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October 4, 2002

EX PARTE – Via Electronic Filing

EX PARTE OR LATE FILED

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket No. 96-98, 98-147

Dear Ms. Dortch:

On October 3, Tom Koutsky and George Ford of Z-Tel and Tim Simeone and I met with the following Wireline Competition Bureau lawyers and economists: Jeremy Miller, Rob Tanner, Tom Navin, Jon Reel, Aaron Goldberger, Claudia Pabo, Elizabeth Yockus, Gina Spade, Mike Engel, Ian Dillner, and Ben Childers. Messrs. Koutsky, Ford and I then met with the following lawyers in the Office of General Counsel: John Rogovin, Debra Weiner, Nick Bourne, Paula Siberthau, Linda Kinney, and Mary McManus. We distributed and discussed the attached documents at these meetings.

In accordance with FCC rules, a copy of this letter is being filed in the above-captioned docket.

Sincerely,

Christopher J. Wright
Counsel to Z-Tel Communications, Inc.

Unbundled Local Switching, UNE-P and the Triennial Review

Thomas M. Koutsky
George S. Ford
Christopher J. Wright
Timothy J. Simeone

October 3, 2002

CC Dockets Nos. 01-338, 96-98, 98-147

What the Act was about...

- 1996 Act was about consumer choice in telecom services

- In the end, if we do *not* see increased consumer choice = the 1996 Act will have failed

- Six years after the Act, mass market consumers are finally seeing that choice in new, innovative telecom services and packages – because of UNE Platform

Today's Agenda

- Legal hurdles to any ULS restriction
- Application of Impairment Standard to Mass Market
- Forging role for state commissions
- Latest empirical research
- What Z-Tel does with UNE-P

Legal Hurdles

- Core elements of UNE-P (loops, switching and transport) specifically listed in section 271 checklist
  - Legislative history: checklist contains "at a minimum" what should be unbundled under section 251
  - Consistent with purpose of the Act to provide "parity" of "equal access" between IXCs and ILECs into one another's markets
- Restricting any section 271 element would require section 10 forbearance (Verizon petition) – which is sharply limited
- Application of forbearance by FCC as requested by Verizon exceeds constitutional bounds of FCC's authority
- Additional state unbundling or access requirements specifically preserved in section 251(d)(3).
  - States adopted core elements of UNE-P under state law before and after Act passed.
  - There is no legal "inconsistency" between an FCC decision not to order unbundling nationally and a state order ordering unbundling locally

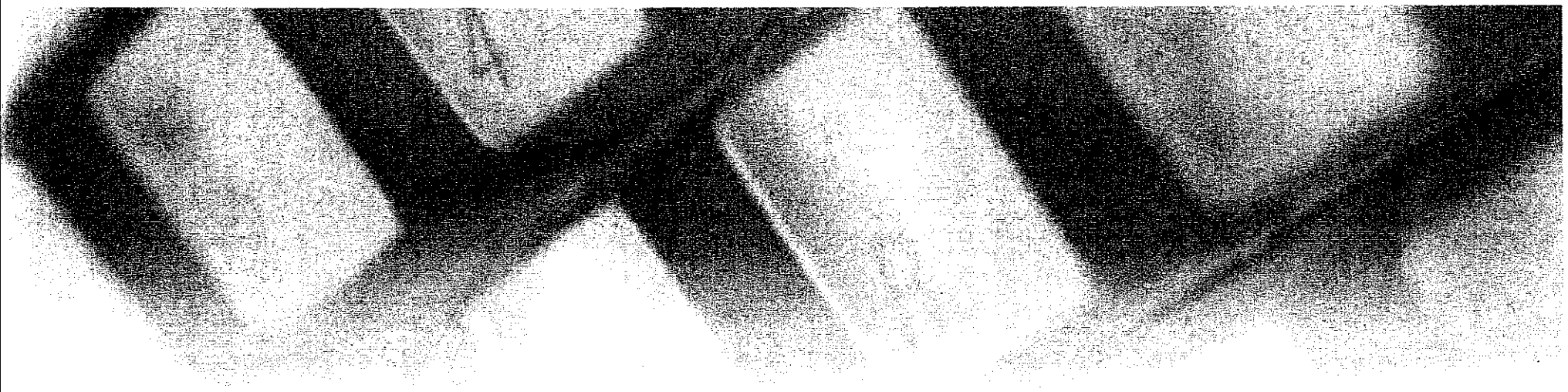
Proposed Impairment Framework

1. Begin with market definition – the "service" requesting carrier "seeks to provide"
   - E.g.: the local telecommunications mass-market (Z-Tel Comments Attachment A, or >139MM lines)
   - Consistent with FCC precedent in prior Orders
   - Provides "granularity" *USTA* requests
2. What are the demand-side requirements of "serving" that "market"?
3. What are supply-side requirements of "serving" that "market"?
4. **Without unbundled access, can entrant serve as many customers within 2 years as with unbundled access?**

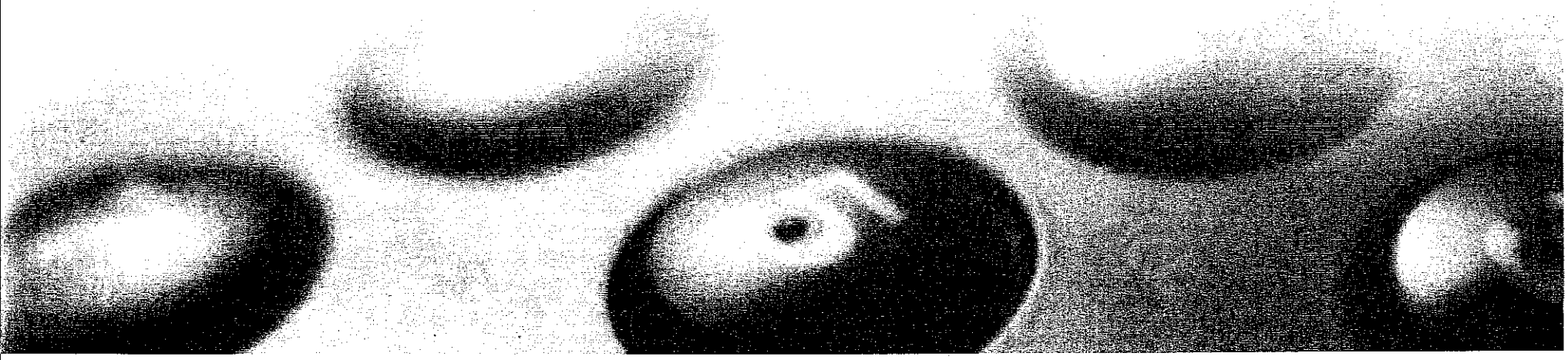
Ford Reply Decl. Section III

Impairment exists when a lack of access to an ILEC network element reduces a CLEC's output by a small, but significant, and non-transitory amount

- Complies with *USTA* -- a fact-based analysis
- Requires FCC to consider whether alternatives to element…
  - Are available from other sources in sufficient quantity and quality
  - Can be utilized by entrant in seamless manner
  - Can be implemented without adversely affecting customer service *at service level demanded by consumers for that service*
  - Can be implemented without adversely affecting competitive output
- Flexible enough to consider prices, the "profitability" of particular entry strategies, the "difficulty" of self-provisioning
- "Significant and non-transitory" are objective "limiting principles" grounded in antitrust law



Application of Standard to ULS and UNE-P



Steps 1, 2 and 3: "Analog Mass Market"

1. In BOC Merger Orders, FCC has identified "mass market" for local services that includes residential and small businesses
2. Demand-Side Characteristics of the Mass Market
   - Low revenue per month ($40-80/line)
   - Highly reliable service (turn up service quickly, repairs <24 hrs, etc.)
   - Regulatory requirements (lifeline, installation/disconnection service requirements)
   - Diffuse consumer base
   - No long-term contracts/month-to-month service
   - High churn (5%-10%/mth)
3. To profitably serve Mass Market, carriers must…
   - Keep costs of customer acquisition low
   - Have reliable, electronic method of service provision
   - Be able to service churn profitably
   - Sell through mass market advertising techniques (ubiquitous coverage with consistent product)

Mechanized Provisioning: Essential to Assessing Step 3

- Over 139MM analog dialtone lines on Bell/GTE networks – supporting competitive entry requires large quantities
- ILECs serve this market in largely automated manner – they do not do a hot cut each time an analog dialtone customer adds a line or turns up service
- With low revenue/mth, regulatory service quality requirements, and high churn – CLECs *must* be able to have similar automated access to serve these customers profitably
- Project hot cuts do not and cannot solve this fundamental disparity – because still relies on manual provisioning for *all* CLEC lines while ILEC keeps mechanized access

The loop-port combination in UNE-P is today the *only* method of access that provides this automated provisioning

Step 4: Hot Cut Bottleneck

Without access to ULS and UNE-P, Z-Tel and other mass market carriers would not be able to serve same amount of mass market lines because of capacity constraint

- No wholesale market of sufficient capacity exists anywhere – let alone with sufficient capacity
- "Hot-cut" capacity limits self-provisioning/UNE-L entry
  - Example: 5% churn per month
  - If ILEC can provide only 15,000 hot cuts per month in a state… **maximum Mass Market Penetration for that CLEC is 300,000 lines**
  - In NY, that would be 2.3% of the market
  - Project hot cuts not adequate to serve mass market, as manual provisioning and mass market customers not sign term contracts.
  - "Transition" to UNE-L would require CLEC to enter two businesses simultaneously *and* double-pay for switching while conversion happened
- Mechanized Access through UNE-P *can* support such volumes
  - NY: 250,000 UNE-P conversions in December 1999
  - GA: BellSouth converted 1% of its lines via UNE-P in Summer 2001
  - Over 9MM UNE-P lines in service nationwide today

Step 4: Provisioning Cost Impediment

Without access to ULS/UNE-P, mass market entrants like Z-Tel would face substantially higher cost that would lower output

- UNE-L conversions are expensive and manual
  - Manual Provisioning Process; backward-looking multi-step process
  - Verizon and NYPSC: each hot cut costs over $180!
  - FCC cannot assume that the hot cut rate is lower – nor can it subsidize below-cost hot cuts
- Even if manual hot cuts were available in unlimited quantities, still place material limitation on quality of CLEC product
  - CLEC pay for manual provisioning of every line = cannot compete with Bells who have mechanized access
  - Manual error: to support mass market entry, huge volumes would be required
  - Even an optimistic success rate would still mean putting out of service hundreds of thousands of existing UNE-P customer lines (450,000 if 95% "success")
- Transport costs and inefficiencies add to UNE-L costs

Step 4: Network Impediments

Without access to shared transport/UNE-P, mass market entrants like Z-Tel have to enter the "local network" business, which would substantially increase costs and lower output

- Z-Tel retail customer densities not sufficient to warrant collocation and transport investment
  - Z-Tel has UNE-P lines in 4207 ILEC central offices
  - In 87% of those COs, Z-Tel has less then 50 lines
  - In 94% of those COs, Z-Tel has less than 100 lines
- Collocation is expensive; ILECs fight efficient arrangements
- ILECs possess switch/transport network density economies because they were bequeathed monopoly by the state
- Even with interoffice density, CLECs cannot match efficiencies in ILEC switch/transport network with only one switch
  - Example: CLEC must pay for interoffice transport of a call **even if** that call originates and terminates at same end office
  - Bells do not incur that cost with switches in each CO

Essentially No UNE-L Competition in Mass Market

- The BOCs' own "UNE-Fact Report" suggests that CLECs -- *i.e.*, putting aside cable franchises and small ILECs -- currently serve at most 1/10 of 1% of the mass market via UNE-L.

- Of the nine "CLECs" in "Figure 4" of the BOCs's Report that supposedly serve 25,00 or more residential lines, most are either cable overbuilders or ILECs.

- The Act does not require a competitor to buy a cable company or an ILEC in order to compete.

- Moreover, nearly all of the "Figure 4" companies either never sought to serve the mass market or have abandoned plans to do so

- Without proof of actual market success, claims that CLECs simply can "transition" to UNE-Loop to serve Mass Market ring hollow

State commission fact-finding

- Rather than illegally preempt states, FCC should enlist their assistance
- *USTA* requires detailed fact-finding and granular analysis – states can **help** FCC write rules that pass muster
- Example: States do fact-finding with regard to whether impairments continue to exist – with particular focus upon whether reduction in output would occur in their states
  - Discovery
  - Cross-examination
  - States that have done this to date have found the UNEP access is warranted to serve the mass market (see Texas) – current evidence in Triennial Review docket is insufficient to rebut those findings
- Example: States examine impact of unbundling and UNE-P on retail price regimes (as in NY and IL today)
- FCC can utilize these state findings to determine future federal unbundling rules or applications of those rules

UNE-P: The Future

- In considering, "What happens after UNE-P?", FCC should not adopt paradigm that "locks in" particular model of competitive entry

- UNE-Loop entrants are *just* as dependent upon ILEC as UNE-P entrants
  - They cannot serve customers without loops and collocation
  - UNE-Loop entrants will have invested millions of dollars into a network architecture that mirrors the Bells – same COs, same loops
  - Potential for UNE-Loop "lock in" – once millions invested in ILEC network architecture, will that entrant *ever* migrate away from ILEC any further?

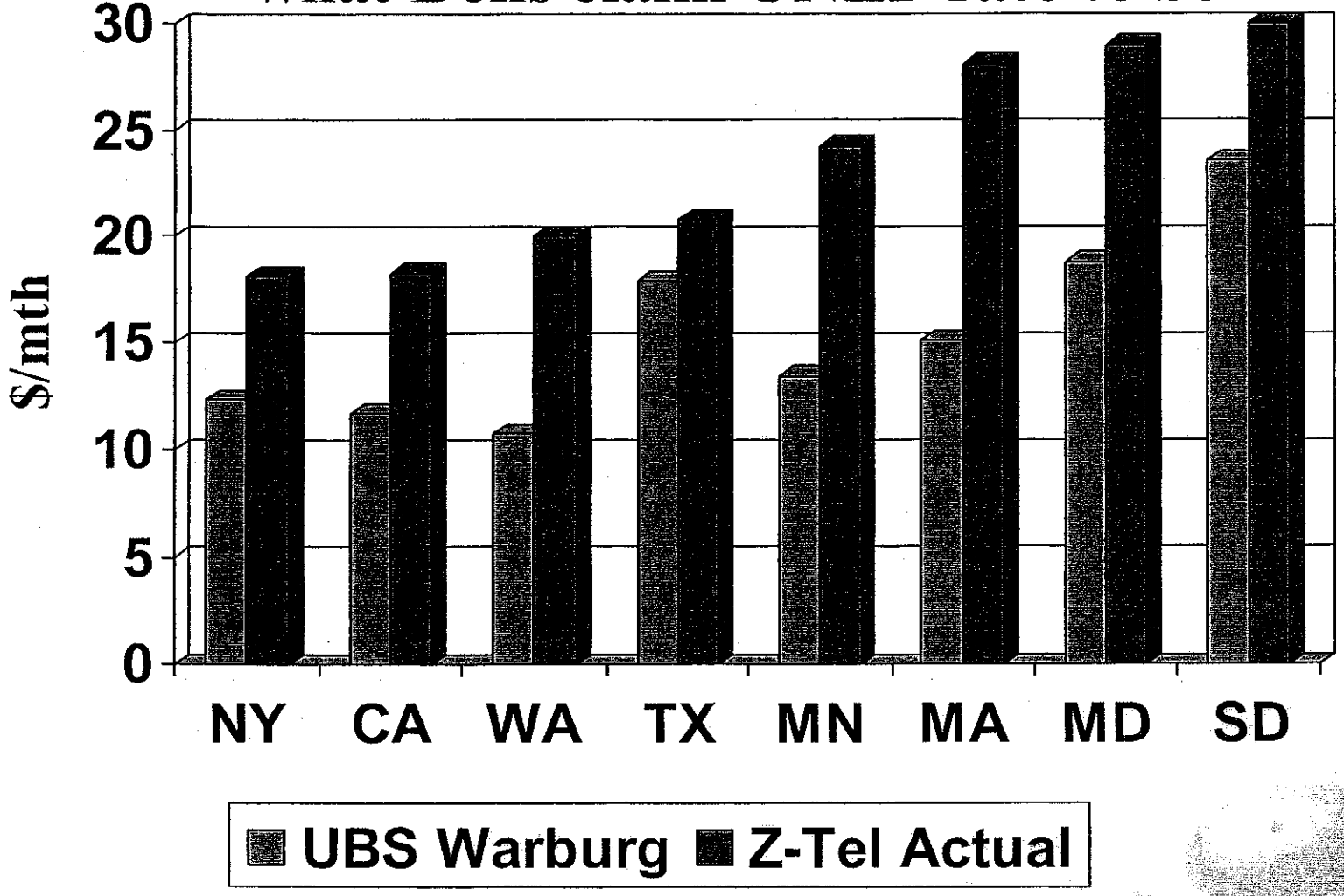
- UNE-P entrants free to migrate customers *totally* away from ILEC network once those networks are built
  - Since no CapEx associated with ILEC architecture, **UNE-P customer base is mobile**
  - If FCC wants new networks, facilitating open bidding for mass-market customer bases helps – locking CLEC customer bases into perpetual ILEC loop dependence does not
  - **These alternative networks will not be built without "customers first" – UNE-P provides that customer base**
  - *See* Beard, Ford and Spiwak, "Why AdCo?" (FCBA Journal)

Z-Tel Empirical Research

- ***Residential/Small Business Competitive Entry greater where UNE Platform available without restriction***
  - Z-Tel Policy Paper No. 3, updated to respond to Bell replies
  - Data: FCC Local Competition Reports
- ***UNE-P promotes facilities investment***
  - Z-Tel Policy Paper No. 4
  - Data: looks at switch deployment over time, using FCC Local Competition data, LERG
- ***Bells make money selling UNE-P to Z-Tel***
  - September 23 and 30, 2002 Z-Tel ex parte letters to Chairman Powell
  - SBC CFO confirms that competition in Texas – ***where UNE-P has been and is now available without restriction*** – is "workable" and "doable"
  - Wall Street reports substantially misstate actual costs of UNE-P

Real UNE-P Prices

Z-Tel actual payments >25% more than what Bells claim UNEP rate to be



Bells Crying Wolf?

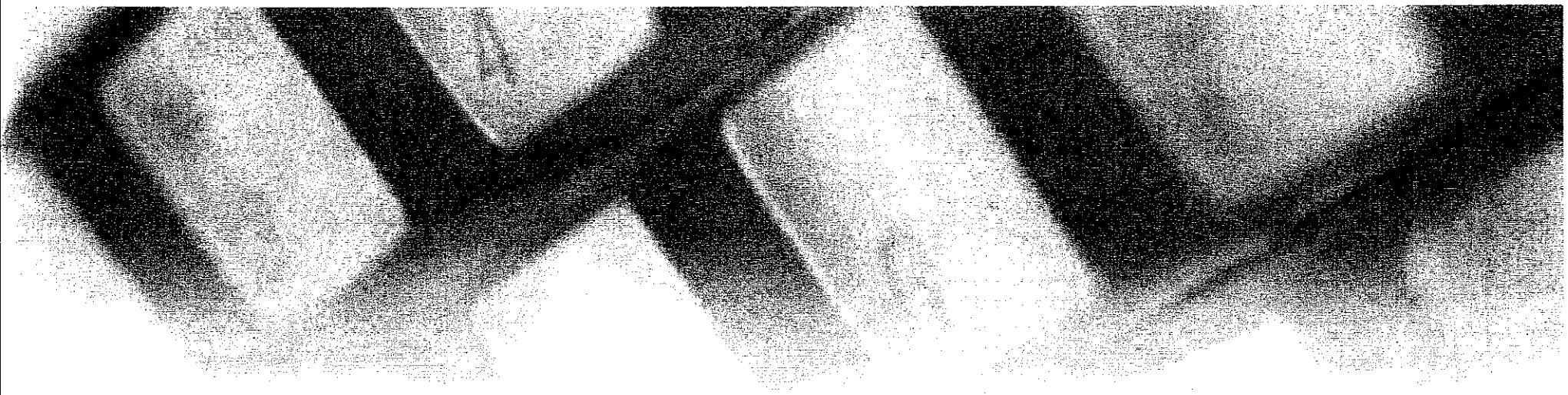
- BOCs average over 50% EBITDA margin selling UNEP to Z-Tel
- Margins **more** than sufficient to cover depreciation and "investment"
  - Z-Tel UNEP payments compared to actual Bell ARMIS operating costs
  - Z-Tel Sept. 23, 2002 letter to Chairman Powell and NARUC President Nugent
  - Z-Tel Sept. 30, 2002 letter to Chairman Powell and NARUC President Nugent
  - Phoenix Center Policy Paper No. 16
- Bells dramatically overstate impact of UNEP; understate UNE-P revenue by over 25% -- or $7/month per line.
- What happens to Bell profits if UNE-P lines immediately move to facilities? *Bells lose another $3B per year.*

Debate is *not* about "what type of competition to have" but about returning lost customers to Bells and increasing prices

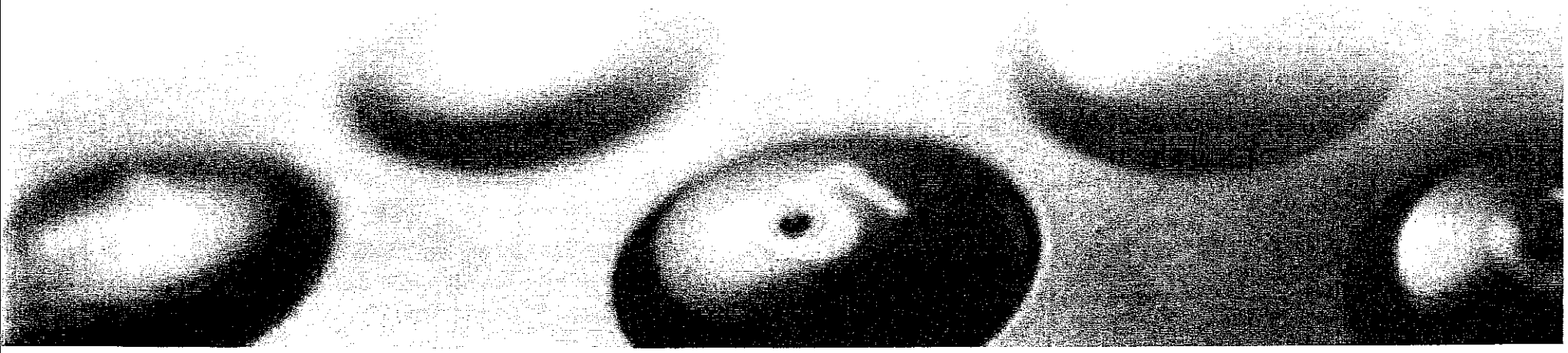
More Research...

- ***Lower UNE prices do not "discourage" facilities-based entry***
  - Beard, Ford and Koutsky, *Facilities-Based Entry into Local Telecommunications* (2002) (attached to Z-Tel Comments)
    - Study also supports findings of Policy Paper No. 4
    - Data: FCC Local Competition data, LERG, state UNE prices
    - **Study entirely unrebutted the record**
  - Pelkovits and Ford, *Unbundling and Facilities-Based Entry by CLECs* (2002)
    - Data: ARMIS, FCC Form 477 data (latest available data)

- ***Unbundling and "facilities-based" entry are not substitutes***
  - Beard and Ford, *Make or Buy? Unbundled Elements as Substitutes for Competitive Facilities* (2002)
  - Data: UNE-P Fact Report, FCC Form 477 data and UNE pricing data
  - Estimated demand curves for unbundled loops purchased with switching (UNE-P) and without switching (UNE-L)
  - Comparing elasticity of these curved indicates whether CLECs view UNE-P and UNE-L as substitute forms of entry, or whether they are different forms of entry to serve different markets
  - Results: **UNE-P and UNE-L are not substitutes**
  - Findings support Z-Tel argument that impairment not solved by availability of UNE-L – in fact, forced migration to UNE-L risks unserving the market UNE-P currently supports



Z-Tel's Innovative Uses of UNE-P

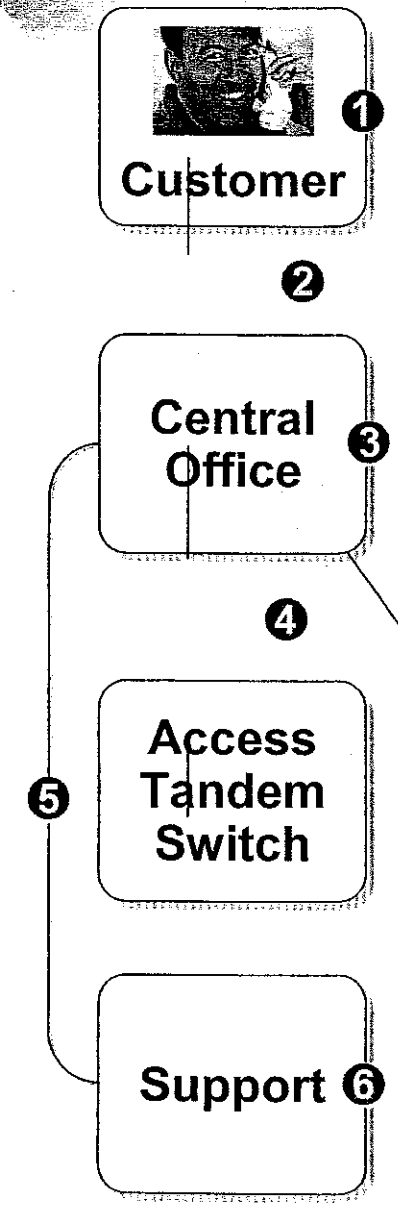


1st Nationwide Local Phone Company

Mass-market consumers in red can get Z-Tel service today.

Elements of UNE-P

Unlike resale, we control all elements.



Elements:

1. Network Interface Device
2. Local Loop
3. Local Switching
4. Interoffice Transport
5. Signaling and Call Related Databases (AIN)
6. Operations Support Systems

Access to the Switch Port in UNE-P allows CLEC to integrate innovative technology

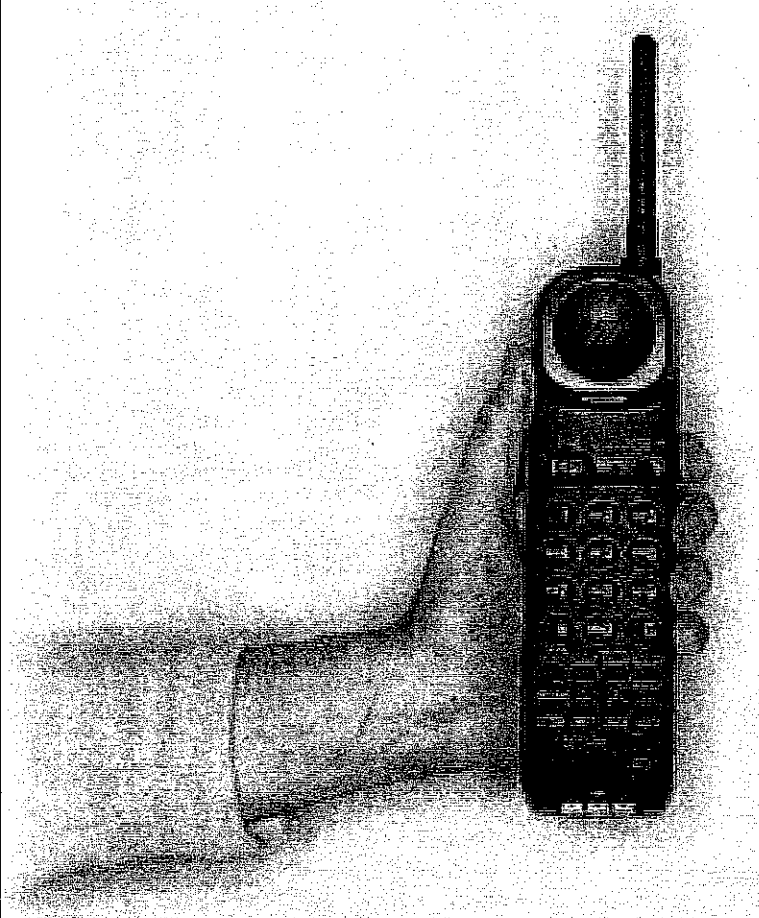
We're What the Act Was About

Innovative and new local services to *mass-market residential and small business customers*

For example:

- Remote access to calling & messaging via phone or Web
- Internet-accessible voicemail
- Multiple-number Call Forwarding
- Dial-by-voice functionality
- Web conferencing

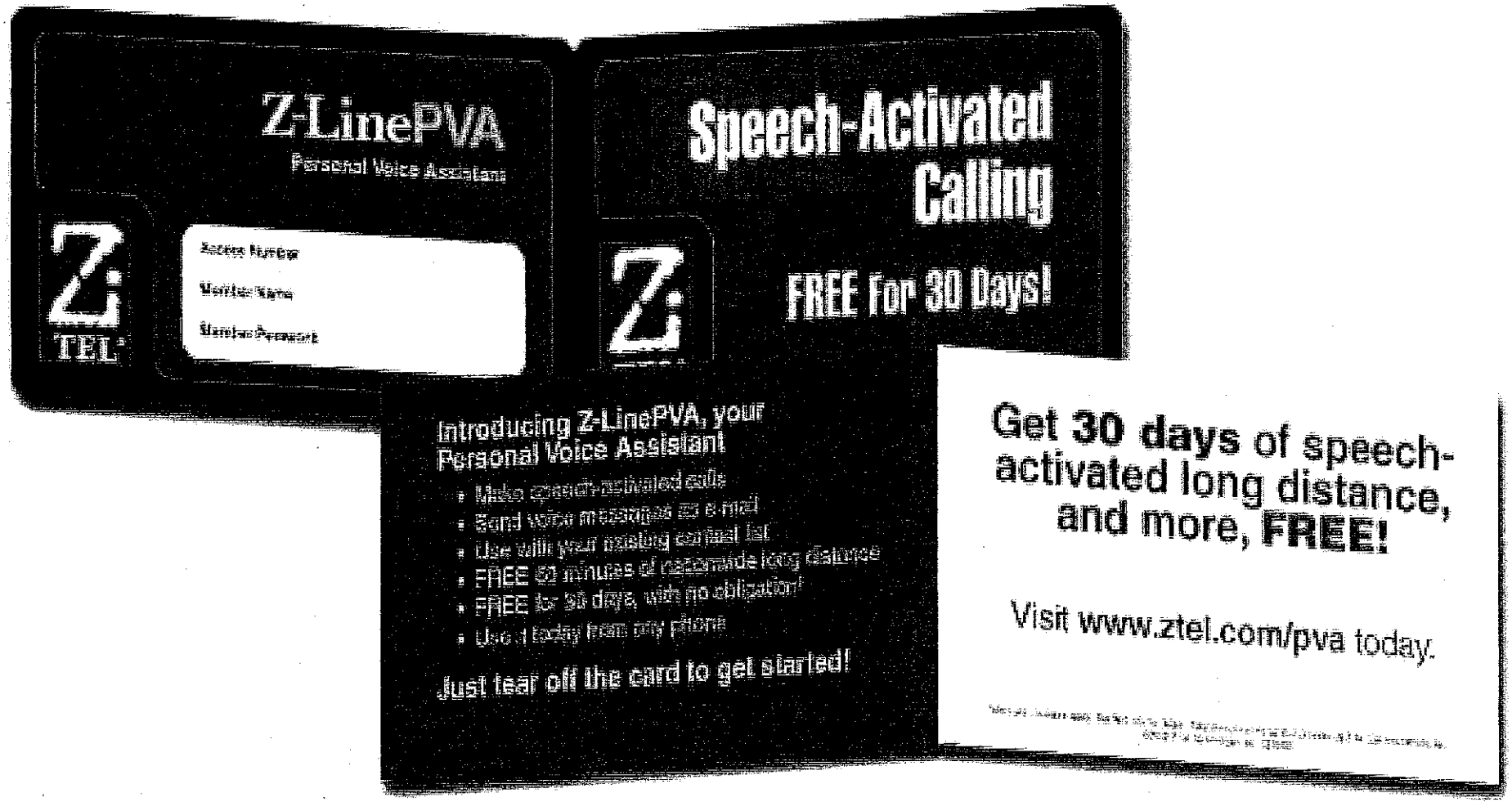
What the Bells Don't Offer…



[1] Place Call
[2] Message Center — Mom, Dad, Kids
[3] Account Options
[4] PVA(Personal Voice Assistant)
[5] Conference Calling
[6] Unified Messaging Coming Soon!
[7] Tasks & Calendaring Coming Soon!
[8] Content Coming Soon!
[9] Yellow Pages Coming Soon!
[0] Customer Care

Intelligent Dial Tone

Introducing Z-Line Personal Voice Assistant (PVA)



For More Information…

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The Commission Should Continue to Require Unbundling of Local Switching and Other Elements Needed to Serve the Mass Market

I. Z-Tel's ability to serve the mass market would be "impaired" without access to the UNE platform within any reasonable meaning of that term in section 251(d)(2)(B).

A. *Impairment Framework:*

- Section 251(d)(2)(B) focuses the Commission's attention on whether the "failure to provide access" to a network element would "**impair the ability of the [requesting] carrier** . . . to provide the services it seeks to offer."

- Section 251(d)(2)(B) thus indicates that the impairment analysis should be a granular, service-specific inquiry into whether failure to provide the element would **reduce CLEC output.**

    - The alternative impairment framework proposed by BOCs is inconsistent with the Act because: (1) it rewrites the statute to ignore its express focus on the ability of the requesting carrier to provide the "services it seeks to offer"; and (2) it rewrites the statute to replace "impair" with "essential." Congress chose "impair," which clearly requires a far more limited showing of reduced output than would "essential."

- Focusing on intermodal competition, as urged by the BOCs, would be flatly inconsistent with the Act's emphasis on whether the **requesting carrier** would be impaired. Congress did not require new entrants to buy a cable operator as a condition of entry.

- **But whether Z-Tel would be "impaired" without access to the UNE platform does not turn on what impairment framework is adopted.** As set forth below, under any reasonable meaning of the term "impair," the record here mandates a finding of impairment absent access to the UNE platform.

B. *Z-Tel Has Demonstrated Impairment:*

- *The Mass Market is Unique*: The **mass market** to which Z-Tel seeks to offer services has distinctive characteristics that currently make it nearly impossible to serve that market without unbundled switching and the other elements of the UNE platform. These characteristics include: high churn; low incremental revenue per account; need for headache-free installation and prompt customer service; and unwillingness to enter annual contracts.

- *Hot Cut Costs are Prohibitive in the Mass Market*: The primary costs of self-provisioning switching are not for the switch itself, but for start-up, collocation, maintenance and, most importantly, hot cut costs. Z-Tel's analysis of the New

York market indicated that **even if the switch itself, collocation, and maintenance were *free*,** it would not be profitable to deploy a switch to serve mass-market customers in New York at a "true" hot cut cost of over $185 found by the New York Commission.

- *Hot Cut Capacity is Insufficient to Serve the Mass Market*: The ILECs could not possibly perform the millions of hot cuts per month that would be needed in a competitive market. For example, the New York Commission recently found that if Verizon's current UNE-P orders were converted to UNE-L orders, **Verizon's hot cut capacity would have to expand by 4400 percent**, which is clearly not going to happen. New York Commission Comments at 4. (In fact, there are statements from the CWA in New York that Verizon is instead cutting back its hot cut capacity.) At current conversion rates and capacity, the New York Commission said that "it would take Verizon **over 11 years** to switch all existing UNE-P customers to UNE-L." *Id.* And that would not account for adding new customers, or churn. Rather than seriously addressing the capacity issue in its Reply, Verizon baldly asserts that it is not a problem.

- *Hot Cut Reliability Remains Problematic in the Mass Market*: The BOCs tout problem-free hot cut performance 90+ percent of the time – but it is extremely difficult to build a mass-market customer base when there *any* significant chance of losing phone service. These errors occur in bulk, or "project" hot cuts as well – because they still ultimately rely upon manual provisioning. **Unlike business customers, mass market customers cannot save enough to justify the possibility of losing service.**

C. ***The BOCs' "UNE-Fact Report" Supports Z-Tel's Arguments:***

- *The BOCs' Report Suggests that Competitive Carriers Currently Serve, at Most, About 1/10 of 1% of the Mass Market via UNE-L*: "Figure 4" of the "Fact" Report shows that – putting aside cable franchises – the BOCs were able to find only nine companies that purportedly serve 25,000 or more residential lines. But the vast majority of those lines are **not served via UNE-L**. The "Figure 4" companies are primarily either ILECs or cable overbuilders – and no one seriously thinks that the Act is only about enabling competition by such companies. And even among those companies, **most either never sought to serve the mass market, or have abandoned plans to do so.**

- *The BOCs' Latest List of CLEC-Deployed Switches*: The BOCs' list of CLEC switches is entirely dominated by companies that obviously do not use their switches to provide services to the mass market via UNE-L. Instead, they primarily serve medium-sized and large business customers, for whom it makes economic sense to aggregate loops at the customer's premises and provide service at a DS1 interface or higher. **This avoids the need for manual analog hot cuts at the ILECs' central office to serve these customers.** (Large businesses with intensive bandwidth needs are a different market than the mass market – they will

agree to sign long-term contracts and can tolerate some degree of manual installation.) Z-Tel (like other commenters) estimates that aggregation may become economically viable at about 16-20 lines.

D. *Z-Tel's Impairment Arguments are Fully Consistent With USTA v. FCC:*

- *Z-Tel has Urged that Impairment Analysis Should be Market-Specific*: *USTA* faulted the Commission for adopting impairment rules of "unvarying scope." Z-Tel wholeheartedly agrees with the D.C. Circuit's view that the large business and mass markets should be distinguished and analyzed separately.

- *Cost Disparities*: *USTA* cautioned that impairment cannot properly be based on "cost disparities" that would be "faced by virtually any new entrant in any sector of the economy." But the **hot cut (and related) costs giving rise to impairment for CLECs seeking to serve the mass market are unique to that market** – Z-Tel is not aware of *any* other industry where new entrants must pay established monopolists for the privilege of attracting the monopolists' customers.

- *Verizon*: The Commission must be cautious not to over-read *USTA*. *Verizon* expressly indicated that the Act is intended to promote broad unbundling to give "aspiring competitors every possible incentive to enter local" markets and overcome the monopolists historical advantage. Accordingly, *dicta* in *USTA* to the effect that the Commission should limit unbundling to facilities with natural monopoly characteristics must be viewed with skepticism, particularly since the Commission's next order will not necessarily be reviewed in the D.C. Circuit.

II. The Commission should continue to recognize state authority to establish additional unbundling requirements.

- *Plain Language*: Section 251(d)(3) expressly provides that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a state commission that . . . establishes access and interconnection obligations of local exchange carriers." When the Commission tried, in 1996, to construe this language to prohibit state unbundling rules that were inconsistent with the Commission's regulations, the Eighth Circuit reversed. The court held that section 251(d)(3) was meant "to shield state access and interconnection orders from FCC preemption." *Iowa Utilities Board*, 120 F.3d at 807.

- *States are Better Able to Undertake the Required Granular Analysis*: As NARUC's comments noted, "[s]tate regulators have access to the detailed real-world information that is essential" to determining what UNEs should be unbundled in particular markets. NARUC Comments at 7. State regulators are able to employ **fact-finding procedures**, including detailed discovery, live testimony, and cross-examination, that are not generally available to the FCC. *Id*

- *State commissions support the UNE platform for mass market consumers*: Those states that have undertaken detailed analysis of the need for UNE-P have generally endorsed state-wide unbundling of the UNE platform for the mass market. New York and Texas, in particular, correctly emphasized hot cut bottleneck problem in reaching that conclusion.

III. The section 271 checklist requires the BOCs to unbundle loops, transport, and switching, and there is no basis for forbearance from its requirements at this time.

A. *Section 271*

- *Plain Language*: The second item on the checklist requires BOCs to provide "[n]ondiscriminatory access to network elements" in accordance with sections 251(c)(3) and 252(d)(1). Items four through six of section 271 require that "loop transmission," "transport," and "switching" be provided on an "unbundled" basis. The two provisions thus plainly require that the BOCs provide unbundled access to loops, transport, and switching at cost-based rates and in accordance with the other provisions governing interconnection agreements.

    - There is absolutely **no textual support** for Verizon's contention that loops, transport, and switching suddenly cease to be "network elements" if the Commission finds that they need not be unbundled under section 251(d)(2).

- *The Problem of "Surplusage"*: Construing the checklist as the BOCs advocate to require only what section 251(d)(2) requires would violate a "cardinal principle" of statutory construction – it **would render the checklist items mere "surplusage."** The checklist items have meaning only if BOCs are required to unbundle those elements even *after* those items are not required to be unbundled pursuant to the standards of section 251.

- *The Commission's Prior Construction of Section 271*: In the *UNE Remand Order*, the Commission expressly construed section 271(c)(2)(B) to "require[] BOCs to . . . provid[e] . . . to requesting carriers the following network elements: local loops, transport, switching, databases and signaling." 15 FCC at 3905. Agreeing with the BOCs now that section 271 does not require unbundling independent of that mandated by section 251 would oblige the Commission to repudiate its earlier interpretation of section 271.

- *Maintaining Unbundled Switching and the Other Elements of the UNE-P Necessary to Serve the Mass Market Would Serve the Core Purposes of the Act*

    - *Congress Intended the Act Is to Eliminate the Local Monopoly*: According to the Supreme Court, the Act was intended to introduce competition to "persistently monopolistic local markets, which were

thought to be the root of natural monopoly in the telecommunications industry." *Verizon*, 122 S. Ct. at 1654. The act was "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Id.* at 1661.

- There is absolutely no statutory basis for Verizon's view that Congress intended competition using leased network elements to be just a short-term, transitional measure. Both the *AT&T* and *Verizon* cases indicate that Congress intended UNE-based competition to be one of three equally important modes of competitive entry.

- *Congress Intended Parity Between Local and Long Distance Entry*: Congress expressly envisioned that "**[w]hen we open local service exchanges to competition**, then the Bell operating systems will [be able to] go out and compete in the long distance market." 141 Cong. Rec. S8,135 (Sen. Dorgan). As Senator Breaux put it, "You can get in my business when I can get in your business." 141 Cong. Rec. S8,153. BOCs can now "get in" the long distance business (once they receive section 271 authorization) by simply leasing interexchange capacity and paying less than $5 per customer to switch the customer electronically to its service. In contrast, for a CLEC like Z-Tel to "get in" the local market via UNE-L (as the BOCs would require), the CLEC must pay tens or even hundreds of dollars per customer in hot cut costs. Because that is simply not a viable entry strategy, under the BOCs' approach, no "parity" would exist.

- *Congress Intended that the BOCs Must Provide Loops, Transport, and Switching for the "Reasonably Foreseeable Future"*: Congress knew that local competition would not develop overnight. Senator Pressler, the sponsor of the Senate Bill, explained that the checklist would require the BOCs to continue to unbundle the three core elements for the "**reasonably foreseeable future.**" 141 Cong. Rec. S8,469 (Sen. Pressler).

B. *No Justification for Forbearance*

- *Verizon's Petition is Premature*: So long as the BOCs are required to unbundle loops, transport, and switching under section 251(d)(2), the question of "forbearance" from 271 does not arise. The Commission should require Verizon to refile after issuance of a Triennial Review decision, to **avoid wasting everyone's time now**.

- *Verizon's Forbearance Argument Just Repeats its Erroneous Statutory Interpretation*: Verizon's "forbearance" argument essentially ignores the requirements of section 10. Verizon's entire "forbearance" argument rests on its

assertion that the section 271 checklist adds nothing to the requirements of section 251(d)(2). That argument would render the checklist mere "surplusage."

- *The Anti-Backsliding Provision*: Section 271(d)(6) provides for a range of penalties "if the Commission determines that a Bell operating company has ceased to meet any of the conditions required for [section 271] approval." Accordingly, it is clear that section 271 is not "fully implemented" simply because the checklist has been initially satisfied. Section 271 imposes continuing obligations.

- *Constitutional Issues*: "Forbearing" from enforcing section 271 would raise serious questions about the Commission's section 10 authority. The forbearance provision represents an unprecedented delegation from Congress to the Commission of authority to repeal portions of the Act. The Supreme Court has held that the President may not constitutionally be authorized to repeal portions of an Act, *see Clinton v. City of New York*, 524 U.S. at 439, and neither may the Commission.

- *Unbundling Should be Maintained Until There are Alternative Sources of Supply*: Contrary to the BOCs arguments, Z-Tel does not urge that the UNE platform should be preserved in perpetuity. The key question, though, is: "What must occur before a CLEC like Z-Tel **could viably serve the mass market**, in the absence of the platform?" The answer is clear: Z-Tel would need to be able to get the elements of the platform from someone other than the current monopolists – *i.e.*,, **from a fully-functional wholesale market** that can provide seamless conversions at sufficient capacity to meet demand. That is the situation today for the BOCs in the long-distance market, where they lease wholesale capacity.

WHERE UNE-P IMPLEMENTED, CONSUMERS BENEFIT STATEWIDE

With manually-provisioned UNE Loops, competition is scant and concentrated

The ability to provision orders electronically and ubiquitously allows competitors to utilize UNE-P to offer mass market residential and small business consumers a competitive choice today. The data below, obtained from SBC and BellSouth through discovery in state proceedings and aggregated here, clearly shows that UNE-P provides **geographically ubiquitous** competitive mass-market coverage. Other forms of entry – notably UNE Loop – are not ubiquitous. Because of this potential ubiquitous competitive response, it is no surprise, then, that State regulators have implemented UNE-P under state law as part of retail price cap regulation of ILECs.

Where's the Competition in Texas?
Local Entry By Size of SBC Central Office (Oct 2001)

Wire Center Ranking	Average Lines/CO	Competitive Penetration UNE-L	UNE-P
The 10% Largest Wire Centers	102,571	2%	8%
Next 10%	54,443	1%	11%
Next 10%	34.139	1%	12%
Next 10%	20,331	0%	13%
Next 10%	12,309	0%	16%
Next 10%	7,218	0%	17%
Next 10%	4,265	0%	18%
Next 10%	2,532	0%	21%
Next 10%	1,373	0%	25%
Smallest 10% Wire Centers	485	0%	21%

Where's the Competition in Georgia?
Local Entry By Size of BellSouth Central Office (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%