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April 12, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W., Room 5-B540
Washington, D.C. 20554

Re: Notice of Proposed
Rulemaking, CC Docket No. 01-338 98-147

Dear Mr. Caton:

Enclosed please find an original and four copies of a corrected version of Qwest's comments filed on March 5 in the above-referenced docketed proceeding. The corrections address an erratum found on page 24. I have also enclosed a diskette containing the corrected version of these comments. Please contact me if you have any questions regarding this matter.

Respectfully submitted,

David M. Kreeger

Enclosures

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

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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April 12, 2002

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SUMMARY

As the Commission recognized when it decided to engage in a triennial review of unbundling obligations, changes and developments in the marketplace are a critical consideration in determining what elements need to be unbundled and in what circumstances. Since passage of the 1996 Act, and more particularly since the *UNE Remand Order*, the marketplace has evolved significantly: CLECs increasingly rely on non-ILEC facilities to provide local exchange service, and intermodal competition (such as from cable and wireless providers) has developed rapidly to offer alternatives to ILECs' facilities and services. Where empirical evidence shows that CLEC access to a certain network element is not necessary for the development of meaningful competition, the Commission need not engage in a theoretical analysis about whether other CLECs might be impaired without access to that network element. In such cases, the empirical data conclusively demonstrates that a network element is *not* a bottleneck facility and that competition would *not* be impaired without access to that element under section 251. Requiring continued unbundling in such circumstances would only hinder the development of the facilities-based competition that this Commission has correctly identified as the ultimate goal of the Act.

Where the empirical evidence alone does not demonstrate that CLECs are able to provide service without access to an element, the Commission should alter its analytical framework to place less weight on the difference between UNE prices and alternative sources of a network element (such as self-provisioning), and on CLECs' alleged lack of ubiquity. The mere fact that the cost of obtaining a UNE from an incumbent is lower than the cost of obtaining that network element from another source does not necessarily mean that CLECs would be impaired from providing service without access to that UNE. Indeed, such comparisons are particularly problematic given that some state commissions have set below-cost UNE rates that fall below even the Commission's TELRIC standard. The Commission also should not place significant

weight on the alleged lack of CLEC ubiquity. Less than full coverage may be a competitive advantage if, for example, it results from business plans to target only those areas with the most profitable customers. Moreover, because CLECs are by definition newer entrants, their facilities will almost always be less extensive than incumbents' facilities and allowing a purported lack of ubiquity to serve as a trigger for unbundling obligations would virtually guarantee that those obligations would continue in perpetuity.

Finally, although marketplace evidence may support adoption of more granular unbundling rules in certain circumstances, the Commission's unbundling rules should be objective and largely self-executing. Complex and subjective rules are more costly and difficult to implement, create uncertainty that hampers business planning by all carriers, and will inevitably lead to more disputes and litigation. With the growth in intramodal and intermodal competition, the Commission should seek to reduce regulatory burdens and uncertainty for all carriers by simplifying its regulatory scheme, not by making that scheme more complex. The Commission also should not delegate to state commissions responsibility for defining or implementing unbundling requirements. Doing so would undermine the goals of the 1996 Act, produce inconsistent applications of federal standards based on individual state policy preferences, and increase litigation and administrative costs.

Whatever the details of the analytical framework the Commission adopts, the marketplace evidence compels removal of the obligation to unbundle circuit switching nationwide and, in many areas, dedicated transport. CLECs are self-provisioning switches throughout the country and have deployed their own switches in wire centers serving the vast majority of BOC access lines. They have used their initial investment in such switches to develop economies of scale serving large business customers, allowing them to extend their

services to the mass market. As a result, the marketplace evidence leaves no doubt that CLECs' ability to compete would not be impaired without access to circuit switching from the ILECs under section 251. As to dedicated transport, the empirical evidence again establishes that CLECs can and do rely on non-ILEC sources in a wide variety of markets. As a result, the Commission should no longer require the unbundling of dedicated transport at least in those markets that meet the test it formulated in the *Pricing Flexibility Order* to identify markets in which price cap LECs face competition for special access services.

The Commission should also reaffirm its earlier decision that ILECs are not required to unbundle packet switches and other facilities used to provide DSL and other advanced services. In the case of such services, ILECs are effectively new entrants, do not have a material advantage over CLECs seeking to provide similar services, and face considerable intermodal competition from cable operators and other sources. Indeed, given that ILECs have a significantly smaller market share than firms such as cable modem providers, who do not face unbundling requirements, imposing such requirements on ILECs would be particularly misguided. Moreover, requiring ILECs to provide unbundled access to facilities used to provide these services would create significant disincentives for both ILECs and CLECs to invest in new facilities, contrary to section 706 of the 1996 Act. Even *uncertainty* about whether unbundling obligations would apply to such facilities will likely deter investment by ILECs in such facilities. By removing ILECs' unbundling obligations with respect to these network elements, the Commission will encourage efficient investment and promote true facilities-based competition to the benefit of all consumers.

Although members of the Commission had previously indicated that UNE pricing issues also would be addressed in this proceeding, the Notice makes no mention of pricing. This

omission is unfortunate: even if the Commission correctly determines what elements to unbundle and under what circumstances, facilities-based competition cannot efficiently develop unless UNE prices that apply to such elements and circumstances are set correctly as well. With increasing success, non-facilities based CLECs have claimed before state commissions that as a matter of law and policy, they are entitled to UNE rates that produce whatever profit margin they deem sufficient to induce them to enter the local market. To achieve that end, these CLECs have further claimed that TELRIC either requires or permits state commissions to set UNE rates by picking and choosing whatever input assumptions would be lowest cost, even if those assumptions are historic rather than what would be required to build a replacement network today. The resulting rates are so far below incumbents' actual costs and TELRIC that they inevitably distort carriers' decisions about whether to rely on UNEs or to invest in their own or third-party facilities. Stated another way, no carrier will invest in alternative facilities if it can instead purchase facilities at rates that are based on the costs of a network built with *today's* technology but under *historic* conditions (e.g., fewer roads, buildings, and other development) that reduce costs. The Commission needs to provide guidance as soon as possible, without waiting for the conclusion of this docket, to prevent such distortions of TELRIC. No serious proponent of facilities-based competition could contend otherwise.

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	)	
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Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	
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FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully submits its Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1/] Consistent with the requirements of the Telecommunications Act and in light of the competitive entry in the local exchange market by various providers using wireline and other types of facilities from non-ILEC sources, the Commission should move swiftly and decisively to remove circuit switching and, in many areas, dedicated transport from the list of network elements that must be unbundled, and to reaffirm its earlier decision to exercise "regulatory restraint" and not to unbundle facilities used primarily to provide advanced services such as DSL. While Qwest recognizes that, at least at this point in time, unbundling some elements may

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1 Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 01-361 (rel. Dec. 20, 2001) ("*Notice*").

satisfy the "necessary and impair" standard and other relevant factors previously identified by the Commission, the empirical evidence clearly demonstrates that competing providers are able to and do obtain switching, transport (in many areas), and advanced services facilities from non-incumbent sources and accordingly would not be "impaired" in their ability to provide competitive service without access to those elements from incumbents. Requiring that these elements be unbundled would serve only to discourage investment in new facilities and services by incumbents and CLECs alike and dampen the development of truly differentiated, competitive product offerings. In addition, the Commission should act promptly to give guidance to the states (and federal courts) and correct certain misinterpretations of TELRIC that radically distort the decision to deploy new facilities or lease UNEs, contrary to TELRIC's fundamental objective. Because these errors are so damaging to the prospects for facilities-based competition and are not unique to particular UNEs, the Commission need not and should not wait to provide this guidance until it completes this proceeding, but should act forthwith.

INTRODUCTION

The Telecommunications Act of 1996 (the "1996 Act" or "Act") established a national policy of promoting competition among telecommunications providers by, among other things, removing the legal and regulatory barriers to entry into the local exchange market. While the Act establishes mechanisms to enable CLECs to obtain unbundled network elements (UNEs) from incumbents and to resell incumbents' services, the Act's goal and the Commission's duty are to stimulate true *facilities-based* competition. As the Commission has observed, "[t]hrough its experience over the last five years in implementing the 1996 Act, the Commission has learned that only by encouraging competitive LECs to build their own facilities or migrate toward

facilities-based entry will real and long-lasting competition take root in the local market."[2] In contrast to resale and UNE-based competition, "[f]acilities-based competition provides the basis for eventual deregulation and the substitution of a largely self-policing industry structure as the means for achieving and maintaining economically efficient pricing and allocation of resources in the industry."[3]

The Commission should be careful to adopt unbundling *and* pricing rules that do not encourage CLECs to use UNEs where it would be more efficient for them to invest in alternative facilities.[4] Even if the Commission were to make all the correct decisions as to which elements should be unbundled and when, it cannot ensure the full development of an efficient market and facilities-based competition unless UNE prices are set correctly as well. Prices that are set below

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[2] Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435 ¶ 4 (2001). Similarly, Chairman Powell has stated that, while "other methods of entry are useful interim steps to competing for local service, . . . Commission policy should provide incentives for competitors to ultimately offer more of their own facilities. . . . This would . . . provide the means for truly differentiated choice for consumers, and provide the nation with redundant communications infrastructure." FCC Chairman Michael K. Powell, "Digital Broadband Migration" Part II, Press Conference (Oct. 23, 2001).

[3] John Haring & Harry M. Shooshan, Strategic Policy Research Report, *Reorienting Regulation: Toward a More Facilities-Friendly Local Competition Policy* 3 (Apr. 3, 2002) (submitted as Attachment A to these comments) ("Haring & Shooshan"); *see also id.* at 4-5; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in part and dissenting in part) ("It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge.").

[4] *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3701 ¶ 7 (1999) ("*UNE Remand Order* ") ("Unbundling rules that encourage competitors to deploy their own facilities in the long run will provide incentives for both incumbents and competitors to invest and innovate, and will allow the Commission and the states to reduce regulation once effective facilities-based competition develops."); Haring & Shooshan at 25 ("If the government is really serious about promoting facilities-based competition, it needs to take care not to dissipate investment incentives for facilities deployment."); *see also id.* at 2-3.

costs will inevitably distort carriers' decisions about whether to rely on UNEs, rely on a third-party alternative, or self-provision facilities, and will encourage competitors to use UNEs when it would be more efficient to invest in alternative facilities that will lead to facilities-based competition.[5]

Although members of the Commission had originally indicated that the Commission intended to address UNE pricing as a part of this proceeding, this subject has been omitted from the *Notice*. That is most unfortunate, for UNE prices are increasingly being set well below not only incumbents' actual costs, but below any plausible interpretation of TELRIC costs, at the behest of non facilities-based CLECs claiming the need for a greater "profit margin" to compete with ILEC services that are offered to end users at below cost, subsidized rates. CLECs have advocated, often successfully, that TELRIC gives them license to pick whatever input assumptions would result in the lowest costs, even if that involves mixing and matching historic assumptions with those that would apply to building a replacement network today. Moreover, CLECs often advocate blind adoption of the inputs used by the Commission in its universal service inputs order for UNE cost proceedings, notwithstanding this Commission's clear direction not to do so. The Commission should put an end to such distortions of TELRIC, whether in this or another simultaneous proceeding. Failure to do so will distort carriers' "make/buy" decisions, make it more difficult for facilities-based CLECs like QwestLink, Qwest's out-of-region CLEC affiliate, to enter and compete, and hinder the development of efficient competition and facilities investment.

In deciding which UNEs should remain subject to the unbundling requirement, and in what circumstances, the Commission needs to apply an analytical framework that is based in the

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5 Haring & Shooshan at 3, 6, 25-26.

first instance on marketplace evidence. Indeed, to *disregard* marketplace developments, and continue to require unbundling of network elements that CLECs no longer truly need and could provide more efficiently themselves, would only retard the development of true facilities-based competition and promote inefficient entry that ultimately benefits no one. While the Commission has identified a number of theoretical factors that might affect whether a CLEC would be impaired absent access to a particular UNE, empirical evidence of the ability to compete should be the touchstone of the Commission's inquiry: if CLECs demonstrably are able to and do obtain a particular type of facility without relying on the incumbent, that facility is no longer a bottleneck, and there is no need for the Commission to continue to require the unbundling of that facility. The Commission recognized the significance of such marketplace developments when it decided, in the *UNE Remand Order*, to engage in a triennial review of unbundling obligations.[6]

As the accompanying *UNE Fact Report* demonstrates,[7] since the passage of the 1996 Act — and more particularly since the Commission last engaged in a review of unbundling obligations — both intermodal and intramodal facilities-based competition have increased significantly. To be sure, a number of CLECs have encountered economic difficulties recently — a fact of which Qwest is well aware since it operates not only as an ILEC, but also as an out-of-region CLEC. However, the demise of particular competitors is due to a variety of reasons and does not answer the question before the Commission here: whether, based on the evidence concerning the market as a whole, there can be no competition absent access to particular

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6 *UNE Remand Order* ¶ 15.

7 *UNE Fact Report 2002* (April 2002) (submitted by BellSouth, SBC, Qwest, and Verizon) (submitted as Attachment B to these comments) ("*UNE Fact Report*").

network elements from the ILEC. The answer to that question is that reliance on the ILEC networks generally should be unnecessary in the foreseeable future and is not necessary today with respect to certain elements. CLECs have provided service over their own facilities or facilities obtained from non-incumbent sources, even in cases where they have had the opportunity to rely on leasing incumbents' facilities at prices that are below even the prices that TELRIC is supposed to generate.

In particular, CLECs' reliance on non-ILEC sources has been most prominent with respect to circuit switching, dedicated transport, and advanced services facilities. For example, CLECs now have switches serving customers in wire centers containing approximately *86 percent* of Bell Operating Companies' (BOCs) access lines, and no impediment to CLEC use of non-ILEC switches exists today.[8] Likewise, the market for interoffice transport services has become highly competitive due to the growth of CLEC transport and fiber networks, the prevalence of fiber-based collocation in ILEC wire centers, the emergence of "collocation hotels" and "data centers," and the proliferation of wholesale suppliers of local fiber.[9] With respect to facilities used to provide DSL and other advanced services, CLECs have proven as capable as the BOCs, if not more so, in deploying facilities such as packet switches.[10] Such marketplace evidence demonstrates that, at least for some types of facilities, CLECs now have many alternatives to using ILEC network elements to provide service.

Wireline local exchange carriers also face increasing intermodal competition in the local telephony market from providers such as wireless carriers and cable operators. Industry analysts

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8 *Id.* at II-1.

9 *Id.* at III-1 to III-13.

10 *Id.* at II-22 to II-37.

have recognized that, "as rates go down, cellular is becoming economically competitive with landline service."[11] Indeed, a wireless phone "is already a better choice for some calls because of bundled long-distance and large airtime buckets."[12] Likewise, cable modem subscribers outnumber DSL subscribers by nearly 2-to-1,[13] and cable operators have begun offering cable telephony services.[14] Moreover, AT&T and Comcast have represented that the vast majority of their cable plant has been upgraded to facilitate the provision of cable telephony.[15] That some providers are furnishing service without relying on the ILECs' networks (i.e., the existence of intermodal competition) should be a major factor in deciding whether to require ILECs to provide to CLECs access to UNEs. The Act is not intended to protect particular competitors or even types of competitors, but to encourage the development of competition in the market as a whole, particularly facilities-based competition whether intermodal or intramodal. Such competition both ensures that retail prices are the product of market forces and provides the public with the security and reliability of redundant networks. The development and availability

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11 John Sullivan, *Gearing Up for Wireless in a Sedentary Environment*, Wireless Insider, Oct. 29, 2001.

12 *Id.*

13 *See* Eighth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CD Docket No. 01-129, FCC 01-389 ¶ 44 (rel. Jan. 14, 2002); Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, FCC 02-33, ¶¶ 45, 50 (rel. Feb. 6, 2002).

14 Currently, there are more than 1.5 million cable telephony subscribers in the United States. *UNE Fact Report* at II-1, II-11.

15 *See, e.g.*, December 20, 2001 Joint Analyst Meeting, at 10 (comments of Bill Schleyer, AT&T: "we've got about 80% of our plant is state-of-the-art."); *id.* at 18 (comments of Brian Roberts: "Comcast is going to be 95% complete with our rebuild by the end of this year [2001]").

of these facilities-based local telecommunications service systems also demonstrates that the ILECs' circuit-switched networks are no longer the sole, or even primary, means of providing telecommunications and advanced data services.

The Commission must respond appropriately to the clear message that six years of market data is sending: switching, dedicated transport (in many areas), and advanced services facilities do not need to be unbundled to ensure competition for local services. Where the evidence, at least today, demonstrates the contrary — for example, with respect to many existing local loop facilities — the Act and Commission policy support maintaining the unbundling requirements for now. Even in the context of loops, however, marketplace developments such as the increase in intermodal alternatives (e.g., wireless and cable) foreshadow a time in the near future when loops will no longer need to be unbundled, at least in many circumstances. But, as we discuss below, there is unassailable evidence *today* that switching, dedicated transport, and advanced services facilities should not be unbundled: meaningful competition does not require CLEC access to these facilities. As a result, the Commission should not require that these elements be unbundled following a brief transition period to allow CLECs to arrange for alternative facilities.

The Commission should make especially clear that facilities used primarily to provide DSL and other advanced and broadband services are not and will not be subject to unbundling requirements. CLECs are not impaired by lack of access to these new facilities. As an initial matter, ILECs are effectively new entrants in providing such services and accordingly do not have material advantages over CLECs who seek to deploy these same facilities. Moreover, even if the Commission were to find that CLECs might be impaired without access to these facilities in some cases, it should still not require that they be unbundled: having to provide these

facilities at cost — let alone at the below-cost or even below-TELRIC rates being imposed by some state commissions — creates a significant disincentive for ILECs to make the investments and take on the attendant risks in deploying these facilities, a result directly contrary to section 706 of the Act. Indeed, even *uncertainty* about whether such unbundling may be required creates such a disincentive for ILECs and likely will deter any significant investment by ILECs in such facilities. As Chairman Powell recently noted, "[w]e must now clarify the regulatory . . . treatment of these new services, so companies — incumbents and competitors alike — know what to expect and can make prudent decisions to build and enter these new markets."[16] Particularly given the Commission's recent determination that cable modem providers — which hold an overwhelming share of the broadband market — are not subject to unbundling requirements, imposing such requirements on ILECs' advanced service facilities would hamper their ability to compete in the provision of such services. Thus, it is critical that the Commission use this proceeding to make clear that ILECs are not required to unbundle advanced service facilities.

These comments are divided into four parts. Part I discusses how the Commission should apply the "necessary and impair" standard, along with the other factors it previously identified, to arrive at clear, objective rules that are based primarily on the marketplace experience of the last six years. Part II establishes that the Commission should no longer require unbundling under section 251 of circuit switching nationwide and dedicated transport in areas that meet the Commission's pricing flexibility standard. Part III discusses the need for the Commission to reaffirm and expand its prior decision that advanced services facilities such as packet switches

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16 Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-339, FCC 01-361 (rel. Feb. 14, 2002) (Separate Statement of Chairman Michael K. Powell).

should not be required to be unbundled. Part IV demonstrates that at the behest of the CLECs and with the inadvertent assistance of the Commission, state commissions are misapplying TELRIC to create artificial "profit margins" for resellers in a manner that is contrary to its stated purpose of sending the correct economic signals whether to "make" or "buy" facilities.

I. ANALYTICAL FRAMEWORK

In the *Notice*, the Commission inquired how it should refine and apply its analytical framework for identifying network elements that must be unbundled.[17] As set forth more fully below, the Commission should apply the "necessary and impair" standard and the other factors it previously identified in a manner that furthers the procompetitive, deregulatory objectives of the Act. Because the Act is intended to promote the development of competition as a whole, and not to protect particular competitors, the Commission's decisions should emphasize the marketplace experience of the last six years both in terms of intramodal competition from CLECs and *intermodal* competition from a variety of sources. Moreover, the result of the Commission's analysis should be clear, objective rules that can be applied with few if any additional proceedings. To ensure certainty and consistency, the Commission should not delegate to state commissions any of its duties to determine the scope and applicability of the ILECs' unbundling obligations.

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17 *See Notice* ¶¶ 15-46.

A. The Commission's Analysis Should Focus on Empirical Evidence Demonstrating the Types of Elements CLECs Can Self-Provision or Obtain from Other Sources.

1. Marketplace Evidence of Deployment of an Element by CLECs Establishes That Lack of Access to That Element Would Not Result in Impairment.

The *Notice* asks numerous questions about the appropriate analytical framework for determining whether an element should be unbundled, including whether the Commission "should assign more or less weight to any of the factors" that it adopted for its "materially diminish" determination.[18] But, of course, there is no universal, magic formula by which the Commission or anyone else can assign weights to various factors and arrive at the answer as to whether a particular element meets the "impair" standard and should be unbundled. The basic question is whether CLECs can feasibly provide service and meaningfully compete without access to a particular type of facility.

At root, the question is an empirical one: to the extent that CLECs have been able to provide service without relying on particular incumbent network facilities such as switching and transport, there is no need for the Commission to engage in theoretical analysis about whether carriers *might be* impaired by factors such as the cost, service quality, ubiquity, delays, and operational impact of using elements obtained from non-incumbent sources. The fact of widespread CLEC entry without reliance on a particular UNE from the incumbent should be deemed to — and clearly does — establish that lack of access to that UNE under section 251 does not impair the ability of a CLEC to provide service. Moreover, even if CLECs have not entered each and every geographic location without a UNE, evidence showing that they have entered a particular type of market means that they are not impaired without access to that UNE

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18 *Notice* ¶ 19.

in that type of market; for example, if CLECs have self-provisioned an element in 92 of the top 100 MSAs, there is no reason to believe that they would be impaired without access to that element in all of the top 100 MSAs.

As discussed below, in the case of an element such as circuit switching, this type of marketplace evidence is itself sufficient to end the inquiry. That CLECs have been able to enter both the business and mass markets without relying on ILEC switches provides concrete evidence that those facilities are *not* bottlenecks in any sense of the term and that CLECs would not be "impaired" in any meaningful sense without access to those facilities. The 1996 Act's clear policy of encouraging facilities-based investment and alternative, redundant facilities mandates that the Commission adapt its unbundling requirements in light of such evidence, in order to send the correct economic signals for the creation of efficient competition and remove unnecessary regulation.

2. The Mere Fact that UNE Costs Are Lower or that CLEC Service Is Not Ubiquitous Does Not Demonstrate Impairment.

While the most weight should be given to evidence of actual deployment and competition, the Commission's other factors may come into play where empirical evidence does not by itself demonstrate that CLECs are able to provide service without access to a particular UNE. In that case, the Commission should alter its analysis in certain key respects. In particular, the Commission should put less weight on alleged differences between the cost of utilizing a UNE versus the cost of obtaining facilities from non-incumbent sources than it did in the *UNE Remand Order*. The mere fact that UNE prices might be lower than a CLEC's cost of obtaining an element from an alternative source does *not* establish that lack of access to that

UNE would impair the CLEC's ability to provide service.[19] Indeed, the CLEC may be able to provide service at a lower cost than the ILEC's actual cost by relying on the alternative facility, and the lower UNE price may simply be creating a disincentive for the CLEC to do so.[20]

The Commission should also be careful about the weight it gives to CLECs' alleged lack of ubiquity. Because they are newer entrants, CLEC facilities almost by definition will be less ubiquitous than incumbents' facilities; thus, the mere fact that CLEC networks are less ubiquitous cannot be sufficient to trigger unbundling requirements or *all* elements would *always* have to be unbundled.[21] A CLEC's lack of ubiquity may be the result of nothing more than a CLEC's business plan rather than any "impairment." Indeed, it may be a competitive *advantage* if, for example, a CLEC has chosen to deploy facilities only in areas with the most profitable customers (e.g., in urban areas with many business customers) and avoided the investment costs and risks in areas where profits are less likely. In fact, Qwest, as a CLEC, has pursued such a strategy in deploying fiber rings in more than two dozen out-of-region cities. Similarly, the fact that a CLEC does not *currently* provide ubiquitous service to all classes of customers may not be a reflection of its inability to do so. For example, as discussed below, a CLEC-provisioned

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19/ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999).

20 *See* Haring & Shooshan at 3, 6, 25-26.

21/ A frequent justification offered to support rules that would allow CLECs to enter telecommunications markets using most or all of the ILECs' networks is that such rules would allow the CLECs to obtain a customer base enabling them to realize economies of scale and scope and justify subsequent investment in their own networks to which they could migrate their customers. But that justification is theoretical at best and is more likely a myth. Qwest is not aware of any UNE-based CLEC that has acquired customers through use of the UNE-platform, for example, and then migrated those customers to their own networks. Experience has demonstrated that far from laying the groundwork for facilities-based competition, the expansive interpretation of CLECs' "rights" to purchase elements of the ILECs' networks has delayed such competition. *See UNE Fact Report* at I-9.

switch can be used (or efficiently expanded through modular additions) to provide service to a very large geographic area. A CLEC may have chosen not to provide service immediately across that entire area for a variety of business reasons and instead to enter by deploying facilities to serve select, high-margin customers and then growing its network to serve additional customers. Lack of access to switching or another UNE should not be deemed to impair a CLEC's ability to provide such ubiquitous service in the face of evidence that it has deployed or can deploy switching or other facilities to do so.[22]

3. In Addition to Impairment, the Commission Should Consider the Effect on Incentives to Invest and the Existence of Intermodal Competition in Determining Whether an Element Should Be Required To Be Unbundled.

Beyond the factors the Commission considers to determine "impairment," the Commission's unbundling analysis must, as it recognized in the *UNE Remand Order*, also take into account the effect of unbundling requirements on incentives to invest in facilities and deploy broadband services.[23] Encouraging investment and deployment of facilities — or at least not *discouraging* it — is particularly critical in the relatively nascent advanced services market. When a market is in its formative period, public policy should avoid creating disincentives to facilities investment and deployment, since doing so may well stifle the development of the

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22 The Commission's prior consideration of whether self-provisioning a network element or obtaining the element from a non-incumbent source would impair a CLEC by delaying entry is also of less relevance today. *See Notice* ¶ 8. Though that may have been a valid consideration at the earliest stages of promoting competition, CLECs have now had more than 5 years in which to deploy and/or make arrangements with alternative sources to obtain network elements needed to provide service. That period should have been more than sufficient for CLECs to enter the market while simultaneously identifying and arranging to use elements outside of the incumbent's network. Thus, the possibility of delays associated with using non-incumbent network elements should not carry the same weight that it once did in the Commission's unbundling analysis.

23 *See UNE Remand Order* ¶ 7.

market in the first place. Adding unbundling obligations for advanced service facilities — indeed, failing to make clear that such obligations will not apply — will create precisely such disincentives: CLECs will have no reason to incur the risks associated with deployment when they know they can share the ILECs' new facilities. Likewise, "if the incumbent thinks it might have to unbundle new advanced facilities at or below cost, it will have greatly reduced incentive to take the risk associated with that investment."[24]

The Commission should also consider the presence of intermodal competition when evaluating whether particular facilities should be made available on an unbundled element. Such intermodal competition demonstrates that there are numerous alternatives to ILEC circuit-switched facilities for providing telecommunications and advanced services. In many cases, CLECs can rely on such intermodal facilities as an alternative to ILEC UNEs in order to provide service. For example, as discussed below, a number of carriers provide or plan to provide voice services using packet, rather than circuit switches.[25] More fundamentally, even where CLECs are unable or decide not to obtain access to the facilities of the ILECs' competitors, the existing intermodal competition provides customers with the real benefits and choices that the Act was designed to foster (e.g., prices that reflect market forces and the security afforded by redundant, alternative network facilities).[26] Because the purpose of the Act is to protect competition and not competitors, evidence of such intermodal competition is a legitimate and compelling basis to eliminate unbundling obligations.

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24 Haring & Shooshan at 11.

25 In such cases, intermodal facilities are themselves viable alternatives to use of UNEs from incumbents and should be considered directly in the Commission's impairment analysis.

26 *See* Haring & Shooshan at 4-6.

B. The Commission Should, If Anything, Reduce Complexity or Subjectivity in Its Unbundling Rules.

The Notice also asks "whether and to what extent [the Commission] should adopt a more sophisticated, refined unbundling analysis."[27] Although marketplace evidence and other analysis may warrant the adoption of a more granular approach to the unbundling of some elements, the conditions imposed by the Commission on whether and where an element needs to be unbundled should be objective and largely self-executing. The Commission should resist invitations to engage in an increasingly complex unbundling analysis that is operationally difficult to implement and that will lead to uncertainty and invite greater litigation. With the continued growth of facilities-based competition, the Commission's role should be one of decreasing the regulatory burden on all carriers, not increasing that burden, and, if not carefully crafted, more granular unbundling requirements will not serve that function. Rather, subjective, granular unbundling rules will create uncertainty and hamper the ability of all carriers to engage in rational business planning and delays new investment. Put simply, regulation in finer, albeit more numerous and complex increments, is not deregulation at all and does not serve the goals of the 1996 Act.

The Commission instead should adopt an analytical framework that provides objective, clear, and easy-to-administer rules that produce predictable results. Such an approach will reduce litigation and uncertainty, and promote efficient investment by CLECs and ILECs alike. Moreover, the Commission should be conscious of the potential operational difficulties in implementing granular rules. For example, rules that are crafted based on geographic markets generally should not be based on areas smaller than MSAs; finer geographic increments will

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27 *Notice* ¶ 34.

simply increase administrative and systems costs. Similarly, rules based on specific customer characteristics (such as the four-line carve-out the Commission previously adopted for switching) are too impractical to implement.

C. Because Consistency and Certainty Are So Critical, the Commission Should Not Delegate to the States its Role in Defining, Applying, Expanding or Contracting Unbundling Obligations.

The Commission seeks comment on the appropriate role of "state commissions in the implementation of unbundling requirements for incumbent LECs."[28] Qwest respectfully submits that the Commission should not delegate to the states its responsibilities for defining or implementing unbundling requirements. Such delegation would only increase uncertainty about the scope and applicability of unbundling obligations, which in turn would deter investment and increase litigation and administrative costs. Moreover, delegating greater authority to states to define or apply unbundling rules would lead almost inevitably to inconsistent and improper application of federal standards based on individual states' "policy" choices.[29] State-by-state

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[28] *Notice* ¶ 75.

[29] As AT&T noted in its reply comments in the *UNE Remand* proceeding when it led the opposition against allowing states to determine what elements should be unbundled, this point was cogently illustrated by the positions taken in that proceeding by the state commissions for Illinois and Ohio. Reply Comments of AT&T Corp., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 57-58 (filed June 10, 1999). In their comments, both state commissions applied the "necessary and impair" standard of section 251(c)(3) to come up with a list of UNEs to which ILECs must provide access. Illinois favored unbundling of most if not all of the ILECs' networks, while Ohio proposed unbundling significantly fewer elements. *Compare* Comments of Illinois Commerce Commission, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 1-15 (filed May 26, 1999) *with* Comments of Ohio Public Utilities Commission, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 5-13 (filed May 26, 1999). Because both states are very similar demographically and in other relevant respects, the radical difference in their conclusions can only be attributed to different policy preferences.

analysis harms CLECs particularly because it increases exponentially the uncertainty and thus makes more precarious their access to capital.

The 1996 Act establishes a strong presumption in favor of, if not a requirement that, the Commission, not the states, establish the unbundling requirements. Section 251(d)(2) directs the Commission, not the states, to determine "what network elements should be made available" and provides a two-part test for making that determination.[30] Where Congress sought to give the states a role in implementing the 1996 Act (e.g., in determining rates and terms for particular interconnection agreements under Section 252), it did so explicitly. However, Congress did not do so when it came to defining the network elements subject to unbundling.

As a policy matter, establishing and applying the unbundling requirements at a national level furthers the goals of the 1996 Act. The Act established a nationwide policy of promoting competition, in large part to replace the patchwork of state and local regulations that effectively prevented competitive entry. This policy is best served by the adoption of uniform rules that do not vary based on the policy preferences of individual states. Moreover, allowing states to determine which network elements must be unbundled under Section 251 (whether by issuing their own standards or by applying non-objective standards established by the Commission) will create additional uncertainty and lead to protracted litigation, which simply increases the costs for all parties. Any other approach inevitably will lead to inconsistent and uncertain results as 50 different state commissions bring to bear their differing interpretations of the Commission's rules and their particular policy goals and preferences.

Marketplace experience also demonstrates that CLECs have been deploying the same types of facilities across the country and that state-specific requirements are accordingly

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30 47 U.S.C. § 251(d)(2).

unnecessary. As the *UNE Fact Report* shows, CLECs have generally deployed or relied on similar amounts of non-ILEC facilities nationwide, especially as to switching, transport, and advanced services facilities. Similarly, cable operators and wireless providers have a presence throughout all fifty states. To be sure, the level of competition may vary depending on the characteristics of a given area — urban areas, for example, generally have greater competitive entry than rural areas. But that variation is independent of state boundaries.

Critically, the Commission should not hold open the door for states to *add* unbundling requirements, particularly as to facilities that the Commission determines should not be unbundled. The mere possibility that states could add such obligations increases uncertainty and costs and decreases investment and facilities deployment by both incumbents and CLECs. In particular, even if the Commission declines to require the unbundling of advanced services facilities, if it leaves open the possibility that states may do so, then it will have failed to eliminate the very regulatory uncertainty that is dampening investment in such facilities and to implement the Act's procompetitive, deregulatory objectives.

While the Commission concluded in the *UNE Remand Order* that states may impose additional unbundling obligations so long as doing so was consistent with the Commission's criteria and framework, any addition by the states of unbundling requirements which the Commission has found to be unjustified would almost certainly be inconsistent with the Act and the Commission's application of its analytical framework. For example, if the Commission concludes, as it should, that new advanced services facilities should not be unbundled because, *inter alia*, such a requirement would discourage investment in those facilities, a state requirement that those facilities be unbundled obviously would be inconsistent with the Commission's framework.

In addition, the Commission should make clear that when it determines that a network element is not subject to unbundling under section 251, states may not require that such elements be priced at TELRIC or any other rate determined through regulation. Specifically, a number of CLECs in Qwest's region have argued that state commissions should establish through arbitrations, cost dockets, or other proceedings the "market" rates that apply to elements that the Commission determines are not subject to section 251 unbundling.[31/] There is no meaningful difference between a state commission's determination that an element should be subject to unbundling under section 251 (or similar requirements under state law) and its determination that, although not subject to unbundling requirements, the element should be offered at regulated rates, or "market" rates established by the regulatory process. Each approach would effectively reverse this Commission's determination, based on its application of the "necessary and impair" standard and other factors, that ILECs should not be required to provide access to the element at regulated, cost-based rates. Each would also be inconsistent with Congress' determination that there should be a national unbundling standard.

II. INDIVIDUAL NETWORK ELEMENTS

A. The Commission Should No Longer Require ILECs To Provide Unbundled Circuit Switching under Section 251.

1. CLECs Would Not Be Impaired Without Access to Unbundled Circuit Switching.

In the *UNE Remand Order*, the Commission acknowledged that, even then, "significant marketplace developments" warranted a finding that"[t]he pattern of switch deployment by

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31/ *See, e.g.*, Testimony of Joseph Gillan on Behalf of the Joint Case of AT&T Communications of the Mountain States, Inc. and WorldCom, Inc., *In the Matter of US WEST Communications, Inc.'s Statement of Generally Available Terms and Conditions*, Pub. Utils. Comm'n of Colo., Docket No. 99A-577T, at 20 (June 27, 2001) (urging state commission to reject Qwest's market rates for local switching that was not required to be unbundled).