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
	)	

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The Competitive Telecommunications Association ("CompTel") submits these reply comments to address selected issues in this proceeding. Events in the industry since the opening comments were filed just over three months ago – including both judicial decisions and industry developments – have raised the stakes in this proceeding still higher. The Commission can re-energize local telecommunications competition by re-adopting and expanding the list of unbundled network elements ("UNEs"), or it can help the nation regress toward a system of monopoly local fiefdoms controlled by the Bell Companies.

The Commission's task in this proceeding undoubtedly has been complicated by the unfortunate decision issued by the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"). CompTel applauds the Commission's decision to seek panel rehearing, or rehearing *en banc*, of the *USTA* appeals. Should it be necessary, CompTel urges the Commission to seek Supreme Court review. Because it is not clear whether the *USTA* decision will stand, CompTel has not addressed in detail the impact of this decision on the scope or nature of the FCC's application of the impair standard. Rather, CompTel has focused these reply comments on two discrete sets of issues: (i) the need to re-adopt the current list of mandatory UNEs based on three affidavits from investment bankers in the competitive telecommunications sector; and (ii) the critical need to ensure that State regulators play a significant role in this proceeding and in establishing the contours of, and implementing, the UNE regime that will govern the industry on a going-forward basis.

First, CompTel has attached affidavits from the General Partner or Managing Director of three private equity firms whose total investment in competitive local carriers is

approximately $2 billion. Unfortunately, these affidavits confirm that this proceeding, in and of itself, already has caused significant harm to competitive conditions in U.S. local telecommunications markets. The Commission should seek to repair this damage by taking actions to maximize certainty in the industry, including the re-adoption of all current mandatory UNEs and the elimination of any further three-year review cycles.

These investment banker affidavits also pertain directly to several critical issues raised in this proceeding:

- The affidavits show that competitive entrants will not respond to the removal of UNEs by increasing capital investment in telecommunications facilities and infrastructure. The necessary capital is simply not available in today's market environment. Removing UNEs will harm competitive infrastructure investment by pushing new entrants to exit the market altogether.

- The affidavits conclusively confirm that capital markets are for all intents and purposes closed to new entrants today. Self-provisioning, even if theoretically possible, is not a real-world option for any new entrants today because they cannot obtain the capital necessary to implement self-provisioning. The result is that the Commission is prohibited from considering self-provisioning as a feasible option when applying the statutory impair standard.

- The affidavits illustrate the serious harm that the Commission would inflict on new entrants who use UNEs, and the competitive wholesale carriers who supply them, should the Commission remove even a single UNE. Such an action could force carriers to exit the market by denying them access to critical bank lending facilities, which could then have a domino effect on competitive wholesale carriers who will lose their customers and customer base.

Second, CompTel urges the Commission to ensure that State commissions have a significant role in this proceeding, particularly given judicial criticisms that the Commission has failed to fully recognize the extent to which market conditions vary by geography when adopting UNE rules. State commissions have a great detail of market-specific experience with the actual

implementation of unbundling rules, both under state and federal statutes. Further, State commissions often employ adjudicatory fact-finding procedures – including discovery, witness testimony, and cross-examination – to establish a more complete and less ambivalent evidentiary record that fully and accurately reflects the market conditions in their States. The Commission would be wasting a tremendous resource if it did not utilize the expertise of the States in this proceeding. Therefore, CompTel urges the Commission to move promptly to implement a Federal-State Joint Conference on UNEs, as requested by CompTel and supported by the National Association of Regulatory Utility Commissioners ("NARUC") and several individual State commissions.

In fact, based on their experience with the implementation of unbundling and interconnection requirements, the State commissions almost uniformly have urged the Commission to supplement the current national list of UNEs, or at the very least, to maintain the status quo. In particular, the large majority of State commissions have asked the Commission to eliminate restrictions on unbundled local switching, which in turn will ensure that the pro-competitive UNE Platform is a viable entry strategy consistent with NARUC's November 2001 resolution. Further, the State commissions consistently have recommended that the Commission expand the unbundling obligations on the ILECs with respect to the provision of advanced services. Such requirements will facilitate competitive broadband offerings and promote the deployment goals of Section 706.

Finally, CompTel supports the State commissions' request that the FCC establish at most a *minimum* national list of UNEs to which the states can add under FCC guidelines. CompTel agrees that State commissions are the best judges of the market conditions in their

jurisdictions, and as such, the States should retain the flexibility to establish an expanded list of UNEs as necessary to promote competition and consumer welfare.

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REPLY COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these reply comments in the above-captioned proceeding.

This proceeding is highly unusual in that it has been characterized by significant judicial and industry developments in the more than three months since opening comments were filed. In particular, there have been several major judicial decisions, including a landmark Supreme Court decision, while industry marketplace conditions have continued to show significant volatility and deterioration. CompTel does not feel that it is going out on a limb to predict that how the Commission moves forward with this proceeding, and its ultimate decision as to which unbundled network elements ("UNEs") must be provided by incumbent local exchange carriers pursuant to Section 251(c)(3), will determine whether local telephone competition moves forward or the nation regresses to system of monopoly local fiefdoms controlled by the Bell Companies and other ILECs.

CompTel believes that competitive local entrants have more endurance than many industry observers give them credit for, and that the Commission can restore forward momentum among new entrants in the local telecommunications market sector by retaining or expanding the current list of mandatory UNEs and then rigorously enforcing the ILECs' statutory obligations to provide such UNEs in a timely, reasonable and non-discriminatory manner. Conversely, a decision by the Commission to remove UNEs from the mandatory list, or to restrict the use of UNEs and UNE combinations, or even to avoid enforcing the current statutory and regulatory UNE requirements, could have disastrous negative consequences for local telecommunications competition in America.

The Commission's already difficult task has been complicated by the recent decision issued by the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"). The *USTA* decision is fundamentally at odds with the Communications Act of 1934, as well as the recent Supreme Court decision in *Verizon Telephone Cos. v. FCC*, 122 S. Ct. 1646 (2002). CompTel applauds the Commission's recent filing of a "Petition for Rehearing or Rehearing En Banc" in the *USTA* appeals last week, which clearly identified those inconsistencies. Further, CompTel urges the Commission, should it be necessary, to take this appeal to the U.S. Supreme Court. Until it is clear whether *USTA* will stand, it will be difficult if not impossible for the Commission to issue a decision comprehensively and definitively resolving the issues raised in this proceeding.

Given the current uncertainty regarding whether *USTA* will stand, CompTel will not address in these reply comments the scope or nature of the impact that this decision might have on the UNE regime under Section 251(c)(3). CompTel is working with its member

companies to monitor and analyze this issue, and CompTel will submit its views to the Commission on the record at an appropriate time should it be necessary. In these reply comments, CompTel would like to address two issues. *First*, CompTel has attached several affidavits from investment bankers in the telecommunications industry. These affidavits constitute probative record evidence showing that all current UNEs satisfy the statutory impair test, and that the Commission would harm the development of telecommunications competition and facilities investment were it to remove any UNEs from the mandatory list or significantly restrict the use of UNEs or UNE combinations. *Second*, CompTel documents the critical importance of ensuring that State regulators have a significant formal role in this proceeding and in establishing the contours of the UNE regime that will govern the industry on a going-forward basis.

I. THE COMMISSION SHOULD NOT REMOVE ANY UNES FROM THE MANDATORY LIST

In its opening comments, CompTel demonstrated that all current mandatory UNEs satisfy the statutory impair standard, and that the Commission therefore should affirm the current list in this proceeding. In support of its position, CompTel has obtained affidavits from three telecommunications investment bankers: Mr. Peter H. O. Claudy, General Partner of M/C Venture Partners; Mr. John Hunt, Managing Director of Boston Ventures; and Mr. James N. Perry, Managing Director of Madison Dearborn Partners. All together, these three investment banking firms currently have approximately $2 billion invested in the competitive telecommunications sector. These affidavits are precisely the kind of probative, marketplace evidence that the Supreme Court required the Commission to consider when applying the impair

standard. *See AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 389-90 (1999). These affidavits establish several facts relevant to this proceeding.

1. Harm From This Proceeding.

The Commission's decision to commence a comprehensive review of the UNE regime two years after the *UNE Remand Order*, 15 FCC Rcd 3696 (1999), has itself caused serious harm to local telecommunications competition. *See* Claudy Affidavit at 4-6; Perry Affidavit at 5. In a market that already was characterized by significant turmoil and volatility, the commencement of this proceeding has heightened the regulatory risk factors that investment bankers must take into account when deciding whether to invest scarce equity capital or to supplement existing investments. There is now uncertainty in the marketplace as to whether the Commission is committed to ensuring that ILECs provide the UNEs necessary for requesting carriers to compete in the local market. It bears emphasis that private equity capital is invested with a multi-year horizon that is significantly longer than two or three years. *See* Claudy Affidavit at 5 (ten-year timeline); Perry Affidavit at 3 (5-7 year timeline). The Commission's decision to review its UNE rules after only two years – and the possibility that it may establish future three-year review periods – has had a dramatic destabilizing influence on the competitive telecommunications sector. To put it bluntly, investment bankers no longer have certainty regarding the regulatory regime that will be in place over the expected lifetime of their investments, and as a result they are much less likely to invest private equity capital. The bottom line is that the initiation of this proceeding has itself compounded the capital scarcity problems that are at the root of the market volatility that has buffeted new entrants.

2. Investment Incentives.

These affidavits offer conclusive proof that removing UNEs will not create an incentive for new entrants to invest more in their own network facilities. The ILECs have constructed the "tough love" myth that removing UNEs will force new entrants to build-out their own networks earlier and to a greater extent. The reality is quite the opposite. The affidavits show that any FCC decision that increases the capital investment requirements of a new entrant will result in less rather than more capital investment. As Mr. Hunt notes – "I wish to make this one point perfectly clear: even if replication of ILEC facilities . . . would ultimately lower [the CLEC's] incremental costs to serve its customers, Boston Ventures would not fund such an increased capital requirement at this time." Hunt Affidavit at 3. As Mr. Perry notes: "I do not believe it is likely that competitive carriers will be able to attract sufficient capital to replicate ILEC facilities currently purchased as UNEs if the FCC chooses to eliminate access to these network components." Perry Affidavit at 8. Similarly, Mr. Claudy notes that most new entrants would require additional capital in order to replace UNEs with their own facilities, and concludes that "it is extremely unlikely that in the present economic climate, any competitive carrier would be able to secure approval for a material change in a business plan that required *additional* investment to implement essentially the same plan." Claudy Affidavit at 8 (emphasis in original).

Instead, the principal result of FCC rules that increase capital investment requirements by removing UNEs would be to "hasten the exist of those [competitive telecom] assets from the market." Hunt Affidavit at 3. Investment bankers have doubts both as to the ultimate viability of new telecommunications entrants and the Commission's commitment to

enforcing applicable statutory and regulatory UNE provisions. Any agency decision to remove UNEs would only underscore those doubts and intensify capital flight from the industry. *Id.* at 4. As Mr. Hunt notes, a Government decision to outlaw renting will not result in people without capital buying their own homes. Rather, "a decision by the government to phase out the practice of renting . . . would likely create more homeless people than home owners." Hunt Affidavit at 5.

3. Self-Provisioning.

In its opening comments, CompTel demonstrated that the Commission is prohibited from considering possible self-provisioning by new entrants when applying the impair standard. As CompTel noted (at 65), "based on the current state of capital markets in the United States, self-provisioning of any UNE is inherently infeasible for a brand-new entrant and for many existing entrants." The result is that "the Commission cannot lawfully consider self-provisioning as an option for requesting carriers when applying the impair standard." *Id.*

The attached affidavits confirm that capital markets remain closed to new entrants, and thereby eliminate the Commission's ability to consider self-provisioning as a feasible option when applying the impair standard. As Mr. Hunt notes, "capital markets today are closed to significant new investment in competitive telecommunications ventures. In this environment, self-provisioning is not a viable solution for a competitive local provider if it requires any significant capital market funding." Hunt Affidavit at 6. Mr. Claudy concurs, noting that "I do not believe that M/C Ventures, or any other private equity investors, will be likely to fund substantial investments in new network construction and infrastructure." Claudy Affidavit at 6. Mr. Claudy concludes that "[t]he idea that 'self-provisioning' is a viable

substitute for an ILEC UNE is completely divorced from market realities." *Id.* at 8. Given the current state of capital markets, new entrants do not have the financial resources to engage in significant new self-provisioning, thereby removing the Commission's ability to consider self-provisioning as a factor in the impair analysis as a matter of law.

4. The "Domino" Effect.

When applying the impair standard, the Commission should keep in mind the impact that removal of an ILEC-supplied UNE will have on the new entrants that today rely upon that UNE, as well as "domino" or ripple effects throughout the competitive industry. If the FCC removes a UNE in today's market, the new entrant will be forced to purchase the same functionality from the ILEC at a higher price (*e.g.,* as a Special Access service). This will reduce the entrant's margins and could easily place the carrier in violation of its bank financing covenants. Covenent violations are treated harshly in today's economic climate, as banks frequently withdraw credit facilities and the entrant is effectively precluded from obtaining a similar credit facility elsewhere. As a result, the impact of removing a UNE could be to effectively force multiple new entrants to exit the market. *See* Perry Affidavit at 7-8; Claudy Affidavit at 9-10.

Unfortunately, the forced exit of new entrants due to the removal of a UNE could have a "domino" effect on other entrants who do not rely on the UNE. Several competitive carriers rely upon revenue streams they obtain by providing wholesale services to other entrants. However, should these carrier-customers exit the market or default on their payments, the wholesale provider may be forced to default on its own bank lending covenants. The wholesale providers would find themselves in exactly the same unenviable position as their carrier-

customers, and could be forced to exit the market. Hence, far from viewing the removal of UNEs as a positive development that expands the market, competitive wholesale providers view the elimination of UNEs as a serious negative development because it undermines the health of the industry segment upon which these wholesale providers depend. As a result, there is a very real possibility that removing a UNE could, "at the stroke of a pen," literally wipe out a sizable portion of the competitive local telecommunications industry. *See* Claudy Affidavit at 10; Perry Affidavit at 8-9. The irony, of course, is that the removal of a UNE also may eliminate the underlying competitive wholesale market for supplying that functionality, the existence of which presumably will be a factor motivating the Commission's decision to jettison the UNE. Perry Affidavit at 10.

II. IN LIGHT OF THEIR EXPERIENCE IN APPLYING FEDERAL AND STATE UNBUNDLING STANDARDS, THE STATES MUST HAVE A SIGNIFICANT ROLE IN SETTING THE NATIONAL MINIMUM LIST OF UNBUNDLED NETWORK ELEMENTS

Although CompTel shares the Commission's belief that the *USTA* decision is inconsistent with Supreme Court precedents and the underlying statutory provisions, CompTel would note that this decision, even if it stands, is consistent with CompTel's long-held position that the Commission should create formal mechanisms to ensure maximum State participation and input in this proceeding. The *USTA* Court criticized the Commission for imposing uniform national rules when market conditions vary, sometimes substantially, by geography. Further, the *USTA* Court criticized the Commission for not having engaged in a sufficiently detailed compilation or examination of the relevant factual circumstances necessary to make an informed decision on the record. Without endorsing the *USTA* decision, CompTel would note that the Commission can fully address both of those criticisms by ensuring that State regulators have a

formal role in the adoption and implementation of the mandatory UNE rules. State regulators have the experience and information necessary to shape the geographic contours of the Commission's UNE rules, and they have fact-finding procedures that supplement, and in some ways are superior to, the Commission's notice-and-comment procedures. As a result, the *USTA* decision only underscores the requests made by numerous parties for the Commission to ensure that States are fully represented in this proceeding.

A. The Commission Should Immediately Convene a Federal-State Joint Conference

CompTel proposed that the Commission convene a Federal-State Joint Conference on UNEs on November 26, 2001, approximately one month before the Commission released the *Notice* in this proceeding. More than six months have passed and the Commission still has not moved to convene the Joint Conference or to initiate any other action intended to give the States a significant role (beyond mere participation as commenters) in the Triennial UNE Review. CompTel hopes that the Commission will not use its own delay in responding to this proposal as an excuse to exclude state regulators from a meaningful role in this proceeding on the ground that there is no longer enough time to convene and utilize a Joint Conference. Unless the Commission has already made up its mind as to the decision it intends to issue in this proceeding, it is imperative that the Commission immediately convene a Joint Conference so that state regulators may bring their unique experience and expertise to bear on the critical issues the Commission has raised in the *Notice*.

CompTel's Joint Conference proposal has received strong support in the record. In particular, NARUC has unequivocally endorsed the proposal, both in a letter to the FCC last

year and in its formal comments in this proceeding.[1] In addition, many State commissions individually filed comments supporting CompTel's and NARUC's request for a Federal-State Joint Conference on UNEs.[2] The Illinois Commerce Commission, for example, requested that the Commission, in order to avoid "weaken[ing] the authority of individual states as it pertains to unbundling rules," adopt a "Federal/State Joint Conference approach to any proposed changes to Federal unbundling requirements."[3] The Commission should recognize that implementation of Sections 251(c)(3) and 251(d)(2) is a joint endeavor between itself and State commissions, particularly in the wake of the D.C. Circuit's *USTA* decision, by convening a Federal-State Joint Conference on UNEs as proposed by CompTel and NARUC.

B. The States Have Unique Experience and Expertise with Implementation of Interconnection and Unbundling Requirements.

The State commissions are more than just parties in this proceeding. Since the Commission released its initial Local Competition Order in CC Docket No. 96-98 in 1996,[4] the State commissions have not only implemented the federal rules, they have used their own

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1 *See, e.g.,* Letter from Joan Smith, NARUC Committee on Telecommunications et al., to Michael Powell, FCC Chairman, CC Docket No. 96-98 (filed Dec. 5, 2001); Comments of the National Association of Regulatory Utility Commissioners at 4-6 ("NARUC Comments").

2 *See, e.g.,* Comments of the Indiana Utility Regulatory Commission at 5 ("IURC Comments"); Comments of the Illinois Commerce Commission at 3 ("ICC Comments"); Comments of the Kentucky Public Service Commission at 1 ("KYPSC Comments"); Comments of the Michigan Public Service Commission at 6 ("MIPSC Comments"); Comments of the Mississippi Public Service Commission at 1 ("MSPSC Comments"); Comments of the New Jersey Board of Public Utilities at 1 ("NJBPU Comments"); Comments of the Oklahoma Corporation Commission at 5 ("OCC Comments"); Comments of the South Dakota Public Service Commission at 2 ("SDPUC Comments"); Comments of the Public Utility Commission of Texas at 3 ("TXPUC Comments").

3 ICC Comments at 3. Other parties, including AT&T and the PACE Coalition, also have made proposals on ways to give the States more input into this process and to use the States' expertise constructively to implement the provisions and objectives of the Telecommunications Act of 1996. Those proposals are fully consistent with CompTel's and NARUC's proposal for a Federal-State Joint Conference on UNEs.

authority to refine and in some cases expand the national list of UNEs. In fact, several states, notably New York and Illinois, imposed regulations to open their local markets in the early 1990s, years before the passage of the Telecommunications Act of 1996. The State commissions have been continuing this work concurrently with the Commission's initiation of the Triennial UNE Review proceeding. The State commissions actually implement unbundling requirements, evaluate RBOC compliance with those requirements through the Section 271 review process, and resolve disputes that arise between incumbents and competitors. The State commissions perform these duties under both under state and federal law, which gives them expertise and experience that the Commission lacks. Therefore, it is critical that the State commissions have appropriate mechanisms for sharing their in-depth knowledge with the Commission and the industry to ensure that the issues raised in this proceeding are decided correctly. It is clear that merely permitting State commissions to file comments in this proceeding is a patently inadequate means of participation. The Commission must reach out to the State commissions to tap their extensive knowledge of market conditions in their own jurisdictions as well as the States' greater practical familiarity and expertise with the UNE regime in Sections 251(c)(3) and 251(d)(2).

The comments of particular State commissions are instructive. For example, the Public Utility Commission of Texas urges the Commission to proceed in "full collaboration with state regulatory agencies."[5] "We believe it would be most prudent to evaluate and address the myriad of issues within this NPRM as a whole, and in concert with the states. Such

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4 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499 (1996).

5 TXPUC Comments at 7.

collaboration is based upon our mandate from Congress and our experience in implementation of federal initiatives on the state level."[6]

Further, many State commissions have a more thorough understanding than the Commission of the market conditions in their jurisdictions as well as the practical realities of the UNE regime. In part, this is due to the more rigorous procedures employed by many State commissions in developing a factual record upon which to make critical decisions about how to implement UNEs and whether to expand the national list of UNEs beyond the minimum list adopted by the Commission. Unlike the State commissions, the Commission relies heavily upon the filing of comments and *ex parte* submissions, which ultimately leads to "he-said, she-said" types of disputes over key factual issues. By contrast, State commissions often employ adjudicatory fact-finding procedures – including discovery, witness testimony, and cross-examination – to establish a more complete and less ambivalent evidentiary record that fully and accurately reflects the market conditions in their States. As the Florida Public Service Commission notes, State commissions "resolve factual disputes through information gathering procedures which go beyond written comments."[7] The States are "better positioned to conduct fact-specific inquiries" and are "more familiar with conditions within their borders, including the level of competition and the system of retail price regulation that applies to an incumbent

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6 *Id.*

7 Comments of the Florida Public Service Commission at 3 ("FPSC Comments"). "Generally, the FCC conducts rulemaking procedures exclusively through the submission of documents (*i.e.*, comments and reply comments). This process does not include discovery, witness testimony, and cross examination that are utilized by state commissions to address and resolve complex factual issues." *Id.* at 2.

carrier."[8] Because an important goal of this proceeding is to thoroughly evaluate the level of impairment a requesting carrier faces without access to UNEs on a state-by-state basis, the knowledge already possessed by the States is critical to informed decision-making.

The Illinois Commerce Commission agrees that State commissions occupy a "unique position" which grants them "a singular expertise to evaluate the status of competition in their respective jurisdictions as well as the availability of network elements to competitive carriers within their states."[9] The Illinois commission notes that "Congress structured the Telecommunications Act of 1996 such that the FCC may take advantage of the expertise of State Commissions in gathering and evaluating evidence when ILECs submit Section 271 applications."[10] The Illinois commission also recognizes that there is no reason to limit the use of this expertise to the Section 271 forum: "This same expertise, the unique product of the State Commission's traditional regulatory responsibilities as accentuated in their current roles in implementing the interconnection provisions integral to the success of the 1996 Act, places States in roles appropriately situated to implementing the FCC's unbundling rules as they apply to individual elements."[11]

The Commission would waste a scarce public resource and risk undermining the Telecommunications Act of 1996 were it not to avail itself of the State commissions' first-hand experience with implementation of local competition policy in this proceeding. As noted by the

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8 *Id.* at 3. Similarly, the Texas commission affirms that "[c]onsistent with the [Act], the Texas PUC remains the primary fact-finder for most matters regarding UNEs in Texas." TXPUC Comments at 7.

9 ICC Comments at 3-4.

10 *Id.*

11 *Id.*

California Public Utilities Commission, without "proper recognition of the actual state of competition," the Commission would "harm rather than promote competition if [its decision is] based on assumptions that the competitive market is progressive and healthy."[12]

III. THE COMMISSION SHOULD PLACE GREAT WEIGHT ON THE RECOMMENDATIONS OF THE STATE COMMISSIONS WHEN CONDUCTING THE IMPAIR INQUIRY AND DECIDING WHAT ACTIONS WILL BEST PROMOTE LOCAL COMPETITION

CompTel strongly supports the fundamental positions espoused by the large majority of State commissions on the record in this proceeding. The State commissions are most familiar with the state of local competition in their markets, as well as the practicalities and nuances of the UNE regime under Sections 251(c)(3) and 251(d)(2). Hence, the Commission should pay close attention to the State commissions, which are nearly unanimous in advising the Commission to refrain from removing UNEs from the mandatory list or otherwise restricting the availability of UNEs. In fact, many of the State commissions advocate an expansion of the current national minimum UNE list based on their own experience with implementation of state and federal interconnection and unbundling requirements.

A. The Commission Should Not Remove UNEs From The Mandatory List

It is easy to see which parties support competition – they are the ones seeking to preserve access to a robust list of UNEs so that competitive carriers will be able to provide services to end users, despite current market conditions. The State commissions share the vision of full local competition, facilitated by all modes of entry both within and across all platforms, as

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[12] Comments of the People of the State of California and the California Public Utilities Commission at 5 ("California Comments").

outlined in the Telecommunications Act of 1996. As a result, the State commissions favor greater access to unbundled network elements, or at least maintenance of the *status quo.*[13]

Removing UNEs from the national minimum list or imposing restrictions on a requesting carrier's access to them could slow the growth of competition or even reduce the current percentage of competitive market share. As stated by the Illinois Commerce Commission, removing UNEs or revising the unbundling rules "would undermine the competitive progress the ICC has achieved to date and frustrate the continuing efforts to foster a competitive local exchange market in Illinois."[14]

Similarly, the California Public Utilities Commission urges the FCC not to reduce the UNE obligations imposed on ILECs unless there is a "clear and convincing need" to do so.[15] As the California commission aptly notes, "given current market conditions, it may be appropriate to require more, not less, unbundling."[16] The California commission's reasoning is sound and indeed compelling: "To remain viable, many CLECs must take advantage of facilities

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13 The limited exceptions to this are the Public Utilities Commission of Ohio and the Florida Public Service Commission. The Ohio commission supports switching restrictions. It is worth noting however, that the latest FCC Local Competition Report shows that the market share of competitive local carriers in Ohio – four percent – lags behind all other Ameritech States. This is one of the lowest percentages of CLEC market share nationally. Similarly, the Florida commission proposes that loops, switching and transport could be subject to geographically based unbundling requirements. FPSC Comments at 3. Though CompTel disagrees with this analysis as it applies to these three types of UNEs, we are particularly concerned about the Florida commission's proposed restrictions on unbundled voice grade analog loops, which almost all parties, including the incumbents, support unbundling on an unrestricted basis. In its Comments, the Florida commission describes in great depth its superior fact-finding processes. As such, CompTel encourages the Florida commission to submit the facts upon which it makes this assertion to the FCC.

14 ICC Comments at 2.

15 California Comments at 5.

16 *Id.*

that are already 'in the ground,' but in order to do so, they need access to a complete offering of UNEs that is financially attractive and available without impediments imposed by the ILEC."[17]

The Indiana Utility Regulatory Commission concurs, asserting that "eliminating or limiting the availability of certain UNEs and combinations could force CLECs to duplicate many ILEC facilities, plant, or equipment," which could be "costly and inefficient."[18] As a direct result, "competition would be delayed considerably in Indiana, due to limited access to capital and limited construction budgets for many CLECs, and the sheer amount of time it would take CLECs to replicate many of the ILECs' network components." [19] CompTel agrees that, over time, many competitive carriers will build out their own networks, when and where it is technically and economically feasible to do so. In the meantime, as the Indiana commission notes, it is "critical" that the Commission should facilitate all modes of entry envisioned by the Act – facilities-based, resale and UNEs – and not "arbitrarily reduce their competitive options."[20]

Similarly, the Missouri Public Service Commission believes that "the Commission should continue on the path as established in the UNE Remand Order" in order to promote competition via all three methods of entry envisioned in the 1996 Act.[21] While "elements that are currently unbundled should remain on the national list," the Commission should also "initiate a review to determine the benefits, if any, of increasing unbundling requirements to include such things as technologies to promote advanced services such as SBC's

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17 *Id.*

18 IURC Comments at 4.

19 *Id.*

20 *Id.*

21 Comments of the Public Service Commission of the State of Missouri at 9 ("MoPSC Comments").

Project Pronto architecture and line splitting provisions."[22] CompTel agrees with the Missouri commission that "[u]ntil such time as consumers nationwide, whether rural or urban, can experience true competition, it is premature to remove unbundling obligations from incumbent local exchange carriers."[23]

1. The Switching UNE.

CompTel urges the Commission to examine with particular care the position taken by the majority of the State commissions with respect to two UNEs – switching and loops. The State commissions are nearly unanimous in their belief that the Commission should provide greater access to the full UNE Platform ("UNE-P") by eliminating existing restrictions on the availability of unbundled local switching. Particularly compelling are the comments of the New York Public Service Commission. The New York commission was the first state commission to facilitate a successful Section 271 application and it remains the leader in competitive local market penetration.[24] In fact, two years after the New York commission determined that Verizon had opened its market in compliance with Section 271, the New York commission stated that the unbiquitous availability of UNE-P is required to bring the lasting benefits of robust local competition to New York consumers.

> Although competition in New York is developing, it is premature to eliminate the UNE-P requirement until CLECs can migrate large volumes of customers to their own switches more efficiently. There are still major

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22 *Id.*

23 *Id.*

24 CLEC penetration in New York is approximately 27% as of the beginning of this year, according to the Order Instituting Verizon Incentive Plan. *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework*, Case No. 00-C-1945; *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case No. 98-C-1357, 31 (Issued and Effective Feb. 27, 2002) ("*Verizon-NY Incentive Plan Order*").

> issues that hamper the development of facilities-based competition. Until hot-cuts can be performed in much greater volumes, CLECs' lack of access to the UNE-P will materially diminish their ability to provide local service.[25]

In its comments, the New York commission explains the complex administrative procedures involved in performing a hot cut and the greater efficiencies that are required prior to elimination of the platform. As it notes, "Verizon would need to dramatically increase the number of hot-cut orders per month if UNE-P was terminated" and CLEC customers switched to loops. The New York commission estimates that Verizon's hot-cut performance would need to improve approximately 4400 percent, and notes that such an improvement "would be unlikely absent major changes to streamline the hot-cut process."[26]

As described above, the New York commission recently approved an incentive regulation plan for Verizon that ensures UNE-P availability for service to business customers using 18 lines or fewer throughout New York State (with the limited exception of customers served out of specifically designated central offices in New York City).[27] The New York commission concluded that the Verizon Incentive Plan, which includes greater competitive access to business customers through the UNE Platform, "will significantly enhance the conditions for local telecommunication competition in New York."[28] It is not surprising that

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25 NYDPS Comments at 3.

26 *Id.* at 4.

27 *See generally Verizon-NY Incentive Plan Order.*

28 *Id.* at 32.

New York has the highest percentage of competitive market share of any state in the nation based on its efforts to promote local competition.[29]

For similar reasons, the Georgia Public Service Commission opposes any "rigid unbundling rules that dictate, for instance, geographic areas and/or classes of customers for which unbundled local switching is and is not required." Such a "rigid, one-size-fits-all standard could not and would not recognize the myriad variables that determine whether or not unbundled local switching is necessary to the survival and further development of competition within individual states and within specific regions within those states."[30]

The Louisiana Public Service Commission is even more direct in its evaluation of the importance of the switching UNE to competition. It asserts that any action by the Commission to "restrict, or further restrict CLEC access to unbundled switching from ILECs at TELRIC rates will retard the further development of competition in Louisiana."[31] The availability of UNEs, including unbundled switching, "provides the most successful mode of market entry for competitive carriers in Louisiana."[32]

Similarly, the Public Utility Commission of Texas has found that unrestricted access to unbundled local switching is critical to the development of local competition. In a

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29 *Local Telephone Competition: Status as of June 30, 2001*, Federal Communications Commission, Feb. 2002 (data current through June 30, 2001).

30 Comments of the Georgia Public Service Commission at 3-4 ("GPSC Comments").

31 Comments of the Louisiana Public Service Commission at 2 ("LPSC Comments"). Unfortunately, competition in Louisiana can ill afford any further shocks, as competitors serve a mere four percent of the lines in that State.

32 *Id.* "Under the FCC rules, even in New Orleans—the largest market in Louisiana—circuit switching is available at cost-based rates to serve only the smallest customers (those with three or fewer lines). Competitive carriers need unrestricted access to UNEs at TELRIC rates in the most densely populated areas of the state in order to economically provide services to consumers in the less populated areas of the state." *Id.*

Texas arbitration proceeding, the Texas commission determined that lack of ILEC unbundled switching would "hinder the rapid deployment of facilities, as well as investment in innovative technologies and product offerings."[33] Moreover, the Texas commission was not persuaded "that UNE-P would create a disincentive to investment and innovation, or that the FCC based its unbundling analysis solely on the ability of CLECs to self-supply switching in the largest markets without considering the availability of switching from other providers."[34] Specifically, the Texas commission concluded that the unbundled switch port should be available without restriction throughout the State, and it rejected the unbundled local switching restrictions adopted by the Commission in a series of decisions in CC Docket No. 96-98.[35] Applying the standards contained in the Act, the arbitrators determined that "CLECs would be impaired in zones 1, 2, and 3 in Texas if local switching were not available as a UNE."[36] They stated that "even if in its Triennial UNE Review proceeding the FCC were to remove local switching from the national list, or create a new exception standard, the Arbitrators nonetheless find that on this specific final record CLECs in Texas would be impaired without the availability of local switching on an unbundled basis."[37]

In Illinois, legislators imposed significant new unbundling requirements on ILECs operating in the state when they revised their telecommunications laws in 2000. In a proceeding to implement that new legislation, the Illinois Commerce Commission rejected the argument that

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33 *Petition of MCIMetro Access Transmission Services LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, ICC Docket No. 24542, 74 (Illinois Commerce Commission April 5, 2002).

34 *Id.*

35 *Id.*

36 *Id.* at 73 (footnotes omitted).

the availability of UNEs hinders the development of facilities-based competition: "The Commission and the FCC have rejected Ameritech's 'CLECs must build to be competitive' argument on so many occasions that citation is unnecessary. At some point, we are confident that CLECs will undertake the infrastructure investments necessary to serve their clients." [38] In the meantime, the Illinois commission concluded, "the United States Congress and now, the Illinois Legislature have required a different scheme" and the Illinois commission has been "charged by the legislature with imposing a broad based UNE combination requirement upon Ameritech."[39] Moreover, the Illinois commission found that "[t]he language is straightforward, a telecommunications carrier may use a network elements platform to provide service to an end user, without qualification as to the number of lines the end user has in service."[40]

It should be noted that both Georgia[41] and Tennessee[42] are currently engaged in state investigations into the availability of unbundled local switching. In fact, the Tennessee Hearing Officer rejected BellSouth's argument that the state cannot impose unbundling

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37 *Id.*

38 *Illinois Bell Telephone Company Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act,* ICC Docket No. 01-0614, 56 (Illinois Commerce Commission June 11, 2002).

39 *Id.*

40 *Id* at 139.

41 *See generally Generic Proceeding to Review Cost Studies, Methodologies, Pricing Policies and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications, Inc.'s Network*, Docket No. 14361-U (Georgia PSC).

42 *See generally Petition of the Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Unbundled Switching an Unrestricted Unbundled Network Element*, Docket No. 02-00207 (Tennessee Regulatory Authority).

obligations with respect to a UNE previously removed from the national UNE list by the FCC.[43] The Commission's actions in this proceeding should be consistent with the enlightened nationwide trend among State commissions to increase access by requesting carriers to the switching UNE and by extension to the UNE Platform for serving all types of customers throughout the state.

2. Loop UNEs.

CompTel urges the Commission to use this proceeding to clarify that, as some State commissions have recommended, requesting carriers have broad access to loop and subloop UNEs. In particular, the Commission must make clear that the unbundling requirements apply to loops at all levels, including but not limited to DS-1s and DS-3s, and to the separate high and low frequency portions of loops.

For example, the California Public Utilities Commission urges the Commission to retain the unbundling requirements as they relate to the provision of DS-1 loops.[44] "DS-1 is used by CLECs to provide fast growing, integrated voice and data service that competes directly with the ILEC, and offers technical benefits and cost savings to consumers. There is no alternative supplier. If [the] DS-1 unbundling requirement is lifted, this fast growing, lucrative and economically important market will fall totally into the lap of the ILEC."[45] Similarly, the California commission also supports the retention of the requirement that ILECs provide access

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43 *Petition of the Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Unbundled Switching an Unrestricted Unbundled Network Element*, Initial Order Denying BellSouth's Motion to Dismiss and Strike, Docket No. 02-00207, 8 (Tennessee Regulatory Authority April 9, 2002).

44 California Comments at 19.

45 *Id.*

to the high frequency portion of the loop necessary for the provisioning of line sharing arrangements between the ILEC and a CLEC. "Retaining this requirement is imperative in order to allow the CLEC parity with the ILEC's affiliate in providing advanced services."[46]

The Public Utility Commission of Texas also advocates continued access to loops, subloops and dark fiber, including access to high capacity loops.[47] More specifically, the Texas commission "agrees with the FCC findings in the UNE Remand Order that without access to dark fiber and these loop capabilities (e.g., DS-1, DS-3, OC-3), carriers are impaired."[48] According to the Texas commission, these UNEs must be preserved because "fiber optic technology is undoubtedly one of the most important elements in a high capacity telecommunications network."[49]

B. States With More Rather Than Less Expansive Access To Mandatory UNEs Have Witnessed Accelerated Competitive Entry.

Many States have already determined that the unbundling requirements established in the UNE Remand decision and subsequent FCC orders did not go far enough to enable local exchange competition. These States have therefore imposed additional unbundling requirements, and have done so in two areas in particular: advanced services and new networks, and unbundled local switching.

The net effect of these State commission efforts is that competition is more robust in States that have taken an aggressive posture on expanding the access of requesting carriers to a broad range of mandatory UNEs. Indeed, many of the States listed above, such as New York,

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46 *Id.*

47 TXPUC Reply Comments at 12.

48 *Id.*

Illinois and Texas, have the largest competitive local penetration rates in the nation. In fact, the actions of these State commissions clearly demonstrate that the current list of federally-mandated unbundled elements is insufficient to facilitate true local competition. This illustrates the wisdom displayed by Congress in enacting Sections 251(d)(3) and 261(c), which give States the flexibility to go beyond federal rules and policies in designing and imposing requirements to encourage competition.

The Commission's own Local Telephone Competition report shows that competitive carriers serve 23% of the lines in New York, 13% of the lines in Illinois, and 14% of the lines in Texas – all well above the national average of 9%.[50] These numbers reveal two important facts. First, States that actively promote competition by mandating further unbundling are producing tangible benefits for all classes of consumers, including residential subscribers. One study indicated, for example, that consumers in New York will save approximately $220 million per year as a result of the local competition there.[51] In Michigan, Ameritech recently cut its basic rate plan by one-third in response to competitive forces resulting from the Michigan Public Service Commission's diligent efforts to set TELRIC compliant UNE rates and enforce

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49 *Id.*

50 Local Telephone Competition: Status as of June 30, 2001, Industry Analysis Division, Common Carrier Bureau, February, 2002 (data current through June 30, 2001).

51 *See NYPSC Issues Telecom Report: Competition Intensifying – Independent Consumer Group Hails $220 Million Annual Savings for New York Consumers*, Press Release (New York Public Service Commission June 30, 2001), *citing* Telecommunications Research and Action Center ("TRAC") Study (September 2000). This study, in fact, was based on local exchange competition numbers that are less than half of what they are today in New York.

unbundling obligations under state and federal law.[52] Second, while these levels of competition lead the nation, they are below where this Commission should expect them to be six years after the Telecommunications Act of 1996 became law.

C. CompTel Strongly Agrees with State Commissions That Advanced Services Must Be Unbundled.

Advanced services must not be segregated from traditional services when it comes to defining the ILECs' UNE obligations. Several State commissions have correctly sought to promote competition and increased deployment of broadband facilities and services by eliminating artificial distinctions between "legacy" and "broadband" investments and by requiring the ILECs to unbundle the network functionalities used to provide broadband services.

For example, the California Public Utilities Commission notes that "Congress intended the FCC to focus primarily on whether the incumbent provider of local services continues to exercise control over bottleneck network facilities needed by competing carriers, and how to unbundle those network facilities to enable competitors to meaningfully compete with the incumbent for customers."[53] "Nothing in the Act," it adds, "indicates an intent by Congress to reduce the degree of unbundling of bottleneck facilities by the incumbent provider for the purpose of promoting new investments by that provider."[54]

The California commission thus has firmly concluded that the unbundling requirements that apply to Pacific Bell, the "dominant provider of broadband services in

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52 Editorial, *Competition Keeps Calling, But Local Bells Resist,* USA TODAY, July 17, 2002, *available at* http://www.usatoday.com/news/comment/2002/07/17/nceditf.htm. CompTel has attached a copy of this editorial.

53 California Comments at 7.

54 *Id.* (noting that Section 271 requires BOCs to provide access to various elements without regard to the necessary and impair standard).

California," must "remain in place if significant competition is to become a reality, and its benefits brought to California consumers."[55] Based on its actual experience, the California commission has concluded that unbundled access to all bottleneck facilities will promote wider deployment of broadband services, which benefits the public interest. The fact that Pacific Bell has "successfully promoted DSL service to customers under the current regulatory environment to the point of outstripping cable modem service makes clear that the current regulatory environment is conducive to, and does not impede investment in, broadband technology by the ILEC."[56] Conversely, "absolving the ILEC from any unbundling obligations on an overlay network will inhibit a competitor's ability to provide comparable services to those of the ILEC, such as Pacific Bell/SBC's Project Pronto."[57]

CompTel also agrees with the California commission that the FCC should lift restrictions on unbundled packet switching due to impairments caused by ILEC network upgrades, such as SBC's Project Pronto architecture. Accordingly, the California commission urges the FCC to "modify the requirements under which an ILEC must provide CLEC access to packet switching. Specifically, the FCC should re-examine the elements required for unbundling packet switching in light of how the industry has evolved since the adoption of the current national list. Packet switching unbundling is imperative if broadband competition is to emerge."[58]

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55 *Id.* at 8.

56 *Id.*

57 *Id.* at 19.

58 *Id.* at 20.

Similarly, based on its experience with the incumbent, the Illinois Commerce Commission urges the Commission to require the ILEC to unbundle all local loop facilities, regardless of the technology used.[59] The Illinois commission notes that "[a] statement reflecting the FCC's intent to enforce Section 251(c)(3) to the fullest extent of the law, will encourage rather than discourage ILECs from deploying advanced networks."[60] The Illinois commission believes that the advantage in the provision of DSL services that the ILECs hold by virtue of their "dominant position" will be reduced by "[s]trengthening implementation of Section 251(c)(3)."[61] By acting to "further enable competitors to deploy advanced services facilities, the FCC will ensure that the market, rather than the ILECs, will dictate deployment of advanced services."[62]

The Missouri Public Service Commission agrees that the Commission should require SBC to unbundle Project Pronto and ILEC-owned splitters to advance the broadband deployment goals of Section 706. The Missouri commission considers it "imperative" that the Commission consider unbundling "technologies that will support the growth of broadband or advanced services competition."[63] For "competition to progress" and to fulfill Section 706

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59 ICC Comments at 4 ("The FCC should therefore make clear its intention to require unbundling of local loop facilities whether or not they are used for advanced services or voice services.") Such a requirement would include, for example, SBC's Project Pronto. *See id.*

60 *Id.*

61 *Id.* at 4-5.

62 *Id.* at 5.

63 MoPSC Comments at 8-9. "[T]he Commission should initiate a review to determine the benefits, if any, of increasing unbundling requirements to include such things as technologies to promote advanced services such as SBC's Project Pronto architecture and line splitting provisions." *Id.* at 9.

objectives, the Commission should "use this opportunity to consider the unbundling of advanced service offerings such as Project Pronto."[64]

The New York Public Service Commission believes that it is "premature to relieve the ILECs of their current obligations to offer wholesale access to all the capabilities of the local loop for broadband purposes."[65] Although the wireline ILECs are already competing for broadband with cable offerings, "CLECs, both old and new, continue to seek access to end-user customers for broadband using the ILECs' infrastructure over the last mile."[66] Should the Commission restrict CLEC access to broadband loops, and withstand the legal challenges, "only the ILECs will be able to offer wireline-based broadband."[67]

The positions taken by the State commissions in their comments are consistent with the actions that numerous States are taking to promote broadband competition and deployment. Because the Commission ostensibly shares these same goals, the experience of the States is both insightful and instructive.

As one example, the Illinois Commerce Commission has rejected the theory that alternative access to broadband can serve as a basis for failing to provide unbundled access to Project Pronto, instead finding that broadband market entry via resold service offerings, cable, satellite or wireless were not adequate alternatives to the unbundling of SBC's network. Specifically, the Illinois commission requires SBC to offer its Project Pronto architecture as an

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64 *Id* at 8. The Commission should "initiate a review to determine the benefits, if any, of increasing unbundling requirements to include such things as technologies to promote advanced services such as SBC's Project Pronto architecture and line splitting provisions." *Id.*

65 Comments of the New York State Department of Public Service at 6 ("NYDPS Comments"). This is true "regardless of whether the technology deployed is copper or fiber." *Id.*

66 *Id.*

end-to-end, high frequency portion of the loop ("HFPL") UNE.[68] This is because, after applying the Commission's necessary and impair test,[69] the Illinois commission determined that requesting carriers would be impaired without access to this specific portion of SBC's network on an unbundled basis. Moreover, the Illinois commission determined that the broadband and broadband/voice resale products created by the Commission's Project Pronto Waiver Order[70] were not sufficient to provide competitors a meaningful opportunity to compete. Accordingly, the Illinois commission held that "unless and until requesting carriers have meaningful access to the Project Pronto architecture for the use of line cards that will provision the various types of services they wish to provide, they will indeed be impaired in providing those services."[71] Several other State commissions in the SBC region, including California[72] and Indiana,[73] are in the midst of investigating this very same issue.

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67 *Id.*

68 *Illinois Bell Telephone Company Proposed Implementation of High Frequency Portion of Loop ("HFPL")/Line Sharing Service*, Order on Rehearing, Docket 00-0393, (Illinois Commerce Commission Sept. 26, 2001).

69 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

70 *Ameritech Corp. and SBC Communications, Inc. Application For Consent to Transfer Control of Corporation Holding Commission Licenses and Lines Pursuant to Sections 241 and 310 (d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 15 FCC Rcd 17521 (2000) ("*Project Pronto Waiver Order*").

71 *Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop ("HFPL"/Line Sharing Service)*, Order on Rehearing, Docket No. 00-0393, 36 (Illinois Commerce Commission Sept. 26, 2001). "Further, we reiterate that all of the requisite circumstances set forth in Section 51.319 are present in Illinois." *Id.*

72 *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, California PUC Rulemaking 93-04-003; *Investigation on the Commission's Own Motion Into Open Access and Network Architecture Development and Dominant Carrier Networks*, California PUC Investigation 93-04-002.

As in Illinois, the Public Service Commission of Wisconsin imposed similar unbundling requirements on Project Pronto. The Wisconsin commission found that competitors will be impaired within the meaning of Section 251(d)(2) if they are required to collocate a DSLAM at a remote terminal to provide DSL, and if they are only provided resale access to SBC/Ameritech's offerings across the Project Pronto architecture.[74] Similar to the Illinois Commerce Commission, the Wisconsin commission also has found it necessary to require the unbundling of an end-to-end broadband UNE in order to promote facilities-based competition, investment, and innovation.[75] According to the Wisconsin commission, "If practical, economic, and operational alternatives to compete are not available, companies will not invest. The efficiencies Ameritech obtains through Project Pronto architecture including leveraging the scale of operations through its existing voice customers would inhibit other competitors from making alternative investments."[76]

The Public Utility Commission of Texas is currently considering an arbitration award, issued in July 2001, that would impose unbundling obligations identical to the requirements in Illinois and Wisconsin.[77] In the pending arbitration award, the Texas arbitrators

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73 *See also Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport Under the Telecommunications Act of 1996 and the Related Indiana Statutes*, Cause No. 40611-S1 (Indiana Utility Regulatory Commission).

74 *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*,Final Decision, Docket 6720-TUI-161, 109-110 (Wisconsin Public Service Commission March 21, 2002) ("Wisconsin PSC UNE Order").

75 *Id*

76 *Id.*

77 *Petition of IP Communications to Establish Expedited PUC Oversight Concerning Line Sharing Issues*, Docket Nos. 22168 and 22469 (Texas Public Utilities Commission adoption pending).

determined that SBC must make packet switching available as a UNE for any customer served by the next generation digital loop carrier ("NGDLC") architecture established by Project Pronto. The arbitrators took the opportunity at the conclusion of their analysis to note the implication of public statements by SBC that it may reconsider its investment in Project Pronto if the Texas commission required SBC to unbundle the network. "This position, in and of itself, provides clear and convincing evidence that SWBT continues to possess market power and can unilaterally determine who receives, and far more compelling, who does not receive broadband services."[78] The arbitrators concluded that "if one company, in this case, SWBT, can unilaterally determine when and if citizens receive broadband service, it is up to this Commission to continue fostering competition by requiring element unbundling when clearly supported by the evidence. Such is the case here."[79] Moreover, the Texas commission already has decided that a stand-alone splitter should be a required feature and functionality of the loop.[80] This unbundling requirement, which exceeds the Commission's current line-splitting obligations, facilitates the ability of competitors to provide consumers with a combined voice/data offering in competition with the ILEC.

In addition to supplementing the Commission's existing unbundling requirements, some State commissions have eliminated FCC-imposed unbundling restrictions that harm both competitors and consumers. In a recent arbitration proceeding, the Kentucky Public Service

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78 *Petition of MCIMetro Access Transmission Services, LLC et al., for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996,* Arbitration Award, Docket No. 24542, 80 (Texas Public Utility Commission April 5, 2002).

79 *Id.*

80 *Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications, Inc. Pursuant to Section 252(b)(1) of*

Commission ruled that BellSouth can no longer refuse to provide retail xDSL to customers who obtain their voice services from alternative carriers via unbundled loops.[81] The Kentucky commission agreed that BellSouth's refusal to provide its retail xDSL services on unbundled DSL-capable loops used by its competitors was an unreasonable, discriminatory and anticompetitive practice. As stated by the Kentucky commission, "[BellSouth's] practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers."[82] The Kentucky commission's prohibition on these types of tying arrangements exceeds the current federal rules, which apparently permit an ILEC to terminate a customer's DSL service if that customer switches to another voice provider.[83] Moreover, the Michigan Public Service Commission[84] and the Florida Public Service Commission[85] have also outlawed this tying practice, and the Louisiana Public

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the Federal Telecommunications Act of 1996, Docket No. 22315, 9 (Texas Public Utility Commission March 14, 2001).

81 *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications Inc. Pursuant to U.S.C. Section 252*, Case No. 2001-00432 (Kentucky Public Service Commission July 12, 2002).

82 *Id.* at 7.

83 *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, ¶ 157 (May 15, 2002).

84 *Complaint of the Competitive Local Exchange Carriers Association of Michigan, CMC Telecom, Inc., Long Distance of Michigan, Inc. McLeodUSA Telecommunications, Inc., MichTel, Inc., and the Association of Communications Enterprises against SBC Ameritech Michigan for Anti-Competitive Acts and Acts violating the Michigan Telecommunications Act*, Case No. U-13193 (Michigan Public Service Commission June 6, 2002).

85 *Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under*

Service Commission is considering a Staff Recommendation that would impose a similar prohibition.[86] The Commission should follow the lead of these State commissions and eliminate this exception, which creates a barrier to competitive entry and customer choice.

The actions of these State commissions confirm the need to require the ILECs to provision all network functionalities, regardless of whether such facilities are pieces of the ILECs' existing networks or upgrades, as mandatory UNEs under the statutory UNE regime. Such a requirement will promote competition and the advanced services deployment goals of Section 706.

D. The Commission Should Not Undermine The Ability Of State Commissions To Supplement The Commission's Mandatory List of Minimum UNEs.

The Commission must not impinge on the ability of the State commissions to expand upon or otherwise enhance the minimum federal unbundling requirements. The 1996 Act envisions a cooperative federalist scheme in which the Commission and State commissions possess certain rights and responsibilities. While the Commission may choose to establish a minimum set of network elements[87] the States retain the ability to establish concurrent regulations – particularly those that are "necessary to further competition."[88]

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the Telecommunications Act of 1996, Order No. PSC-02-0765-FOF-TP (Florida Public Service Commission June 5, 2002).

86 *BellSouth's Provision of ADSL Service to End-users Over CLEC Loops Pursuant to the Commission's Directive in Order No. U-22252-E*, Staff's Proposed Recommendation, Docket No. R-26173 (Louisiana Public Service Commission July 12, 2002).

87 47 U.S.C. §251(d)(1) and (d)(2). CompTel does not oppose proposals that would give State commissions an even greater role in establishment if the national UNE regime.

88 47 U.S.C. §261(c); *see also* 47 U.S.C. §251(d)(3).

In a significant display of solidarity, every State commission that filed comments in this proceeding supported the ability of State commissions to supplement the minimum list of unbundled elements to suit the needs of their respective States. These comments were consistent with, and often cited, NARUC's February 2002 resolution, which argues for the continued ability of State commissions to add UNEs to any list that the FCC might mandate. [89] Further, this position is fully consistent with the Commission's previous rulings honoring the plain language of the Act. As the Florida Public Service Commission stated, for example, the Commission "should only promulgate relatively broad rules that would afford state commissions flexibility to customize the level of granularity based on the market conditions within the state."[90] The Louisiana Public Service Commission suggests that the Commission create a UNE base line to be made available nationally and that the State commissions should be allowed to "assume the responsibility for applying local conditions to ensure that competitive services are widely available" in their state.[91]

Several State commissions expressly ask the Commission to commit that the FCC will not formally attempt to preempt the States' ability to add UNEs and unbundling requirements over and above any national minimum standard, and CompTel strongly supports this request. For example, the Louisiana commission expresses concern that "the FCC may

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89 National Association of Regulatory Utility Commissioners, *Resolution Concerning the States' Ability to Add to the National Minimum List of Network Elements* (Feb. 13, 2002) ("NARUC UNE Resolution"). *See, e.g.,* Comments of NARUC at 4-6; IURC Comments at 5; ICC Comments at page 3; KYPSC Comments at 1; MIPSC Comments at 6; MSPSC Comments at 1; NJBPU Comments at 1; OCC Comments at 5; SDPUC Comments at 1; TXPUC Comments at 3.

90 FPSC Comments at 2-3.

91 LPSC Comments at 2.

adopt new UNE minimum standards that increase the level of [CLEC] impairment."[92] As a result, the Louisiana commission "urge(s) the FCC not to reduce previously established minimums and to state explicitly that state commissions may, consistent with federal guidelines, approve additional UNEs or expand the availability of UNEs beyond the FCC's established minimum."[93]

Similarly, the Georgia Public Service Commission "fully supports" the NARUC UNE resolution and notes that, consistent with that resolution, "it is uniquely situated to evaluate Georgia specific factual issues in order to make decisions about the degree to which local switching and other network elements should be unbundled . . . in order to achieve the pro-competitive goals of the Act and of Georgia law."[94] In recognition of the federalist scheme, the Georgia commission welcomes the Triennial UNE Review proceeding while urging the Commission "not to attempt to limit the ability of individual state regulatory commissions to impose unbundling obligations upon the incumbent LECs within their jurisdiction" as long as those obligations are consistent with the Section 251 of the Act and the policy framework established by the Commission in its UNE Remand Order.[95] "Any attempt to constrain a state commission's ability to require unbundling where the factual circumstances demonstrate its necessity would clearly undermine the pro-competitive goals of the Act."[96]

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92 *Id.*

93 *Id.*

94 GPSC Comments at 3.

95 *Id.*

96 *Id.*

The Illinois Commerce Commission asserts that "States must continue to have the power to implement unbundling rules within the broader guidelines established by the FCC."[97] While acknowledging the benefits that a nationwide list of UNEs can provide competitors, CompTel agrees that a "one size fits all" approach is "inappropriate and could undermine rather than enhance the development of competition."[98]

> "The unique position of State Public Utility Commissions grants them a singular expertise to evaluate the status of competition in their respective jurisdictions as well as the availability of network elements to competitive carriers within their states. States must continue to have the authority to respond to developments in the local marketplace through State Commission and State Legislative actions."[99]

The wisdom of giving State commissions the discretion to impose unbundling requirements on ILECs that go beyond the minimum federal standards is bolstered by the fact that State commissions often use a variety of fact-gathering techniques that exceed the Commission's notice-and-comment procedures. As the Public Utility Commission of Texas recently noted, its arbitrators accord "considerable deference to the FCC's broad national perspective and significant experience and expertise," and "depart from the FCC's conclusions only where circumstances specific to Texas appear to differ from those addressed by the FCC."[100] The Texas commission determined that "the facts before the FCC in September 1999, when the UNE Remand Order was issued, and the factual circumstances in Texas today raise

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97 ICC Comments at 3.

98 *Id.*

99 *Id.* at 3-4.

100 *Petition of MCImetro Access Transmission Services LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Docket No. 24542, 70 (Texas Public Utility Commission April 5, 2002).

questions regarding the applicability of the [ULS] exception in Texas at this time."[101] The more rigorous fact-gathering procedures used by the State commissions and their proximity to market conditions justify the statutory scheme that enables State commissions to impose unbundling requirements on ILECs beyond what the FCC may require.

E. Potential Intermodal Competition Cannot Excuse Full Implementation of the 1996 Act

Full intramodal wireline competition cannot be sacrificed in the hope that intermodal broadband competition may someday develop. In their initial comments, the State commissions correctly reject the notion that national competition policy should embrace intermodal competition to the exclusion of intramodal competition.

For example, the Illinois commission notes that "[w]ith the powerful network externalities in the telecommunications market, encouraging such competitors to innovate requires permitting these competitors access to the dominant carrier's network. Section 251(c)(3) opens one important avenue for CLECs to gain such access – an avenue that should not be closed." It underscores that "[w]hile recognizing that reducing or barring CLEC access to ILEC facilities capable of supporting advanced services may encourage slightly quicker deployment of these facilities, the ICC believes that such essentially <u>short-term</u> <u>gains</u> will likely be much less significant than the <u>long-term</u> <u>losses</u> associated with diminished incentives for innovation on the part of both the ILECs and the CLECs.[102] The Illinois commission correctly realizes that limiting access to UNEs <u>now</u> will limit the development of robust competition –

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101 *Id.*

102 ICC Comments at 4 (emphasis added).

with its associated price reductions, service quality improvements, and technical innovation – in the long-term.

Similarly, the Texas commission questions whether there is available data of "adequate quality of granularity" to make decisions on the appropriate steps to ensure local competition and encourage the deployment of advanced telecommunications services.[103] "Specifically, we question whether there exists, at this time, sufficient intermodal competition to benefit consumers."[104] This statement is compelling because Texas is one of the most competitive telecommunications markets in the nation.

The Indiana commission wisely asserts that any competition to the ILECs' broadband offerings from providers other than competitive carriers "should not be viewed as justification to lessen the competitive opportunities for CLECs."[105] "Claims of intermodal competition for the provision of broadband or advanced services must be scrutinized carefully, and any 'competition' from affiliates or subsidiaries must be removed from the data and statistics on competition to obtain a more realistic view of the true competitive threat facing the ILECs in the provision of broadband and advanced services."[106] Noting recent reports that any delay in making broadband and advanced services available more ubiquitously is the result of high prices and lack of demand rather than restrictions in supply, the Indiana commission recommends that

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103 TXPUC Comments at 5. The Texas Commission also notes that similar concerns were raised by Commissioner Copps in the Third Advanced Services Report and Order.

104 *Id.*

105 IURC Comments at 9.

106 *Id.*

the Commission "actively encourage, not discourage, CLECs' ability to compete against the ILECs."[107]

The California commission notes that the goal of the Act is to spur competition, which leads to more choice, lower prices, more innovation and the development of new technologies.[108] The goal of encouraging investment in new technologies should not be an end in itself, but rather "is the product . . . of competition."[109] The goal of additional investment should not come at the expense of greater choice and lower prices.[110] In California, ILECs remain the "dominant providers" of local service to the vast majority of customers in their territories, particularly in the residential and small commercial customer broadband market.[111] The California commission notes, for example, that SBC serves more customers than cable modem providers, and is increasing its market share.[112] Perhaps more importantly, one third of all Californians live in areas where DSL is the only choice for broadband.[113] Thus, without robust intramodal competition, one third of the most populous State will be served only by a potentially unregulated monopoly provider of broadband services. As a result, the California commission concludes that the unbundling requirements applicable to Pacific/SBC must "remain

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107 *Id.*

108 California Comments at 6.

109 *Id.*

110 *Id.*

111 California Comments at 7.

112 *Id.*

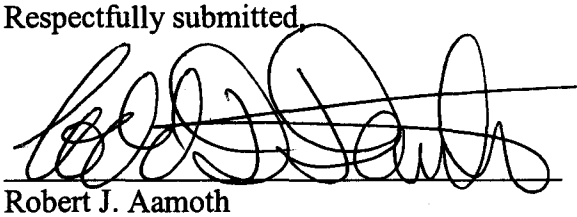
113 *Id* at 8.

in place if significant competition is to become a reality, and its benefits brought to California customers."[114]

CONCLUSION

The Commission should take action in this proceeding consistent with these reply comments, as well as CompTel's opening comments in this proceeding.

Respectfully submitted,



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[114] *Id.*