



N A R EX PARTE OR LATE C  
National Association of Regulatory Utility Commissioners

ORIGINAL

February 6, 2002

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Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW, Suite TW-8B115  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**RE: NOTICE OF MULTIPLE ORAL AND WRITTEN EX PARTE COMMUNICATIONS**  
– Two originals filed in the proceeding captioned: *Triennial Review of the Section 251*  
*Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; CC*  
*Docket No. 96-98; and CC Docket No. 98-147*

Dear Secretary:

This notice of ex parte contacts is meant to cover a series of additional contacts between NARUC Member Commissioners and FCC Commissioners that occurred between January 28, 2003 and February 6, 2003. NOTE THIS ENTIRE PACKAGE OF DOCUMENTS WAS E-MAILED TO ALL THE FCC COMMISSIONER'S OFFICES AT 4:50 PM EST BEFORE SUNSHINE. This is just the notice of the filing. NARUC respectfully requests any waivers needed to file this out – of-time.

**A. TUESDAY, JANUARY 28, 2003:**

*Commissioner Brett Perlman* with the *Texas Public Utility Commission* filed the attached letter with the FCC.

**B. FRIDAY, JANUARY 31, 2003:**

All three members of the *New Jersey Board of Public Utilities* filed the attached letter with the FCC

**C. MONDAY, FEBRUARY 3, 2003:**

*Thomas Long, Advisor to California Commissioner Loretta Lynch*, left voice mail for *Jordan Goldstein, Advisor to Commissioner M. Copps*, noting the critical importance to California of continuing "Line-Sharing."

**D. TUESDAY, FEBRUARY 4, 2003:**

*California Commissioner Loretta Lynch* left a message for *Commissioner Copps* on the same issue - the critical importance to California of continuing Line-Sharing.

**E. WEDNESDAY, FEBRUARY 5, 2003**

Between Wednesday night, February 5, 2003, and Thursday morning NARUC's *General Counsel Brad Ramsay* spoke one or more times with *Lisa Zaina*, Office of Commissioner Adelstein, *Matthew Brill*, office of Commissioner Ahemalhy, *Christopher Libertelli*, Office of the Chairman, *Dan Gonzales*,

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Office of Commissioner Martin and *Jordan Goldstein*, Office of Commissioner Copps. In all of those calls, Mr. Ramsay discussed NARUC's probable filing of a refinement of its positions in this docket sometime before "sunshine" on the 6th. In one or more of those calls Mr. Ramsay also reiterated aspects of NARUC's base positions and described the continued state commissioner support for NARUC's base positions.

**F. THURSDAY, FEBRUARY 06, 2003:**

(1) *Becky Klein, Chair of the Texas Public Utility Commission* e-mailed the attached letter dated Thursday, February 0, 2003 to **all FCC Commissioner Offices**.

(2) **As** a result of the calls to FCC Commissioner assistants listed earlier, *NARUC's General Counsel Brad Ramsay* forwarded an April 2002 New York Public Service Commission filing (which is already filed in the record of this proceeding) to *Lisa Zaina, Chris Libertelli, Dan Gonzales, Jordan Godstein, and Matthew Brill* about a possible filing by NARUC. A copy of a written January 28, 2003 ex parte from *Texas Commissioner Brett Perlman* (also attached) was forwarded as well. The forwarded ex parte discussed possible switching "economic/operational" impairment in urban areas. The text of the e-mail follows:

"Morning (still,..)I've called each of you to alert you to NARUC's prospective filing today. **As** a result of my conversations with Chris discussing various aspects of that filing, I forwarded to him a copy of a written January 28, 2003 ex parte from Texas Commissioner Brett Perlman with one section highlighted discussing possible switching "economic/operational" impairment in urban areas - which - if NARUC does indeed file it later today, supports one key aspect of the NARUC proposal, aka nothing should drop off until a State decision (or perhaps in the case of the possible listed presumption against inclusion in that filing - until the State has a reasonable opportunity to rebut). That document is still "fluid." Some of my conversations with the rest of you also suggested you would probably also find the Perlman "excerpt" of interest. On the same issue, I also ran across some relevant passages in New York's comments already filed in this proceeding. I'm expecting a few states to try to file in support of NARUC's letter later today (A few should come in even if for some reason NARUC does not file). If I get them, I will circulate them to you. (If they were filed before 5:00 eastern) - otherwise you'll have to check the record to see if you got any "prohibited" late ex partes ... The relevant excerpts from both filings pasted in below (the New York comments are attached. Hope ya'll are getting more sleep than me....have a great day BRAD

(1) Texas Cmr. Perlman Ex Parte to Cmr. Martin- "In fact, the Texas Commission has recently performed exactly the type of analysis that you discussed in your speech. Last year, the Texas Commission reviewed the necessity for local switching by examining the robustness of the local switching market and whether CLECs would be impaired should switching be removed as an unbundled network element. \*\*\*\*\*In applying the FCC's existing test, the Texas Commission found, based on the specific circumstances in our market, that SBC was not offering nondiscriminatory access to the enhanced extended loop (EEL) in urban areas (Zone 1), such that CLECs would be able to utilize their own switching. The Texas Commission, based on a review of an extensive factual record, also found impairment in suburban and rural markets. The Texas Commission left the door open for removal of switching as an unbundled element when SBC can demonstrate that it provides nondiscriminatory access to the EEL to its CLEC customers. In addition to the MCI arbitration, the Texas Commission's recent report on competition may provide insight as to the impact of the Commission's proceedings.<sup>2</sup> This Report, which contains exchange level data from local exchange providers, is the most in-depth and recent analysis of local telecommunications competition available. The Report shows that CLEC market penetration (both in terms of revenues and access lines) has remained essentially flat since January 2001, due in large part to industry conditions (during the last two years 47 Texas CLECs declared bankruptcy and 42 relinquished certifications to serve) **At** the same time, the method of entry for CLECs continues to change, with some form of facilities-based service (UNE-L or carrier-owner facilities) comprising 45 %

of CLEC revenues, followed by UNE-P (44%) and resale (12%). \*\*\*\*\* On the other hand, the data shows that UNE-P is the primary means of serving residential customers in urban and suburban areas. UNE-P accounts for 76% of CLEC urban residential lines and 67% of CLEC suburban residential lines in Texas."

(2) NEW YORK PSC'S APRIL 2002 COMMENTS: Page 3-4 specifically addresses demonstrable "impairment" of CLEC self-provisioned switching for the mass market in NY, pretty close to, if not the most, competitive market in the US - and for the the NYC area most densely populated urban market. \*\*\*Footnote 17 says "Moreover, the fact that the hot-cut process impairs the CLECs' ability to provide their own switching is reinforced by the failure of the CLECs to install their own switches during the period they were arguing that the unbundled switching rate was too high."

\*\*\*Footnote 18 says: "There are currently 1.8 million lines being served via UNE-P. The 56,000 hot-cut orders in 2001 consisted of approximately 157,000 lines. At that rate, it would take Verizon over 11 years to switch all the existing UNE-P customers to UNE-L. In addition, Verizon would need to perform hot-cuts for new CLEC customers served via LINE-I."

\*\*\*The Text says the PSC found: "Verizon provisioned an average of approximately 205,000 orders per month via UNE-P in years 2000 and 2001. Those orders should increase in 2002 as the CLECs(tm) UNE-P offering is expanded under the Plan. Verizon performed approximately 56,000 hot-cut orders in 2001 or an average of approximately 4,700 hot-cut orders per month. Verizon would need to dramatically increase the number of hot-cut orders per month if UNE-P was terminated and CLEC customers were switched. In fact, if all of the 205,000 UNE-P orders were to become UNE-Loop (UNE-L) orders, Verizon's hot-cut performance would have to improve approximately 4400 percent. Such an improvement would be unlikely absent major changes to streamline the hot-cut process."

(3) *NARUC President and Michigan Commissioner David Svairda, NARUC 1st Vice President Georgia Commissioner Stan Wise, NARUC 2nd Vice President Washington Chair Marilyn Showalter, NARUC Telecommunications Chair Michigan Commissioner Robert Nelson, NARUC Telecommunications Co - Vice Chair New York Commissioner Thomas Dunleavy, NARUC Telecommunications Co - Vice Chair Florida Chair Lila Jaber, Alaska Chair Nan Thompson, Georgia Commissioner Stan Wise, New Jersey Commissioner Connie Hughes, Kentucky Chair Martin J. Huelsmann, Iowa Chair Diane Munns, Iowa Commissioner Elliott Smith, Texas Commissioner Bret Perlmann, Massachusetts Commissioner Paul Vasington, Nebraska Commissioner Anne Boyle, Oregon Commissioner Joan Smith, and Maine Commissioner Thomas Welch, several other State Commissioners, and numerous State staff, including NARUC General Counsel Brad Ramsay were on a call with FCC Chairman Michael Powell to discuss NARUC's proposal (attached).*

(4) *NARUC President and Michigan Commissioner David Svairda, NARUC 1st Vice President Georgia Commissioner Stan Wise, NARUC 2nd Vice President Washington Chair Marilyn Showalter, NARUC Telecommunications Chair Michigan Commissioner Robert Nelson, NARUC Telecommunications Co - Vice Chair New York Commissioner Thomas Dunleavy, NARUC Telecommunications Co - Vice Chair Florida Chair Lila Jaber sent the attached letter and outline to more detail NARUC's position on how the FCC should proceed in this docket.*

(5) *Pennsylvania Commissioner Glenn Thomas sent the following e-mail to FCC Commissioner Kevin Martin: "-----Original Message----- From: Thomas, Glen Sent: Thursday, February 06, 2003 3:30 PM To: 'kmartin@fcc.gov' Subject: Triennial Review -Kevin - I know you are probably pretty swamped down there right now as you try to put the finishing touches on the triennial review. It sounds like you and your fellow commissioners are making quite a bit of progress and I certainly can't wait to see the final product. I just wanted to reach out and let you know that I appreciate your advocacy for the states in this process. From what I hear, you are really sticking up for the states and it is greatly appreciated. It is the*

right thing to do. I also like the notion a lot of looking at the switch issue from a perspective of different zones or density cells (as we call them here). Telecommunications policy is clearly becoming more regionalized between areas of greater population and areas of sparser population. If the FCC could acknowledge this reality and then formulate rules that recognize this distinction, it will pave the way for states to do the same in this and in other areas. I'm sure that there will be many important devils in the details, but the overall concept is a good one and one that I would look forward to standing behind.

Thanks for all the hard work you have put into this and I look forward to seeing you soon." Glen Thomas, Chairman - Pennsylvania PUC

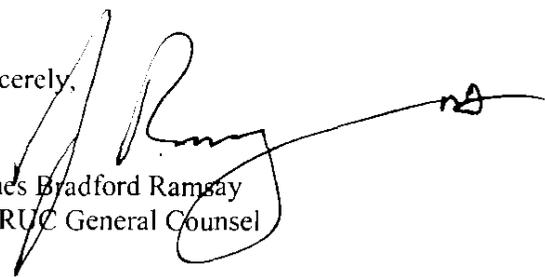
(6) A representative from the *New Jersey Board of Public Utilities* sent the following to all the *FCC Commissioner offices*: "The New Jersey Board of Public Utilities The New Jersey Board of Public Utilities has recognized, through various decisions related to Local Competition matters, that access to unbundled switching and the other network elements that constitute the UNE-Platform, are necessary to mass market provision of local service, particularly residential and small business customers. In a Status of Local Competition proceeding, the Board held hearings relating to, among other things, whether CLECs should have access to unbundled switching. At the conclusion of these hearings and subsequent collaborative workshops, the Board required that the UNE platform be available to CLECs serving the mass market. Without such access, CLECs would therefore be impaired from serving this market segment and their ability to develop a critical mass of customers in a given geographic area, would be eliminated. As we have previously stated, we have experienced significant inroads by competitors into the residential and small business local exchange markets over the last 6 months which is directly attributable to lower UNE rates and the availability of the UNE-P. Without the platform, these consumers will see little or no competitive alternatives. We again urge the Commission to give the states the discretion we need to tailor rules to our market and not set mandatory nationwide rules that cannot possibly account for the unique circumstances in each individual state. In addition, this Board and the FCC relied upon, among other things, the availability of UNE-P in determining that the local market in New Jersey was sufficiently open to allow Verizon-New Jersey to enter the long distance market. Elimination of UNE-P will cause the carefully crafted balance between local and long distance markets to be skewed toward Verizon and the other Regional Bell Operating Companies at the expense of competitors and consumers."

#### OTHER INFORMATION

Except as otherwise noted, contacts with FCC Commissioners and Staff re-emphasized NARUC members' commitment to the tasks Congress assigned to the State commissions and urged the FCC representatives not to limit or restrict the tools available to the States in fulfilling their tasks. State commissions remain focused on the difficult tasks of promoting facilities-based competition as envisioned by the 1996 Telecommunications Act and assuring customers receive better service and more choices at lower prices. States cannot accomplish that important economic policy goal without the availability of effective competitive entry strategies.

If you have any questions about this, or any other NARUC filing, please do not hesitate to give me a call at 202-898-2207 or [jramsay@naruc.org](mailto:jramsay@naruc.org).

Sincerely,

  
James Bradford Ramsay  
NARUC General Counsel

**January 31,2003 Letter From by the New Jersey Board of Public Utilities:**

Honorable Michael K. Powell, Chairman  
Honorable Kathleen Q. Abernathy  
Honorable Michael J. Copps  
Honorable Kevin J. Martin  
Honorable Jonathan S. Adelstein  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Dear Chairman Powell:

This letter is written in support of the issues and concerns raised by members of the House of Representatives regarding potential changes under consideration by the Commission with respect to competitor's access to the existing telephone network. That correspondence addressed several issues including (1) consumer advocates' concerns that the proposal would lead to higher rates for local telephone service; (2) CLEC concerns that proposed changes would curtail their services or be forced out of business; (3) long distance carriers' concerns that Bell Companies would gain a significant advantage in providing long distance service; (4) independent Information Service Providers concerns that they would be placed at a significant competitive disadvantage; (5) state regulators, such as this Board, concerns that we would be preempted by FCC regulations and, since we utilized the UNE-P framework for assessing sufficient local competition to recommend long distance entry by Verizon, the proposed changes would undermine local competition; and (6) small business' concern that they would lose competitive alternatives if UNE-P and existing network access rules were eliminated.

As we have stated repeatedly in the past several months, we are particularly concerned with state preemption and the potential elimination of the UNE-P. We have experienced significant inroads by competitors into the residential and small business local exchange markets over the last 6 months which is directly attributable to lower UNE rates and the availability of the UNE-P. Without the platform, these consumers will see little or no competitive alternatives. We again urge the Commission to give the states the discretion we need to tailor rules to our market and not set mandatory nationwide rules that cannot possibly account for the unique circumstances in each individual state. In addition, this Board and the FCC relied upon, among other things, the availability of UNE-P in determining that the local market in New Jersey was sufficiently open to allow Verizon-New Jersey to enter the long distance market. Elimination of UNE-P will cause the carefully crafted balance between local and long distance markets to be skewed toward Verizon and the other Regional Bell Operating Companies at the expense of competitors and consumers.

In conclusion, we would urge the Commission, as do the members of Congress who authored the January 24, 2003 letter, to address the concerns of consumers, CLECs, long distance companies, independent ISPs, small businesses and state utility commissions as part of your deliberation of these complex public policy issues. Sincerely,

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Jeanne M. Fox, President

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Frederick F. Butler, Commissioner

\_\_\_\_\_  
Carol J. Murphy, Commissioner

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Connie O. Hughes, Commissioner

\_\_\_\_\_  
Jack Alter, Commissioner

Dear Chairman Powell:

Thank you for continuing our dialogue on the FCC Triennial Review.

NARUC considers the issues to be addressed in that proceeding to be vital to ensuring sustainable, economic competition in the telecommunications industry. This has been an intense process and we commend you for your hard work. We believe that, in the Telecommunications Act of 1996, Congress intended to establish shared responsibility between the states and the FCC for the implementation of the law. In this regard, your leadership in reaching out to the states to hear our concerns and suggestions is much appreciated. We are grateful for the willingness of all of the FCC commissioners in working with state commissioners to find a mutually acceptable framework to address the availability of unbundled network elements (UNE).

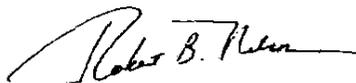
We would like to offer the enclosed document as a useful summary of much of the discussion between state commissioners and the FCC these last two weeks. Some of these guiding principles could form the basis for an approach to the UNE issues that we feel would encourage competition and further investment in the telecommunications sector. While we might agree that the FCC must, in the first instance, determine whether competing carriers are "impaired" in the provision of a telecommunication service, we believe that my ruling that results in the removal of a UNE used to provide mass market consumer services should not result in a flash cut implementation. As you will see in the principles provided herein, we believe that a reasonable transition period for the benefit of consumers and carriers alike is critical. We acknowledge that there are differences among states in their position. We encourage you to seek state input and refer to the individual comments filed by states.

We hope you find this information useful. Thank you again for giving us the opportunity to work through these important issues with you.



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David A. Svanda, NARUC President;  
Michigan Commissioner



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Commissioner Robert Nelson, Co-Vice Chair,  
NARUC Telecommunications Committee



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Stan Wise, NARUC First Vice President;  
Georgia Commissioner



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Thomas J. Dunleavy, Co-Vice Chair,  
Telecommunications Committee



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Marilyn Showalter, NARUC Second Vice  
President; Washington Chairwoman

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Commissioner Lila Jaber, Co-Vice Chair  
NARUC Telecommunications Committee

## UNE Triennial Review: Principles and Standards for State Commissions

### I. FCC ESTABLISHES GENERAL OVERARCHING PRICIPLES:

*FCC provides generic language interpreting the statutory tests for impairment applicable to all elements.*

*Subject to a showing of the presence or absence of impairment, the FCC specifies that ILECs, CLECs, or a State PUC (sui sponte/on its own motion) can **seek** to add to or subtract from any presumptive national list. Additions may be appropriate, e.g., **where** persistent "operational impairment" issues resurface after an element has been removed.*

*The FCC specifies that where a State's granular analysis results in an item being removed from the list, the State has considerable discretion to tailor any **needed** transition period to assure subscriber's continuity of service (where it appears a CLEC may potentially be unable to continue operations) and provide the carrier(s) with an appropriate time frame to adjust businesses as well as deal with any necessarily short term service adjustment shifts.*

### II. FCC ESTABLISHES PRESUMPTIVE NATIONAL LIST:

*The use of a presumption allows the FCC to better meet **the DC Circuit's requirement for a granular analysis and avoid litigation over either the new "generic standard" provided is inappropriate in application -- a flaw the court seemed to focus on in its remand order.***

#### A. SWITCHING

*(i) **LARGE HIGH-VOLUME CUSTOMERS** (subscribers to high-capacity voice services) **IN ZONE 1**: FCC, based **on record evidence**, establishes a presumption stating that access to unbundled local switching to serve large high-volume customers located in the State-defined "Zone 1" need not be provided and should be removed from the national list.*

*(ii) **ZONE 3 AND HIGHER**: FCC, based on record **evidence**, establishes a presumption that access to unbundled local switching in Zone 3 (and higher for states that have established more than 3 Zones) should remain on the national list.*

*(iii) **ZONE 2/1**: FCC finds the record inconclusive whether or not to **require** the provision of unbundled local switching for all market segments in **Zone 2** and in Zone 1 **for** mass market customers.*

#### B. **TOR TRANSPORT AND ALL OTHER CURRENT UNEs** (including Line Sharing)

*(i) FCC finds based on record evidence that all **other** items should be on the list a presumption that all other items remain on the **list**.*

### III. FCC OUTLINES GENERAL SCOPE OF STATE GRANULAR INQUIRY:<sup>1</sup>

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<sup>1</sup> As the BOCs themselves have argued, their costs and processes vary from state to state. Consequently, state commissions, which are well equipped to deal with variations, and tailor solutions to the circumstances in their own states, are best suited to address economic and operational barriers. The process is similar to the detailed fact-finding and other work of the state commissions in evaluating BOC applications for authority to offer in-region interLATA services pursuant to Section 271

**A. GENERIC PROCEDURE TO ELIMINATE, ADD, RETAIN ANY UNE:**

*(i) SWITCHING – LARGE HIGH- VOLUME CUSTOMERS (subscribers to high-capacity voice services) IN ZONE I: Upon application by a CLEC, or on its own motion, the State may create a record and take final action to rebut the presumption in 2.A.(i).*

*(ii) OTHER ACCESS TO SWITCHING AND OTHER ELEMENTS: Upon application by an ILEC, or on its own motion, the State may establish a proceeding and create a record to determine if unbundled local switching should be made available in a particular market. The State PSC would have the flexibility to determine, through a fact-based evidentiary proceeding, what the relevant geographic area (market) was for local switching (or any element), what conditions determined whether or not impairment existed, and to make the ultimate decision regarding retention or elimination of unbundling requirements for the element in question.<sup>2</sup>*

**B. GENERIC GUIDELINES FOR ALL UNES**

- (i) FACTORS: FCC should establish a non-exhaustive list of economic (demand and supply elasticity(s), contestability analyses, etc) and operational factors for the state commissions to apply in conducting the impairment analysis required by Section 251(d)(2). It will be very difficult to provide generic standards for all the elements.*
- (ii) SWITCHING SPECIFIC EXAMPLES: FCC could use the extensive record on ways to analyze "switching - to create a non-exhaustive list "of the type of factors" that States should consider in any "element" analysis.*

**Economic factors:**

- Proper geographic market definition (CO, cluster of COs, MSA, etc.)
- Proper product/service market definition (Digital vs. Analog, Large vs. Small businesses/Residential, etc)
- Number of Lines in the Market provisioned by CLEC switches
- Number of CLEC switches in the defined market
- Pricing/availability of collocation (physical and virtual)
- Pricing/availability of alternatives to get access to loops other than collocation.
- Transport costs, including all variations of EELs
- Loop migration costs, including project migrations
- Other costs incurred by CLECs in transitioning to existing/new facilities

**Operational factors:**

- Existence of loop provisioning process that enables customers to switch easily and quickly between facilities-based carriers without undue service disruption on the scale required for mass markets services, e.g., for analog hot-cuts, in the same time as ILEC retail POTS provisioning and no performance problems for a set period.
- Establishment of terms, conditions and procedures for implementation of efficient loop provisioning - meaning a level of provisioning that is not necessarily electronic

<sup>2</sup>

It is important to permit states this flexibility because of the great degree of variation in markets and submarkets between states and across elements. For example, network architecture varies significantly based on geography and population density. How CLECs configure networks can vary significantly based on entry strategy and business plans. States are best able, through evidentiary hearings, to accommodate these variations if given broad guidelines and flexibility to address the nuances of individual markets. An example of an element for which a different geographic area might be more relevant is local transport. In certain parts of the east coast of Florida, casual evidence suggests that fiber optic transport has been deployed in excess and, in theory, is widely available at low cost. This is substantially different from the case of local switching. Given the existence of wide variations in the availability between elements and different network designs that adapt to these variations, it is important that states be able to determine relevant markets and conditions in those markets that significantly influence the availability of any given element. It is also likely that migration issues vary by state and region and possibly by network element.

- loop provisioning, but still capable of allowing CLECs to transition customers from UNE-P to their own switches either on a project basis, or for a single customer.
- Unbundling of all loop types, where technically feasible
  - Resolution of all ILEC-CLEC migration scenarios
  - Resolution of customer-affecting matters relating to transition from UNE-P to UNE-L, including LNP and 911 issues

**Caveats:**

(1) NARUC believes that, given the DC Circuit's opinion, by deferring the granular analysis to the States, the FCC actually improves the prospect that any FCC order will survive judicial review. The DC Circuit opinion was focused in part in how the FCC applied its standard. Rules/guidelines promulgated by the FCC would satisfy the granularity requirement because they require the outcome of the process to be based on a more specific geographic and market analysis --even if it is the States that apply the FCC guidelines to produce specific results. The FCC new rules would recognize that the FCC cannot perform the market-specific analysis (at least with all deliberate speed and specificity) and the rules/guidelines would guide the results reached by States. The presumption is essentially of an interim or temporary effect.

(2) NARUC believes the States should make the granular analysis suggested by the D.C. Circuit. During recent calls, some have raised questions as to whether the FCC has to do a "granular analysis" before any items currently on the list can be placed "back on" the national list after the Court's mandate issues on February 20, 2003:

**As** outlined very briefly in a previous NARIJC ex parte, notwithstanding the footnote in the FCC's motion to the DC Circuit to extend the mandate, NARUC believes that a position that the Court meant to vacate all the elements as of February 20, 2003 on the list is legally suspect.

But, even assuming *arguendo* all the UNEs are vacated, if the FCC chooses not to implement NARUC's recommendation, and decides, based on a "granular analysis" that there is "no impairment" with respect to specific elements and they must come off the list. *all the FCC Commissioners appear to believe that the FCC easily can establish a glide path or transitional mechanism for CLECs using those items to "transition" from their use.*

If the FCC has the authority needed to establish a transition for such migration for reasons of continuity of service, avoiding the further massive disruption that would ensue from a flash cut, etc --- the FCC can also establish a transitional period during which time the States could determine (for, e.g., certain Zone 1 mass market and Zone 2 customers where NARUC has suggested the national record might be inconclusive) whether "impairment" exists. Indeed, some have suggested a two or three year transition for one particular element, if there is a finding of "no impairment." That is more than an adequate time for a state "granular analysis" proceeding to proceed to conclusion. This would allow States to make their determinations to affect the outcome and would promote stability during the transition period.

*Appendix - The "NARUC Principles"*

Elements State Regulators Urge as Components of any FCC Order

**(1) NO STATE PREEMPTION:**

Any FCC Order should make clear no preemption is intended or should be implied - particularly with respect to additions to the National list imposed by States.

**(2) PRESUMPTIVE NATIONAL LIST THAT INCLUDES EXISTING UNE's.**

Any FCC list should, at a minimum, include all existing **items**.

**(3) STATE CHECK OFF BEFORE A UNE IS DE-LISTED .**

Carriers that want to remove an item from the list must make a factual case before a State commission.

**(4) TIMING OF IMPACT OF STATE DECISION.**

Any challenged UNE stays on the required list until State commission makes contrary finding.

**(5) CAUCUS WITH STATES NECESSARY PREREQUISITE.**

FCC should caucus with State commissions extensively before promulgating the "necessary and impair" standard used to evaluate if a UNE should be available.

**(6) STATE AUTHORITY TO ADD UNES CONFIRMED.**

FCC should confirm its previous ruling that States **RETAIN** the right to add to the national list after hearing based on State and Federal law.

**Rebecca Klein**  
Chairman

**Brett A. Perlman**  
Commissioner

**Julie Caruthers Parsley**  
Commissioner

**W. Lane Lanford**  
Executive Director



## *Public Utility Commission of Texas*

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February 6, 2003

Chairman Michael K. Powell  
Commissioner Kevin J. Martin  
Commissioner Kathleen Q. Abernathy  
Commissioner Michael J. Copps  
Commissioner Jonathon S. Adelstein  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking*, CC Docket No. 01-338 (rel. Dec. 20, 2001).

Dear Commissioners:

**As** the discussion between and among the states and the FCC on the appropriate regulatory paradigm for unbundled network elements comes to an end, I would like to thank you for being mindful of the important role that states have played in creating a competitive telecommunications market. I would also like to emphasize the critical importance the states play in conducting the "granular analysis" in individual telecommunications markets required by the United States Court of Appeals for the D.C. Circuit in the *USTA* decision.<sup>1</sup>

**As** you are undoubtedly aware, this Commission has invested enormous resources to ensure that the competitive framework in Texas has the proper balance between and among all the relevant stakeholders. The Texas Commission worked with southwestern Bell (SBC) and the competitive carriers for a full two years before granting SBC's Section 271 application, and we worked closely with your Commission throughout that process. Because of the critical importance of the UNE issues, last year, the Commissioners presided as Arbitrators over a hearing pursuant to Section 252 of the federal Telecommunications Act to determine whether CLECs were impaired without access to unbundled local switching. The Commission found "that CLECs are impaired in Texas without access to local switching as an unbundled network element."<sup>2</sup> This impairment was found in "all zones" throughout the State, including urban

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<sup>1</sup> *United States Telecom Association v. Federal Communications Commission*, 290 F.3d 415 (D.C. Cir. 2002).  
<sup>2</sup> Texas PUC Docket No. 24542, *Petition of MCI Metro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeodUSA Telecommunications Services, Inc., and AT&T Communications of Texas, L.P. For Arbitration With Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Revised Arbitration Award, at 43 (Oct. 3, 2002) (*hereinafter*, Docket 24542 **Award**).

zones. The Commission found “compelling the evidence that UNE-P is the only viable market entry mechanism that readily scales to varying sized exchanges to serve the mass market, while minimizing capital outlays and permitting a CLEC to gain a foothold.”<sup>3</sup> Under our own state statute, the Commission also found “that there is competitive merit and it is in the public interest to make local switching available on an unbundled basis.” As stated in the Commission’s arbitration award:

[T]he Arbitrators independently find that CLECs would be impaired in zones 1, 2, and 3 in Texas if local switching were not available as a UNE. Therefore, even if in its Triennial UNE Review proceeding the FCC were to remove local switching from the national list, or create a new exception standard, the Arbitrators nonetheless find that on this specific factual record CLECs in Texas would be impaired without the availability of local switching on an unbundled basis.<sup>4</sup>

In reaching this conclusion, the Commission “considered the evidence in light of each of the factors specified in 47 C.F.R. § 51.317: cost; timeliness; ubiquity; impact on network operations; rapid introduction of facilities; facilities-based competition; investment and innovation; certainty to requesting carriers regarding availability; administrative practicality; and reduced regulation.”<sup>5</sup> For instance, the record showed that elimination of ULS creates additional transactions costs for every line. The evidence showed that the non-recurring cost to migrate a single analog loop to a CLEC’s collocation cage in Texas is \$24.52, while the cost to migrate an existing loop/port combination is \$2.56, or approximately 90 percent less. This differential does not include any of the additional costs of the collocation, the backhaul or the switching incurred by the CLEC.<sup>6</sup>

The Commission also found the availability of the switch was especially critical for the development of residential and small business competition throughout Texas. The evidence revealed that as the central offices became less dense, the percentage of customers served via UNE-P increased.’ In the top 50 end offices in Texas, only 8 percent of the customers are served via UNE-P, while in the 67 least dense offices, 21 percent are served via UNE-P.<sup>8</sup> For states with predominantly rural demographics, like Texas, UNE-P is a critical entry strategy.

Although opponents of UNE-P argue that its availability diminishes investment in facilities, the FCC’s own data shows that UNE-P has not deterred facilities based deployment, but rather use of resale. In its *Local Telephone Competition Report*, FCC data shows that in December 1999, CLECs served 33 percent of their customers over their own facilities. By contrast, CLECs served 43 percent of their customer through resale of the ILEC facilities and 24 percent of their customers through the purchase of

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<sup>3</sup> Award at 87-88

<sup>4</sup> *Id.* at 72-73. It is my understanding the Revised Arbitration Award has been filed in the Triennial Review docket.

<sup>5</sup> Award at 73

“Texas PUC Docket No. 24.542, Rebuttal Testimony of Joseph Gillan, on behalf of the Texas UNE-P Coalition (December 21, 2001).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

unbundled network elements. In the FCC's most recent data, June of 2002, CLECs served 29 percent of their customers over their own facilities. By contrast, CLECs served 21 percent of their customer through resale of the ILEC facilities and 51 percent of their customers through the purchase of unbundled network elements. As these figures illustrate, although the use of unbundled network elements has increased dramatically, that increase has had a nominal effect on deployment of facilities. Instead, it predictably reduced the number of CLEC customers served via resale. The FCC released Texas-specific data regarding the mode entry beginning with December 2001 data. In the six month period between December 2001 and June 2002, CLECs transitioned from resale to UNEs, but facilities-based deployment was unaffected.'

I would caution the FCC against usurping the states' role or adopting any approach that would lessen the substantial, important role that the states have played since the enactment of the federal Telecommunications Act of 1996. The D.C. Circuit was critical of a "uniform national rule" that applies in every geographic market and customer class, "without regard to the state of competitive impairment in any particular market."<sup>10</sup> The states are in the best position to make impairment decisions on a state and region wide basis.

I look forward to continuing the partnership between the FCC and the states that has allowed the competitive marketplace to evolve.

Sincerely,



Rebecca Klein  
Chairman

cc: Commissioner Brett A. Purlman  
Commissioner Julie Caruthers Parsley

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<sup>9</sup> FCC data shows that in December 2001, Texas CLECs served 19 percent of their customers over their own facilities. By contrast, CLECs served 14 percent of their customer through resale of the ILEC facilities and 67 percent of their customers through the purchase of unbundled network elements. In the FCC's most recent data, June of 2002, Texas CLECs served 19 percent of their customers over their own facilities. By contrast, CLECs served 10 percent of their customers through resale of the ILEC facilities and 71 percent of their customers through the purchase of unbundled network elements. Once again, the increase had no effect on the deployment of facilities.

<sup>10</sup> 290 F.3d at 422.