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 UNE PLATFORM COALITION

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REPLY COMMENTS OF THE UNE PLATFORM COALITION

The UNE Platform Coalition,[1] (hereinafter the "UNE-P Coalition," "Coalition," or "Joint Commentors"), through counsel, hereby submits its reply comments in the above-captioned proceeding. The UNE-P Coalition is composed of 16 companies who have invested more than a billion dollars developing a diverse base of facilities, operational infrastructure and innovative software applications, and business processes, to compete in the local telecommunications market. The common feature among the members of the Coalition is their use of unbundled local switching ("ULS") and unbundled shared transport in the combination known as the Unbundled Network Element Platform ("UNE Platform" or "UNE-P") to establish a broad competitive footprint and provide conventional voice services to residential and small business customers not sufficiently large to desire higher capacity digital services.

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[1] Joint Commentors include Access Integrated Networks, Birch Telecom, Inc., BridgeCom, CoreComm Limited, Data Net Systems, DSCI Corporation, IDS Telcom, Inc., InfoHighway Communications Corp., ionex Telecommunications, ITC^DeltaCom, MCG Capital Corp., Metropolitan Telecommunications, nii communications, LTD., Sage Telecom, Inc., Talk America, Inc., and TruComm.

I. INTRODUCTION AND SUMMARY

The UNE-P Coalition submits that in this Triennial Review proceeding,[2] the Commission must make a realistic appraisal of where the competitive local marketplace that was envisioned by Congress when it passed the Telecommunications Act of 1996[3] really is today. In doing so, the Commission must develop an unbundling framework that is consistent with both the goals of the Act, as well as with the opinions of Supreme Court in *Verizon v. FCC*[4] and the D.C. Circuit in *USTA v. FCC.* [5]

In *Verizon*, the Supreme Court found that Congress provided the Commission with significant latitude regarding standards for accessing UNEs, including combinations, and for pricing UNEs.[6] In *USTA*, the D.C. Circuit reviewed the Commission's exercise of its authority under Section 251(d)(2) of the Act to formulate the incumbents' unbundling obligations. The *USTA* court's primary and overriding criticism of the Commission's approach in the *UNE Remand Order*[7] was that it did not engage in "granular," or market-specific fact-finding regarding UNE availability, which, in turn, may have resulted in unbundling rules that make

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2 *In the Matter of Review of Section 251 Unbundling Obligations of Local Exchange Carriers*, CC Docket No. 01-339, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Notice of Proposed Rulemaking*, 15 FCC Rcd 22781 (rel. Dec. 20, 2001) ("*Triennial Review NPRM*" or "*UNE Triennial Review*").

3 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("1996 Act").

4 *Verizon Communications, Inc. v. FCC,* 122 S.Ct. 1646 (2002) ("*Verizon*").

5 *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. May 24, 2002) ("*USTA*").

6 *See Verizon*, 122 S.Ct. at 1683-87.

7 *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (rel. Nov. 5, 1999)("*UNE Remand Order*").

UNEs available to CLECs in markets where there is "no reasonable basis for thinking that competition is suffering from any impairment."[8]

The approach advocated by the Joint Commentors herein, as well as in their initial comments, is supported by Supreme Court in *Verizon* and addresses the concerns of the D.C. Circuit in *USTA*. Here, Joint Commentors set forth a roadmap whereby the Commission would adopt an impairment standard which would then be applied by State Commissions consistent with the Act, as well as the State Commissions' own independent unbundling authority. Specifically, the Coalition submits that in light of the decisions in *Verizon* and *USTA,* the Commission should adopt unbundling standards that would be employed by the State Commissions to determine the extent of unbundling that is warranted, taking into account competitive conditions within their jurisdictions. Such an approach is consistent with the "more granular" factual and legal analysis required by *USTA*, as well as the approach sought by the Commission in its *Triennial Review NPRM.*

The course proposed by the Coalition will ensure that federal and State regulators work together to achieve Congress' desire to open local markets, as well as ensure that incumbent local exchange carrier ("ILEC") unbundling obligations adopted by States as an integral component of deregulatory alternative regulation plans continue to have effect. Indeed, recognizing the important role of State Commissions finds broad and deep support in the initial

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[8] *USTA*, 290 F.3d at 422.

round of this proceeding.[9] Furthermore, as the Joint Commentors submit herein, expansion of State Commission authority is fully consistent with – if not compelled by – the *USTA* court's desire for express consideration of sub-national market conditions.

II. THE RECORD SHOWS THAT UNE-P (AND ITS LOOP, LOCAL SWITCHING, SHARED TRANSPORT, SIGNALLING AND OS/DA ELEMENTS) IS RESPONSIBLE FOR THE VAST MAJORITY OF EXISTING MASS-MARKET LOCAL COMPETITION IN THE UNITED STATES, AND THAT UNBUNDLING PROMOTES, RATHER THAN STIFLES, FACILITIES-BASED COMPETITION

There is no question that local competition stands at a crossroads. Competition for mass-market customers is finally beginning to take root after nearly a half decade of ILEC delay in fulfilling their unbundling obligations. The most recent official statistics compiled by the Commission regarding local competition demonstrate that the number of switched access lines provided by CLECs is in decline in many States.[10] Given the state of the market, the Joint Commentors find it unimaginable that the Commission is even considering whether to limit the availability of existing UNEs. Indeed, the *Verizon* court noted that in the absence of UNEs "[a] newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network . . . ."[11]

In recognition of the statutory obligations of the ILECs, not to mention the tenuous state of telecommunications competition that exists today, the Commission should maintain its

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9 *See e.g.* California Public Utilities Commission at 22-24: Florida Public Service Commission at 5-6; Georgia Public Service Commission at 2-4; Indiana Utility Regulatory Commission at 5-6; Louisiana Public Service Commission at 2; Kansas Corporation Commission at 4; Massachusetts Department of Telecommunications and Energy at 3-6; Michigan Public Service Commission at 4-6; New York Department of Public Service at 8; Oklahoma Corporation Commission at 5-6; Pennsylvania Public Utility Commission at 4-7.

10 Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2001* (rel. Feb. 27, 2002) at 2 ("*Local Competition Report*").

11 *Verizon*, 122 S.Ct. at 1662.

existing "necessary" and "impair" standard and UNE access rules,[12] while leaving to State Commissions the task of applying that standard and those rules to the local conditions in their States. Further, the Coalition maintains that, as it demonstrated in its initial comments, State Commissions will conclude that CLECs would be materially impaired in any attempt to provide mass-market telecommunications services if denied access to unbundled local loops ("loops"), ULS, shared transport, and operator services and directory assistance ("OS/DA").

A. Empirical Experience Shows That Unbundling Promotes Facilities-Based Competition

The ILECs claim, without any factual basis, that mandatory unbundling obligations are a disincentive to investment in deployment of facilities-based telecommunications capabilities.[13] However, as the Commission has readily acknowledged, unbundled access to network elements, including unbundled local switching, actually accelerated the development of competitors' alternative networks, allowing them to "acquire sufficient customers and the necessary market information to justify the construction of new facilities."[14] In fact, unbundling is even more necessary in today's economic climate for telecommunications carriers; a recent Wall Street Journal article noted that today, "telecoms don't start to get the full benefit of their fixed assets until they reach very large scale -- with total assets approaching $50 billion."[15]

The Commission's previous finding regarding the benefits of unbundling is in accord with the Supreme Court's decision in *Verizon*. There, the Supreme Court concluded that

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12 *See*, 47 C.F.R. § 51.317 (defining the "necessary" and "impair" standards; *see also, e.g.*, 47 C.F.R. § 51.309 (prohibiting use restrictions on UNEs).

13 *See Verizon,* 122 S.Ct. at 27-32. *See also* SBC at 8.

14 *UNE Remand Order*, ¶ 112.

15 *Wall Street Journal*, July 2, 2002, "When the Telecom Upstarts Act Like the Big Boys, the Trouble Brews."

duplication of costly bottleneck elements "is neither likely nor desired."[16] Therefore, unbundling such elements would not adversely impact any proper deployment incentive. The Supreme Court also concluded that competitors are likely to deploy facilities without any regulatory prompting wherever it is sensible on account of "the desirability of independence from an incumbent's management and maintenance of network elements."[17] In addition, the Supreme Court noted that whether or not different rules "would have generated even greater competitive investment than the $55 billion that the entrants' claim, . . . it suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities."[18] The Court also endorsed "the commonsense conclusion" that so long as there is "some competition, the incumbents will continue to have incentives to invest and to improve their services to hold on to their existing customer base."[19] As the Supreme Court concluded in *Verizon*, it is the threat of competition that is likely to spur incumbent investment in broadband facilities, which is what happened with deployment of DSL technologies after passage of the 1996 Act. The Organization for Economic Co-operation and Development (OECD) similarly concluded, after studying broadband infrastructure issues: "what constrains investment is lack of competition and factors which restrict the ability of new entrants to compete."[20] Real-world experience and marketplace data bear this out.

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16 *Verizon*,122 S.Ct. at 1675.

17 *Id.* at 1670.

18 *Id.* at 1675-76.

19 *Id.* at 1676 n.33.

20 OECD Working Party on Telecommunication and Information Services Policies, *Developments in Local Loop Unbundling* (May 2, 2002) at 15.

B. States Experiencing UNE-P Based Competition Are Significantly More Competitive Overall Than Other States

Market experience has repeatedly demonstrated that achieving broad competition for the typical residential and small business customer requires access to a full complement of UNEs, including local switching. As demonstrated herein, and in the Coalition's initial comments, a UNE-P based local entry strategy has proven successful because it addresses each of the most critical impairments that would otherwise bar entrants seeking to offer "mass-market" services. States where local competition is strongest are those States where UNE-P is most widely available. Four States, New York, Illinois, Michigan, and Pennsylvania, accounted for nearly half of the entire net gain in CLEC access lines in the first half of last year.[21] Looking *inside* the competitive activity in these States demonstrates that the principal driver of growth is UNE-P.

[21] Source: FCC Restated Local Competition Report for December 2000 compared to FCC Local Competition Statistics as of June 2001.

Table 1: CLEC Growth and UNE-P
(December 2000 to June 2001)

State	Growth in UNE-P (RBOC Only)*	CLEC Growth (Statewide) **
New York	278,255	368,319
Illinois	128,248	309,620
Pennsylvania	160,367	252,005
Michigan	165,223	217,348

*** Source: RBOC Response to FCC Form 477 Request.**
**** Source: CLEC Total Lines (Dec. 2000 - updated) and FCC Local Competition Report (June 2001).**

Texas is universally recognized as one of the most competitive markets in the Nation. As the Reply Comments of the Texas Public Utility Commission ("Texas PUC") indicate, in Texas, UNE-P accounts for virtually all (between 88% and 94%) of the net gain in local competition in that State the first half of last year:[22]

Table 2: Importance of UNE-P to Local Competition in Texas
(Lines Provisioned by SWBT)[23]

Entry Strategy	Jan-00	June-01	Gain	Percent of Net Gain
UNE-Platform	148,000	1,210,233	1,062,233	87.9% (94.2%)
UNE-Loop	49,000	143,446	94,446	7.8% (8.4%)
Service Resale	347,000	284,472	-62,528	-5.2% (-5.5%)
Other Facilities	Deleted due to SWBT Proprietary Claim		114,183 (34,079)	9.4% (3.0%)
Total			1,028,344	

22 *See* Reply Comments of Texas Public Utility Commission, CC Docket 01-338 at 6 (filed May 2, 2002) ("*Texas PUC Reply Comments*").

23 *Id.*

The statistics in Georgia tell a very similar story regarding the breadth and depth of UNE-P as a market entry strategy. As shown in Table 2 below, UNE-P is able to support widespread competition, which is a defining characteristic of the mass market. UNE-P enables choice not only in the largest end-offices, but in the smallest, most rural, end-offices as well. Importantly, the competition in the smaller end offices is possible only because of competition in urban areas. Approximately two-thirds of the UNE-P lines in Georgia are in the top two strata. *Because* of competition in these less costly urban markets, UNE-P competitors are able to offer service in rural markets as well – no carrier is able to compete if limited only to those markets with the least attractive economics.[24]

Table 3: Comparing the Competitive Profile of UNE-P and UNE-Loop Georgia 2002

Wire Center Ranking	Average Lines/CO	Competitive Penetration	
		UNE-L	UNE-P
The 25 Largest Wire Centers	67,977	3%	6%
Next 25 Largest Wire Centers	40,012	2%	9%
Next 25 Largest Wire Centers	26,616	1%	8%
Next 25 Largest Wire Centers	13,542	0%	8%
Next 25 Largest Wire Centers	6,943	0%	6%
Next 25 Largest Wire Centers	3,875	0%	7%
Smallest 28 Wire Centers	1,697	0%	6%

This evidence presents compelling reason for the Commission to allow the UNE-P entry model to continue to be deployed nationwide. Elimination of, or further restrictions upon, UNEs will only serve to decrease, not increase, local telecommunications competition in the United States,

[24] This information confirms an analysis of competitive penetration for Texas cited in the Joint Commentors' initial comments. *See* UNE Platform Coalition at 11.

and will foreclose any competitive choice for mass-market residential and small business customers for the foreseeable future, especially in historically underserved areas.

At the time the Commission decided it would conduct a "triennial review" of its national minimum UNE list, no one could have predicted that in just two short years the competitive landscape would have changed so dramatically. The fundamental lesson of this experience is that the Commission should not prejudge how local competition should evolve, selecting any particular approach as a "preferred" strategy. The 1996 Act embraced a competitively-neutral philosophy that treats *all* entry strategies equally, with the view that market forces should guide the deployment of investment and the sequence of competitive expansion. The Commission must hold true to this vision, retaining all the basic tools required by entrants – most especially those tools beginning to demonstrate success – and allow the market, which is to say business and residential customers, to decide which strategies and innovations provide lasting benefit.

Ultimately, new technologies will likely be necessary to achieve a fully competitive marketplace; but these technologies may never emerge or gain a commercial foothold unless there is a base of competitors pre-positioned to integrate them into their operations. The existing exchange monopoly is the product of more than 100 years of (government protected) maturation; the Commission will never achieve a competitive local market by fundamentally redefining commercial opportunity every two or three years. A long-term change in this market requires a long-term commitment to competition.[25]

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[25] *See, id.* at 7 ("The Texas PUC urges the FCC to consider whether a mere six years after the passage of the Act is an adequate period to curtail the availability of UNEs to CLECs. Prior experiences with deregulation suggest that it takes several years for a market to be sufficiently competitive.")

C. The Commission's Own Form 477 Data Shows That Where UNE-P Has Been Made Operational, Competition In The Mass Market Residential And Small Business Markets Has Flourished, While In Places Where UNE-P Is Not Generally Available, Competition Lags

The ILECs argue that offering unbundled local switching discourages entrants from installing their own switches. In effect, they claim that UNE-P-based entry occurs at the expense of UNE-L entry. Significantly, however, the ILECs have produced no data that supports their claim that external switches are a reasonable substitute for ILEC-provided unbundled local switching, nor have they demonstrated that where UNE-P is succeeding, UNE-L strategies are not.

To empirically evaluate the relationship between UNE-L and UNE-P, the Joint Commentors analyzed the past 2½ years of local competition data filed with the FCC by the incumbents using Form 477. Form 477 requires each ILEC to provide the number of end-user lines, UNE-L, UNE-P and Resale lines, by State, every six months. As a result, these reports provide a comprehensive data source that can be used to analyze actual relationships between various entry strategies in areas served by an RBOC.[26]

The goal of the Coalition's analysis is to determine whether there is a systematic relationship between UNE-L and UNE-P penetration and, if so, its basic form. The ILECs claim that UNE-P competition develops at the expense of UNE-L (that is, where UNE-P succeeds, it occurs only through lines that would have been served by UNE-L). As we show below,

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[26] The Coalition's analysis excludes observations in the former GTE service territories. Even a cursory review of the data demonstrates that local competition in the former GTE areas is "developing" (if that is the term that should apply) at a pace far differently than that occurring in RBOC areas. For instance, as of December 2001, total UNE penetration in the former GTE territories was only 0.7%, while UNE-P data was withheld from public view in every former GTE State because competitive activity in former GTE territories is so low that release of such data would have potentially revealed competitively sensitive company-specific information.

however, that conclusion is not supported by market evidence. To the contrary, the ILEC-provided data shows that States that promote local competition get more of everything – there is more UNE-P and there is more UNE-L competition in those jurisdictions.

To evaluate whether there is a relationship between UNE-P and UNE-L penetration, three relatively simple and straightforward linear regressions were performed.[27] The first model simply estimates the linear relationship between UNE-L and the other entry strategies (*i.e.,* UNE-P and Service Resale).[28] The results from this regression are shown below:

Model 1 Regression Statistics

Multiple R	0.8367		
R Square	0.7001		
Adjusted R Square	0.6960		
Observations	221		
F Statistic	168.9		
Variable	Coefficients	t Stat	p value
Intercept	-6,353.0	-1.56	0.1193
UNE-P	0.0580	4.24	0.0000
End User Lines	0.0177	12.71	0.0000
Resale	-0.0232	-0.39	0.6966

The results from Model 1 contradict the ILECs' core assertion that UNE-P harms the UNE-L strategy. Rather, the above analysis indicates a positive (and statistically significant) relationship between these UNE strategies, while the level of Service Resale appears to have no effect.

27 Unlike traditional econometric analysis, the purpose of these regressions is not to test for a causal economic relationship between the data. Rather the goal is more modest – to simply determine whether the observed relationships are consistent with ILEC claims.

28 To protect confidentiality, Form 477 data was not released in States with very low CLEC penetration. The analysis eliminated from the data analyzed any observation (*i.e.*, the data for a particular State in a particular report) where any data (for instance, the number of unbundled loops without switching) had been withheld to protect confidentiality. This screen removed 24 potential observations from the analysis, generally relating to smaller States.

Similar results are confirmed by Model 2, which includes dummy variables based on the vintage of the observation (*i.e.*, whether the data was reported for December 1999, June 2000, etc...).

Model 2 Regression Results

Multiple R	0.8724		
R Square	0.7611		
Adjusted R Square	0.7532		
Observations	221		
F Statistic	96.9		
Variable	Coefficients	t Stat	P-value
Intercept	-35,034	-5.72	0.0000
UNE-P	0.0377	2.97	0.0033
End User Lines	0.0175	13.80	0.0000
Resale	0.0217	0.40	0.6927
Jun-00	14,068	1.76	0.0806
Dec-00	28,113	3.47	0.0006
Jun-01	41,797	5.22	0.0000
Dec-01	52,295	6.61	0.0000

UNE-L volumes are positively related with UNE-P and the number of end-user lines in the State, and Service Resale continues to show no effect.

To further check for consistent results, Model 3 adds dummy variables based on the reporting RBOC.

Model 3 Regression Results

Multiple R	0.8759		
R Square	0.7673		
Adjusted R Square	0.7562		
Observations	221		
F Statistic	69.2		
Variable	Coefficients	t Stat	P-value
Intercept	-28,073	-3.48	0.0006
UNE-P	0.0361	2.80	0.0056
End User Lines	0.0172	13.51	0.0000
Resale	0.0145	0.25	0.7990
Jun-00	14,915	1.86	0.0643
Dec-00	29,349	3.60	0.0004
Jun-01	42,668	5.32	0.0000
Dec-01	52,480	6.66	0.0000
BellSouth	-15,615	-1.89	0.0607
Qwest	-8,764	-1.11	0.2676
SBC	179	0.02	0.9814

Clearly, the above analysis is not intended to explain the myriad of economic factors that collectively determine CLEC success. However, the analyses unequivocally demonstrate that the incumbents' claim that UNE-P harms UNE-L is simply not supported by market experience.[29]

III. THE UNBUNDLING STANDARDS PROPOSED BY THE ILECS IN THIS PROCEEDING ARE CONTRARY TO THE LETTER AND SPIRIT OF THE ACT

The ILECs maintained in the initial round of this proceeding that a fundamental reexamination of the Commission's impairment analysis is warranted. The incumbents unpersuasively argued that the Commission can only mandate unbundling for a UNE where it

[29] In addition to the simple models presented above, more sophisticated General Method of Moments (GMM) analyses were conducted to address any potential estimation problems resulting from a possible endogenous relationship between UNE-L and UNE-P. The results of the GMM estimation confirmed the analyses above: The relationship between UNE-L and UNE-P was positive and statistically significant in each model.

finds, after conducting a service or market-specific analysis, that CLECs would be *competitively* impaired (*i.e.,* impaired in their ability to compete, not simply because they must incur the costs that ILECs do) without access to the element.[30] The ILECs will, no doubt, attempt to twist the words of the D.C. Circuit in *USTA* to support their wrongheaded approach, but the fact is, the case does not support their tortured interpretation.

BellSouth maintains that the Commission should do away with any unbundling obligation that "does not promote facilities-based competition" and contends that even in the face of an impairment finding, the Commission has the statutory authority to decline to mandate unbundling.[31] Similarly, SBC and Verizon urge the Commission to fundamentally alter the impairment analysis, and jettison certain factors altogether, as well as reformulate others. For example, SBC urges the Commission to remove from the impairment analysis the "ubiquity" factor, stating that focusing on "ubiquity" precludes a proper discrete, "market centered approach."[32] Verizon takes the most aggressive stance, urging the Commission to delete all of the impairment factors (cost, timeliness, quality, impact on network operations and ubiquity) previously utilized by the Commission.[33]

The Joint Commentors submit that the Commission should reject the ILECs' analyses, which fly in the face of the clear intent of the statute, not to mention common sense. The *USTA* decision took no issue with the Commission's factors *per se*, but rather, overturned the

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30 *See,* Verizon at 40-41; SBC at 12-13; Qwest at 11-14; BellSouth at 23-25 ("only where there is no actual data to indicate the existence of CLEC self-provisioning or sufficient competitive alternatives to ILECs offering in a geographic specific market should the Commission undertake a 'material diminishment' analysis.")

31 BellSouth at 71, n. 250.

32 SBC at 37; Qwest at 13.

33 *See,* Verizon at 55-61.

Commission's application of that analysis on only a national basis. The *USTA* court concluded that the flaw in the Commission's approach in the *UNE Remand Order* was that it paid too little attention to specific fact-finding. The *USTA* court prefaced its rulings by stating: "We note at the onset the extraordinary complexity of the [Federal Communications] Commission's task. Congress sought to foster competition in the telephone industry, and plainly believed that merely removing affirmative legal obstructions would not do the job. It thus charged the Commission with identifying those network elements whose lack would 'impair' would-be competitors' ability to enter the market, yet gave no detail as to either the kind or degree of impairment that would qualify."[34] But "[a]s to almost every element," the court noted, "the Commission chose to adopt a uniform national rule . . . without regard to the state of competitive impairment in any particular market."[35] It later added that "the Commission has loftily abstracted away all specific markets."[36] Accordingly, the *USTA* decision in no way rejected the Commission's impairment framework, only its national application.[37]

The Commission should maintain its 'materially diminish' standard and the factors previously identified by the Commission should serve as the basis for the unbundling analysis (taking into the account the *USTA* court's criticisms of the Commission's "cost" impairment analysis). Application of these factors by the States in the conduct of an impairment analysis on a market-by-market basis will result in unbundling requirements that are consistent with the

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34 *USTA*, 290 F.3d at 421-22.

35 *Id.* at 422.

36 *Id.* at 423.

37 *See id.* At 425. *See also* the Commission's Petition for Rehearing or Rehearing En Banc of *USTA v. FCC* at 10-11 (filed July 8, 2002) ("*Petition for Rehearing*") ("By contrast—even though the USTA panel acknowledged the 'extraordinary complexity' of the Commission's task of implementing the network element unbundling provisions and the fact that Congress had given it 'no detail' as to how to carry out that task, the panel stepped directly into the 'debate for economists and regulators.'").

statute and the *Verizon* and *USTA* decisions, and which meet the needs of consumers in their States.

IV. THE GRANULAR UNBUNDLING ANALYSIS REQUIRED BY THE *USTA* COURT IS NOT ADMINISTRATIVELY PRACTICAL AT THE NATIONAL LEVEL

As the Joint Commentors noted in the initial round of this proceeding -- well before the release of the *USTA* decision -- the State Commissions are in the best position to conduct a sophisticated and granular analysis of the ILECs' unbundling obligations.[38] Further, the record leaves little question that the Commission is clearly not in the best position to adduce the market-specific facts required by *USTA*, particularly if those facts vary considerably from location to location. Of course, where impairment conditions are national in scope, a national unbundling rule may be both justified and efficient. But any analysis that is less than national in scope is beyond the Commission's fact-finding tools and oversight.

A. As Evidenced By The Comments Of The State Commissions And Their Advocates, The States Are Best Positioned To Conduct The Fact-Specific Inquiry Contemplated By The Commission In Undertaking A "Granular" Unbundling Analysis

NARUC perhaps said it best: "[G]iven the Act's purpose to ensure the UNE regime will promote competition for local telecommunications services, the direct involvement of State regulators with jurisdiction over such local services seems indispensable to any meaningful three-year UNE review."[39] Similarly, in its reply comments the Texas PUC noted that "...it is the opinion of the Texas PUC that the best way to determine whether or not a particular element should remain unbundled is through an overall market analysis in an individual State, rather than

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38 *See*, UNE Platform Coalition at 30-32.

39 NARUC at 5.

on the capabilities of an individual CLEC . . . States should be free to determine when an element should be unbundled after considering all relevant evidence surrounding that UNE."[40] Furthermore, the Texas PUC cautions against "the establishment of 'triggers' [such as those implemented for circuit switching] for phasing out certain UNEs without consultation with the States."[41] The UNE-P Coalition submits that the NARUC and Texas PUC statements are irrefutable, and any effort to implement a more "granular" approach to unbundling must engage State Commissions in fact-based determinations of local market conditions in their respective States.

The statements made by NARUC and the Texas PUC were echoed by virtually all of the more than one dozen States that filed comments in this proceeding. Indeed, even prior to the D.C. Circuit's decision in *USTA*, the State Commissions were clearly articulating their need for ongoing flexibility in addressing local concerns:

- "The FCC should continue to allow states to supplement current unbundling requirements, tailored to particular local market conditions."[42]
- "If the FCC chooses to establish geographic, more granular unbundling standards, it should only promulgate relatively broad rules that would afford state commission flexibility to customize the level of granularity based on the market conditions within the state . . [as] states are better positioned to conduct fact-specific inquiries."[43]
- "[T]he FCC should not attempt to limit the ability of individual state regulatory commissions to impose unbundling obligations upon incumbent LECs within their jurisdiction, as long as those

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40 *Texas PUC Reply Comments* at 11.

41 *Id.*

42 California Public Utilities Commission at 22.

43 Florida Public Service Commission at 2-3.

obligations are consistent with the requirements of Section 251 of the 1996 Act and . . . [the] *UNE Remand Order*."[44]

- "[I]t is important that the FCC take no action that restricts the ability of the IURC to add elements as appropriate."[45]

- "The FCC should adopt a baseline national list of UNEs and establish minimum requirements that do not reduce UNE availability to carriers. The LPSC should then be allowed to assume the responsibility for applying local conditions to ensure that competitive services are widely available."[46]

- "[T]he FCC [should] not restrict the ability of state commissions to designate additional UNEs based upon the competitive environment present in the local market.... The FCC [should] further define its identified factors and should allow the state decision-maker to balance [the] factors, rather than assign weights to individual factors."[47]

- "The unique position of the 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."[48]

- "States are better able to judge the appropriateness of a particular UNE in light of local market conditions and can be more responsive to change in those conditions. Each state has a unique interest in the availability of UNEs in that state because of the effect on competition and investment in that state and ultimately the state's economy."[49]

- "[S]ome states . . . have been pursuing regulatory strategies based on their individual goals, objectives and circumstances,

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44 Georgia Public Service Commission at 3.

45 Indiana Utility Regulatory Commission at 5.

46 Louisiana Public Service Commission at 2

47 Kansas Corporation Commission at 4.

48 Illinois Commerce Commission at 3.

49 Massachusetts Department of Telecommunications and Energy at 3.

and those strategies should not now be disputed by external tinkering."[50]

- The Commission should "continue to implement § 251(d)(3) of the Act, which permits states . . . to add to the minimum list of national UNEs and adopt policies that reflect local market conditions that are consistent with the Act."[51]

- "State commissions are more familiar than the FCC with the characteristics of markets and incumbent carriers within their jurisdictions."[52]

- "[T]he Commission should expressly authorize the states' ability to add network elements to a list that does not preempt any state's own UNE law or policy. The Commission's minimum national list, in addition to permitting other state-mandated UNEs, must not preempt a state from requiring the delivery of additional network components or services."[53]

- "It is imperative that states retain the authority to impose additional unbundling obligations on ILECs, provided they meet the requirements of § 251 of the FTA, the policy framework of the UNE Remand Order, and any subsequent Commission policy."[54]

The uniformity of the State Commission comments is compelling. Any granular approach to unbundling simply must include material State Commission involvement and oversight. Rather than disrupting progressive State regulatory decisions, which are occurring

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50 Michigan Public Service Commission at 5.

51 New York Department of Department of Public Service at 8.

52 Oklahoma Corporation Commission at 6.

53 Pennsylvania Public Utility Commission at 6.

54 Texas Public Utility Commission at 2.

with increasing regularity,[55] the Commission should rely on the obvious local expertise that State Commissions bring to the table in implementing the unbundling provisions of the Act.

B. There Is A Significant Potential For Harm If There Is A Disconnect Between The Degree Of Local Competition In A State And The Amount Of Retail Price Deregulation The ILEC Enjoys In That State

State Commissions have a tremendous "interest to encourage the ILECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying ILEC obligations to interconnect and provide nondiscriminatory access to competitors."[56] Indeed, the State Commissions' interest in telecommunications policy is readily apparent when one recognizes that 70% of the ILECs' regulated revenues are regulated by the States, with more than 90% of the ILECs' interstate revenues related to a single service, *i.e.* access.[57] The uncontested conclusion is that the States have the *effective* responsibility for the local marketplace.

With this backdrop in place, it should be of no surprise to this Commission that the Section 251 and 252 local competition provisions of the Act are just a piece – an admittedly significant piece – of the overall telecommunications mosaic that the State Commissions are faced with implementing. As such, "granular" limitations or restrictions on UNEs based on

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55 *See, e.g., Unbundling Obligations of Incumbent Local Exchange Carriers Under Section 251 of the Telecommunications Act of 1996,* Docket No. 02-AD-0431, Order Establishing Docket, Procedure and Schedule (Mississippi Pub. Svc. Comm'n July 2, 2002) ("Nothing herein would prevent the Commission from adding UNEs to the list adopted as mandated by law or the FCC; provided, however, that if the FCC were to eliminate a UNE(s) from the list of federally required minimums, such UNE(s) would not be removed from the list adopted by Mississippi absent a showing by any party petitioning for such removal that it would not impair the ability of the CLEC seeking assess [sic] to provide the service that it seeks to offer.")

56 NARUC at 3.

57 UNE Platform Coalition at 29.

determinations in Washington, DC risk disrupting the interplay of complex telecommunications policy goals that exist at the State level. The varying levels of complexity that exist at the State level militates against any effort by the Commission to establish rigid definitions of specific UNEs or to micromanage State analysis of local market conditions.

Two real-world examples should suffice in demonstrating the interplay between retail rate regulation at the State level and UNE availability. Over the course of the past year, both the New York Public Service Commission ("NYPSC") and the Illinois Commerce Commission ("ICC") have utilized robust unbundling rules as a means to provide some retail regulatory relief to Verizon in New York and SBC in Illinois. In New York, the NYPSC used a combination of its "alt reg" authority and its unbundling authority to provide Verizon with significant retail pricing flexibility.[58] In Illinois, the State legislature enacted a statute the requires SBC to make available robust UNE and UNE combination offerings if it chooses to be regulated under an alternative (also known as an incentive) regulation plan.[59] Any order by the Commission that limits a State's flexibility to make unbundling determinations either under State or federal law risks hobbling the States' ability to balance multiple State-specific telecommunications policy goals to meet the interests of consumers in the State.

At bottom, there is a significant potential for harm if there is a disconnect between the degree of local competition in a State and the amount of retail price deregulation the ILEC enjoys in that State. Only the States are in the position to fully understand (and address) the interrelationship between retail price regulation and local competition and to guard against an

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58 *See, Verizon New York, Inc.—Proceeding to Consider Cost Recovery and to Investigate Future Regulatory Framework;* Case 00-C-1945 and *New York Telephone Company—Rates for Unbundled Network Elements*, Case 98-C-1357, Order Instituting Verizon Incentive Plan (N.Y. Pub. Serv. Comm'n 2002).

59 *See,* Illinois Public Utility Act §§, 13-502.5, 13-801(d)(4).

outcome where consumers lose the protection of regulation without first enjoying its preferable alternative, *i.e.* competition. State Commissions have the real-world expertise and experience with local competition that is essential to reasoned decision-making. In addition, the State Commissions will provide continued and on-going oversight and "fine tuning" of the rules closest to their own markets, so decisions can be implemented in a timely fashion.

C. The Nature Of A "Notice And Comment" Rulemaking Proceeding Does Not Lend Itself To The Development Of The Empirical Record Needed To Make Reasoned Determinations Regarding The Future Availability Of UNEs

As noted above, the Coalition questions whether the confines of a rulemaking docket provide the Commission with the tools needed to fully develop the facts. Recognizing the inherent limitations of the FCC's rulemaking proceedings, the Texas PUC "caution[ed] the FCC against making any finding regarding UNEs or broadband services without compelling data that shows that competition exists for a significant portion of the relevant customer base – whether for local service or broadband."[60]

State Commissions, on the other hand, have routinely engaged in rigorous and innovative arbitration and dispute resolution processes. State Commissions are equipped with the appropriate procedures, including written discovery and document production, depositions, and opportunities for cross-examination both by counsel and by State Commissioners and staff members. As expressed by NARUC:

> State regulators have access to the detailed real-world information that is essential to reasoned decision-making [concerning unbundling], employ procedures (such as discovery and cross examination) that are most compatible with fact-finding and verification, and are in the best position to balance competitive

[60] Texas Public Utility Commission at 6.

> policies with the regulatory/deregulatory framework that governs the ILECs operating within their jurisdictions.[61]

Similarly, the Florida Public Service Commission noted that "[S]tates are more familiar with conditions within their borders, including the [actual] level of competition," and "are able to evaluate factual disputes through procedures that include discovery, sworn testimony, and cross-examination."[62] The FCC simply does not utilize these critical fact-finding tools.

As the UNE-P Coalition noted in its initial comments, the more granular the inquiry, the more dependent that inquiry is on the detailed factual data that is difficult to develop and impossible to verify in a "notice and comment" proceeding.[63] Indeed, in the *Triennial Review NPRM*, the Commission itself "recognize[d] that State commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdictions, and that entry strategies may be more sophisticated in recognizing regional differences."[64]

USTA now strongly suggests that the Commission should develop an unbundling framework which State Commissions can apply to specific geographic locations. The Coalition believes that the Commission should utilize the *UNE Triennial Review* to re-focus its existing impairment standard and related factors, allow the State Commissions to apply this federal impairment standard, along with their own State statutes and the regulatory/deregulatory

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61 NARUC at 7.

62 *See e.g.*, Florida Public Service Commission at 7.

63 UNE Platform Coalition at 27.

64 *Triennial Review NPRM* at ¶ 75.

framework that applies to the ILECs in their State, to determine the level of unbundling that is warranted in their jurisdictions.[65]

In *USTA*, the court appeared skeptical of the Commission's ability to develop a satisfactory unbundling analysis. The court recognized "the extraordinary complexity of the Commission's task."[66] But "[a]s to almost every element," the court quickly added, "the Commission chose to adopt a uniform national rule ... without regard to the state of competitive impairment in any particular market."[67] It later added that "the Commission has *loftily abstracted away* all specific markets."[68]

The *USTA* decision does not prevent the Commission from finding national impairment and requiring that a network element be offered nationally. Rather, *USTA* requires that the Commission articulate that impairment and explain (rather than "abstract away") why national unbundling is warranted. *USTA* addresses the fact that the Commission ignored a market-by-market analysis, where such analysis would be appropriate. In those circumstances, any change in national minimum unbundling requirements must be the product of the market-specific analysis that only a State Commission is positioned to accomplish.

The approach criticized by the *USTA* court stands in stark contrast to the fact-finding process engaged in by the States. The Coalition believes that the best course of action is one where this Commission and State regulators each focus their efforts on what they do best. For

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65 *See Comments of the Public Utility Commission of Texas*, CC Docket 01-338 (filed Mar. 14, 2002) ("The Texas PUC believes that States remain in the best position to recognize the 'characteristics of markets and incumbent carriers within Texas, and the entry strategies that have worked best.")

66 *USTA*, 290 F.3d at 421.

67 *Id.* at 422.

68 *Id.* at 423 (emphasis added).

the Commission, this means utilizing the *UNE Triennial Review* to adopt flexible unbundling standards to give effect to the congressional policy embodied in the 1996 Act. For the State Commissions, this means assuming the responsibility to apply these standards to local conditions.

V. THE COMMISSION SHOULD BUILD UPON ITS EXISTING RULE 51.317 AND EMPOWER STATE COMMISSIONS TO MAKE UNBUNDLING DETERMINATIONS ACCORDING TO FEDERAL "NECESSARY" AND "IMPAIR" GUIDELINES

As demonstrated above, State Commissions are well equipped to perform unbundling analyses at the level of "granularity" suggested by the Commission and sought by the *USTA* court. Accordingly, the UNE-P Coalition submits that the Commission should promulgate a rule – similar to Rule 51.317 – to guide State Commission unbundling decisions, in lieu of establishing specific UNEs. That effort would be left to the State Commissions, which would apply Commission-established factors, largely based on those contained in Rule 51.317.

A. Commission Rule 51.317 Should Serve As The Base Set Of Factors For State Commission Unbundling Determinations

As part of the *UNE Remand Order* the Commission promulgated Rule 51.317, which specifies the factors to be considered in applying the "necessary" and "impair" standards contained in Section 251(d)(2) of the Act. Section 51.317 of the Commission's Rules states as follows:

> Sec. 51.317 Standards for requiring the unbundling of network elements.
>
> (a) Proprietary network elements. A network element shall be considered to be proprietary if an incumbent LEC can demonstrate that it has invested resources to develop proprietary information or functionalities that are protected by patent, copyright or trade secret law. The Commission shall undertake the following analysis to determine whether a proprietary network element should be made available for purposes of Section 251(c)(3) of the Act:

(1) Determine whether access to the proprietary network element is "necessary." A network element is "necessary" if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to the network element precludes a requesting telecommunications carrier from providing the services that it seeks to offer. If access is "necessary," then, subject to any consideration of the factors set forth under paragraph (c) of this section, the Commission may require the unbundling of such proprietary network element.

(2) In the event that such access is not "necessary," the Commission may require unbundling subject to any consideration of the factors set forth under paragraph (c) of this section if it is determined that:

(i) The incumbent LEC has implemented only a minor modification to the network element in order to qualify for proprietary treatment;

(ii) The information or functionality that is proprietary in nature does not differentiate the incumbent LEC's services from the requesting carrier's services; or

(iii) Lack of access to such element would jeopardize the goals of the 1996 Act.

(b) Non-proprietary network elements. The Commission shall undertake the following analysis to determine whether a non-proprietary network element should be made available for purposes of Section 251(c)(3) of the Act:

(1) Determine whether lack of access to a non-proprietary network element "impairs" a carrier's ability to provide the service it seeks to offer. A requesting carrier's ability to provide service is "impaired" if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer. The Commission will consider the totality of the circumstances to determine whether an alternative to the incumbent LEC's network element is available in

such a manner that a requesting carrier can provide service using the alternative. If the Commission determines that lack of access to an element ``impairs" a requesting carrier's ability to provide service, it may require the unbundling of that element, subject to any consideration of the factors set forth under Section 51.317(c).

(2) In considering whether lack of access to a network element materially diminishes a requesting carrier's ability to provide service, the Commission shall consider the extent to which alternatives in the market are available as a practical, economic, and operational matter. The Commission will rely upon the following factors to determine whether alternative network elements are available as a practical, economic, and operational matter:

(i) Cost, including all costs that requesting carriers may incur when using the alternative element to provide the services it seeks to offer;

(ii) Timeliness, including the time associated with entering a market as well as the time to expand service to more customers;

(iii) Quality;

(iv) Ubiquity, including whether the alternatives are available ubiquitously;

(v) Impact on network operations.

(3) In determining whether to require the unbundling of any network element under this rule, the Commission may also consider the following additional factors:

(i) Whether unbundling of a network element promotes the rapid introduction of competition;

(ii) Whether unbundling of a network element promotes facilities-based competition, investment, and innovation;

(iii) Whether unbundling of a network element promotes reduced regulation;

(iv) Whether unbundling of a network element provides certainty to requesting carriers regarding the availability of the element;

> (v) Whether unbundling of a network element is administratively practical to apply.
>
> (4) If an incumbent LEC is required to provide nondiscriminatory access to a network element in accordance with Sec. 51.311 and Section 251(c)(3) of the Act under Sec. 51.319 of this section or any applicable Commission Order, no State commission shall have authority to determine that such access is not required. A state commission must comply with the standards set forth in this Sec. 51.317 when considering whether to require the unbundling of additional network elements. With respect to any network element which a state commission has required to be unbundled under this Sec. 51.317, the state commission retains the authority to subsequently determine, in accordance with the requirements of this rule, that such network element need no longer be unbundled.[69]

The UNE-P Coalition submits that the Commission should modify this rule to empower State Commissions in the first instance to make "necessary" and "impair" unbundling determinations on a State-by-State basis.[70] In so doing, the Commission would obtain the level of granularity that it seeks in a way that satisfies the *USTA* court's concern that the Commission issued an "undifferentiated national rule" for each UNE.[71]

In the UNE-P Coalition's view, adoption of national unbundling guidelines for the State Commissions to implement would work in a fashion similar to the Commission's existing approach on UNE pricing, whereby the State Commissions are responsible for setting UNE rates based on Commission-established pricing guidelines.[72] The past six years of experience in setting UNE rates demonstrates that such an approach is reasonable and that the State

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69 47 C.F.R. § 51.317.

70 A proposed modified rule is attached hereto at Exhibit A.

71 *USTA*, 290 F.3d at 423.

72 *See* 47 C.F.R. §§ 51.501-51.513.

Commissions possess the requisite expertise to implement Commission-established standards. Indeed, in each of the Section 271 applications approved by the Commission since the New York approval in September 1999, the Commission has found[73] that 15-out-of-15 State Commissions reasonably applied the Commission's UNE pricing rules.[74] There can be no doubt that the State

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[73] This is not to say that the Joint Commentors endorse the Commission's findings in each case. *See, e.g. In the Matter of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts,* CC Docket No. 01-9, FCC 01-130, Memorandum Opinion and Order (rel. Apr. 16, 2001)

[74] *See, In the Matter of Application of Verizon New Jersey, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in New Jersey,* WC Docket No. 02-67, FCC 02-189, Memorandum Opinion and Order (rel. Jun. 24, 2002); *In the Matter of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Maine,* CC Docket No. 02-61, FCC 02-187, Memorandum Opinion and Order (rel. Jun. 19, 2002); *In the Matter of 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, FCC 02-147, Memorandum Opinion and Order (rel. May 15, 2002); *In the Matter of Application by Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Vermont,* CC Docket No. 02-7, FCC 02-118, Memorandum Opinion and Order (rel. Apr. 17, 2002); *In the Matter of Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Rhode island,* CC Docket No. 01-324, FCC 02-63, Memorandum Opinion and Order (rel. Feb. 22, 2002); *In the Matter of Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996, To Provide In-Region InterLATA Services in Arkansas and Missouri,* CC Docket No. 01-194, FCC 01-338, Memorandum Opinion and Order (rel. Nov. 16, 2001); *In the Matter of Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, FCC 01-269, Memorandum Opinion and Order (rel. Sep. 19, 2001); *In the Matter of Application of Verizon New York, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut,* CC Docket No. 01-100, FCC 01-208, Memorandum Opinion and Order (rel. Jul. 20, 2001); *In the Matter of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts,* CC Docket No. 01-9, FCC 01-130, Memorandum Opinion and Order (rel. Apr. 16, 2001); *In the Matter of Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* CC Docket No. 00-217, FCC 01-29, Memorandum Opinion

(continued...)

Commissions similarly possess the competence to apply national "necessary" and "impair" guidelines in their respective States.

As for implementation of this approach, the UNE-P Coalition submits that the Commission's existing unbundling rules should remain in effect in accordance with the *USTA* remand until action is taken by a State Commission to supercede the existing rules on a State-by-State basis. Existing interconnection agreements would remain in full force and effect until such time as they are amended or superceded on a prospective basis. If a State Commission declines to act, then the Commission could preempt the State Commission,[75] just as the Commission has done in similar contexts.[76]

B. Promulgating Factors For States To Apply In Making Unbundling Determinations Is Consistent With The 1996 Act

The factor-based approach proposed herein by the UNE-P Coalition is fully consistent with the Section 251(d) of the Act. Section 251(d) established three essential implementation activities. First, the statute directed the Commission to establish initial implementing rules

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(...continued)

and Order (rel. Jan. 22, 2001); *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238, Memorandum Opinion and Order (rel. Jun. 30, 2000); *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 00-295, FCC 99-404, Memorandum Opinion and Order (rel. Dec. 22, 1999).

75 UNE-P Coalition Proposed Rule 51.XXX(d), attached hereto at Exhibit A.

76 *See e.g., Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications act of 1996*, 15 FCC Rcd 11277 (2000).

within six months of the statute's enactment.[77] The Commission satisfied this provision with its initial implementation rules issued on August 8, 1996.[78]

Second, the statute directs the Commission to establish UNE "access standards," which must consider: (i) whether access to "proprietary" network elements is "necessary" for competitors and (ii) whether lack of access to non-proprietary network elements would "impair" the ability of a carrier to provide the services that it seeks to offer."[79] This, of course, is the subject of the instant proceeding and the *USTA* case. Nothing in the text of the statute obligates the Commission to make individual determinations of what network elements must be made available in a given locale. Rather, the statute only obligates the Commission to establish "access standards," which effectively is what the Commission established in Rule 51.317. Modifying that rule to empower State Commissions to make specific unbundling determinations in the first instance is thus fully consistent with the plain language of Section 251(d)(2).

Third, the statute expressly preserves the implementation of "State access regulations," including items such as network "access and interconnection obligations."[80] Remarking on this section, the Commission previously noted that "Section 251(d)(3) grants the state commission the authority to impose additional obligations upon incumbent LECs beyond those imposed on the national list, as long as they *meet the requirements of Section 251 and the national policy*

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77 47 U.S.C. § 251(d)(1).

78 *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 95-185, FCC 96-235, First Report and Order (rel. Aug. 8, 1996) ("*Local Competition Order*").

79 47 U.S.C. § 251(d)(2).

80 47 U.S.C. § 251(d)(3).

framework instituted [by the Commission]."[81] Clearly, nothing in Section 251(d)(3) precludes a State Commission from applying a Commission-defined "necessary" and "impair" analysis at the State level. Indeed, Section 251(d)(3) ensures that State Commissions are in no way precluded from implementing State telecommunications requirements, so long as those requirements are consistent with the Act and the Commission's rules.

For all of these reasons, the Commission, without question, possesses the statutory authority to adopt UNE availability standards that State Commissions would apply in the first instance. Indeed, the plain language of the Act supports such an approach.

C. Promulgating Factors For States To Apply In Making Unbundling Determinations Is Consistent With And Responsive To The *USTA* Decision

In addition to being consistent with the plain language of the Act, the factor-based approach presented herein is fully consistent with – if not compelled by – *USTA*. In *USTA*, the court expressed particular concern over "the Commission [decision] to make its unbundling requirements ... applicable uniformly to all elements in every geographic or customer market."[82] Indeed, rather than focusing on the FCC's articulation of the "necessary" and "impair" standards, the *USTA* court instead focused its analysis on the Commission's establishment of an "undifferentiated national rule" for each UNE.[83]

The factor-based approach offered by the UNE-P Coalition is directly responsive to the *USTA* court, as it empowers State Commissions to make State-specific unbundling determinations. As a result, the "undifferentiated national rule" complained of by the *USTA*

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81 *UNE Remand Order* at ¶ 154 (1999)(emphasis added). The FCC went on to codify this finding in Section 51.317(v)(4) of its rules, which specifically permits State Commissions "to require the unbundling of additional network elements." 47 C.F.R. § 51.317(v)(4).

82 *USTA,* 290 F.3d at 419.

83 *Id.* At 423.

court would be superceded by State-specific unbundling determinations made by fact finders that are experts in telecommunications generally, and on the needs of their States specifically.

Under *USTA*, the present status of Rule 51.317 is unclear, and will remain unclear until the court issues its mandate (which is stayed pending rehearing). The language of the opinion is ambiguous as to whether Rule 51.317 has been remanded, or if only the UNE definitions found in Rule 51.319, which resulted from the "undifferentiated national" application of the "necessary" and "impair" standard, have been remanded. In any case, empowering State Commissions to make local unbundling determinations based on national factors – similar to those contained in Rule 51.317 – would fully satisfy the *USTA* court's remand.

In addition, maintaining the *status quo* unbundling rules on a State-by-State basis pending State Commission application of the "necessary" and "impair" standard is fully consistent with the remand in *USTA*. In remanding rather than vacating the Commission's rules, the *USTA* court left the existing rules in place pending resolution of the remand proceeding.[84] Under the factor-based approach proposed by the UNE-P Coalition, the Commission's existing rules would be superceded and the remand would be resolved on a State-by-State basis, as each State Commission completes its proceeding applying the "necessary" and "impair" standard.

D. Section 271 Provides A Backstop For The Commission To Review State Unbundling Determinations

Commission action to define the unbundling framework would not preclude Commission involvement and review of State Commission unbundling decisions. Indeed, just as the Commission reviews pricing determinations as part of its Section 271 analysis, the Commission

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[84] *See e.g.*, *National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (regulations that are remanded but not vacated are "le[ft]... in place during remand"); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (same).

could use its Section 271 authority—including its enforcement authority under Section 271(d)(6)—to consider the effect on competition of State Commission unbundling decisions. In addition, the Coalition agrees with Z-Tel, among other commenters, who note that Section 271's checklist sets forth minimum Bell Operating Company ("BOC") unbundling obligations.[85]

1. The Commission's Section 271 Enforcement Authority Will Enable The Commission To Consider The Competitive Impact Of State Unbundling Decisions

Under Section 271(d)(6)(A) if, after notice and hearing, "the Commission determines that a Bell operating company has ceased to meet any of the conditions required for [Section 271] approval"[86] the Commission has the authority to: (i) issue an order to an BOC to correct deficiencies in its Section 271 compliance; (ii) to impose monetary penalties for falling out of compliance with Section 271; or (iii) to suspend or revoke a BOC's Section 271 authority. Clearly, the Commission's authority to suspend or revoke Section 271 interLATA authority is the most potent, effective, and arguably controversial, remedy it has available to promote continuing BOC compliance with the market opening provisions of the Act, including the provision of UNEs and UNE combinations.

Section 271(d)(6)(B) obligates the Commission to hear complaints regarding a BOC's on-going compliance with the Section 271 competitive checklist.[87] The Coalition submits that this requirement provides the Commission with on-going oversight of the BOCs, as well as an opportunity to limit the potential adverse impact of a State Commission that over-restricts the provision of UNEs through a State Commission-conducted unbundling proceeding. If a

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85 *See,* Z-Tel at 14-15.

86 47 U.S.C. § 271(d)(6).

87 47 U.S.C. § 271(d)(6)(B).

competitor believed that BOC implementation of a State Commission decision restricting access to UNEs resulted in a Section 271 violation, the competitor could file a complaint with the Commission alleging that a BOC's provision of checklist items, including loops, switching, and transport, under the State Commission's ruling was insufficient for Section 271 purposes. As such, Section 271 would serve as a backstop to permit ongoing Commission monitoring of BOC unbundling obligations.

2. The Coalition Agrees With Z-Tel That Section 271 Obligates The BOCs To Provide Unbundled Access (At Cost-Based Rates) To Any Elements Required By The Section 271 Checklist

The *Triennial Review NPRM* sought comment on the relationship between Section 271(c)(2)(B) — the 14 point checklist of Section 271 — and the impairment standard and unbundling obligations of Section 251. The Joint Commentors agree with Z-Tel that in light of the fact that the Section 271 checklist clearly requires BOCs to unbundle access to loops, transport, and switching, the Commission lacks the authority under Section 251(d)(2) to override Congress' determinations that BOCs must provide those UNEs.[88] Although the Commission decided in the *UNE Remand Order* "that the prices, terms and conditions set forth under Sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of Section 271,"[89] the Joint Commentors submit that finding makes little sense. As the Commission noted in its *Petition for Rehearing*, the inclusion of the loop, transport, switching, and signaling in Section 271's competitive checklist, "as well as the limitation on the FCC's authority to forbear from enforcing the checklist until the requirements of Section 271 have been 'fully implemented'—suggests at a minimum that Congress viewed such unbundling as having

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88 Z-Tel at 7-17.

89 *UNE Remand Order*, 15 FCC Rcd at 3905, ¶ 469.

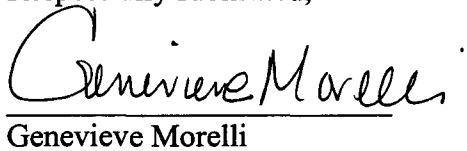
competitive benefits warranting consideration by the FCC, not (absent natural monopoly characteristics) as being merely a cost to be 'inflict[ed] on the economy.'"[90]

Accordingly, the Coalition agrees with Z-Tel that Congress clearly intended that unbundled network elements be offered at cost-based rates, and the competitive checklist sets forth minimum unbundling obligations that apply to the BOCs. It would be irrational for Congress to have required the BOCs to offer loops, transport and switching, while at the same time excluding these critical elements from the Act's pricing provisions.

VI. CONCLUSION.

For the foregoing reasons, the Joint Commentors urge the Commission to adopt the proposals and requirements outlined herein.

Respectfully submitted,



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[90] *Petition for Rehearing* at 12.

EXHIBIT A

PROPOSED MODIFIED RULE 51.XXX

Sec. 51.XXX State Commission standards for requiring the unbundling of network elements under federal law.

(a) Proprietary network elements. A network element shall be considered to be proprietary if an incumbent LEC can demonstrate that it has invested resources to develop proprietary information or functionalities that are protected by patent, copyright or trade secret law. The State Commission shall undertake the following analysis to determine whether a proprietary network element should be made available for purposes of Section 251(c)(3) of the Act:

(1) Determine whether access to the proprietary network element is "necessary." A network element is "necessary" if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to the network element precludes a requesting telecommunications carrier from providing the services that it seeks to offer. If access is "necessary," then, subject to any consideration of the factors set forth under paragraph (c) of this section, the State Commission may require the unbundling of such proprietary network element.

(2) In the event that such access is not "necessary," the State Commission may require unbundling subject to any consideration of the factors set forth under paragraph (c) of this section if it is determined that:

(i) The incumbent LEC has implemented only a minor modification to the network element in order to qualify for proprietary treatment;

(ii) The information or functionality that is proprietary in nature does not differentiate the incumbent LEC's services from the requesting carrier's services; or

(iii) Lack of access to such element would jeopardize the goals of the 1996 Act.

(b) Non-proprietary network elements. The State Commission shall undertake the following analysis to determine whether a non-

proprietary network element should be made available for purposes of Section 251(c)(3) of the Act:

(1) Determine whether lack of access to a non-proprietary network element "impairs" a carrier's ability to provide the service it seeks to offer. A requesting carrier's ability to provide service is "impaired" if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer. The State Commission will consider the totality of the circumstances to determine whether an alternative to the incumbent LEC's network element is available in such a manner that a requesting carrier can provide service using the alternative. If the State Commission determines that lack of access to an element "impairs" a requesting carrier's ability to provide service, it may require the unbundling of that element, subject to any consideration of the factors set forth under Section 51.XXX(c).

(2) In considering whether lack of access to a network element materially diminishes a requesting carrier's ability to provide service, the State Commission shall consider the extent to which alternatives in the market are available as a practical, economic, and operational matter. The State Commission will rely upon the following factors to determine whether alternative network elements are available as a practical, economic, and operational matter:

(i) Cost, including all costs that requesting carriers may incur when using the alternative element to provide the services it seeks to offer;

(ii) Timeliness, including the time associated with entering a market as well as the time to expand service to more customers;

(iii) Quality;

(iv) Ubiquity, including whether the alternatives are available ubiquitously;

(v) Impact on network operations.

(3) In determining whether to require the unbundling of any network element under this rule, the State Commission may also consider the following additional factors:

(i) Whether unbundling of a network element promotes the rapid introduction of competition;

(ii) Whether unbundling of a network element promotes facilities-based competition, investment, and innovation;

(iii) Whether unbundling of a network element promotes reduced regulation;

(iv) Whether unbundling of a network element provides certainty to requesting carriers regarding the availability of the element;

(v) Whether unbundling of a network element is administratively practical to apply;

(vi) Whether unbundling of a network element would further state telecommunications policy goals.

(c) A State Commission may commence a proceeding to implement this rule on its own motion or in response to a petition by a certificated telecommunications carrier.

(1) Any such proceeding shall:

(A) Commence within 90 days of receipt by the State Commission of a petition by a certificated telecommunications carrier;

(B) Conclude within 9 months of commencement.

(2) State Commission decisions making unbundling determinations under this section shall remain in effect for a maximum of three years; however, a State Commission may conduct reviews of unbundling determinations at its discretion.

(d) If a State Commission fails to act to implement this section, then the FCC may act in place of the State Commission.

Certificate of Service

I, Ross A. Buntrock, hereby certify that the foregoing *Reply Comments of the UNE Platform Coalition* were filed via the Commission's ECFS this 17th day of July 2002. Copies of the *Reply* were sent electronically to the following individuals:

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