout BellSouth’s serving territory. Wireless prices continue to fall. Innovative one-rate-type pricing plans bundle local, intraLATA toll and long distance service with calling features in ways that provide offerings as attractive as any wireline phone service. Entry analysis conducted under a United States Department of Justice, *Anti-trust Merger Guidelines*-type analysis would highlight the ability of wireless firms to further compete by lowering prices and building and expanding facilities.

evidence of any such concern in 1999, given advances in technology there can certainly be no such impairment today.

**E. Even if the Commission Concluded Some Impairment, the Commission Should Not Mandate Unbundling.**

The Commission must by any measure conclude that a CLEC's ability to provide the service it seeks to offer is not impaired because of the availability of alternative loop elements outside of the ILEC network. Accordingly, with such a "no impairment" finding, the Commission is bound by statute to end its inquiry and not make available loops as an unbundled network element. Even if the Commission were, contrary to the record in this proceeding, to make an impairment finding, the additional permissive factors which the Commission considers, when properly weighted and calibrated to conform with section 251's objectives, counsel the Commission to decline to mandate unbundling for reasons other than lack of impairment.<sup>250</sup>

**1. Unbundling Does Not Promote Facilities-based Competition, Investment and Innovation.**

As explained in the Joint Petition, mandating unbundling of high-capacity loops would be antithetical to Congress's overarching directive to promote facilities-based entry and its specific emphasis, in Section 706, on deployment of advanced services because of the social costs of unnecessary unbundling: decreased investment in facilities by both incumbent providers and competing carriers.<sup>251</sup> As set out in the Shelanski Declaration, cost-based unbundling under section 251(d)(2) creates disincentives to both CLEC and incumbent LEC investment in the

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<sup>250</sup> 47 C.F.R. §51.317(3)(i)-(v), *NPRM*, ¶ 21 ("an initial finding that a network element satisfies the 'necessary' or 'impair' standard does not automatically lead to the designation of a UNE"). The *NPRM* correctly interprets the "at a minimum" language as a limiting condition. That is, absent an impairment finding, the Commission has no statutory authority to mandate unbundling. Even if there is a finding of impairment, however, the Commission has statutory authority to decline to mandate unbundling.

<sup>251</sup> Joint Petition at 30-32.

unbundled facility and assets that compete with it.<sup>252</sup> Creating a CLEC-entitlement to a cost-based incumbent LEC local loop will reduce CLEC incentives to invest in alternatives.

A cost-based unbundling obligation will also reduce incumbent incentives to invest in upgrading the local loop. The potential effect of this disincentive on consumers is especially troubling in light of the need to invest in local loop technologies to compete with cable providers. Under the Commission's current cost-based pricing rules, incumbents would shoulder all the risk of investing in the local loop but enjoy none of the potential benefits.<sup>253</sup> This disincentive to investment establishes a regulatory obstacle to providing advanced services over the local telephony loop. Given the freedom from similar unbundling requirements of cable operators offering directly competing services, this policy also tilts the playing field. None of this serves consumers.

The promotion of facilities based competition brings with it attendant advantages of public safety, network integrity and network security. The redundancy created by duplicative loop facilities not only results in innovation and greater service differentiation but also provides additional security in the event of network disruptions.

## **2. Unbundling Will Not Reduce Regulation.**

Maintaining unbundling requirements necessitates regulation. To the extent any unbundling requirement is maintained for ILEC loop plant, the Commission should establish a sunset period of two years, to coincide with the 2004 biennial review. In the face of market evidence demonstrating the widespread availability of alternatives that do not impair a CLECs ability to provide service, leaving loops on the list will do nothing to reduce regulation or further other relevant goals of the 1996 Act.

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<sup>252</sup> Shelanski Decl., ¶ 26.

<sup>253</sup> *Id.*

**3. Continued Unbundling Is Not Necessary to Promote the Rapid Introduction of Competition in the Telephone Exchange Service Market.**

The competitive reality in the business market is that CLECs are successfully competing by using alternatives to incumbent loops. Many CLECs are competing in the market and CLECs have gained a substantial share in a short time. Local competition, at least in the larger business market, is ahead of the pace at which long distance competition developed. There is no better evidence than this that CLEC opportunities to compete would not be impaired without access to the incumbent local loop at cost-based prices, at least in the more metropolitan MSAs shown in this pleading and in the UNE Fact Report. CLECs are using both fiber and Wireless Local Loop (“WLL”) technology to connect larger businesses to their networks. Both present competitive alternatives to incumbent LEC loops used to provide service to larger businesses today. The fact that CLECs have installed thousands and thousands of miles of fiber and have connected to a substantial portion of the commercial buildings in the country to their networks suggests that there are no impediments to installing fiber or directly serving larger business customers. That certain CLECs have overlaid ILEC loop plant in some markets, and that cable providers and wireless providers are successfully competing against ILECs in local telephone service – the two latter categories of carriers without access to ILEC UNEs—demonstrate that further unbundling is not necessary to advance competition in the local telephone exchange service markets. And currently bundling rules should be modified to take into account those competitive alternatives.

**4. Unbundling Provides the Illusion of Certainty to Requesting Carriers Regarding the Availability of the Element and Sends the Wrong Market Signals.**

As demonstrated above, the ubiquitous availability of a wide range of alternative local loop facilities through self-provisioning or third party procurement, as well as the demonstrated

existence of intermodal competition, proves that there is no market uncertainty as to whether a carrier is able to obtain loops in the markets they seek to serve. Trend data for cable telephony, wireless penetration and targeted wireline overbuilds demonstrate that in certain geographic markets consumer welfare is promoted by multi-facilities and intermodal competition and requesting carriers are therefore not impaired without access to mass market loop facilities. By forcing ILECs to continue to offer loop UNEs at artificially low rates will discourage innovation and investment in times when capital is hard to raise, thus discouraging the development of facilities-based non-ILEC element alternatives.

**5. Unbundling Has Proven Administratively Feasible, if Burdensome, but is Still Unnecessary.**

The fact that BellSouth has provisioned unbundled loops for six years demonstrates that it is administratively feasible to do so, notwithstanding the burdens caused by necessary modifications to BellSouth's provisioning systems. However, this factor may not be used by the Commission to mandate unbundling where there has been no finding of impairment, and therefore cannot be used to mandate unbundling of high-capacity loops in particular. This factor may only be used by the Commission to decline to mandate the unbundling, not to require unbundling. In some MSAs it is conceivable that alternatives to mass market ILEC loops (including effective intermodal competition) are not yet actually available, and it is also possible that they cannot feasibly become available in the very near future. In this event, BellSouth would not argue that mass market loops should not be unbundled for reasons of administrative practicality.

**F. Subloops and NIDs.**

In the UNE Remand Order the Commission essentially established non-discriminatory access requirements to ILEC subloops and NIDs. BellSouth and others have petitioned for

reconsideration of portions of these requirements for the sake of administrative clarity, network integrity and economic efficiency. The Commission should grant the Petitions of BellSouth and Verizon on these subjects.

With respect to subloops, BellSouth has requested clarification that the Commission's requirement that an ILEC construct a single point of interconnection (SPOI) applies only where the ILEC owns relevant facilities. A number of parties, including CLECs, agree on this point.<sup>254</sup> BellSouth's concern is that the Commission's order could be interpreted to require an incumbent to construct such a point in locations where it owns no facilities on the premises being served. ILECs should not be required to construct a SPOI if a CLEC has not placed an order for access from the ILEC, or where the ILEC neither owns nor controls the facilities at issue.<sup>255</sup>

BellSouth also agrees with Verizon that the Commission should not have reversed its ruling in the *Local Competition Order* declining to require an ILEC to permit a new entrant to connect its loops directly to the ILEC's NID. There was no evidence in the remand proceeding that refuted the technical issues, including over voltage that led the Commission to adopt its original rule. There are at least two ways that a CLEC accessing an ILEC's NID could create hazards to an end-user's premises; first, by removing the wiring around the protector, and second, by removing the wire that bonds the NID to the ground. In either case, hazardous power or lightning energy may enter the customer's premises via the actual ILEC telephone drop.

In the alternative, it would not be unreasonable for ILECs to provide access to NIDs under certain circumstances, namely, where there is spare capacity on the NID, and the CLEC agrees to follow practices and procedures that ensure safety and continuity of service, including

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<sup>254</sup> See BellSouth Reply, CC Docket No. 96-98, filed Apr. 5, 2000, comments cited at 7, n. 21 ("BellSouth Reply").

<sup>255</sup> BellSouth *ex parte* May 15, 2000.

following proper grounding techniques and being prohibited from disconnecting existing ILEC service arrangements. Thus, CLECs should not be permitted to disconnect ILEC facilities from an ILEC NID in order to place their own facilities on the ILEC NID. Where there is no spare capacity, CLECs can reasonably provide their own NID and connect their facilities to the customer side of the ILEC NID without interfering with the existing ILEC loop.<sup>256</sup> In the alternative, CLECs can lease loops or subloops from ILECs that include the NID termination.

Finally, and critically, the record demonstrates that the Commission should reconsider the overly broad definition of inside wire it adopted in the *UNE Remand Order*.<sup>257</sup> BellSouth believes the Commission unintentionally described various categories of intra-building wire plant in a general descriptive term “inside wire;” however, the term “inside wire” has a particular regulatory significance. At the heart of the matter is the Commission’s referring to certain ILEC owned intrabuilding plant as “inside wire” when “inside wire” actually designates facilities on the customer’s side of the network demarcation point. As with BellSouth’s SPOI proposal, BellSouth’s request with respect to inside wire mostly garnered widespread support, and BellSouth, in its Reply, met the well-taken objections of carriers who pointed out inadvertent inconsistencies in BellSouth’s proposal. In a multiple carrier world, it is more important than ever that there is clear understanding over the rights and responsibilities appurtenant to wire facilities in buildings, particularly Multi-Tenant Environment (“MTEs”). The Commission’s clarification of the various types of intra-building plant, as suggested in BellSouth’s proposed definitions of “Intrabuilding Network Cable” and “Network Terminating Wire.”<sup>258</sup>

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<sup>256</sup> *UNE Remand Order*, 15 FCC Rcd at 3803, ¶ 239.

<sup>257</sup> BellSouth Reply at 1-7.

<sup>258</sup> *Id.* at 4-5.

## VIII. SPECIFIC NETWORK ELEMENTS: LOCAL CIRCUIT SWITCHING

In 1999, despite the arguments of facilities-based CLECs that unbundled switching was unnecessary and counterproductive,<sup>259</sup> the agency’s “totality of the circumstances” unbundling analysis would not “admit that evidence of CLEC switch deployment strongly suggests that CLECs are not significantly impaired without access to unbundled switching, both in areas in which CLECs have deployed switches and areas in which they have not done so.”<sup>260</sup> As then Commissioner Powell observed, the Commission did this by focusing “predominantly on cost” and assigning “almost no weight to other factors directly relevant to assessing whether a CLEC can become an effective competitor in a particular market or customer segment.”<sup>261</sup> Then, as now, an unbundling analysis faithful to the commands of the statute and the Supreme Court compels the conclusion that ILECs should not be required to unbundle switching.

Post-1999 market trends demonstrate that the Commission’s 1999 general impairment conclusion is untenable even under its 1996 and 1999 vintage “blanket access” impairment analyses. In 1996 the Commission found that incumbent switches should be unbundled and priced based at cost because there was no evidence that other elements of incumbent networks could substitute for the switching element.<sup>262</sup> In 1999, despite “evidence that CLEC switch deployment means that CLECs, *as a general matter*, are not significantly impaired from competing if the incumbent is not forced to unbundle switching,” and because the Commission “declin[ed] to consider seriously all of the factors relevant to impairment” and afforded

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<sup>259</sup> Petitioners’ Impairment Brief at 59.

<sup>260</sup> *UNE Remand Order*, Statement of Commissioner Michael K. Powell, Dissenting in Part, at 3 (“Powell Partial Dissent”).

<sup>261</sup> *Id.*

<sup>262</sup> *First Report and Order* at 15710-11, ¶ 420.

disproportionate weight to the factors it purported to consider,<sup>263</sup> the Commission found that “in general 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.”<sup>264</sup> The Commission further determined that “the record does not support a finding that requesting carriers, as a general matter, can obtain switching from carriers other than the incumbent LEC.”<sup>265</sup> New data compel contrary conclusions, even when analyzed in the context of the Commission’s previous “blanket access” blinders.

**A. Alternatives Outside the Incumbent’s Network.**

In 1999 the Commission acknowledged that a significant number of competitive switches had been deployed, that requesting carriers had self-provisioned a significant number of switches, and indeed that the pattern of switch deployment by competitors did not “preclude” requesting carriers from serving certain customer classes in certain geographic markets.<sup>266</sup> The growth of alternatives outside the incumbent’s network since then has been nothing less than explosive, notwithstanding concurrent changes in the outlook of capital markets. Known CLEC voice switch deployment has grown from 700 to approximately 1300.<sup>267</sup> More than 200 CLECs of all sizes have actually deployed local voice switches.<sup>268</sup> Packet and wireless switches represent significant additional competitive pressure, diverting significant traffic volumes from

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<sup>263</sup> Powell Partial Dissent at 3.

<sup>264</sup> *UNE Remand Order*, 15 FCC Rcd at 3808, ¶ 253.

<sup>265</sup> *Id.*

<sup>266</sup> *UNE Remand Order*, 15 FCC Rcd at 3809, ¶ 255.

<sup>267</sup> 2002 Fact Report, II-1.

<sup>268</sup> *Id.*

the embedded ILEC circuit switch base.<sup>269</sup> Since 1999, known new CLEC installations of data switches nearly doubled, from 860 to 1700.<sup>270</sup>

BellSouth's experience reflects the national experience. Since the *UNE Remand* proceedings, the number of CLEC switches in each of several major MSAs in BellSouth's telephone exchange service markets has at least doubled. There are now 49 operational CLEC switches in Atlanta, up from 20 in 1999. Miami's installed base of CLEC switches has increased from 13 to 30 during that same period. There are now 14 operational switches in New Orleans, up from seven three years ago. In Louisiana the number of CLEC switches deployment has grown from zero in 1999 to six today.

Of course, the Commission has determined that facilities-based competitors need not deploy switches in exactly the same network configuration as the incumbent, thus allowing competitors to achieve their own unique and competitive efficiencies by deploying their own switches.<sup>271</sup> The Commission relied on record evidence that only 22% of the then current number of total switches were required to serve the entire country, and that competitors "have found it advantageous to have their switches serve a much large geographic area than [I]LEC switches."<sup>272</sup> Thus:

Switches deployed by competitive LECs may be able to serve a larger geographic area than switches deployed by the incumbent LEC, thereby reducing the direct, fixed cost of purchasing circuit switching capacity and allowing requesting carriers to create their own switching efficiencies. If a competitor uses a single switch to serve a rate area consisting of 10-15 incumbent LEC switches, the average utilization of the competitor's one switch can be as high, or higher, than many, or even all, of the incumbent LEC switches.<sup>273</sup>

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<sup>269</sup> *Id.* at II-2

<sup>270</sup> *Id.* at II-25.

<sup>271</sup> *UNE Remand Order*, 15 FCC Rcd at 3812, ¶ 258.

<sup>272</sup> *Id.* at n. 504.

<sup>273</sup> *Id.* at 3814, ¶ 261.

Indeed, in Florida, US LEC touts its single central office switch as designed to facilitate traffic termination to the same 19 rate centers served by two BellSouth tandem switches.<sup>274</sup>

Given the well-established ability of CLECs to extend the serving range of their switches through digital loop carrier and remotes, CLEC switches remain more than capable of serving a much broader geographical area than the Zone where they are actually deployed.<sup>275</sup>

Switches continue to be available from numerous manufacturers. CLECs installing switches continue to benefit from much improved switch pricing and technology and the consequent cost advantage over older incumbent LEC switching. In the last few years, switch manufacturers have made it easier and more cost-effective than ever for CLECs to purchase and deploy new circuit switches.<sup>276</sup> Overall, switch costs have declined 7.5% since 1996.

Switch manufacturers continue to compete for business from CLECs of all sizes. The largest switch manufacturers specifically tailor switches for small CLECs, reducing their entry costs and promising quick paybacks. New, smaller manufacturers are targeting the smaller CLEC market specifically. These manufacturers are providing CLECs access to new technology such as server-based switching solutions that further lowers costs and provides additional flexibility and efficiency.<sup>277</sup>

**B. A Material Diminishment Analysis Should Only Apply in Those Areas Where There is No Evidence of Competitive Alternatives to ILEC Circuit Switching.**

The UNE Fact Report makes clear the existence of competitive switching alternatives. For example the UNE Fact Report looks at the top 100 MSAs demonstrates that ILEC circuit

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<sup>274</sup> 2002 Fact Report at II-9, Table 7.

<sup>275</sup> BellSouth Comments at 59.

<sup>276</sup> 2002 UNE Fact Report at II-10.

<sup>277</sup> BellSouth Comments at 57.

switching should not be unbundled, even conditionally, in those areas.<sup>278</sup> In the face of this marketplace evidence, the Commission should de-list local switching and end its inquiry. To the extent, however, a requesting carrier can demonstrate that there are no alternative switching elements available in some MSA somewhere, then that carrier should have the burden of showing that its ability to provide service would be materially diminished if it had to self-deploy or procure alternative switching elements. In doing so, the Commission, must correct the mistakes it made in the UNE Remand Order with respect to those factors it used to keep the some of the switching element listed.

### **1. Cost**

In 1999 the Commission found that the total costs of self-provisioning a switch imposes significant cost disadvantages relative to the incumbent LEC. The costs that the Commission considered included (1) the direct and incremental costs of self-provisioning, which the Commission found “varied significantly;” (2) “the economies of scale that *may* characterize local circuit switching;” and (3) the “additional costs that requesting carriers incur when placing their self-provisioned switches into operation.”<sup>279</sup> The Commission rated the second and third categories of its cost analysis the “more critical” aspect of its undertaking.

On a prospective basis, the Commission should not examine these cost categories, as it did in 1999, relative to the incumbent LEC. In many cases, a new entrant will not have the same economies of scale and scope as an incumbent. Rather, the Commission should, as it announced in the notice, find “evidence of actual marketplace conditions to be more probative than other kinds of evidence, such as cost studies or hypothetical modeling.”<sup>280</sup> Building on its own

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<sup>278</sup> See 2002 UNE Fact Report at Section II.

<sup>279</sup> *UNE Remand Order*, 15 FCC Rcd at 3812-13, ¶ 259.

<sup>280</sup> *NPRM*, ¶ 17.

recognition that “switches served by competitive LECs may be able to serve a larger geographic area than switches deployed by the incumbent LECs,” and that “[t]his dynamic mitigates, to a varying degree, incumbent LEC advantages of scale,”<sup>281</sup> the Commission must assess whether “a CLEC can become an effective competitor in a particular market or customer segment, such as the CLEC’s ability to target market and the relative profit potential of serving different types of customers.”<sup>282</sup>

The market evidence of actual CLEC switch deployment, as outlined above, belies any claim that the costs of acquiring circuit switches, circuit switch upgrades, alternative soft switches, are a significant enough impairment so as to require the Commission to unbundle BellSouth’s local circuit switching. By the most conservative estimates, CLECs serve 1.8 million business and 300,000 residential lines over the circuit switches they have deployed in BellSouth’s region alone.<sup>283</sup> CLECs in BellSouth’s region have publicly proclaimed the extensive geographic reach of the switches they have deployed. Moreover, the pattern of CLEC switch deployment since the remand proceedings demonstrates conclusively that, in BellSouth’s operating territories, CLECs can and do target specific markets and can become an effective competitor in a particular market or customer segment.<sup>284</sup>

Intermedia, a CLEC operating in Florida, states:

Instead of deploying a multiplicity of switches to cover an area, as is BellSouth’s custom, Intermedia deploys a single switch to cover a very large area. Intermedia can do this because the switches it deploys are very capable and have a very large capacity.<sup>285</sup>

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<sup>281</sup> *UNE Remand Order*, 15 FCC Rcd at 3814, ¶ 261.

<sup>282</sup> Powell Partial Dissent at 3.

<sup>283</sup> 2002 Fact Report at II-5, Table 2.

<sup>284</sup> Powell Partial Dissent at 3.

<sup>285</sup> 2002 UNE Fact Report at II-9, Table 7.

Thus, “Jacksonville, Orlando, Tampa and Miami are each served by a single switch. This is a great deal of territory, all covered by four Intermedia switches.”<sup>286</sup>

As BellSouth pointed out in its initial remand comments, and as the Commission indicates it will do in the Public Notice, resolving the question of whether lack of access to unbundled incumbent LEC switching impairs an efficient CLEC’s meaningful opportunity to compete requires the Commission to look at what CLECs have done in the switching arena.

**2. Will An Efficient CLEC’s Meaningful Opportunity To Compete Be Impaired Without Access to Incumbent LEC Switching at Cost Based Pricing**

The facts then and now demonstrate that CLECs have chosen to install their own switches rather than rely on incumbent switching, both in BellSouth’s operating territories and nation-wide. These switches can serve broad geographic areas using digital loop carrier or remote switching modules. CLECs are purchasing these switches at continually falling per-line costs, and they have substantially more flexibility in deploying them than incumbents do.

The Commission should give no consideration to the third category of costs it identified in the context of its 1999 local switching unbundling analysis, the “additional costs that requesting carriers incur when placing their self-provisioned switches in operation.”<sup>287</sup> In the first place, the costs of hot cuts, collocation and other “additional costs” of putting a switch in service are the inherent costs of doing business in this industry. They would have to be incurred whether or not the entity the requesting carrier has to deal with is an ILEC or one of the 200 CLECs of all sizes that have actually deployed local voice switches in the Bell operating

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<sup>286</sup> *Id.*

<sup>287</sup> *UNE Remand Order*, 15 FCC Rcd at 3813, ¶ 259.

companies' service territories.<sup>288</sup> Moreover, BellSouth's hot cut performance data have improved dramatically. The Commission, by statute, needs to confine its impairment analysis to the specific element at issue, in order to achieve a meaningful limitation on ILEC unbundling as required by the Supreme Court. By introducing extraneous costs that are not specifically tied to the element under analysis, the Commission is at risk of recreating the "blanket access" already rejected by the Supreme Court by considering "any" increase in cost.<sup>289</sup> In any event, and in separate proceedings, the Commission has addressed the costs of collocation which the Commission found "materially" diminished the ability of a requesting carrier to offer service.<sup>290</sup> Collocation costs in BellSouth's region declined 20.3% from 1999 to 2000, and an additional 7.4% from 2000 to 2001; it now takes BellSouth an average of 55 days to provision a collocation arrangement.

Finally, the Commission in 1999 determined that everywhere a CLEC loses a customer the inherent flexibility of switches means that self-provisioning is not an unreasonable risk.<sup>291</sup> In 1999, the Commission incorrectly compared all three cost categories to an incumbent LECs existing "economies of scale and scope," completely disregarding the nimbleness, inherent advantages of target marketing, and relatively light hand of regulation that attends CLEC provision of local telephony service, as well as the significant regulatory constraints imposed on the ILEC. Prospectively, the Commission should assess its questions of cost against the actual deployment of circuit switching, and the actual deployment of circuit switching alternatives, in

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<sup>288</sup> 2002 UNE Fact Report at II-1.

<sup>289</sup> *Iowa Utils. Bd.*, 525 U.S. 3 at 390.

<sup>290</sup> *UNE Remand Order*, 15 FCC Rcd at 3815-16, ¶¶ 262-63.

<sup>291</sup> *UNE Remand Order* ¶ 182.

the open market.<sup>292</sup> Given the current state of CLEC switch deployment, the advancement of switch architecture and the variety and availability of switch hardware and software from multiple vendors at competitive prices, the economical availability of ILEC collocation on competitively neutral terms established by the Commission and the significant improvements in BellSouth loop cutover processes,<sup>293</sup> the market evidence demonstrates that any of the cost categories identified by the Commission in 1999 operate to materially diminish a CLECs ability to provide service to its targeted market without access to unbundled ILEC switching.<sup>294</sup>

### 3. Ubiquity and Timeliness

In 1999 the Commission “triple counted” the collocation and coordinated loop cutover processes against the ILECs when it considered three of the five factors it said it would rely on to determine whether alternative switching was available to CLECs as a practical, economic and operational matters, citing it as a factor with respect to cost, timeliness and ubiquity. As demonstrated above, the costs of hot cuts, collocation and other “additional costs” of putting a switch in service are inherent costs of doing business that cannot and should not be avoid without distorting the market in favor of certain carriers without principled distinction. These costs will be incurred whether or not the entity the requesting carrier has to deal with is an ILEC or a CLEC. In any event, to the extent the Commission does consider this factor, the economical availability of ILEC collocation on competitively neutral terms established by the Commission

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<sup>292</sup> 2002 UNE Fact Report at II-4, *et seq.*

<sup>293</sup> Over 95% performance in all nine BellSouth states over the last six months.

<sup>294</sup> *See* 2002 UNE Fact Report at V-7, V-8, Figs. 1 & 2.

and the significant improvements in BellSouth loop cutover processes have significantly altered a CLEC's ability to deploy switches in a timely manner.<sup>295</sup>

#### **4. Quality and Impact on Network Operations**

The Commission made no findings in 1999 as to either "quality" or "impact on network operations" in its "totality of the circumstances" analysis for unbundled switching, as it was required to by the express terms of the rules it promulgated with the *UNE Remand Order*.<sup>296</sup> Because quality and network operations are essential to the immediate commercial success and long-term commercial viability of any CLEC, this *lack* of an impairment finding is critical: the Commission had no evidence to conclude that available alternatives to ILEC unbundled switching would result in a material diminishment of quality or efficient network operations in 1999. The Commission, however, gave absolutely no weight to these factors, which could have counter-balanced its findings with respect to the factors it did consider. On a prospective basis, the Commission should give as much weight to the absence of any negative impact on CLEC service quality or CLEC network operations, as well as to the existence of any negative impact on ILEC service quality or ILEC network operations, as it does to any other factor.

#### **C. Even if the Commission Concluded Some Impairment, the Commission Should Not Mandate Unbundling.**

The Commission must by any measure conclude that a CLEC's ability to provide the service it seeks to offer is not impaired in light of the availability of alternative switch elements outside of the ILEC network. Accordingly, with such a "no impairment" finding, the Commission is bound by statute to end its inquiry and not make switching available as an

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<sup>295</sup> As shown above, both the costs and duration of collocation provisioning within BellSouth's region have decreased substantially since 1999, and BellSouth's cutover process has improved dramatically.

<sup>296</sup> 47 C.F.R. § 51.317(b)(2)(iii), (v).

unbundled network element. Even if the Commission were, contrary to the record in this proceeding, make an impairment finding, the additional permissive factors which the Commission considers, when properly weighted and calibrated to conform with section 251's objectives, counsel the Commission to decline to mandate unbundling for reasons other than lack of impairment.<sup>297</sup>

### **1. Unbundling Switching Does Not Promote Facilities based Competition, Investment and Innovation.**

As demonstrated above, the ubiquitous deployment of CLEC switches that can serve wide geographic areas, the amount of telephone numbers ported and the amount of access lines served by CLECs demonstrate that even if unbundling local switching at cost based rates was ever appropriate, it is inappropriate in light of today's market conditions.<sup>298</sup> Moreover, the dispersal of facilities based switching alternatives over a wide geographic area serving the same customer markets ensures the public safety, network integrity and network security aspects of facilities-based completion in the event of a major network disruption.

As demonstrated above, the Commission should give the most weight to this factor. For reasons of national security, network integrity, and public welfare, the Commission should affirm its preference for facilities-based competition. And experience since the 1996 Act establishes that facilities-based competition has evolved largely apart from the UNE-based forms of competitive entry.<sup>299</sup> Some CLECs have continued to invest aggressively in switching despite

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<sup>297</sup> 47 C.F.R. §51.317(3)(i)-(v), NPRM at 21 (“an initial finding that a network element satisfies the ‘necessary’ or ‘impair’ standard does not automatically lead to the designation of a UNE”). The NPRM correctly interprets the “at a minimum” language as a limiting condition. That is, absent an impairment finding, the Commission has no statutory authority to mandate unbundling. Even if there is a finding of impairment, however, the Commission has statutory authority to decline to mandate unbundling.

<sup>298</sup> Shelanski Decl., ¶ 54.

<sup>299</sup> 2002 UNE Fact Report at V-1.

the availability of unbundled incumbent switching because of the competitive service advantages obtained by self-provisioning and because dropping switch costs and increasing flexibility in the geographic reach of switches continues to make the investment payoff attractive.

These CLECs, which have relied on a facilities-based strategy from the outset, have grown incrementally, establishing a foothold and then expanding core network facilities step by step into new geographic and product markets.<sup>300</sup> These CLECs provide robust competition for very significant numbers of both business and mass-market customers, and remain viable competitors with fully funded business plans.<sup>301</sup> Other CLECs, however, adopted business strategies that center on long-term reliance on UNEs with no intention of ever building facilities to replace the UNEs.<sup>302</sup> The 2002 Fact Report documents these phenomena, and demonstrate that UNEs promote only the “short term appearance of competition,” but not true facilities-based competition, investment or innovation.

## **2. Unbundling Will Not Reduce Regulation.**

Maintaining unbundling requirements necessitates regulation. The unqualified elimination of switching capability from the Commission’s list of specific unbundling requirements is exactly the kind of de-regulatory, pro-market action that Congress expected the Commission to take. By retaining the requirement, and the qualified exemption from the requirement, the Commission, of course necessitates inefficient and costly regulatory proceedings at both the state and federal levels to implement the requirements. In the face of market evidence demonstrating the widespread availability of alternatives that do not impair a

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<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at V-2. Again, Wall Street sees behind short term strategies. “While near-term regulatory risks to UNE-P may have abated, out long-term investments thesis for competitive telecom continues to favor facilities-based platforms.” *Morgan Stanley*, (Feb. 25, 2002)

CLECs ability to provide service, leaving local switching on the list will do nothing to reduce regulation or further other relevant goals of the 1996 Act. Rather, it will create additional social and administrative costs.

**3. Continued Unbundling Is Not Necessary to Promote the Rapid Introduction of Competition in the Telephone Exchange Service Market.**

As shown above, requesting carriers are able to obtain switching alternatives to serve targeted mass-market and business market customers. Thus, there is no need maintain the current unbundled local switching requirement, or to condition any exemption from the current requirement on number of lines the requesting carrier serves, the location of the circuit switch which is to be unbundled, or the availability of unbundled loop and transport combinations.

**4. Unbundling Is Not Necessary in Order to Provide Certainty to Requesting Carriers Regarding the Availability of the Element.**

As demonstrated above, the ubiquitous availability of a wide range of alternative switching facilities through self-provisioning or third party procurement demonstrates that there is no market uncertainty as to whether a carrier is able to obtain local transport on the open market. On the other hand, the continued availability of ILEC legacy switching at TELRIC prices could discourage further competition in switch provisioning by third parties.

**5. Unbundling Has Proven Administratively Feasible, if Burdensome, But is Still Unnecessary.**

BellSouth has unbundled local circuit switching, and has demonstrated that it is administratively practical to do so. However, this factor may not be used by the Commission to mandate unbundling, especially where, as here, carriers are not impaired without access to the

ILEC's switching function. This factor may only be used by the Commission in the exercise of its discretion to decline to mandate the unbundling for which it has made an impairment finding.

## **IX. SPECIFIC NETWORK ELEMENTS: INTEROFFICE TRANSMISSION FACILITIES**

In the sixteen years following Sprint and MCI's assertion at the divestiture of the Bell operating companies from AT&T that local transport was not part of the local monopoly and should be opened to competition,<sup>303</sup> multiple facilities based competitive access providers (CAPs) have invested in fiber optic network alternatives to ILEC interoffice transmission facilities.<sup>304</sup> Thus, the Commission recognized in its 1996 *Local Competition Order* that "there are alternative suppliers of interoffice facilities in certain areas,"<sup>305</sup> but nevertheless mandated the unbundling of ILEC interoffice transport. In 1997 the Commission found that "there are already a number of competitors offering [transport] services."<sup>306</sup>

By mid-1999, the record in the *UNE Remand* proceeding established that more than 60 CLECs had deployed interoffice transport facilities in 289 cities, and CLECs were serving 8-18% of business customers in dense urban areas over their own loops.<sup>307</sup> The Commission took note in the *UNE Remand Order* that "the record indicates that competitive LECs have deployed

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<sup>303</sup> BellSouth 1999 Comments at 47, n. 46, citing 1999 UNE Fact Report: Interoffice Transport Section at 2.

<sup>304</sup> 2002 UNE Fact Report at III-1. As BellSouth noted in its comments in the remand proceeding, both MCI and Sprint argued at divestiture that local transport was not part of the local monopoly and should be opened to competition. BellSouth Comments at 47, n. 46, citing 1999 UNE Fact Report: Interoffice Transport Section at 2.

<sup>305</sup> *First Report and Order*, 11 FCC Rcd at 15718, ¶ 441.

<sup>306</sup> *In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20042, ¶ 111 (1997) ("*Bell Atlantic/NYNEX Order*").

<sup>307</sup> Petitioners' Brief at 63-64, citing 1999 UNE Fact Report at II-6, III-17.

transport facilities along certain point-to-point routes.”<sup>308</sup> The Commission nevertheless found that requesting carriers were impaired without continued access to ILEC’s unbundled dedicated and shared transport network elements.

In the subsequent two years, competitive transport facilities have continued to proliferate dramatically. At the time the record closed in the *UNE Remand* proceeding, CLECs had 100,000 fiber miles and 486 local fiber networks in the top 150 MSAs; today CLECS have 184,000 fiber miles.<sup>309</sup> With the ubiquitous availability of dedicated transport facilities wherever there is likely to be market demand, Verizon, SBC and BellSouth filed a Joint Petition in the spring of 2001 asking the Commission to find that dedicated transport not be subject to mandatory unbundling.<sup>310</sup> The market for interoffice transport remains competitive.

**A. Alternatives Outside the Incumbent’s Network.**

Today, alternative dedicated transport is available either through self-supply or from a large and ever-expanding number of fiber wholesalers.<sup>311</sup> The market evidence of this availability is demonstrated in three ways: through the fiber-based collocation by CLECs in ILEC central offices, by the deployment of CLEC fiber routes, and by the existence of wholesale suppliers of fiber for transport.

The extent of fiber-based collocation in ILEC central offices is a simple, conservative and unambiguous indicator of the extent of competition in the interoffice transport market, because “the fundamental . . . strategy of most fiber-based companies in the industry today is that we will

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<sup>308</sup> *UNE Remand Order*, 155 FCC Rcd at 3842, ¶ 321.

<sup>309</sup> 2002 UNE Fact Report at I-1.

<sup>310</sup> Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket NO. 96-98, at 3 (filed April 5, 2001) (“Joint Petition”).

<sup>311</sup> *Id.* at 18.

build to a central office, and we will co-locate with a regional Bell operating company.”<sup>312</sup> At the time the BOCs filed their Joint Petition, CLECs with their own fiber facilities were collocated in a substantial number of BOC central offices.<sup>313</sup> Specifically, out of the 320 MSAs served by the BOCs, 183 (including 42 of the 50 largest MSAs, which account for 80% of total BOC special access revenues) had at least one fiber-based collocator (often more) in wire centers covering 30% of special access revenues in those MSAs and 154 (including 33 of the 50 largest, generating 64% of total BOC special access revenue) had collocation in wire centers covering 65% of special access revenues in those MSAs.<sup>314</sup>

The numbers have increased in little less than a year. As of year end 2001, one or more CLECs had obtained fiber based collocation in 60% of BOC wire centers 13% of BOC, which in turn contain more than 10,000 business lines. These totals are even higher in large metropolitan areas. In the 25 largest MSAs served by BellSouth, one or more CLECs has obtained fiber-based collocation in 37% of the central offices served by those MSAs.<sup>315</sup> Multiple CLECs have fiber-based collocation in 27% of BellSouth wire centers in the 25 largest MSAs within BellSouth’s operating territories.<sup>316</sup>

The foregoing data are conservative because it does not take into account ILEC central office bypass. Many private business customers generate such significant amounts of traffic as to justify their own direct-to-CLEC customer connections.<sup>317</sup> “Collocation hotels” such as those operated by Switch & Data, Exodus Communications, Global Switch, and Metro Nexus are

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<sup>312</sup> 2002 UNE Fact Report at III-2, n.6, *quoting* WinStar CEO Bill Rouhana.

<sup>313</sup> Joint Petition at 19.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at Table 2.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at III-5.

large, high-security facilities, often located adjacent to ILEC wire centers, that house servers, data storage equipment, and network interface equipment used by telecom carriers and ISPs and that provide multiple CLECs and IXC's points at which to station their equipment and interconnect their networks.<sup>318</sup> Data concerning fiber-based collocation simply will not indicate this and thus understates the current amount of self-provisioned interoffice transport.

Moreover, there has been a burgeoning market for wholesale fiber for interoffice transport.<sup>319</sup> These wholesalers have invested over \$1 billion in deploying local fiber networks that they sell or lease to other carriers.<sup>320</sup> As the 2002 Fact Report indicates, metropolitan fiber suppliers have raised about \$2 billion in capital since the third quarter of 2000, and are "some of the few getting capital."<sup>321</sup> A table featuring eleven of these wholesale fiber suppliers, eight of whom are operational in metropolitan areas within BellSouth's operating territories, as well as a table listing sixteen power utilities that provide wholesale fiber for local transport, is set forth in the 2002 Fact Report at III-12 and III-13.

**B. A Material Diminishment Analysis Should Only Apply in Those Areas Where there is No Evidence of the Existence of Competitive Alternatives to ILEC Transport Elements.**

There is absolutely no basis for the Commission to conclude that any carrier anywhere is today impaired in the provision of telephone exchange service without access to ILEC transport

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<sup>318</sup> *Id.*

<sup>319</sup> There is also a thriving wholesale market for dark fiber, as detailed in the 2002 Fact Report, III-9 – III-14. Because public rights-of-way acquisition costs fall equally on ILECs and CLECs, and because CLECs and other telecommunications service providers have rights of mandatory access to ILEC poles, ducts, conduits and rights-of-way at cost based rates regulated by the Commission on terms and conditions that are subject to a special Commission enforcement and complaint process, there is absolutely no basis to find any continuing impairment in a non-ILEC carrier's ability to secure dark fiber on the open market, just as ILECs currently do.

<sup>320</sup> 2002 UNE Fact Report at III-7.

<sup>321</sup> *Id.* at III-10.

services.<sup>322</sup> Nevertheless, and for the sake of argument, BellSouth will demonstrate that even where a carrier could allege that there is no actual transport alternative available, or that self-provisioning is not feasible, it could not carry its burden of proof under a proper application of the Commission's "material diminishment" analysis.

## 1. Costs

In 1999 the Commission erred in failing to target its impairment analysis to specific geographic and customer markets when it agreed "with commenters that argue that replicating the incumbent's vast and ubiquitous transport network would be prohibitively expensive, and delay competitive entry."<sup>323</sup> Competing providers of dedicated transport need not replicate the entire ILEC interoffice network; they can concentrate their resources on the discrete set of wire centers that serve their customers.<sup>324</sup> Leasing capacity from wholesalers, taking as much capacity as needed and scaling network to meet demand, allows individual CLECs to minimize their costs of providing alternative dedicated transport.<sup>325</sup> It is often as economical for facilities-based CLECs to extend their fiber networks directly to "datacom hotels," large business customers, data ISPs, wireless carriers, cable head ends, and other, often new, points of traffic concentration outside of the ILEC central office, as it is to build to a central office.<sup>326</sup>

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<sup>322</sup> As shown above, wireless providers are not impaired without access to transport UNEs, *see also* 2002 Fact Report at V-20. Similarly, the highly competitive nature of the interexchange market demonstrates that interexchange carriers are not impaired in their ability to provide service without access to UNEs in the form of special access conversions. 2002 Fact Report at V-18 – V-20. Nor should UNEs be extended into the competitive information services marketplace or the broadband services marketplace. 2002 Fact Report at V-22.

<sup>323</sup> *UNE Remand Order*, 15 FCC Rcd at 3855, ¶ 355.

<sup>324</sup> Joint Petition at 23; 2002 Fact Report at Section V, *passim*.

<sup>325</sup> *Id.* at 24.

<sup>326</sup> Joint Petition at 23-25.

The alternative collocation market described above – the non-ILEC “collocation hotels”— is also dramatically reducing the costs of deploying alternative fiber facilities.<sup>327</sup> Moreover, the costs of collocation in ILEC central offices have also declined considerably, given such options as cageless collocation, shared collocation, and non-standard cage sizes. As the Commission has already made clear, technical changes are also driving down the marginal costs of alternative transport providers:

Advances in fiber and electronics have made expansion of transport capacity relatively inexpensive. Once a competitor has infrastructure in place, the marginal cost of adding customers is not significant, and competitors are not likely to lack sufficient capacity for an extended period.<sup>328</sup>

Finally, while the costs of deploying fiber underground for self-provisioning carriers is a cost of doing business that every carrier must address, even these costs could be cut in half by revolutionary technological developments. The 2002 Fact Report details a well financed entity that “aims to revolutionize the rollout of broadband services in cities by dispatching tiny robots to lay fiber-optic cables in sewer pipes,” and has agreements to deploy fiber within eight major cities and is in talks with dozens of other municipalities.<sup>329</sup>

## 2. Timeliness.

The substantial increase both in fiber-based collocation and fiber network deployment since the *UNE Remand Order* is the best market evidence that CLECs are no longer (if ever they were) impaired without access to ILEC dedicated transport elements because of delays due to securing access to rights-of-way and to collocate in ILEC end offices. The FCC has, of course,

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<sup>327</sup> *Id.* at 24.

<sup>328</sup> Brief of FCC, *MCI WorldCom v. FCC*, Nos. 99-1395 *et al.* (D.C. Cir. Filed Nov. 30, 2000).

<sup>329</sup> 2002 UNE Fact Report at III-9.

established a national standard for collocation that has been in place for over a year and a half.<sup>330</sup> At the time of the Joint Petition, BellSouth's average provisioning time for initial collocation was 108 calendar days, well below the CLEC claims credited in the *UNE Remand Order* of six to twelve months.<sup>331</sup> BellSouth's average provisioning time for initial collocation has improved to 55 calendar days, well within the reasonably accepted planning parameters of network engineering. Moreover, as demonstrated above and in the 2002 Fact Report, the continued proliferation of "collocation hotels" often adjacent to and interconnected with ILEC central offices, provides alternatives to ILEC provisioning schedules. To the extent carriers cannot collocate any more quickly in a private "collocation hotel" than in an ILEC central office, the market has demonstrated that current BOC collocation intervals are reasonable.

Access to rights-of-way is a ubiquitous cost of doing business that faces ILEC and CLEC alike. The Telecommunications Act recognizes that municipalities may have legitimate expenses relating to rights-of-way management, and seeks to strike a balance between a local government's need to recover its cost of maintaining public rights-of-way and Congress's desire for multiple facility-based local telephone service providers.<sup>332</sup> BellSouth, in fact, is working hand-in-hand with CLECs and interexchange carriers to address issues of cost and delay arising from securing local government access to public rights-of-way. Moreover, section 224 of the Act imposes asymmetrical procedural rights on ILECs and CLECs concerning access to the other's rights-of-way at cost-based rates within a range of reasonableness established by the

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<sup>330</sup> *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 15 FCC Rcd 17806 (2000).

<sup>331</sup> Joint Petition at 26.

<sup>332</sup> 47 U.S.C. §253 (c).

Commission through rulemaking and adjudication. CLECs have a statutory mandatory right of access to other LEC's rights-of-way at rates within a zone of reasonableness established by the Commission, as well as presumptive rights of access to other utility rights-of-way.<sup>333</sup>

Telecommunications service providers and cable operators, but not BOC ILECs, have access to FCC complaint procedures (including Accelerated Docket procedures) concerning the terms and conditions of access to another LEC's rights-of-way. With this combination of legal entitlement, enforcement remedy, and industry-wide cooperation, not to mention the general availability of leased-capacity from existing suppliers during the municipal approval process, delays in accessing rights-of-way do not constitute a material impairment to a requesting carrier's ability to provide service.

### **3. Functionality and Quality**

As explained in the Joint Report, any concern that the Commission had that the use of competitive transport alternatives "can result in a material degradation of quality" is no longer valid.<sup>334</sup> CLECs themselves have reported no apparent diminution in service quality even when they have chosen to use multiple alternative transport vendors.<sup>335</sup> The entire public switched telephone network is an interconnecting of a "patchwork of transport offerings" and it is not as if BellSouth, because of its historic LATA restrictions, has significant "ubiquitous end-to-end transport networks" to any greater extent than a competitive access provider or competitive LEC which has been allowed to build facilities without those same restrictions.

### **4. Ubiquity.**

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<sup>333</sup> 47 U.S.C. § 224.

<sup>334</sup> *Id.* at 28.

<sup>335</sup> *Id.*

The Commission did not specifically find that a lack of ubiquity resulted in a material diminishment. However, the current market evidence of widespread alternative transport elements, both self-provisioned and third party supplied, demonstrates the ubiquity of alternative fiber-based transport facilities. Both the 2002 Fact Report and the Joint Petition establish conclusively this ubiquity.<sup>336</sup> Today CLECs enjoy access to many practical and economic sources of competitive transport.

**C. Under the Totality of the Circumstances, Requesting Carriers are Not Impaired Without Access to Unbundled Transport Elements.**

Economist Robert W. Crandall has reviewed the record developed in response to the Joint Petition and demonstrates that it would be economically rational for CLECs to continue to build and extend their alternative fiber transport facilities. CLECs can and will continue to deploy competitive local transport facilities in a timely and cost-effective manner, assuming rational policies that motivate sustainable, facilities-based competition.<sup>337</sup> CLECs can, and of course often do, serve customers without using an ILEC's interoffice transport UNE. They can do so in a timely way by collocating in an ILEC's end office where timeliness is assured by federal rule, or by collocating in a competitive collocation center that presents even more opportunities to access concentrated telecommunications traffic. The ubiquitous availability of alternative transport facilities, which has increased even since the Joint Petition, aligns with those ILEC wire centers that serve the majority of high revenue business customers and concentrated target market populations. High quality alternative transport services have been available since 1985, and significant market share has been lost by the BOCs to CAPs and other competing carriers – market data that would not appear if quality of service were an issue. There simply is no

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<sup>336</sup> 2002 Fact Report at I-13; Joint Petition at 18-22.

<sup>337</sup> *Id.* at 7.

evidence in the current record that the impact on network operations plays any role in a CLEC's ability to obtain local transport network elements from any source other than the local BOC LEC.

**D. Even if the Commission Concluded Some Impairment, the Commission Should Not Mandate Unbundling.**

The Commission must conclude that a CLEC's ability to provide the service it seeks to offer is not impaired because of the availability, as a practical, economic and operational matter, of alternative elements outside of the ILEC network as evidenced by widespread and substantial fiber-based collocation and deployment. Accordingly, with such a "no impairment" finding, the Commission is bound by statute to end its inquiry and not make available local transport as an unbundled network element. Even if the Commission were, contrary to the record in this proceeding, to make an impairment finding, it should decline to require the unbundling of transport after considering additional factors that further statutory goals.<sup>338</sup>

**1. Unbundling Does Not Promote Facilities-based Competition, Investment and Innovation.**

The economic evidence in the record of this proceeding demonstrates that the current pricing rules that apply to UNEs discourages facilities-based competition.<sup>339</sup> This is bad for network redundancy, public safety, network integrity and network security. To the extent that CLECs argue that the cost difference between the local transport UNE and the self-provisioning

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<sup>338</sup> 47 C.F.R. §51.317(b)(3)(i)-(v); *NPRM*, ¶ 21 ("an initial finding that a network element satisfies the "necessary" or "impair" standard does not automatically lead to the designation of a UNE"). The *NPRM* correctly interprets the "at a minimum" language as a limiting condition. That is, absent an impairment finding, the Commission has no statutory authority to mandate unbundling. Even if there is a finding of impairment, however, the Commission has statutory authority to decline to mandate unbundling.

<sup>339</sup> Reply Affidavit of Jerry A. Hausman and J. Gregory Sidak at 7-10, Attachment B to Reply Comments of BellSouth Corporation, CC Docket No. 96-98 (filed June 10, 1999) ("Hausman/Sidak Affidavit"); Rebuttal Declaration of Robert W. Crandall at 34, Attachment B to Reply of BellSouth, SBC and Verizon, CC Docket No. 96-98 (filed June 25, 2001) ("Crandall Rebuttal Declaration").

or procurement of dedicated transport is impairment, they not only misconstrue the instruction of the United States Supreme Court, they prove the unreasonableness of current pricing policies. Moreover, the Commission has already concluded that incumbent special access services, which are substitutes for interoffice transport and dark fiber, are subject to substantial competition.<sup>340</sup> If sufficient competition exists in a portion of a BOC's serving territory such that pricing flexibility may be granted for local transport substitutes, it is arbitrary and unreasonable to find that carriers are impaired without access to the local transport UNE. As a practical matter, the presence of a collocated competitor shows beyond dispute that CLECs can deploy their own fiber facilities (or obtain them from others) in a specific location, and thus that there is no impairment under any reasonable standard.<sup>341</sup>

## **2. Unbundling Will Not Reduce Regulation.**

Maintenance of a transport UNE brings with it the attendant artificial distortions of the market that are inconsistent with the Telecommunications Act's general deregulatory goals.<sup>342</sup> By retaining the requirement, the Commission necessitates inefficient and costly regulatory proceedings at both the state and federal levels to implement the requirements. In the face of market evidence demonstrating the widespread availability of alternatives that do not impair a CLECs ability to provide service, leaving local transport on the list will do nothing to reduce regulation or further other relevant goals of the 1996 Act, but will only increase costs.<sup>343</sup>

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<sup>340</sup> Petitioners Brief at 66.

<sup>341</sup> Petitioners Brief at 67.

<sup>342</sup> "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American consumers and encourage the rapid deployment of new telecommunications technologies." Preamble, Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

<sup>343</sup> Shelanski Decl. at 2 & ¶¶ 60-65, 76.

**3. Continued Unbundling Is Not Necessary to Promote the Rapid Introduction of Competition in the Telephone Exchange Service Market.**

Competition amongst alternative local transport has raged for 16 years. The data demonstrate widespread deployment of alternative facilities available to CLECs. An alternative market for CLEC transport already exists. CLEC fiber and wireless networks have substantial capacity, perhaps excess capacity, and that capacity can easily be expanded.<sup>344</sup> (find the perverse footnote in Remand Order about CLECs not using other CLECs fiber because of UNE pricing) As shown above, CLECs are also installing new fiber at a rapid rate. Entry is relatively easy given the need only to connect points where substantial traffic is aggregated. Based on the presence of these alternatives and the relative ease of entry and expansion, the Commission must conclude that unbundling is not necessary to promote competition.

**4. Unbundling is Not Necessary in Order to Provide Certainty to Requesting Carriers Regarding the Availability of the Element.**

As demonstrated above, the ubiquitous availability of a wide range of alternative local transport facilities through self-provisioning or third party procurement demonstrates that there is no market uncertainty as to whether a carrier is able to obtain switching alternatives on the open market. Indeed, these alternatives could dry up in the face of mandatory unbundling of ILEC transport Elements at TELRIC Prices.

**5. Unbundling Has Proven Administratively Feasible, if Burdensome, But is Still Unnecessary.**

BellSouth has unbundled local transport, and has therefore demonstrated that it is administratively practical to do so. However, this factor may not be used by the Commission to

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<sup>344</sup> In determining that AT&T was no longer a “dominant” carrier in the interexchange market, the Commission placed heavy reliance on the effectiveness of competitive *capacity* as a restraint. *AT&T Reclassification Order*, 11 FCC Rcd at 3303-3305, ¶¶ 56-62.

mandate unbundling, especially where, as here, carriers are not impaired without access to the ILEC's local transport element. This factor may only be used by the Commission in the exercise of its discretion to decline to mandate the unbundling for which it has made an impairment finding.

## **X. SIGNALING NETWORKS AND CALL-RELATED DATABASES**

In 1999 the Commission found that there were six major facilities-based SS7 network providers and four mid-sized facilities-based SS7 network providers that operate regional SS7 networks, that more than half a dozen manufacturers supplied equipment based on standard interfaces and protocols that are used to operate a signaling network, and that, in GTE's service area alone, twelve CLECs opted to build their own signaling networks.<sup>345</sup> At that time there were actually three "national" SS7 networks that provided signaling transport; these networks remain in operation today. Today, as then there are a number of regional SS7 providers, including ILECs such as BellSouth.<sup>346</sup> SS7 signaling network deployment remains widespread national through multiple regional and national networks. Over two dozen separate SS7 networks are today connected to BellSouth's SS7 network. Including the three networks that are national in scope, owned by Verizon-GTE, Illuminet and SNET. Each of these national networks currently has CLEC customers in BellSouth's telephone exchange service territories.

Nevertheless, the Commission required ILECs to unbundled SS7 access. This requirement was not based on 1) substantial and material costs, 2) timeliness of availability through alternative means, or 3) overall quality of signaling transport provided by others.

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<sup>345</sup> *UNE Remand Order*, 15 FCC Rcd at 3869-70, ¶ 389.

<sup>346</sup> Most CLECs do not have a particular need for a national SS7 provider. For the most part CLECs, even those like MCI which have IXC arms, leave national SS7 interconnection up to the IXC that their end user customer selects to haul interLATA traffic. It is the practice of BellSouth and other carriers to connect to a national provider only if they need access to another carrier's SS7 in a remote location for Line Information Data Base or Calling Name database access or similar services.

Rather, the FCC concluded that since ILECs have “ubiquitous” deployment of signaling network that is, an STP in every LATA, CLECs stood the potential for more widespread outages if using a less robust alternative provider. However, as a result of FCC declaring SS7 signaling to be an incidental interLATA service, BellSouth has made its signaling network more efficient and no longer has STPs in every LATA. Given that alternative signaling networks thrive and that even the “ubiquitous” deployment argument relied upon in the *UNE Remand Order* is no longer an issue, the FCC should remove this element from the lists.

The Commission should conclude from the market data that, due to the widespread availability of economic switching alternatives to ILEC switching, the dearth of requests by CLECs for unbundled local switching and its attendant signaling component, and the widespread deployment of CLEC SS7 networks throughout BellSouth’s region, requesting carriers willing to invest their capital dollars in their own switching equipment are also willing to install databases and develop features and services that work off of their self- installed database.

Therefore it is unnecessary to undertake a “material diminishment” analysis – the Commission must revise its earlier finding of impairment based on the changed circumstance of reduced ILEC STP deployment. Nevertheless, an analysis of the flaws in the Commission’s earlier analysis may be helpful to demonstrate conclusively that signaling systems should not be subject to section 251 unbundling.

**A. Cost**

The Commission has determined that self-provisioning signaling, or obtaining signaling from alternative providers, does not involve substantial and material cost that would delay competition.<sup>347</sup> There is no ensuing market evidence to indicate that the Commission should

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<sup>347</sup> *UNE Remand Order*, 155 FCC Rcd at 3870-71, ¶¶ 391-93.

change this conclusion. Deploying a signaling network, the Commission correctly observed, does not require a requesting carrier to incur substantial sunk and fixed costs, and cost-effective SS7 signaling networks remain generally available on a national basis.<sup>348</sup>

### **B. Timeliness**

The Commission made no determination regarding this factor during its remand proceeding. Given the continuing widespread availability of cost-effective SS7 signaling networks throughout the nation, and a competitive alternative market for both signaling networks and signaling equipment, there is no evidence that requesting carriers self-provisioning signaling, or obtaining signaling from alternative providers, would involve substantial and material time delays.

### **C. Quality**

In spite of the widespread availability of cost-effective signaling alternatives to ILEC networks that did not pose any impairment from the standpoint of cost, timeliness or impact on network operations, the Commission analyzed the “quality” and “impairment” factors together to conclude that “competitive LECs need to have access to a *ubiquitous* signaling network in order to ensure the *same quality* of service as the *incumbents*.”<sup>349</sup> The Commission, in its analysis of quality, looked at three potential issues: (1) the effect of service outages within signaling networks; (2) an alleged lack of signal diversity leading to an alleged lack of signal reliability, and exacerbation of service outages; and (3) poor customer service associated with utilizing alternative signaling providers. The Commission concluded that there was insufficient evidence to conclude that quality was adversely impacted with respect to two of the three issues, signal diversity and customer service. Instead, the Commission linked the quality issue associated with

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<sup>348</sup> *Id.* at 3870, ¶ 392.

<sup>349</sup> *Id.* at 3871, ¶ 393 (emphasis added).

power outages to ubiquity – “because alternative providers’ signaling networks lack the ubiquity of the incumbent LECs networks,” the Commission reasoned, “larger portions of a requesting carrier’s network would likely be affected by a single point of failure on the signaling network.”<sup>350</sup>

Because the Commission did not purport to outlaw service outages, which can and will occur, but seemed to be more concerned with the relative effects of a service outage (STP failure) on a CLEC as opposed to an ILEC, this is really not a “quality” issue at all. Rather, the finding of impairment was really based solely on the “ubiquity” requirement alone. As shown below in the discussion on ubiquity, this conclusion was inappropriate in light of the Commission’s other findings and the Commission’s stated goal to promote facilities based competition. The possibility of an STP service outage is a fact of life for every carrier and an inherent risk of doing business that confronts every market entrant; each entrant’s response to that risk should be found in the market, and not in the form of a market distorting regulatory performance guarantee.

#### **D. Ubiquity**

Having already determined that there is a thriving cost-effective nationwide market in interconnected signaling networks and equipment, and that carriers are not impaired without access to ILEC signaling from on the basis of cost, timeliness, quality of signal, customer service quality or impact on CLEC network operations, the Commission’s earlier refusal to limit unbundling of ILEC signaling is no longer supported by the evidence. This is the “least efficient competitor” analytical model of unbundling analysis taken to an extreme, and it makes a shambles of the Supreme Court’s mandate of a true limiting standard that takes into account the

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<sup>350</sup> *Id.* at 3873, ¶ 397.

availability of alternatives outside the ILEC network – which cost-effective nationwide alternatives to ILEC signaling the Commission specifically found existed.

With interoffice transport and high capacity loops, the Commission mandated over-inclusive unbundling rules in order to overcome the fixed and sunk costs it determined would impair a requesting carrier’s ability to provide the services it seeks. With signaling, the Commission has specifically found that there are no such fixed or sunk costs to overcome.<sup>351</sup> Three years ago the Commission has found that there are over a dozen signaling network alternatives, and more than half a dozen switching equipment providers. Yet, because the Commission found that BOCs “have deployed at least one STP in every LATA,” while “alternative signaling systems typically rely on a very few or even a single STP pair as a gateway to its signaling system,” then in the event an STP goes down, “a greater portion, if not all, of the competitive LECs’ customers will be negatively affected,” which “could adversely impact the competitive LEC’s customer satisfaction, thereby placing the competitive LEC at a disadvantage vis-à-vis the incumbent.”<sup>352</sup>

The Commission thus elevated ubiquity to the total replication of the BOC one per-LATA STP deployment, without any market calibrated analysis (indeed, in the face of a finding of a cost-effective nationwide market for signaling systems) to determine whether CLECs were indeed serving customers in every LATA. There is no evidence that outages experienced by CLECs would have been minimized had vendors configured their STPs differently, and markets would demand, in any event, that signaling vendors develop the kind of redundancies necessary to enable their customers to mitigate the effects of any service outage. In any event the assumption underlying the Commission’s 1999 findings have changed. Hand in hand with

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<sup>351</sup> *Id.* at 3870, ¶ 392.

<sup>352</sup> *Id.* at 3872, ¶ 395.

incidental interLATA relief for SS7 signaling, BellSouth has reduced the number of STPs it has deployed by 50%. There no longer is a BellSouth STP in every LATA, the lynchpin fact in the Commission's earlier impairment analysis.

**E. Impact on Network Operations**

The Commission made no determination regarding this factor during its remand proceeding. Given the continuing widespread availability of cost-effective SS7 signaling networks throughout the nation, and a competitive alternative market for both signaling networks and signaling equipment, there is no evidence that requesting carriers self-provisioning signaling, or obtaining signaling from alternative providers, would involve substantial and material impacts on network operations.

**F. Even if Some Impairment Could be Proven, the Commission Should Not Mandate Unbundling.**

The Commission must conclude that a CLEC's ability to provide the service it seeks to offer is not impaired because of the availability, as a practical, economic and operational matter, of alternative elements outside of the ILEC network as evidenced by widespread and substantial fiber-based collocation and deployment. Accordingly, with such a "no impairment" finding, the Commission is bound by statute to end its inquiry and not make available local switching as an unbundled network element. Even if the Commission were, contrary to the record in this proceeding, to make an impairment finding, especially by continuing to argue that CLECs must be allowed to replicate the BOC STP deployment at TELRIC prices when the fixed and sunk costs of constructing a signaling network have already been determined by the Commission to constitute no impairment, an analysis of the additional permissive factors which the Commission

found the statute's "at a minimum" language authorized compels a decision not to mandate unbundling.<sup>353</sup>

**1. Continued Unbundling Is Not Necessary to Promote the Rapid Introduction of Competition in the Telephone Exchange Service Market.**

The market evidence is that CLECs are deploying their own switches and transport capabilities and Have no shortage of competitive alternatives for SS7 signaling functionality.

**2. Unbundling Does Not Promote Facilities-based Competition, Investment and Innovation.**

With the fixed and sunk costs of signaling networks and signaling equipment so low as to be "below impairment" from this Commission's perspective, and with the multiplicity of network and equipment providers on the market, the availability of unbundled ILEC signaling at TELRIC pricing will stifle the further deployment of redundant STP signaling networks. Network vendors will not have an incentive to deploy more STPs (if that is indeed the solution to the perceived risk of STP or other network outages) if CLECs can merely purchase "regulatory insurance" from ILECs at the behest of the FCC at below market prices. The Commission should implement regulatory policies that facilitate the establishment of multiple signaling networks that are every bit as ubiquitous and reliable as BOC networks – and innovations in signaling technology do not necessarily mean that alternative signaling networks need to replicate BOC STP deployment step for step.

**3. Unbundling will Not Reduce Regulation.**

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<sup>353</sup> 47 C.F.R. §51.317(3)(i)-(v); , ¶ 21 ("an initial finding that a network element satisfies the "necessary" or "impair" standard does not automatically lead to the designation of a UNE"). The *NPRM* correctly interprets the "at a minimum" language as a limiting condition. That is, absent an impairment finding, the Commission has no statutory authority to mandate unbundling. Even if there is a finding of impairment, however, the Commission has statutory authority to decline to mandate unbundling.

Unbundling signaling will only maintain complicated regulation, and confuse carriers as to what is and what is not available from ILECs.

**4. Unbundling Signaling is not necessary in Order to Provide Certainty to Requesting Carriers Regarding the Availability of the Element.**

As demonstrated above, the availability of a wide range of cost-effective alternative signaling network and equipment elements through self-provisioning or third party procurement demonstrates that there is no market uncertainty as to whether a carrier is able to obtain access to signaling on the open market. The only thing threatening the continued availability of signaling alternatives is the market distorting unbundling of ILEC signaling at artificially low prices, and the effect that this has on competitive signaling network deployment.

Finally, the FCC correctly

“decline[d] to expand our definition of call-related databases to include AIN triggers, and reaffirm the definition of call-related databases in the *Local Competition First Report and Order*.”

The FCC should continue to decline such proposals in the interest of security for the nations’ telecommunications network and because such an arrangement is completely unnecessary in light of competitive offerings.<sup>354</sup>

**XI. THE ROLE OF STATE COMMISSIONS**

Section 251(d)(2) puts limits on a state’s ability to make determinations about unbundling that are inconsistent with those made by the Commission. Thus, if the FCC determines that a requesting carrier is impaired without access to a particular ILEC element in a particular geographic and customer market, state commissions are not at liberty to “remove” that element from an ILEC’s unbundling obligations. Similarly, if the Commission determines that a

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<sup>354</sup> The Commission should therefore deny the Petition for Reconsideration Low Tech Designs in its entirety.

requesting carrier is not impaired without access to an ILEC element in a particular geographic and customer market, then states are not free to determine that ILECs are required to unbundle that element within those same markets. To do so would be to act in violation of section 251(d)(2).

To date, states have been free to add network elements when the Commission has not undertaken an impairment analysis. In this event, requesting carriers have the burden of demonstrating that there is no actual ILEC alternative available in the particular geographic and customer market in which the carrier seeks to provide telephone exchange service. The state commission must conduct the same rigorous impairment analysis as the Commission, weighting the factors in the same way. On a finding of impairment, the state commission must also consider the additional factors to determine whether it should decline to mandate unbundling.

Prospectively, the Commission should announce a policy that the current list of UNEs is finite, and subject to no further expansion. Over half a decade of practical experience in implementing section 251 counsels against expanding the list to develop new “transitional” measures.” It is simply too late in the game to identify “new” facilities within legacy ILEC networks that are essential to the provision of local telephone service. The Commission has already done this twice before. The Commission’s policy should be to limit further unbundling, in keeping with the de-regulatory, pro-facilities based policies that animate the 1996 Act.

The Commission has already recognized the importance of a national list of UNEs, citing the following benefits: 1) allowing small carriers to share in economies of scale, 2) provide greater certainty to financial markets when assessing new carriers’ business plans, 3) facilitate states’ abilities to conduct arbitrations and 4) reduce likely litigation on 251 requirements. All of these potential benefits at that time and even still today argue for a national list of UNEs. In

addition, in today's uncertain financial markets, a national list of UNEs also brings needed certainty and predictability to ILEC business plans and technology deployment as well. As discussed elsewhere, the FCC needs to take into account geographic differences when assessing the necessary and impair standards of the Act. However, such recognition does not call for the states' ability to add UNEs to the national list and in fact reduces any perceived need for such state authority.

The same considerations that prohibit states from removing UNEs from the national list also counsel the FCC to prohibit states from adding UNEs to the national list. The FCC has stated that state-by-state removal of UNEs from a national list would complicate negotiation of interconnection agreements and lead to increased litigation. The FCC also expressed concern that a decision by a state to remove a UNE would likely set a precedent for other LECs. The opposite is also true. The same results occur by allowing states to add UNEs to the national list.

As the FCC recognizes, the availability of UNEs to CLECs is implemented through the negotiation and arbitration of interconnection agreements. In fact, because the *UNE Remand Order* allowed states some ability to add UNEs to the national list, most of the discussion and debate in the states about potential new UNEs has occurred during interconnection arbitrations. Unfortunately, even in cases where a state commission has ruled against creating a new UNE obligation in a previous arbitration proceeding, the state must constantly rehear arguments in subsequent proceedings as CLECs continue to argue for such an obligation. For example, the Florida Public Service Commission (FPSC) has ruled in several arbitration orders as early as January 2000, that BellSouth is not required to unbundle packet switching. However, CLECs are continuing to this day to include this request as an issue in arbitrations before the FPSC. The fact that the FPSC has the authority order to appropriate circumstances to add UNEs to the

national list seems to create an incentive for CLECs to continue to request new UNEs regardless of the fact that a limited state commission may have denied such requests in previous orders. In reality, the net result of the ability of the state commissions to add UNEs has created the very increased litigation that the FCC was concerned about reducing.

Further, the concern over precedent raised by the FCC is actually much greater when states have authority to add UNEs to the national list. The precedent established by a state creating a new UNE affects not only all of the CLECs in that state but also in other states and ILECs as well. A single state commission decision to require a new UNE in a single arbitration will result in any CLEC in that state also having access to that UNE without any finding of impairment because of the “most favored nation” rules which allow a CLEC to opt into other agreements. The result is that all CLECs in a particular state receive a UNE based on a finding made during a two- party arbitration proceeding after a single CLEC demonstrates that it is impaired. Inconsistency results, because another CLEC that requested the same UNE in its arbitration and was found not to have been impaired and therefore not entitled to such UNE could still obtain access to it through “pick and choose.” Likewise, once a new UNE is awarded in one state in the nation, the precedent will cascade to other states and regions as well. Since there is little downside for CLECs, it creates the incentive for repeated hearings and litigation on the same UNE requests in multiple state for a.

Obviously the states have a critical role in the development of local competition. Specifically, the state commissions should participate in proceeding to advocate which UNEs they believe should be on the national list and why. A federal-state joint conference is not needed. The state commissions will establish prices for these UNEs that reflect the unique cost

characteristics of their respective states.<sup>355</sup> As required by the Act, state commissions will continue to oversee the negotiation and arbitration process for interconnection agreements. However, state commissioners should not have the prospective ability to add UNEs to the national list.

## **XII. THREE LESSONS LEARNED**

*Lesson #1. Since it is becoming increasingly clear that the FCC's current UNE requirements are not even in the best interests of the CLECs, the Commission can best achieve its goals of promoting competition while encouraging investment in and innovation of new network technologies by eliminating those requirements.*

While the Commission's unbundling and TELRIC pricing requirements are not solely responsible for the turmoil that the telecom industry has gone through since the passage of the 96 Telecom Act, they have certainly contributed to what is turning out to be a flawed and extraordinarily costly attempt to use the regulatory process to manufacture local exchange competition.

It also is becoming apparent that the Commission's UNE requirements are not even in the best interests of the CLECs. This is largely because investors have grown skeptical about the ability of any CLEC to compete effectively with an ILEC while remaining largely if not totally dependent on use of that ILEC's facilities. Under these circumstances the viability of these CLEC business models necessarily remains highly dependent on the willingness of Federal and state regulators to require the ILEC to discount UNE rates deeply enough to keep the CLEC in business. However, because lowering wholesale prices has had and will continue to have the practical effect of reducing revenue and earnings growth for the CLECs as well as the ILECs,

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<sup>355</sup> A pro-market, rational federal UNE pricing policy that encourages investment and innovations is critical. As demonstrated in the conclusion that follows, disincentives to invest in new technologies have been and will continue to be compounded by the risk that state regulators will respond to the CLECs financial difficulties by affording them ever-deeper discounts in UNE pricing.

application of the Commission's UNE obligations has proven harmful to the entire industry. One need only survey recent views of leading telecom securities analysts to corroborate this concern as well as the proposition that those CLECs that remain highly dependent on UNEs will find it increasingly difficult to raise capital due to the perceived risk of relying on facilities provided by a principal competitor.<sup>356</sup>

***Lesson #2. The key to using UNEs effectively to promote sustainable competition in local exchange markets is to eliminate their availability after the CLECs have had a reasonable opportunity to use them to establish a viable customer base.***

It has been suggested that UNEs might provide a short-term platform for migration in the long run to facilities-based competition. The theory being that giving CLECs access to UNEs at deeply discounted rates would give new entrants the opportunity to establish a "beachhead" in local exchange markets without having to commit large amounts of capital required to build out new networks. Once a viable customer base is established, cash flow from those customers could then be used by the CLECs to invest in state of the art network gear that would allow the new entrants to "leap frog" ILEC network capabilities thereby creating incentives for the ILECs to upgrade, invest and innovate in order to avoid losing market share, revenues and earnings to CLEC rivals.

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<sup>356</sup> In a discussion of the prospects for successful CLEC competition in the future, Dan Reingold of Credit Suisse First Boston stated: "First, as we have long argued, facilities-based competition is the only method of competing against the RBOCs in the long run." (See Dan Reingold and Julia Belladonna, RBOC/ILEC Review and Update, Credit Suisse First Boston, June 1, 2001, p. 5.) Similarly, Bruce Roberts, telecommunications equities analyst for Dresdner Kleinwort Wasserstein, noted that three quarters of CLECs market share "...comes from using leased RBOC facilities, which is an unsatisfactory long term strategy." Further, "...for a CLEC to be successful in terms of long run profitability, it must build its own network...[and] we believe that CLECs will have to provide service over their own networks in order to succeed in the long run. (See Bruce J. Roberts and Stephen H. DeLucia, "Deactivate Panic Button," Dresdner Kleinwort Wasserstein, June 27, 2001 at p. 9.)

In a sense, this was how the FCC introduced competition in the long distance market during the late 1970s and early 80s. At that time, Specialized Common Carriers were permitted to use AT&T transmission capacity obtained under dramatically discounted bulk rate tariffs, combined with “inferior” access to local networks also obtained under heavily discounted tariffed rates that were negotiated under the ENFIA agreements to provide end-to-end, switched, message toll services. The differences between then and now, however, are at least twofold. First, the rates paid then by entrants were compensatory to the incumbent and thereby only reduced, but did not completely destroy the incentive of incumbents to renew or upgrade the facilities with new investment. Second, and more important, new entrants were incented to use whatever free cash flow generated by the combined discounts and minimized capital expenditures for current plant to leap frog AT&T’s technology (as well as inferior access afforded them under the ENFIA tariffs) by investing instead in lower cost, higher quality, more feature rich digital networks.

The difference, of course, with current UNE requirements, including TELRIC pricing discounts, is that they apply to old as well as new technology. If the same rules apply to the ILECs’ most advanced network technologies (e.g., PONs) then there is little incentive for the CLECs to build more modern plant since they already get access to such facilities without risk at or below the cost that they would incur were they to build those facilities themselves. The same is true of the ILECs since they have little to be gained financially by deploying new technology that they have to make available to competitors at non-compensatory rates.

***Lesson #3. Though certainly predictable, efforts on the part of state regulators to “bail out” financially strapped CLECs by affording them deeper discounts to UNEs will end up doing the new entrants more harm than good.***

Disincentives to invest in new technologies have been and will continue to be compounded by the risk that regulators will respond to the CLECs financial difficulties by affording them ever-deeper discounts. The recent decision by the New York PSC to reduce UNE rates by as much as 30 percent is a case in point. From the ILECs' standpoint, this type of decision reduces revenues that they will obviously need to recover the cost of their facilities and to invest in new technologies, thereby raising the risk that some of those costs will not be recovered.

Similarly, reducing UNE rates may have the immediate effect of raising operating margins of financially strapped CLECs that make extensive use of UNEs, but those lower wholesale rates also add to the risk that any given CLECs will not be able to recover the cost of new technology that they might deploy in an effort to leap frog ILEC service capabilities. Confronted with the unpredictability of Federal and (and so many) state political responses to these concerns, many investors are simply inclined to vote with their feet and avoid putting capital to work in telecom markets altogether.

While lowering UNE-P rates may alleviate financial pressure on non-facilities based CLECs in the very near term, those same lower rates may have the unintended but practical effect of making it more risky and, thus, more difficult to attract capital needed to stay in business.<sup>357</sup> Lower UNE-P rates, after all would make it more difficult for CLECs (and their investors) to make a case for purchasing the types of facilities (switches, for example) that a CLEC may need in order to differentiate its service offering from those of the ILEC that it resells. Absent an ability to add value and revenue by differentiating its services, investors may simply conclude

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<sup>357</sup> This point is not lost on the investment community. "...[W]e do not believe that lower UNE rates would necessarily result in increased competition (at least not to the extent that regulators might expect), because the UNE platform remains, by itself, a nonviable business model over the long term, in our opinion." Miller, Zaloum & Enright, "Fourth-Quarter Wrap-Up – What Has Changed?," ABN AMRO (Mar. 1, 2002).

that non-facilities based CLECs will remain at a permanent cost disadvantage with respect to facilities based carriers; and the CLECs financial viability will be dependent on the regulator's interest or commitment to keep less cost efficient resellers in business.<sup>358</sup>

## CONCLUSION

The Commission should refrain from or limit further the unbundling of existing UNEs in accordance with these comments. The Commission should not allow the unbundling of new ILEC investments, or the unbundling of facilities used to provide advanced services, wireless services, interexchange services, exchange access services or information services. State commissions must not be at liberty to make any UNE determination inconsistent with that taken by the FCC.

Respectfully submitted,

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<sup>358</sup> It is not at all clear that these state efforts will result even in short term consumer benefits: "Given the recent favorable ruling on reduced UNE-P pricing in New York (and perhaps other states to follow), AT&T may reinitiate efforts to offer consumer local service, but probably not much in 2002. The company lobbied heavily for the newly-ordered low UNE-P rates in New York and applauded the implementation of low rates in Michigan a year ago, but the company has yet to follow its regulatory policy with marketing in these and other relatively low rate UNE states." R. G. Klugman & R. Bienstock, *Telecom Services Group*, Jeffries & Company, Inc. (Jan. 31, 2002).

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 8<sup>th</sup> day of April 2002 served the following parties to this action with a copy of the foregoing **COMMENTS** by electronic filing to the parties listed below.

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+ **VIA ELECTRONIC FILING**