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**Cronan O'Connell**  
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EX PARTE

December 12, 2002

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W., TW-A325  
Washington, DC 20554

RE: CC Docket Nos. 01-338, 96-98 and 98-147, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Dortch:

Today, Cronan O'Connell of Qwest Communications International Inc. ("Qwest"), Jon Nuechterlein of Wilmer, Cutler and Pickering representing Qwest, Ed Shakin of Verizon, Gary Phillips and Christopher Heimann of SBC and Jon Banks of BellSouth met with the following members of the Federal Communications Commission Office of General Counsel: Laurence Bourne, Linda Kinney, Mary McManus, John Rogovin and Debra Weiner. The material in the attached presentation concerning Triennial Review issues was reviewed. The purpose of the discussion concerned the attached joint letter filed on November 19<sup>th</sup> to Chairman Michael Powell regarding state preemption.

In accordance with FCC rule 1.49(f), this *Ex Parte* letter and attachments are being filed electronically *via* the Electronic Comment Filing System for inclusion in the public record of the above-referenced dockets pursuant to FCC Rule 1.1206(b)(2).

Sincerely,  
/s/ Cronan O'Connell

cc: Laurence Bourne ( [lbourne@fcc.gov](mailto:lbourne@fcc.gov) )  
Linda Kinney ( [lkinney@fcc.gov](mailto:lkinney@fcc.gov) )  
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Attachments



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EX PARTE

November 19, 2002

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W., TW-A325  
Washington, DC 20554

RE: CC Docket Nos. 01-338, 96-98 and 98-147, In the Matter of Review of the  
Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers;  
Implementation of the Local Competition Provisions of the Telecommunications  
Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications  
Capability

Dear Ms. Dortch:

The attached letter on behalf of Qwest, BellSouth, SBC and Verizon to Chairman Michael Powell has been filed in the above docketed proceedings.

In accordance with FCC rule 1.49(f), this *Ex Parte* letter and attachment are being filed electronically *via* the Electronic Comment Filing System for inclusion in the public record of the above-referenced dockets pursuant to FCC Rule 1.1206(b)(1).

Sincerely,  
/s/ Cronan O'Connell

Attachment

November 19, 2002

Ex Parte

Michael K. Powell, Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W., 8<sup>th</sup> Floor  
Washington, DC 20554

RE: CC Docket Nos. 01-338, 96-98 and 98-147, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Chairman Powell:

As the *Triennial Review* proceeding nears completion, those with a vested interest in the status quo are increasing their calls for a transfer of decision-making authority from the Commission to the states concerning what network elements should be subject to unbundling requirements. They claim that, when the Commission excludes a UNE from the unbundling list for failure to meet the federal “impairment” standard of 47 U.S.C. § 251(d)(2), states should be permitted to reach the opposite conclusion and place that UNE back on the list under either federal or state law. Some go even further and suggest that the Commission is incapable of applying section 251(d)(2) on its own and that it should therefore delegate much of that responsibility to the states, albeit with some general guidance that undoubtedly would be of little practical import. We are writing to urge the Commission to reject these requests and to do so explicitly.

First, as a matter of law, the Commission *may not* permit states to override its unbundling determinations. As the Supreme Court and the D.C. Circuit have made clear, section 251(d)(2) establishes important limits on incumbent LEC unbundling obligations. These limits are there for a reason. As the D.C. Circuit explained, “unbundling is not an unqualified good,” because it “comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource.” *USTA v. FCC*, 290 F.3d. 415, 429 (2002). Thus, the limits incorporated by Congress into section 251(d)(2) reflect a balance of “competing values at stake in implementation of the Act.” *Id.* at 428. And when the Commission applies section 251(d)(2) to keep a UNE off the unbundling list, it necessarily decides that *inclusion* of that UNE *on* the list would upset this balance. As a result, states may no more add to the unbundling obligations imposed by the Commission than they may subtract from them.

Second, as a matter of policy, the Commission *should not* permit states to override its unbundling determinations. For good reason, section 251(d)(2) directs “the Commission” – not 50 different state commissions – to “determin[e] what network elements should be made available.” As AT&T explained three years ago, before its expedient about-face, “[a]ny process that involves individualized decisions by state commissions would inevitably give free play to [state policy] differences, and would create a patchwork of decisions on the availability of network elements that would reflect not the application of the congressional standards to different sets of facts, but the application of radically different standards that would subvert the national policy established by Congress.” AT&T UNE Remand Reply Comments, CC Dkt. No. 96-98, at 57-58 (filed June 10, 1999).

For these reasons, delegating the fundamental unbundling decisions to the states would be unlawful and unwise even if the outcome in the states were unknown. But the outcome is quite *well* known: Many states have made clear that, if given the opportunity, they would adopt the very same “more is better” unbundling policies the Supreme Court and the D.C. Circuit have squarely rejected. Such a result would create, in the words of the D.C. Circuit, “completely synthetic competition” in the short term, *USTA*, 290 F.3d at 424, at the expense of any realistic prospect of facilities-based competition in the long term. Put differently, if the Commission tried to avoid responsibility for these difficult unbundling decisions by punting them to the states, the outcome would be the same as if the Commission directly ordered perpetuation of the very UNE-P regime that the D.C. Circuit told it to change.

The Commission, therefore, should make explicit the preemptive effects of its unbundling determination. Any lack of clarity on that issue would itself generate many years of destabilizing state-by-state litigation, as non-facilities-based CLECs and some state commissions resist the preemptive consequences of a Commission decision to exclude particular UNEs from the national list. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (resolving a decade of widespread legal uncertainty by holding that the Department of Transportation’s failure to impose stringent federal airbag standards impliedly preempted state law tort liability for not complying with such stringent standards). And, as the Commission has long recognized, such uncertainty damages competition, investment, and the health of the industry.

The Commission also should make clear that section 271 does not permit end-runs around section 251(d)(2). Unless and until the Commission forbears from checklist requirements at odds with a Commission decision to delist particular elements under section 251(d)(2), such elements should be available only at market terms and conditions, as the Commission has previously held. It is critically important, however, that the Commission clarify that “market terms and conditions” does not mean “subject to regulation,” as some states appear to believe. A Commission determination to keep a given UNE off the list, and liberate it from the market-distorting effects of excessive regulation, forecloses any contrary effort to reimpose regulation of the same element under state law or other provisions of federal law.

An explicit recognition that this Commission’s unbundling determinations are binding and preemptive would be nothing new. In the *UNE Remand Order*, the Commission preempted the states from removing network elements from the national list of UNEs, concluding that any such action “would ‘substantially prevent implementation of the requirements of section 251’ as prohibited by subsection 251(d)(3)(C).” *UNE Remand Order*, at ¶ 157. The Commission did not simultaneously preempt states from *adding* UNEs to that list, but only because the Commission had failed to account properly for the *costs* of unbundling – a failure that the D.C. Circuit has now found unlawful. A clarification in the *Triennial Review* decision that states may not add to the UNE list would thus be a logical and necessary outgrowth of the Commission’s existing preemption policy.

**I. The Federal-Law Prohibition Of *Excessive* Unbundling Obligations Is As Binding On The States As The Federal-Law Imposition Of *Some* Unbundling Obligations.**

Various non-facilities-based CLECs and some states are pressing for a one-way ratchet under which the states may disregard the Commission’s determinations under section 251(d)(2) for the limited purpose of adding – but not subtracting – UNEs from the unbundling list. That asymmetrical, pro-regulatory approach would be inimical to the development of facilities-based competition – and unlawful. The Supreme Court and the D.C. Circuit have left no room for doubt that, when the Commission strikes the proper statutory balance by applying the Congressionally-prescribed limits under section 251(d)(2), the *ceiling* it thereby sets on unbundling rights reflects just as important a federal policy choice as the *floor*. The Commission may not permit the states to ignore that Congressional policy choice.

Section 251(d)(2) directs “the Commission” to strike a nationally binding balance between UNE-based competition on the one hand and facilities investment on the other. In particular, it requires “the Commission” to enforce a “limiting standard,” *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 388 (1998), that prevents “completely synthetic competition” from undermining “incentives for innovation and investment in facilities,” *USTA*, 290 F.3d at 424. When the Commission applies section 251(d)(2) to keep a UNE off the unbundling list, it necessarily decides that *inclusion* of that UNE *on* the list would upset the balance of “competing values at stake in implementation of the Act.” *Id.* at 428.<sup>1</sup>

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<sup>1</sup> Even in the *UNE Remand Order*, the Commission recognized, at least in the context of advanced services, that too much unbundling is inconsistent with the goals of the Act. Thus, in declining to require unbundled packet switching, the Commission concluded that such a requirement would contradict “the Act’s goal of encouraging facilities-based investment and innovation” and could “stifle burgeoning competition in the advanced service market.” *UNE Remand Order* ¶¶ 314-17.

Once the Commission has made such a determination, it could not permit the states to distort the same market on a state-by-state basis without abdicating its statutory duty to enforce the national policy choices embodied in section 251(d)(2). Just as federal law precludes *the Commission* from thwarting those national policy choices on its own, it precludes state-level regulation that would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 287 (1987). And, as discussed below, nothing in section 251(d)(3) remotely preserves the right of states to regulate in conflict with federal policy objectives.

This does not mean that the Commission must adopt a one-size-fits-all approach to unbundling throughout the United States, irrespective of variations in market conditions. Although certain network elements, such as unbundled switching, fail the “impairment” analysis in all markets, other network elements may well require a more granular approach. There is no reason the Commission cannot undertake that approach itself by establishing objective, carefully defined criteria for determining where unbundling is (and is not) appropriate. Indeed, the Commission has established and applied precisely that kind of granular test for special access pricing flexibility, and that test has been affirmed by the D.C. Circuit. What the Commission may *not* do – either expressly or through delegation – is permit the states to add UNEs to the unbundling list simply because they, rather than the Commission, wish to follow the judicially repudiated theory that “more unbundling is better.” *USTA*, 290 F.3d at 425.

AT&T’s contrary position – that “the Commission’s unbundling determinations constitute a *floor*, and that States may build upon those determinations to establish additional such obligations” (AT&T Triennial Review Reply Comments at 367) – has no basis in the Act and is designed solely to favor the interests of non-facilities-based competitors at the expense of facilities-based incumbents and competitors. As the Supreme Court and the D.C. Circuit have both made clear, the very purpose of section 251(d)(2) is to enforce Congress’s national policy choice about the right way – and the wrong way – to use unbundling rules to encourage genuine, value-adding local competition. Continued disregard for that national policy choice – in whatever form it may take – could lead only to a third remand and a legacy of several more years of crippling industry uncertainty.

## **II. The Commission Can And Should Expressly Preempt State Unbundling Rules Inconsistent With The Commission’s Determinations Under Section 251(d)(2).**

Contrary to the views of AT&T and some states, section 251(d)(3) – which the Commission itself has aptly described as a mere “anti-*field*-preemption provision”<sup>2</sup> – does not carve out a safe harbor for state-level overregulation of UNEs. By its terms, that

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<sup>2</sup> FCC Reply Br. 19 n.13, *AT&T v. Iowa Utils. Bd.*, Nos. 97-826 et al. (filed June 1998) (“1998 FCC S. Ct. Reply Br.”) (emphasis added).

provision, while permitting state regulation *consistent* with federal law, *excludes* state regulation that would “substantially prevent implementation of the requirements of [section 251] and the purposes of [the Act].” 47 U.S.C. § 251(d)(3). As discussed, the central point of both *Iowa Utilities Board* and *USTA* is that the Act’s “purposes,” and the limitations on unbundling that were incorporated into the Act to further those purposes, require this Commission to strike a careful balance between too little and too much unbundling – and that means setting a ceiling on unbundling rights. A state decision to add an element that this Commission has excluded from the list would violate both those purposes and the Congressionally-imposed limitations on unbundling. Accordingly, the Act itself precludes states from re-imposing an unbundling requirement for elements that this Commission has removed from the list. *See also Verizon North, Inc. v. Strand*, 2002 FED App. 0338P, slip opinion (6<sup>th</sup> Cir. Nov. 7, 2002) (invalidating state tariff requirement as inconsistent the scheme of negotiation and arbitration prescribed by Congress).

Nor can there be any question about the Commission’s broad inherent power to preempt state regulation inconsistent with the purposes of the Communications Act. As an initial matter, section 251(d)(3) itself expressly anticipates that the Commission can and will preempt state regulation that “substantially prevent[s] implementation” of the federal objectives of the 1996 Act. As the Supreme Court observed, “the Federal Government has taken the regulation of local telecommunications competition away from the States,” and the Commission may therefore “draw the lines to which [the states] must hew,” lest the industry fall into the “surpassing strange” incoherence of “a federal program administered by 50 independent state agencies” without adequate federal oversight. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. Even apart from the Commission’s specific preemption authority under the 1996 Act, its “statutorily authorized regulations . . . will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.” *City of New York v. FCC*, 486 U.S. 57, 64 (1988). A Commission decision to prevent the harms caused by excessive UNE regulation, particularly now that the D.C. Circuit has repudiated the notion that “more unbundling is better,” *USTA*, 290 F.3d at 425, is a quintessentially “reasonable accommodation of conflicting policies . . . committed to the agency’s care by the statute,” *City of New York*, 486 U.S. at 64, and is plainly entitled to preemptive effect.

More generally, where a federal agency has made a determination as to how “the law’s congressionally mandated objectives” would “best be promoted,” states are not at liberty to deviate from those “deliberately imposed” federal prerogatives. *Geier*, 529 U.S. at 872, 881. And, where federal law sets forth a legal and regulatory framework for accomplishing a lawful objective that reflects a careful balancing of competing interests, the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns. *See, e.g., Fidelity Fed'l Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (a federal regulation that “consciously has chosen not to mandate” particular action preempts state law that would deprive an industry “of the ‘flexibility’ given it by [federal law]”). In particular, a federal agency’s decision *not* to regulate has as much preemptive force as a decision to regulate if

it “takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.” *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *see Geier, supra*; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *United States v. Locke*, 529 U.S. 89, 110 (2000); *cf. Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995).

Here, it is inconceivable that a state commission’s decision to add to the list of unbundled network elements could ever be consistent with the federal balance that the congressionally-imposed limitations and the *USTA* decision require as a national unbundling policy. To be sure, when the Commission’s “national policy framework” meant nothing beyond the proposition that “more unbundling is better,” 290 F.3d at 425, a state commission’s decision to add to the list of unbundled network elements was, by definition, consistent with that policy. Now that the D.C. Circuit has invalidated that policy, the states are no freer than the Commission itself to ignore the congressionally mandated federal balance. Thus, where this Commission has considered and rejected a proposal to include a particular network element on the list – or, where the Commission has required that certain conditions be satisfied before the network element must be unbundled – any state commission effort to modify that determination by relaxing the threshold for unbundling is preempted.

Indeed, this is water under the bridge for the Commission. In the *UNE Remand Order*, the Commission exercised its broad preemption authority to foreclose the states from removing UNEs from the national list on the basis of their own individual policy choices. *See UNE Remand Order* ¶¶ 153-161. The Commission’s preemption analysis there is instructive – and is just as applicable here. As a legal matter, the Commission reasoned that, precisely because it had “found that unbundling particular network elements is necessary to further the goals of the Act. . . . state decisions to remove these network elements from the national unbundling obligations would ‘substantially prevent implementation’” of the Act’s requirements and purposes, “as prohibited by subsection 251(d)(3)(C).” *Id.* ¶ 157. That the Commission did not likewise hold that state decisions to *add* unbundling requirements would prevent implementation of the Act’s requirements simply reflects the Commission’s flawed approach to unbundling generally – and, specifically, its failure to recognize the costs, as well as the benefits, of unbundling. Now that the D.C. Circuit has made clear that unbundling policy must address these costs, and thereby must give effect to the limiting standards in the Act that reflect a balance of competing interests, the Commission’s own preemption analysis requires preventing the states from adding, as well as subtracting, from incumbent LEC unbundling obligations.

Another basis on which the Commission invoked its preemption authority in the *UNE Remand Order* was its concern that state-by-state variation in the criteria for unbundling “would lead to greater uncertainty in the market”; would “frustrate the ability of carriers to plan” their business strategies; would discourage carriers from “rais[ing] capital” to “enhance their networks”; would “complicate negotiation of interconnection agreements and would most likely lead to increased litigation”; and, in particular, would lead to state-by-state “litigation in the federal courts [under 47 U.S.C. § 252(e)(6)],

creating even more uncertainty[.]” *Id.* ¶¶ 158-161. Each of those concerns would arise if the Commission were to permit the states to disregard Commission decisions to *exclude* particular UNEs from the list. Permitting each state to reach contrary conclusions within its territory would create “uncertainty,” foreclose rational business planning, depress incentives for facilities-based investment, complicate intercarrier negotiations, and spawn massive “litigation in the federal courts” about the legality of particular state-level unbundling decisions, “creating even more uncertainty.” More uncertainty and litigation are, of course, what this industry least needs right now.

### **III. The Commission May Not Delegate To The States Basic Decisions Regarding “What Network Elements Should Be Unbundled.”**

AT&T and others suggest that, in expressing skepticism about the *UNE Remand Order*’s imposition of massive unbundling obligations on a market-neutral, nationwide basis, the D.C. Circuit’s decision in *USTA* somehow supports their call for empowering the states to make the unbundling decisions in lieu of the Commission, or to disregard national limits on unbundling that the Commission chooses to adopt. This is nonsense. Again, the question here is not whether the Commission should make more or less “granular” unbundling decisions about the market conditions necessary for triggering given UNE rights. The question is *who* should make those unbundling decisions (granular or not): the Commission, to which Congress expressly entrusted these hard choices, or each of the fifty states, without any comprehensive national policy vision for implementing this federal scheme?

The answer is straightforward. It would be neither sensible nor lawful for this Commission to punt these difficult unbundling decisions to the states, whether expressly or (what is the same) by failing to identify objective, specifically defined circumstances in which unbundling particular UNEs is and is not appropriate.

As an initial matter, there is nothing in the Act to suggest that the Commission *can* delegate unbundling decisions to the states, because the statute expressly directs *the Commission* to make those decisions. A federal agency may delegate its authority to the states only if Congress intended to permit that result, either explicitly or implicitly.<sup>3</sup> Here, Congress did not authorize such delegation; to the contrary, it explicitly charged “the Commission” with striking a national unbundling policy that balances the benefits and costs of unbundling. *See* 47 U.S.C. § 251(d)(2) (“[i]n determining what network elements should be made available . . . the Commission shall” engage in the impairment analysis) (emphasis added). If the Commission were to “delegate” the hard policy choices underlying these unbundling decisions to 50 independent state commissions, each with its own individual policy preferences, it would undermine that national policy and

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<sup>3</sup> *See, e.g., National Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 18 (D.D.C. 1999); *see also Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986) (“Without express congressional authorization for a [delegation], we must look to the purpose of the statute to set its parameters.”).

unlawfully abdicate its responsibility to provide “substance to the ‘necessary’ and ‘impair’ requirements.” *Iowa Utils. Bd.*, 525 U.S. at 392. Indeed, the Commission itself has warned the Supreme Court against proposals to “foist most of [the unbundling decision] on the state commissions in individual arbitration proceedings,” given that “Section 251(d)(2) does not, by its terms, even speak to their role.” 1998 FCC S. Ct. Reply Br. 43. It would be entirely inconsistent with the Act for the Commission now to delegate its unbundling responsibility to the states.

But even if the Commission could delegate its unbundling responsibility to the states (and it cannot), it could only do so by ensuring that it retains ultimate authority over the states’ decisions. *See, e.g., National Ass’n of Psychiatric Treatment Centers for Children v. Mendez*, 857 F. Supp 85, 91 (D.D.C. 1994) (concluding that delegation was proper because the federal agency “retains and exercises all final decisionmaking authority”); *United States v. Matherson*, 367 F. Supp. 779, 783 (E.D.N.Y. 1973) (requiring a state permit as a condition for the granting of a federal permit was lawful because the federal agency “retains the ultimate decision-making power. Significantly, no [federal] permit shall issue unless the Superintendent so decrees”), *aff’d mem.*, 493 F.2d 1399 (2d Cir. 1974).<sup>4</sup> To be lawful, any delegation of unbundling responsibility would, at a minimum, require the Commission to establish an additional regulatory framework – both at the state level and at the Commission itself – to exercise its “supervisory power” over state decisions and to ensure that state actions are “consistent with [the] statutory mandate.” *See Assiniboine*, 792 F.2d at 795 (requiring review that is both “meaningful” and “independent”).

Equally untenable to a formal delegation of Commission authority would be a Commission decision to make tentative or presumptive determinations on the core unbundling issues but then permit each individual state to make its own ultimate

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<sup>4</sup> The Commission cited these cases in support of its argument that it could lawfully delegate to state commissions the responsibility, in the first instance, of considering waiver requests of its “no-disconnect rule” for Lifeline consumers. *See Report and Order, Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8987 ¶ 396 n.1022 (1997) (recognizing that such a delegation was lawful only because the Commission itself had (1) “established specific standards to be followed by the [state commissions]”; (2) “retained supervisory power over the actions of the [state commissions]”; and (3) ensured that the state commissions’ actions were “consistent with its statutory mandate.”), *aff’d in part, rev’d in part, and remanded by Texas Office of Pub. Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). In the UNE pricing context, the Commission has prescribed methodological rules without exercising individualized oversight of the application of those rules by the states. That, however, is a function of each state’s *express statutory authority* to “establish any rates” for UNEs. 47 U.S.C. § 252(c)(2); *see also* 47 U.S.C. § 252(d)(1). *See generally Iowa Utils. Bd.*, 525 U.S. at 384. Here, in contrast, Congress directed “the Commission” to determine “what network elements should be made available,” 47 U.S.C. § 251(d)(2), and conspicuously *excluded* any mention of a state role in that process.

determinations on the basis of broad and subjective standards or criteria. AT&T itself said it best in 1999: “[T]he reality is that the principal differences in the outcomes that will emerge from such a process *will reflect not market variations but philosophical ones*. . . . Any process that involves individualized decisions by state commissions would inevitably give free play to [state policy] differences, and would create a patchwork of decisions on the availability of network elements that would reflect *not* the application of the congressional standards to different sets of facts, but the application of radically different standards *that would subvert the national policy established by Congress*.” AT&T UNE Remand Reply Comments, CC Dkt. No. 96-98, at 57-58 (filed June 10, 1999) (emphasis added). Contrary to its earlier position, what AT&T now proposes would be unlawful and unwise.<sup>5</sup> And it would generate a new rash of lawsuits in each of the states as the parties dispute the exact extent to which the Commission’s unbundling “principles” preempt specific state unbundling decisions.

Moreover, even if couched as an open-ended delegation of “fact-finding” authority, an FCC decision to hand off these basic policy judgments to the states would simply ensure continued investment-detering uncertainty (at least pending the outcome of state-specific litigation), perpetuate the UNE-P status quo, and, more generally, promote the “completely synthetic competition” that the D.C. Circuit has rejected as incompatible with this statutory scheme. *USTA*, 290 F.3d at 424-25. Indeed, in its recent letter to Capitol Hill, NARUC reaffirmed the commitment of many of its constituent members to the continued availability of UNE-P. Letter from Comm’rs Smith and Nelson to Sen. Daschle at 1 (Sept. 27, 2002). These states could not have made it clearer that they continue to adhere to the “more is better” approach to unbundling that the Act itself and the courts have repudiated, and that if the decision were left to them, many would retain unbundling requirements that are squarely inconsistent with the Commission’s *stated* commitment to the development of facilities-based competition.

Finally, upon excluding particular UNEs from unbundling obligations under section 251(d)(2), the Commission should take care to prevent re-regulation of those same UNEs through the back door. In particular, non-facilities-based CLECs and some states will undoubtedly seek to impose continued regulation of formally “delisted” UNEs under the competitive checklist of section 271. Of course, that issue would infrequently (if ever) arise if the Commission granted Verizon’s petition for forbearance on this subject.<sup>6</sup> Unless and until it forbears, however, the Commission should reaffirm that,

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<sup>5</sup> AT&T’s about-face on this issue proves the point. Ironically, and in contrast to the position it took in 1999, AT&T is now one of the chief proponents of allowing the states to make the determinations on unbundled access. What has happened since 1999? Having read orders by the Commission and statements by individual commissioners stressing facilities-based competition and the negative impact of liberal unbundling rules, AT&T now believes that its business plan of not investing in competitive facilities would best be furthered if the unbundling obligations were decided in the states.

<sup>6</sup> Verizon’s petition urges the Commission to forbear from applying section 271 unbundling requirements to elements that have been delisted under section 251 where the

where a particular element is included in the competitive checklist of section 271 but “does not satisfy the unbundling standards in section 251(d)(2), . . . it would be counterproductive to mandate that the incumbent offer[] the element at forward-looking prices. Rather, *the market price* should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.” *UNE Remand Order* ¶¶ 470, 473 (emphasis added).

In light of recent experience, moreover, the Commission needs to make clear that the term “market-priced” does not mean “subject to regulation” – and, in particular, that there is no role for the states in determining what constitutes a market price. As the Commission is aware, some states have misconstrued the term “market priced” to permit full-blown rate regulation, whether under TELRIC or some other pricing standard. This is lawless: when the Commission keeps a UNE off the unbundling list, it does so because, as Congress intended, it has determined that sellers and buyers, not federal or state regulators, should set the price. *See id.* ¶ 473. The Commission should make clear that any state-level decision to *set* the “market price” is preempted precisely because such regulation would frustrate the very point of excluding a particular UNE from unbundling obligations in the first place. And there can be no valid doubt about the Commission’s power to preempt in those circumstances. On the contrary, any separate, residual requirement to provide an element under section 271 is purely a requirement of federal law, imposed under the terms of a federal statute that is administered by this Commission. Under these circumstances, the authority to determine the pricing standards that apply lies exclusively with this Commission. And, of course (as noted), even if this were not the case, the Commission may preclude any state regulation that would frustrate the purposes of the 1996 Act. *See* 47 U.S.C. § 251(d)(3); *City of New York, supra*; *see also Local Competition Order* ¶¶ 83-103 (noting Commission’s plenary jurisdiction over facilities used indivisibly for both interstate and intrastate services).

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We are confident that the Commission will step up to the plate and make the difficult policy choices that Congress – and the courts – have entrusted to it, and that it will lift unwarranted unbundling obligations as an incentive for facilities-based investment. We urge the Commission to be explicit about the preemptive consequences of those decisions for inconsistent state decisions to impose either unbundling obligations where the Commission has determined that none belong or price regulation where the Commission has called for “market prices.” Any ambiguity on these issues would inflict yet another layer of destabilizing regulatory uncertainty on this industry by spawning

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competitive checklist requirements have been fully implemented -- as they must be to obtain long distance relief under section 271(d)(3)(A), for example. The petition reasons that, once the Commission determines that unbundling of an element would be inconsistent with the “balance of competing values” reflected in section 251(d)(2), the Commission could not rationally decline to forbear, and by statute any such forbearance decision would bind the states (under section 10(e)).

several more years of state-by-state litigation about the precise extent to which the Commission's unbundling determinations preempt contrary state decisions. The legacy of this proceeding should be clarity and certainty, not a reprise of the profound regulatory indeterminacy that has tormented this industry for the past six years.

Sincerely yours,

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# FCC *Triennial Review*: The Need for National Consistency in Unbundling Rules

Presentation by  
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to OGC

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# Background

- This *Triennial Review* proceeding marks the third time the Commission has sought to give effect to the congressional policy balance reflected in Section 251(d)(2).
- The record makes several UNEs particularly susceptible to removal from the unbundling list, whether in all circumstances or in nationally defined circumstances. *E.g.*:
  - *Dedicated transport and high-capacity loops.* In the pricing flexibility context, the FCC has already identified market conditions that signify sufficient competition to justify deregulation (and has concluded that those conditions are met in certain markets).
    - *See also USTA v. FCC*, 290 F.3d at 422 (citing FCC’s own “finding that 47 of the top 50 areas have 3 or more competitors providing interoffice transport” as basis for expressing skepticism that FCC could reasonably make “finding of material impairment”).
  - *Switching.* CLECs now use their own switches to serve customers in wire centers that contain 86% of all BOC access lines, and 96% of all BOC access lines in the top 100 MSAs.

## Governing Legal Standards.

- *USTA* decision: “[U]nbundling is not an unqualified good,” because it “comes at a cost.” 290 F.3d at 429. Those costs include:
  - “disincentives to research and development by both ILECs and CLECs” (*id.*);
  - “tangled management inherent in shared use of a common resource” (*id.*).
- Limits on unbundling obligations are thus necessary to ensure that “completely synthetic competition” does not thwart a core federal goal: “incentives for innovation and investment in facilities.” *Id.* at 424.
- Ignoring those limits would upset the balance of “competing values at stake in implementation of the Act.” *Id.* at 428.
- Excessive *state* unbundling requirements would upset that federal policy balance as much as excessive *federal* unbundling requirements.

## **Excessive unbundling thwarts federal telecom objectives.**

- Despite *USTA*, some parties argue that the FCC's UNE list sets a floor on unbundling rights but not a ceiling, such that states should be free to retain UNEs on the list that the FCC has removed in enforcing the federal policy balance.
- That reasoning could make sense only if unbundling limitations served no affirmative federal objective. But *USTA* makes clear that the federal-law prohibition of *excessive* unbundling obligations serves federal policy objectives as important as those served by the federal-law imposition of *some* unbundling obligations.
- The states would frustrate these federal objectives if they disregarded the FCC's judgment about how much unbundling is too much in light of the *USTA* court's reading of Section 251(d)(2).

## Excessive unbundling thwarts federal objectives (cont'd).

- Neither Section 251(d)(3) nor any other “savings clause” permits a state to adopt regulations that frustrate federal telecom objectives.
  - The Commission has already crossed this bridge.
    - In the *UNE Remand Order* (§ 157), the FCC expressly preempted “state decisions to remove [UNEs] from the national unbundling obligations,” because such decisions “would ‘substantially prevent implementation’” of federal telecom policy, “as prohibited by subsection 251(d)(3)(C).”
    - Now that the D.C. Circuit has made clear that federal telecom policy is as concerned with the investment-detering *costs* of unbundling as with the putative *benefits*, a clarification that states may not *retain* unbundling obligations that the FCC has *removed* is a logical outgrowth of the FCC’s existing policy.
  - Of course, Section 251(d)(3) and other anti-field-preemption provisions *do* preserve reasonable state-level regulations that do *not* frustrate federal policy objectives: *e.g.*, UNE provisioning intervals, performance measures, technical feasibility issues, etc.

## The FCC may not “delegate” its unbundling responsibilities.

- Congress directed “the Commission” to “determin[e] what network elements should be made available.” 47 U.S.C. § 251(d)(2).
- This proceeding marks the FCC’s third effort to fulfill that responsibility. Each of the previous two times, the courts found that the Commission had failed to strike a responsible balance that recognizes the *costs* of unbundling.
- The Commission would repeat that same mistake if, on this record, it fails to “determin[e] what network elements should be made available” and leaves the final decisions to the states.
  - The FCC is on notice that *at least* “80 state commissioners” wish to pursue the same more-is-better unbundling regime that the D.C. Circuit has found inconsistent with federal law. *See* 11/20/02 NARUC letter (endorsing “UNE-P” and arguing that “[a]ny FCC list should, at a minimum, include all existing items”).
  - Permitting broad unbundling of certain UNEs would substantively contradict the record evidence on “impairment.” (*See* p. 2, above.)
  - A need for *granularity* in some contexts does not imply a need for state-by-state *policy discretion*. *E.g.*, special access pricing flexibility triggers.
  - State-by-state determinations would only bring several more years of state-by-state litigation and uncertainty.

Excerpt from *AT&T UNE Remand Reply Comments* at 57-58 (1999), concerning proposals to leave unbundling decisions to the states:

- “[T]he reality is that the principal differences in the outcomes that will emerge from such a process will reflect not market variations but philosophical ones. . . . Any process that involves individualized decisions by state commissions would inevitably give free play to [state policy] differences, and would create a patchwork of decisions on the availability of network elements that would reflect not the application of the congressional standards to different sets of facts, but the application of radically different standards that would subvert the national policy established by Congress.”