

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

In the Matter of

Review of 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
MPOWER COMMUNICATIONS CORP.
ON TRIENNIAL UNE NPRM**

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Summary

As Mpower emphasized in its Initial Comments, the old copper networks are gradually being augmented and replaced by fiber and the resulting availability of broadband packet technology is producing a convergence of these systems. Consequently, it is increasingly difficult to predict what combinations of technology and facilities will be necessary in the future to reach customers with competitive choices. It is very likely that CLECs will need additional end-to-end UNEs in the future to assure continued access to ILEC networks. Without such CLEC access to ILEC networks, competition becomes non-existent and monopoly or duopoly result.

As almost every non-ILEC commenter attests, competitors need the UNEs they have been awarded. Further, the rules have had almost no time to operate as a complete system. The competitive environment needs certainty and time to utilize the processes so laboriously developed since the passage of the 1996 Act before any significant changes are contemplated.

Specific UNEs exist today and many commenters dealt more specifically with the nature of and need for today's UNEs. Mpower supports numerous comments of this type which were filed by other parties.

There is only limited competition for interoffice transport. Although it may superficially appear that a multiplicity of carriers are selling service into "their own" fiber backbone, only a select few providers have actually installed new fiber cabling into the ground.

In nearly every market, the available metro transport providers have provisioned facilities to the same limited number of COs while the majority of COs are served only

by ILEC facilities. This is primarily because most metro fiber providers have focused on serving the same subset of the largest businesses in a given market and installed their facilities accordingly. Thus, CLECs such as Mpower, that serve a wider spectrum of customers, would be seriously “impaired” if access to UNE transport were eliminated.

The Commission must continue to assure that UNE loops be made available to CLECs and further, require that loops be made available ubiquitously. ILEC positions on UNE availability range from SBC’s CLEC-friendly policy of working with CLECs to obtain an available facility to Verizon’s illegal “no build” policy. Mpower urges the Commission to mandate that ILECs unbundle access to all local loops and to provide clear and concise language that loops shall be made available to CLECs everywhere the ILEC offers retail voice or data services.

The ALTS coalition argued in its Initial Comments that the Verizon “no facilities” policy is unlawful, being based upon an erroneous reading of the Eighth Circuit’s decision regarding the Commission’s “superior network” rules. Mpower supports the interpretation of the ALTS coalition.

The ILECs use “no facilities” policies as a pretext to reject a significant percentage of CLEC orders. The problem relates to all types of loops. If the CLEC is willing to pay the cost of special access, the ILECs routinely make the service available without “no facilities” issues. ILECs must be required to provide non-discriminatory provisioning to CLECs. ILEC policies on “no facilities,” and Verizon’s approach, in particular, help to stymie the robust growth of local competition and the Commission should halt this arbitrary and anti-competitive behavior.

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Mpower Communications Corp. ("Mpower") hereby submits its Reply Comments on the issues raised by the remand of the U.S. Court of Appeals for the D.C. Circuit in USTA v. FCC, No. 00-1012, Decided 5/24/02, as well as by the commenters on the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking ("NPRM") in its Triennial Review of UNE Issues.¹

I. Introduction

Mpower notes that in Initial Comments, there is almost complete agreement among non-incumbent local exchange carrier ("ILEC") commenters on one issue: Little

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Docket No. 01-338, Rel. 12/20/01, ("*Triennial NPRM*").

has changed since the UNE Remand² as far as competitive local exchange carriers' ("CLECs'") need for unbundled network elements ("UNEs"). CLECs need UNEs and they need at least the ones the FCC has already required.

Of foremost importance is providing CLECs with access to the "last mile." As Mpower emphasized in its Initial Comments, the old copper networks are gradually being augmented and replaced by fiber and the resulting availability of broadband packet technology is producing a convergence of these systems. Voice, as well as data, is already being transmitted in packets over broadband networks. Consequently, it is increasingly difficult to predict what combinations of technology and facilities will be necessary in the future to reach customers with competitive choices. This is particularly true for loops. Therefore, it seems very likely that CLECs will need additional end-to-end UNEs in the future, including fiber-based UNEs, to assure continued access to ILEC networks and CLEC customers as fiber increasingly replaces copper and digital loop carriers ("DLCs") are used to expand ILEC networks.³

It is also true, however, that certain specific UNEs exist today and many commenters dealt more specifically with the nature of and need for today's UNEs. Mpower supports numerous comments of this type which were filed by other parties, including both CLECs and Commissions.

² *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Rel. 11/5/99 ("UNE Remand").

³ Telcordia Technologies "DLC Deployment Statistics" (July 2000):

- DLC continues as the primary ILEC vehicle for growth of new lines.
- 88% of the 11.9 million lines added to ILEC networks in 1999 were via DLCs.
- Nationally 28.4% of working lines are served by DLC.
- Most new DLC deployment is fiber-fed and 75% of all existing DLC lines are fiber fed.

Quite notable on a “big picture” basis was Sprint’s comparison of the break-up of AT&T and the development of a competitive long distance market with the process the industry is undergoing today in trying to encourage competition for local service. Sprint pointed out that originally AT&T opposed the FCC’s requirements that resale be made available without restriction but that today all network-based interexchange carriers (“IXCs”), including AT&T, compete vigorously for reseller customers. Sprint further affirms that today no IXC is actively working to eliminate resale and shared use requirements, even though the long distance market is fully competitive. Sprint concludes that:

Ultimately, it is in the interest of any ILEC to have the largest and best facilities-based network in its market, and not to allow any competitor to grow to rival its scale and scope. Thus, even if competitively provided facilities were available on a wide enough scale that the impairment test were no longer satisfied, retaining the legal obligation to make UNEs available should not work a hardship on the ILEC. The ILEC would want to continue to sell network elements, regardless of these regulatory requirements, to maintain its market position.

* * * *

The fact that the RBOCs oppose unbundling, even in high-density business markets, merely confirms that adequate competitive alternatives do not exist, and that requesting carriers are still impaired today.⁴ (Emphasis added.)

Today, there are three broad choices:

- 1) Have no UNEs and return to a monopoly/duopoly situation. Congress has spoken through the Telecommunications Act of 1996 (“1996 Act”). This is no longer an alternative.

⁴ Sprint Comments, Triennial NPRM, 4/5/02, pp. 16-17.

- 2) Make UNEs work. This is the goal of dockets like this one and includes determining what UNEs should exist, how they should be delivered and ultimately, how long they should be available. As Mpower will note in more detail below, UNEs need to be given a chance to work before there are serious discussions about removing any.
- 3) Stalemate. If after the best efforts of the parties, the regulators and the courts, the system continues to be wracked with uncertainty and disputes, it may be necessary to undertake a structural separation of the ILECs to provide nondiscriminatory access to all, as required by the 1996 Act.⁵

It seems clear to Mpower that the parties need to work together to make the second alternative work and that only as a last resort should there be recourse to the regulators. There is a framework. It has largely been validated through the Courts. Now is the time to make Congress' plan for developing competition effective for all – CLECs, ILECs and customers.

II. U.S. Court of Appeals Issues

The U.S. Court of Appeals (the “Court”) remand raises yet again many of the ILECs’ continuing positions. Mpower will deal with each of the major issues which seem to trouble the Court.

A. Transport: Self-Provisioning or Leasing from ILEC and Non-ILEC Providers

Transport is a major concern to the Court, as well as in this docket. Transport must be broken down into its components in order to be adequately analyzed. First of all,

⁵ The EU is at the point of suggesting that this step may be necessary in Europe. *Wall Street Journal*, “EU May Force Phone Giants to Assist Rivals,” July 9, 2002.

long haul transport must be separated from local transport. The vast majority of today's fiber route miles are deployed as intercity "long haul" networks, which do not constitute local competition and are not subject to UNEs.

Thus, the two portions of the network of greatest importance in this docket, are the interoffice network and the outside plant network. A key aspect of analyzing the interoffice network is the fact that CLECs never completely duplicate the ILEC's interoffice network but always select a specific number of central offices ("COs") in which to establish their "footprint." It is also clear, however, that because this type of build-out provides only a limited amount of duplication, it is predicated upon a continued use of ILEC facilities. These non-duplicated ILEC facilities are among the facilities the ILECs wish to remove from availability as UNEs.

The outside plant network consists of loop facilities that connect customers to central office switching nodes. Besides the countless miles of copper cabling deployed over the last century, the outside plant is increasingly augmented by fiber facilities and electronic systems such as DLCs. While individual loops cover relatively short distances, they provide connectivity to a vast number of locations. Such "last mile" facilities represent the bulk of the capitalization of the public switched telephone network ("PSTN") and are consequently the hardest for any CLEC to replicate.

The long haul network is largely competitive and the "last mile," which constitutes 90% of network investment expense, will probably never be fully competitive on the basis of multiple providers of facilities-based network. Thus, in this docket, the key issue is interoffice transport. This is not new ground, however. It has been covered in numerous dockets by numerous commenters. In this docket, for example, the

comments of ALTS et al.⁶ cite WorldCom comments in the Hi Cap proceeding⁷ which, in turn, cite, in part, BellSouth data in one of its pricing flexibility petitions. In each instance, the data show that interoffice transport is far from ubiquitous. WorldCom, as one of the largest alternative providers of interoffice transport, pointed out that “even the largest self-providers of transport must rely on ILEC transport for most interoffice routes.”⁸ (Emphasis supplied) Mpower can verify the accuracy of WorldCom’s statement. Of Mpower’s nearly 600 collocation sites, less than a quarter of these can be directly connected to WorldCom’s substantial metropolitan infrastructure. Thus, WorldCom is unable to serve more than 75% of the COs utilized by Mpower without the use of transport UNEs.

Recently, the President and CEO of American Fiber Systems, David Rusin, told the All-Optical Networks Conference in Miami, “There is no fiber glut in mid-size American cities,”...There may be too much long-haul fiber running between cities, but trying to find quality continuous fiber rings around mid-size cities is nearly impossible. Fiber is not fiber, and metro is not long-haul.”⁹

Mpower has regularly assessed the availability of dark fiber facilities from both ILEC and third parties. To date, given the relative unavailability of fiber, as well as the costs and time frames, Mpower has not been able to undertake the development of its

⁶ *Comments of The Association for Local Telecommunications Services, Cbeyond Communications, LLC, DSLnet Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, New Edge Network, Inc., Pac-West Telecomm, Inc., PaeTec Communications, Inc., RCN Telecom Services, Inc. and US LEC Corp* (“ALTS Coalition Comments”), Triennial NPRM, 4/5/02, p. 63.

⁷ WorldCom Comments, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport* (“High Cap Petition”), CC Docket No. 96-98, 6/11/01, p. 15.

⁸ *Id.*, at 16.

⁹ AFS Press Release, 4/30/2002, available at http://www.americanfibersystems.com/html/news/news_releases_043002.htm

own fiber ring architecture in any of its markets. It is not feasible to “self-provision” from a combination of third party and ILEC fiber, let alone from third party providers independently.

Further, Mpower would like to emphasize that CLECs should not have to replicate the ILEC networks unnecessarily. The 1996 Act specifically provides for three methods for interconnection: a) interconnection with fully facilities-based carriers, b) UNEs and c) resale.¹⁰ Sprint put the ILECs’ emphasis on fully facilities-based competition into practical perspective when it said in its Comments: “Surely each CLEC cannot be expected to build to 100% of the market when dozens of CLECs combined have less than a 10% share of the market.”¹¹ Sprint’s practical comment does not even remind the parties that the ILECs also have had 100 years to build their networks, whereas most CLECs have existed for less than six years.

B. Interoffice Transport in 50 Largest Cities

The Court recognizes that there is at least some competition in the area of transport and asks why CLECs are impaired. This has been an area of some debate but almost all non-ILEC commenters agree CLECs will be impaired without ILEC transport. Based upon Mpower’s current “footprint,” Mpower would be severely impaired without access to ILEC interoffice transport.

¹⁰ 47 U.S.C. 251(c)(2)(4)

¹¹ Sprint Comments, p. 21.

i) Alternative Interoffice Providers

There is a limited amount of competition for interoffice transport. Although it may superficially appear that a multiplicity of carriers are selling service into “their own” fiber backbone, only a select few providers have actually installed new fiber cabling into the ground. The remaining companies either lease their capacity directly from these providers or indirectly through a sublet arrangement with one of the lessors. Alternately, some providers have leased fiber capacity from an ILEC via dark fiber UNEs. In some markets, however, even an ILEC’s fiber facilities may, in fact, be provided by another carrier.¹² Such interdependencies create a “house of cards” where the failure of a single provider may place a substantial number of other carriers at risk. It is worth noting that many of the largest metro transport providers are either in bankruptcy, e.g. Metropolitan Fiber Networks, XO, Yipes, or face significant uncertainty over their long-term viability, e.g. WorldCom.

In nearly every market, the available metro transport providers have provisioned facilities to the same limited number of COs while the majority of COs are served only by ILEC facilities. While this is due in part to the interdependencies described above, this is primarily because most metro fiber providers have focused on serving the same subset of the largest businesses in a given market and installed their facilities accordingly.

¹² For example, BellSouth has leased dark fiber capacity from FPL FiberNet “throughout Miami-Dade, Broward and Palm Beach counties” according to a press release issued on 4/11/2001 (<http://www.fplfibernet.com/news/contents/01038.htm>).

In fact, much of today's alternate transport provider footprint was in place before the 1996 Act when "Competitive Access Providers" such as Metropolitan Fiber Systems (now a part of WorldCom) and Teleport Communications Group (now AT&T Local) competed for the same group of the largest enterprise customers. These large business customers reaped the benefits of competition well before 1996. If transport UNEs were taken away, few additional customers would realize competitive benefits beyond this top 5% of companies.

Mpower, on the other hand, serves a wider spectrum of customers. The larger network "footprint" required to reach these customers is also the reason that companies like Mpower cannot obtain broad coverage from alternative interoffice transport providers among the COs where it provides service.

ii) Mpower Access to Alternate Transport

Mpower presently provides services in 27 metropolitan areas in 8 states. Mpower is collocated in nearly 600 ILEC COs in these markets and has access to nearly 12 million addressable business lines. Mpower offers integrated voice and data services to small and mid-sized businesses, in particular. Its service packages include POTS (plain old telephone service), DSL (digital subscriber line) and T-1-based services.

Mpower owns its own switches, along with collocated equipment at the ILEC COs, and leases transport and loops, the "last mile" of telephone line. Each of Mpower's collocation sites requires transport to provide connectivity to the Mpower aggregation and switching facilities. Overall, even in the COs utilized by Mpower primarily for business customers, approximately half the transport it uses would be unavailable if ILEC transport UNEs did not exist.

In order to identify more specifically the circumstances Mpower would face, it compiled extensive data on third party transport for each of the markets where it provides service. In doing so, it obtained data from more than 20 parties that offer transport services to other providers.

To understand the nature and availability of such services, it is helpful to describe the general categories of companies from which some transport services might be obtained.

- i) Fiber wholesalers. These companies install fiber networks primarily to service enterprise business customers and business parks and are likely to offer exclusively dark fiber, rather than wholesale private line services such as DS1, DS3, etc. These companies collocate at a small number of ILEC COs and are generally unavailable to serve broadly collocated companies like Mpower.
- ii) Interconnect wholesalers. These companies predominantly sell inter-LATA services to other carriers and to enterprise customers. Typically, they are located at “carrier hotels” and would provide any services to the metropolitan area only through the resale of UNEs.
- iii) Private line providers possessing their own fiber plant. Typically these carriers sell private line service to businesses but may also sell to other carriers. The numerous locations not on their fiber network are reached only by means of resale via transport UNEs. In some instances, transport among the provider’s collocation sites is provided exclusively by means of transport UNEs, typically DS1s, DS3s or dark fiber, from the ILEC.

Those particular companies, therefore, cannot function at all in the absence of transport UNEs.

- iv) IP-over-Ethernet providers. These companies have built a fiber network primarily to support business customers but may be collocated at some COs. While such services might be used under certain circumstances, e.g. for data and/or packet voice, they can be utilized with traditional telecommunications equipment only by installing proprietary TDM-to-packet hardware and are not generally compatible with the private line needs of most carriers.

Clearly, of potential third party transport providers, 1) none of them focuses their business on providing transport to third party carriers with a substantial “footprint” and 2) all of them must rely in large measure on transport UNEs to serve other carriers in any meaningful way.

The only carriers whose networks overlap the ILEC COs broadly are carriers similar to Mpower, which have large numbers of collocations in order to offer services to small and medium-sized businesses. Predictably, such carriers have been hurt dramatically by the market downturn. Forcing CLECs to rely on networks of companies on shaky financial footing can only increase the uncertainty of their own position in the marketplace.

Alternative Transport Facilities Available at Mpower Collocation Sites

No Alternative Provider	1 Alternative Provider	2 Alternative Providers	3 Alternative Providers	4 or More Alternative Providers
48%	32%	13%	5%	1%

As noted above, without UNE availability, Mpower would be totally unable to serve approximately half its collocations. In 32% of its collocations, it would have access to one alternative provider. At 13% of its collocations, it would have a choice between two alternative providers of transport – a duopoly. In a mere 5% of its collocations Mpower would have a choice among three alternative providers. It could meet Allegiance’s¹³ suggested standard for competitiveness in only 1% of its collocated facilities. Thus, Mpower would be severely impaired without transport UNEs. If transport UNEs were eliminated, those areas with the least competition would be damaged the most.

C. Geographic Uniformity

The Court seems to believe that the FCC in choosing to adopt a uniform national rule for unbundling has somehow neglected “the state of competitive impairment in any particular market” and that UNEs might, therefore, “be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment.”¹⁴ Mpower will deal with the Court’s concerns about the effects of cross-subsidization in various markets in a subsequent section. At this juncture, Mpower will only deal with the issue of geographic uniformity.

First, a mere six years ago, the ILECs had a nearly total monopoly in local service. CLECs have been struggling for adequate rules to facilitate the development of competition during that entire period and trying, in the meantime, to build competitive businesses in the face of aggressive opposition by ILECs before regulators, courts and legislators and determined foot-dragging in day-to-day business relations. Just how

¹³ Allegiance Comments, Triennial NPRM, 4/5/02, p. 5.

¹⁴ *USTA v. FCC*, 290 F.3d 415, 422 (USCA, D.C. Cir., 5/24/02).

might this purported lack of competitive impairment have developed? There is no evidence of such a state of affairs in the thousands of pages of records in dockets of the FCC and the state commissions.

Secondly, the Court indicates that despite statements that a geographically discrete system is unworkable, the FCC has, in fact, used such a system for switching. Mpower sees no evidence that the FCC has used a geographically discrete rule for switching. While it is true that the rule treats geographical areas of different sizes differently, the rule is a uniform one. It says:

Notwithstanding the incumbent LEC's general duty to unbundle local circuit switching, an incumbent LEC shall not be required to unbundle local circuit switching...when the requesting telecommunications carrier serves end-users with four or more voice grade (DS0) equivalents or lines, and the incumbent LEC's local circuit switches are located in: (i) The top 50 Metropolitan Statistical Areas....(ii) In Density Zone 1.¹⁵

The FCC did not, nor should it, separately research each of these metropolitan areas, develop statistics on numbers of users and how they are served, etc. It made a general rule that in the densest serving areas of the largest cities, CLECs would have to serve their customers without the use of ILEC switching. It did so, in part, based upon general numbers.¹⁶ The Commission, however, specifically rejected a geographic or market-specific approach, stating that:

Incumbent LECs use the geographic dispersion of deployed local circuit switches to argue for a geographic or market-specific approach to circuit switch unbundling. Certain incumbent LECs further argue that the presence of one competitor's switch and collocation in a given market is dispositive of whether requesting carriers generally will be impaired without access to unbundled switching. We reject this argument.¹⁷

¹⁵ 47 CFR 51.319(c)(1)(B)

¹⁶ "SBC...contends that within the 50 largest MSAs, competitors' switches currently serve approximately 75 percent of all BOC and GTE rate exchange areas." UNE Remand, ¶ 254.

¹⁷ *Id.* at ¶ 256.

Further, this is not a feasible approach for the future. The rules are already complicated. Most companies, ILEC and CLEC alike, are multi-state entities. Market-by-market analyses would lead to much additional complexity, while also perpetuating regulatory uncertainty. It would be overwhelmingly difficult to make sensible, effective business plans if the rules essentially required different plans, equipment and strategies in each market. In addition, the amount of time and resources needed to undertake and present in-depth market-by-market analyses are simply prohibitive, even if most CLECs were not struggling just to remain in business. Such granularity is not only unworkable, its effects would be very anti-competitive.

The whole issue of geographic diversity is also fraught with proof problems. Questions of competitiveness are also exacerbated by opportunities for cross-subsidization. Should the Commission proceed along this path, the burden of proof must be squarely and overwhelmingly on the ILEC postulating competitiveness.

Also of great importance at this juncture, as almost every non-ILEC commentator attests in their comments, CLECs need the UNEs they have. They have had very little time to utilize these UNEs to build their businesses. It is far too soon to begin removing them, even if removing them were a sensible goal. Competition in long distance, while physically and administratively much simpler, took more than a decade. The 1996 Act is still relatively new and CLECs are still “impaired” in their ability to compete.

Furthermore, the rules established under 1996 Act have had almost no time to operate as a reasonably complete system. Due to incessant ILEC attacks on the rules before regulators and in the courts, the rules proposed by the Commission have yet to reach a stable state. ILEC challenges have made their way to the U.S. Supreme Court

twice during the short life of the 1996 Act, with the U.S. Supreme Court decision on pricing coming only weeks ago. ILECs have created this instability with their constant challenges and foot-dragging and they should not be able to take advantage of that fact to prematurely deprive CLECs of UNEs and customers of choices.

Numerous commenters have presented the case in this docket that CLECs continue to need the UNEs they have been awarded. Mpower supports and expands on some of these comments in this Reply. Sprint's comments, above, should also be remembered. The very fact that the ILECs continue to try to prevent CLECs from being able to buy wholesale products rather than competing with each other to sell wholesale products to CLECs is indicative of the lack of a competitive marketplace for local services.

D. The Cross-Subsidization Question

The Court describes a widespread system of undercharges for rural and residential users and overcharges for urban and business services and concludes that this gives the CLECs an advantage. While residential services are often subsidized by business services, this is hardly a widespread boon to CLECs. In fact, it tends to preclude CLECs from being able to compete to serve residential customers at all. As to business services, basic charges for business services may also be subsidized – by directory revenues, in particular – and this may make it difficult or impossible for CLECs to compete for small business customers.

The reasons for this are not nearly as simple as the Court presumes, however. First of all, urban and rural services are not necessarily combined. Often such services are provided by different carriers. Even when they are provided by a single carrier, there

are almost always proportionately fewer rural customers. Second and even more important, high cost, rural carriers are the primary recipients of universal service. Universal service charges are paid by virtually all telecommunications carriers and are not met just by the ILEC involved. Further, high cost, rural carriers for the most part are exempted by the 1996 Act from having to provide wholesale services and trying to compete with new carriers.¹⁸

Despite the fact that such anomalies are induced by unreformed monopoly practices, the Court wrongly assumes that they can and will appropriately continue. In fact, as Mpower has periodically advocated, the “answer” to this problem is residential rate re-balancing. When ILECs subsidize major product charges so that their retail costs are not covered by their pricing, this makes it much more difficult for CLECs to compete. Obviously, it is not a healthy competitive practice and when undertaken by monopolies or dominant carriers can also lead to anti-trust suits. When ILECs try to raise their retail prices to cover costs and are not allowed to do so, this can lead to competitive anomalies for ILECs as well as CLECs. The appropriate response, however, is not to continue the practice but to enforce rules that retail product prices at least cover the costs of providing them. Where those rules may not exist, they should be instituted or competition will not flourish.

E. What Constitutes Competition?

The Court calls competition performed by means of ILEC facilities “synthetic competition” and implies that it should not “count.” Again, the Court seems to lack adequate familiarity with the nature of competition in the telecommunications sector.

¹⁸ 47 U.S.C. 251(f)

First of all, intra-modal competition, via UNEs and resale, is a significant part of what the 1996 Act was all about. Three methods of competition were provided: interconnection with fully facilities-based carriers, UNEs and resale.

Typically the first step toward competition is the use by multiple providers of the monopoly facilities. When the long distance market was being opened to competition, if the courts had rejected MCI's requests to use AT&T's network as being "synthetic competition," AT&T would probably still be the monopoly provider in the long distance market and Americans would not be calling coast-to-coast for 5 cents a minute or less.

Secondly, without intra-modal competition, there would be very little to call competition. Local voice services are dominated by ILECs. Broadband is "now largely controlled by two oligopolies: the cable industry...and the Baby Bells."¹⁹ Without effective CLEC access to ILEC networks, there will be no guarantees of competition for either broadband or narrowband services²⁰ and no ready means of transition to a more competitive marketplace.

Broadband is controlled by two oligopolies. This means intra-modal telecommunications services are dominated by the Bells, whereas inter-modal services are a duopoly. Duopolies do not compete on price. Thus, without CLECs, there is no real competition at all. If competition is a desired goal – and the 1996 Act indicates that it is -- CLECs are necessary to avoid monopoly or duopoly.

¹⁹ *Wall Street Journal*, "Plugging In: Tech lobbyists Seek Bonanza in New Push for Speedy Internet," 1/18/2002.

²⁰ Note that packetized voice is a broadband service and that the transition from POTS to "POTS in packets" has already begun. See, for example, Sprint Comments, p. 18.

Further, given the tenuous financial conditions of most CLECs today, it would likely be impossible for CLECs to deploy a third local wireline network nationally in the near future. While wireless and satellite technology are moving forward at a significant pace, there are still cost issues, transmission delay problems and spectrum constraints. As a result, it will likely be many years before fixed wireless or satellite systems present a serious challenge to the ILEC networks.

Consequently, Mpower believes that the sharing of networks must be mandatory. Mpower sees two major alternative means of providing the needed sharing of networks: 1) the effective implementation and enforcement of appropriate UNEs or 2) structural separation, such that telecommunications networks become wholesale businesses equally open to CLECs and ILECs alike.

Failure to share networks effectively is a significant obstacle to competition and without such sharing, the end result will certainly be re-constituted monopolies. Although Mpower believes it is economically necessary to share networks – especially as fiber deployment provides almost unlimited capacity – there are mutual benefits to doing so. The ILECs from whom most network elements are leased receive numerous benefits from being able to “sell” capacity on their networks. First, selling a portion of their network capacity helps to “fill the pipes.” Second, such wholesale business can become a significant source of revenue for ILECs. Third, such wholesale business helps to pay for new investment. Fourth, since investment in fiber purchases enormous capacity, the use by CLECs of some of this capacity is efficient because it makes greater use of the investment at an earlier date. Just as with long distance, such openness is the best route to true competition.

F. TELRIC

The Court seems to buy into the ILEC theme that wholesale prices at TELRIC are “below true cost.” Such a stance is very difficult to reconcile with the recent ruling of the U.S. Supreme Court approving TELRIC principles. One would hope that the industry could move on. As reasonable individuals should have discovered by now, TELRIC is intentionally forward-looking. Almost by definition, the costs of new investments are covered by forward-looking cost models. Since fiber investment is a forward-looking or future oriented investment, its costs are among those most likely to be covered effectively. Further, current statutory definitions provide for the inclusion of a fair profit. This should operate to the advantage of ILECs reselling access to fiber and other new investments. As to the old copper plant, these investments were constructed long ago and under monopoly conditions, which certainly do not provide a good estimation of “true costs.” Further, such copper plant investments have been paid for by ratepayers over many years.

TELRIC operates on economic principles. The continuing subsidies of residential and other non-business users, however, result from political agendas. ILECs quietly conform to political pressures to avoid raising residential rates to cover costs. This is an ILEC problem and a political problem and should not be allowed to become an economic problem for CLECs.

If ILECs are losing money, it is not because of TELRIC pricing. They are losing some of their big business customers because of over-pricing. To the extent they are trying to replace monies needed for continuing politically motivated subsidies, the answer is rate re-balancing and the “rationalizing” of other skewed rates and practices so that

prices generally cover costs. Changing appropriate wholesale costing and pricing will not bring the desired financial results. It will only hamper the development of competition.

G. Investment Incentives

The Court again seems to have taken ILEC arguments at face value. Noting that CLECs have provided evidence that there has been considerable investment in plant, it said: “But the existence of investment of a specific level tells us little or nothing about incentive effects. The question is how such investment compares with what would have occurred in the absence of the prospect of unbundling.”²¹ This is the situation that existed prior to the 1996 Act! There is no question that investment has vastly increased.

The Court also said the FCC must point to something “a bit more concrete than its belief in the beneficence of the widest unbundling possible.”²² One major factor is the significant changes that are taking place in network expansion. Fiber is gradually augmenting and replacing copper. DLCs are constantly being inserted into lines and increasingly voice as well as data is traveling over fiber. There is a convergence not only of the copper and fiber networks but of the voice and data systems as well. This makes it more and more difficult to predict what combinations of technology and facilities will be necessary to reach customers with competitive choices.

Every customer, wherever located, should be assured a competitive choice. To accomplish this, CLECs must be able to get to their customers regardless of the nature of the network and regardless of the equipment used by the ILEC. In the future, it will not be effective to mandate the availability of a copper loop, if most voice and data traffic

²¹ *USTA v. FCC* at 425.

²² *Id.*

travel over fiber. Likewise, it will not be very useful to mandate the availability of a copper loop from a DLC to a customer's premises, if the signal cannot travel from a CLEC's collocation at a CO to the DLC because of fiber in the line. It would also be untenable to de-regulate "broadband," if this means that CLECs cannot order T-1s or EELs (enhanced extended links) or their equivalent. Without access to high-speed or "broadband" facilities, as well as copper, CLECs simply will not be able to provide service to their customers. Competition will fail, along with CLECs .

Thus, Mpower believes the focus should be on access to an "end-to-end" UNE loop that allows CLECs to reach their customers regardless of the technology and equipment used by the ILEC. Mpower also believes that it may be difficult to explicitly incorporate types of technology and equipment into the definition of a loop or UNE without having an impact on ILEC choices. Neither CLECs nor ILECs should be required to rely on specific network technology and/or equipment. This would be unfortunate for CLECs, ILECs, customers and competition.

The Court also seems to think that the new entrant in the telecommunications marketplace is no differently situated than "any new entrant in any sector of the economy, no matter how competitive."²³ It is rather hard to fathom why and how the Court came to this conclusion, given that ILECs had nearly full monopoly status a mere six years before and that no CLECs – even those with fully independent facilities – can enter the marketplace without at least interconnecting with the ILEC. Further, the 1996 Act provided for three means of entering the telecommunications marketplace, two of

²³ *Id.* at 426.

which make the CLEC largely dependent upon the ILEC for important segments of their network. The Court goes so far as to state that it needs to see “[a] cost disparity approach that links ‘impairment’...to natural monopoly.”²⁴ While, in fact, such links likely exist, there is nothing in the statute which indicates such a requirement.

H. Impair Test

The Court suggests that the impair standard is still too broad and that the remedy for this is to root any analysis in “the competing values at stake in implementation of the Act.”²⁵ While the “spirit” of the law is always important in interpreting the “letter” of the law, it is neither legal nor practical to override the words of the statute by weighing some vague sense of the legislative “values” which may have been accommodated in adopting those words. It is hard to imagine how one would even approach such a task.

From a factual standpoint, as many commenters have attested and as Mpower would agree, CLECs would be materially impaired in their ability to offer products they wish to offer in the absence of UNEs. This is likely to continue indefinitely for loops since it is only financially feasible to duplicate them for the largest customers and the increasing deployment of fiber makes the available capacity so great that duplication may be entirely counterproductive. This makes the need to share such facilities by means of UNEs even more crucial.

Further, the importance of controlling the “last mile” should not be underestimated. It was recently reported that:

As monopolies that control the proverbial ‘last mile’ of wires going into homes and businesses, the four Baby Bells have benefited greatly from the established customer bases that provide a steady, predictable revenue stream at a time when much of the rest of the telecom industry is teetering on the brink of insolvency.

²⁴ *Id.* at 427.

²⁵ *Id.* at 428.

And by maintaining a de facto lock over these wires – the local loops – even as regulators have fought to open their networks to competition, the Bells have been in a commanding position in the telecom wars. ‘It turns out that the most valuable asset is the last-mile wire,’ said Mark Cooper, director of research for the CFA. ‘If you own the wire, you own the customer.’²⁶

Since loops are the most significant bottleneck in the ILEC network, it is essential that loops be available to CLECs and that ILECs not be allowed to use technical excuses to avoid providing useable loops to CLECs. In this regard, as the ALTS coalition pointed out, ILECs must be prevented from claiming that they have “no facilities” for CLECs when the issue is that they merely do not wish to take a simple step they would take for their own customers such as connecting the necessary electronics.²⁷ ILECs are required to provide CLECs with “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”²⁸ “Nondiscriminatory” does not and should not mean that the ILEC can discriminate against all CLECs equally. It means that CLECs should have access equivalent to the ILEC.

Similarly, for a variety of reasons CLECs have often purchased network elements off ILEC tariffs, instead of obtaining UNEs. Sometimes, UNEs were not initially available. Sometimes, ILECs deliver the equivalent tariffed product faster. Sometimes errors were made. CLECs may now be attempting to convert tariffed services into UNEs, using the identical facilities. This should typically be a “paper transaction,” which

²⁶ *San Jose Mercury News*, “Baby Bell Phone Firms Outlast Their Rivals,” 6/28/02.

²⁷ ALTS Coalition Comments, pp. 113-117.

²⁸ 47 U.S.C. 251(c)(3).

changes the billing status. Nevertheless, some ILECs have dragged their feet for many months and proposed huge transfer fees. This is another way that ILECs interfere with competition, by interfering with CLECs' access to UNEs.

These are significant examples of the fact that UNE loops still have not been fully provided, pursuant to statute. It is far too early to contemplate removing UNEs when the UNE system has not even been fully implemented to date.

As the ALTS coalition indicated in its Comments, interoffice transport might in time become competitive but alternative forms of interoffice transport are not presently available in a sufficient percentage of locations to offer a practical, economic or operational alternative to the ILEC in most instances.²⁹ Mpower has provided support for this same conclusion, above, based upon its own experience in the markets it serves.

As noted in some detail above, Mpower also believes that ILEC networks are undergoing fundamental transformations over a period of time. It is crucial that the implementation of UNEs take into account those changes so that CLECs do not suddenly find themselves lacking access to their customers merely because of evolutionary network changes.

III. The Commission Must Require that Loops Be Made Available Ubiquitously

ILECs do not have a consistent policy on the availability of loop facilities. The ILEC position ranges from SBC's CLEC-friendly policy of working with CLECs to obtain an available facility to Verizon's illegal "no build" policy. Mpower urges the

²⁹ ALTS Coalition Comments, pp. 60-61.

Commission to mandate that ILECs unbundle access to all local loops. Mpower further urges the Commission to take any subjectivity out of the issue and provide clear and concise language that loops shall be made available to CLECs everywhere the ILEC offers retail voice or data services.

A. Verizon’s “No Facilities” Policy is Unlawful

Mpower operates in Verizon’s former GTE territories in California and Florida. In those areas, Verizon routinely denies Mpower access to UNEs under the pretext that “no facilities” are available. In almost every instance, however, the prospective customer either has service with Verizon or can order service and have it installed within one week. Mpower concludes that Verizon’s “no facilities” policy means it does not believe it must unbundle loops in certain types of situations.

The ALTS coalition argued in its Initial Comments that the Verizon “no facilities” policy is unlawful, being based upon an erroneous reading of the Eighth Circuit’s decision regarding the Commission’s “superior network” rules.³⁰ Mpower supports the interpretation of the ALTS coalition. The Eighth Circuit’s ruling that ILECs need not provide “superior network”³¹ does not justify Verizon’s policy of declining to provide loops that it provides to its own customers as part of its existing network.

“Network” means the type of technology and facilities the ILEC currently deploys, as it ordinarily deploys them. Thus, the existing network includes the types of electronics that ILECs ordinarily attach to a loop, even if such electronics are not

³⁰ *Id.* at p. 112.

³¹ *Iowa Utilities Board v. AT&T*, 120 F.3d 753, 812-813 (8th Cir. 1997, *appealed on other grounds*, 119 S.Ct 721 (1999)).

attached to a particular loop. It does not constitute the provision of new network to attach routine electronics to a loop. Further, Verizon's obligations under 47 U.S.C. 251(c)(3) are not defined by whether Verizon's technicians remove equipment from or add equipment to the loop. The Commission recognized this principle in its loop conditioning rules when it indicated that the ILECs have an affirmative obligation to make modifications to their facilities pursuant to 47 U.S.C. 251(c)(3).³² The requirement that ILECs perform routine enhancements to loops is a reasonable condition of the provisioning of loops and other UNEs.

B. ILECs Use “No Facilities” Policies as a Barrier to Competition

The ILECs use “no facilities” policies as a pretext to reject a significant percentage of CLEC orders. As a result, Mpower has been forced to develop a “no facilities” escalation process in order to obtain such loops. In fact, Mpower has obtained some 2000 loops despite ILEC determinations that “no facilities” exist. The extra hurdle imposed by this process, however, typically adds up to 45 days to the provisioning process. The impact is often that customers cancel their service order with Mpower.

The problem relates to all types of loops. In the case of T-1s, many ILECs say that “no facilities” are available because a mid-span repeater is needed. In other cases, the ILECs do not wish to install a “smartjack” at the customer's network interface device (“NID”) – where ILECs are obligated to cross-connect the loop to the customer's inside wire. At other times, they require an exorbitant fee to complete the provisioning.

³² *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers* (“Local Competition Order”), CC Docket Nos. 96-98 & 95-185, First Report and Order, Rel. 8/8/96, ¶ 382.

If the CLEC is willing to pay the cost of special access T-1s, however, the ILECs routinely make the service available. Since ILECs provide enhancements to loops they provide to their own special access and other customers, they must be required to provide the same enhancements to CLECs to avoid discriminatory provisioning of UNEs. ILEC policies on “no facilities,” and Verizon’s approach, in particular, help to stymie the robust growth of local competition and the Commission should provide clear rules that halt this arbitrary and anti-competitive behavior.

IV. Conclusions

Non-ILEC commenters in this docket have uniformly agreed that CLECs continue to need all the UNEs the rules currently provide. In these Reply Comments, Mpower has provided an analysis of each of the Court’s major objections to the proposition that existing UNEs continue to be made available for some reasonable period of time into the future. Commission rules have only recently been affirmed by the U.S. Supreme Court – for the second time. A period of certainty and stability is much needed.

Mpower has also provided additional factual support in these Reply Comments for the continued need for interoffice UNE transport. If or when it becomes appropriate to consider the possible reduction of UNEs, the approach of geographic diversity is not a workable approach. Cross-subsidization continues to flaw the economics of the debate. Without intra-modal competition there is no competition since there would be only monopoly or duopoly. Intra-modal competition is mandated under the 1996 Act and it needs a chance to thrive. At the same time, network architecture is changing. Despite these changes, CLECs must continue to have sufficient access to ILEC networks to serve their customers. This may affect the specific nature of UNEs over time.

As this debate continues, however, Mpower once again challenges the parties to take a more affirmative approach to their destinies. The fighting has been costly to all concerned. The regulators have acted. The Courts have affirmed. There are undoubted benefits to all from a functional, competitive telecommunications industry. This was proven in the long distance arena. The industry is undergoing yet another change. The industry should look forward and not back. It should cooperate to shape a better future for all, rather than continuing to fight over the crumbling pieces of the past.

Mpower continues to hope that CLECs, ILECs and their trade associations will finally begin to show some leadership in fostering business solutions for the telecommunications industry as a whole. The time for taking only narrow, self-serving positions is over. The ILECs have spent years trying to prevent competition. It is time they begin to understand how competition benefits consumers, the industry and themselves.

Respectfully submitted,

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