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From: Randy May
To: Mike Powell
Date: 1/10/03 11:37AM
Subject: UNE/Broadband Scorecard paper

Michael-. I wanted to make sure you saw this just-released public paper containing benchmarks for evaluating the Commission's actions in the upcoming proceedings. I hope it is helpful in framing the debate and moving things in the forward-looking. less regulatory direction that I know you are trying to lead the Commission, Not an easy task, I know, but one of utmost importance.

Best wishes for the New Year and best regards,
Randy

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THE FCC AND TELECOM RECOVERY: A SCORECARD FOR EVALUATING THE NEW RULES

By Randolph J. May*

It is not hyperbole to say that the Federal Communications Commission is truly at an important crossroads. Indeed. to suggest anything less would be misleading. Sometime in the next few weeks, acting in three separate proceedings, the FCC will issue new rules that will be touted as reducing regulation of telecommunications and information services. Seven years after the passage of the Telecommunications Act of 1996. real deregulation is coming too late. The question is: Will it also be too little to spur a recovery in the depressed telecommunications and high tech-sectors?

This paper provides a seven point scorecard for evaluating whether the agency's actions are pro-competitive, pro-economic growth, and deregulatory in tune with today's technologically dynamic telecommunications marketplace—or, instead, whether they look backwards to a regulatory regime of "managed competition."

The three proceedings in which the Commission will issue new rules are: The *UNE* Triennial Review Proceeding[1]. the Wireline Broadband *Proceeding*,[2] and the Cable High-speed Access *Proceeding*.[3] The *UNE* Triennial Review will determine the extent to which, and for how long, the incumbent local exchange carriers, such as SBC and Verizon, will be required to share every element of their local networks with competitors at regulated below-market prices. And the other two, the Wireline Broadband and Cable High-speed Access proceedings will determine if telephone and

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[1] *In the* Matter *of* the Section *251* Unbundling Obligations *of* incumbent *Local* Exchange Carrieis, *Implementation of the Local* Competition Provisions *of* the *Telecommunications* Act *of 1996*; Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 01-361, CC Docket No 01-338, released December 20 2001

[2] *Review of* the *Appropriate* Framework *for* Broadband Access *to* the *Internet* Over Wireline *Facilities*, FCC 02-485, CC Docket No 02-33, released February 15, 2002

[3] *Inquiry Concerning* High-speed Access *to the Internet* Over *Cable* and Other Facilities, GN Docket No 00-185, released March 15 2002

cable broadband service providers will be able to offer their competitive services free from regulatorily-mandated capacity sharing requirements and price controls.

In reality, in making the crucial decisions, the Commission will be forced to choose between two competing visions of telecommunications regulation:

Vision I — Static Regulated Competition — In this vision, communications services are provided essentially in a natural monopoly environment, and this is likely to be the case indefinitely. So the question for regulators is how to continue to shape regulation to guarantee "competitor access" to incumbent facilities and a "level playing field" for all market participants.

Vision 2 — Dynamic Deregulation — In this vision, communications services are provided in what is rapidly becoming a naturally competitive environment that encourages even *more* competition, investment, and innovation. So the question for regulators is how to transition without undue delay to a much less regulatory framework, leaving regulation in place only where necessary for the remaining "pockets of monopoly."

To be sure, the two visions spelled out above may be oversimplified at the margins. *But* in a very real sense, they do, in fact, describe two divergent paths between which the Commission must choose in confronting the issues in the three major proceedings.

The purpose of this paper is to provide a set of "benchmarks", or a scorecard if you will, that will aid in evaluating whether the Commission's actions are pro-competitive and deregulatory (that is, consistent with the Dynamic Deregulation Vision) or anti-competitive and pro-regulatory (that is, consistent with the Static Regulated Competition Vision). The benchmarks are as follows:

- Unbundling And Sharing Should Not Be Required For Newly Installed Fiber Or Otl Non-Copper Facilities
- Regardless Of Technology Platform, Broadband Services Should Not Be Subject Unbundling and Sharing Requirements Or Computer-11-Type Separation Requirements
- Local Switching Should **Be** Removed Promptly From The Unbundling And S:hari Regime
- Inter-Office Transport and High Capacity Loops Should Be Removed Promptly From T Unbundling And Sharing Regime And "Special Access" Should Not Be Re-Regulated
- A Presumptive Sunset Regime With Competitive Triggers Should **Be Established F** The Removal Of Copper Local Loops From The Unbundling And

Sharing Rcquirements

- The Commission Should Preempt The States From Mandating Unbundling And Siari Requirements That Exceed The Scope **Of** The Federal Obligations

- Elements That Have Been Removed From The Unbundling And Sharing Regime **Shoı** Not Be Considered On The "Competitive Checklist" For Evaluating Section **271** Applications

No doubt, there will be great pressure from outside the Commission, as there always is. for the agency to "split the baby" among the contending sides, to let the battle-hardened contestants walk away with their own victories. After all, in this instance. the opposing forces, whether they are the incumbent "ILECs", the new entrant "CLECs", or whatever, already have decimated their own forest preserves with comments and ex *partes*, and still more and more comments and more ex partes, setting forth their special causes.

And, there will be pressure from inside !he Portals as well for only "incremental' or "moderate" action. After all, if the Commission does, finally, set out determinedly on a truly deregulatory course, it will be deciding that in the future the agency should play a much less intrusive and more modest role than it has in the past. Federal agencies are not by nature immodest in their regulatory ambitions.

So, whether or not the Commission puts it this straightforwardly. as the Commission makes its choices in the *UNE* Triennial, *Wireline* Broadband, and Cable *High-Speed* Access proceedings, it necessarily will be deciding between the pro-regulatory Vision 1, which leads inexorably down a path of false, not sustainable, competition. or the deregulatory Vision 2, which leads to long-term sustainable competition. In this case, actions that may win accolades if characterized as "incremental", "moderate", or "balanced" almost certainly, in reality, will place the Commission firmly on the Vision 1 path.

And make no mistake. It matters greatly which path the Commission chooses. For if the Commission chooses Vision 1 embodying an indefinite future of "managed competition," investment in advanced telecommunications facilities and equipment and innovative new services will be impaired. This is true for incumbent providers, whether they are wireline telephone companies or cable companies or whatever, and for new entrants as well, whether they are wireline, wireless, fiber, or satellite providers. This stifling of investment obviously will have a continuing adverse impact on jobs in the already-depressed telecom and high-tech sectors and thus on the overall economy.

There is little purpose here to be served by reciting facts and figures detailing the extent of the telecom meltdown. The Cornmission surely has in mind the state of the industry. *It* is enough *to* quote from the opening of a November 25 letter to FCC Chairman Michael Powell from Matthew Flanigan. President of the Telecommunications Industry Association:

> [T]he dramatic downturn in the telecommunications sector has led to more than 500,000 job losses, $1 trillion in corporate debt and nearly $2 trillion in market valuation losses in the telecommunications industry alone since 2000. These developments have precipitated an unprecedented slashing of research and development budgets that seriously threatens the future of industry innovation, our global leadership in technology, and, in some very important respects, the very security of the United States.[4]

The Commission's past actions implementing the Telecommunications Act of 1996 in an excessively regulatory way surely are not *solely* responsible for the current telecom meltdown. But they almost certainly have played a *contributory* role.[5] If the Commission acts in these proceedings in a way, judged by the benchmarks set forth in this paper, that is consistent with the Dynamic Deregulation Vision, it most likely will play a *contributory* role in speeding a recovery in the telecommunications and high-tech sectors—to the benefit of consumers and the overall economy

Back in 1998, in an eloquent essay entitled. "Communications Policy Leadership for the Next Century," then-Commissioner Powell described a dynamic communications industry in the process of being transformed by the rapid technological change brought about by the digital revolution.[6] Chairman Powell said: "Policymakers...are fast approaching *moments of* truth in which we will have to decide whether services similar to those offered over one medium should **be** regulated in the same manner as new services offered over another medium—or whether new services should be regulated at all."[7] He asked whether the Commission should allow "traditional wireline telephone companies to take root in the rich soil of deregulation to grow innovative services as have Internet service providers?"' And he then declared that: "As technology erases the differences between these services, communications policy leaders will need to reconcile conflicting regulatory approaches in a way that reinforces forward-looking, pro-competitive approaches and discards outdated *approaches*."[9]

That was *1998,* after the Commission had put in place an overly regulatory and unduly burdensome regime to implement the intended supposedly "pro-competitive, deregulatory national policy framework" of the Telecommunications Act of 1996.[10] It would be easy to belabor the point, but, suffice it to say, that now, in 2003, the

[4] Letter from Matthew Flanigan to Michael Powell, FCC, November 25, 2002 The remainder of the letter is full of facts and figures showing the impact of the telecom sector's decline, especially the severe downturn in capital expenditures, on the overall economy

[5] See Larry F Darby. Jeffrey A Eisenach and Joseph S Kraemer "The CLEC Experimenl Anatomy of a Meltdown Progress *on Point* 9 23 (September 2002) (Washington, D C. The Progress ***8*** Freedom Foundation), at 18-20

[6] 50 Federal Comm. L J. 529 (1998)

Id , at 544

[8] Id (Emphasis added.)

[9] Id (Emphasis added)

[10] See H R Conf Rep No 104-458 at 113 (1996), *reprinted in* 1996 U S C C A124, 124

Commission surely is facing "moments of truth.

The benchmarks provide a guide for evaluating whether the Commission's decisions in the three major proceedings — UNE Triennial Review. *Wireline* Broadband. and *Cable* High-speed Access — meet the minimum requirements necessary to qualify as consistent with the Dynamic Deregulation Vision, or whether, instead, the Commission opts for the Static Regulated Competition Vision.

It is my belief that not only the communications industry, but all of the country's consumers will benefit if the Commission scores well. A discussion of each of the scorecard's benchmarks follows.

1. Unbundling And Sharing Should Not Be Required For Newly Installed Fiber Or Other Non-Copper Facilities

All of the benchmarks set forth in this paper are important, but probably none more so than this first one. By eliminating the unbundling and sharing requirement for investment in newly installed non-copper facilities, whether fiber, coaxial cable, wireless, or some other technology, the Commission will spur much new investment in modern facilities that will deliver innovative services to homes and businesses. And, as crucially, the Commission will be sending an important signal to the marketplace that it is charting a new course that differentiates between the historical public utility regulation applicable to the legacy narrowband copper-based network and a new deregulatory paradigm. The new paradigm will be appropriate for a competitive environment in which various technology platforms offer broadband services over competing networks.

The rationale for removing new investment from the sharing regime is obvious. New entrants are no more "impaired" than incumbents in investing in new fiber facilities or other new technologies. To be sure, such investment may be very expensive, making the decision whether or not to invest difficult in light of uncertainties about consumer demand, the financial outlook, supplanting technologies, and the like. And no doubt, as in most capital-intensive network infrastructure industries, economies of scale may impact the calculations of various service providers, whether they be new entrants or incumbents, in differential ways. Absent legal barriers to entry, there is no valid policy reason for regulators to attempt to manage competition so as to encourage investment in new facilities by CLECs as opposed to ILECs—or vice versa.

Likewise, as a matter of law, the cost considerations attributable to scale economies or initial versus subsequent entry do not meet the "necessary and impair" test of Section *251* of the Communications Act[11] which is a prerequisite for imposing mandatory unbundling obligations. As the Court of Appeals said last May in remanding the UNE regulations to the Commission: "Of course any cognizable competitive 'impairment' would necessarily be traceable *to* some kind of disparity in cost."[12] *But,* the

[11] 47 U S C § 251

[12] United Stales Telecom Ass n v FCC 290 F 3d 415 426 (2002)

court continued:

> Average unit costs are necessarily higher at the outset for any new entrant in virtually any new business...To rely on cost disparities that are universal as between new entrants and incumbents in any industry is to invoke a concept too broad, even in support of an initial mandate, to be reasonably linked to the purpose of the Act's unbundling provisions.[13]

Many illustrations could be given of the adverse impact of the Commission's rules on the deployment of new investment, but take fiber-to-the home ("FTTH") infrastructure, certainly one of the most promising technologies for making very high-capacity bandwidth available to residential and business consumers. As Corning commented in the *UNE Triennial* Review proceeding, deployment of FTTH not only would spur huge new investment, benefiting the overall economy, but also "would allow the development of heretofore unavailable services. which would lead to the growth of whole new industries."[14] But, thus far, the CLECs have a huge lead over the ILECs in installing FTTH (26,000 versus 400 homes) because "only one percent of the wire centers in the United States meet the profitably threshold to justify overbuilding fiber-to-the–home if this technology must be unbundled once constructed."[15] Based on an independent consultants' study submitted with its comments, Corning concludes that, for the ILECs, "[t]he economically rational build out in the regulated case reaches only five percent of the households in the country, an approximately 84 percent reduction when compared to the free market case."[16] Not insignificantly. Corning estimates that the current UNE rules will reduce the ILEC FTTH investment by nearly $40 billion over the next ten years.[17]

While restricting the bulk of its comments to FTTH, Corning emphasizes that "[t]he FCC's unbundling rules inhibit investment in a variety of infrastructures beyond just fiber-to-the-home."[18] In the same vein, as the D.C. Circuit put it in *USTA:* "Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[19]

Referring specifically to the investment disincentives created by the Commission's unbundling regime, the High-Tech Broadband Coalition, composed of the nation's leading high-tech trade associations, has urged the Commission to refrain from imposing unbundling obligations on new last mile broadband facilities.[20] And on November 25, 2002, citing the severely curtailed investment in the telecom and high-tech equipment sectors, the Telecommunications Industry Association once again

13 290 F 3d at 427
14 Comments of Corning, Inc CC Docket No 01-338. April 5. 2002, at 2
15 Id , at 7-8
16 Id at 8
17 Id , at 6-8
18 Id , at 5
19 290 F 3d ai 427
20 Notice of Ex Parte Presentation, CC Docket No 01-338, June 27, 2002

urged the Commission "to promptly determine that incumbent local exchange carriers should be not required to provide access to new, *last-mile* broadband *facilities*."[21] TIA declared that "[s]uch a determination would recognize the folly of applying outdated rules aimed at legacy voice networks to the capital-intensive. nascent and generally competitive broadband marketplace."[22]

So, the first and probably the most important benchmark for evaluating the Commission's upcoming actions is whether it determines definitively and clearly that the unbundling and sharing rules should not apply to new investment in other-than-copper facilities, regardless of how the service provider is denominated. Absent taking this step, the Cornmission's actions should not be considered forward-looking and deregulatory.

2. Regardless **Of** Technology Platform, Broadband Services Should Not Be Subject To Unbundling and Sharing Requirements Or Computer-11-Type Separation Requirements

For many years now, going back at least to 1997, PFF scholars have advocated a uniform deregulatory regime for all broadband service providers.[23] A very important benchmark for evaluating whether the Commission's actions in the upcoming proceedings is free market-oriented will be whether the agency takes definitive action to deregulate the provision of broadband services, regardless of the technology platform over which these services are offered.[24] This means that not only must the Cornmission definitively rule that broadband services are not subject to the Title *II* nondiscrimination, unbundling, rate regulation, and other common carriage requirements as "telecommunications services," but that it should not open still other proceedings to determine what forms of regulation it should impose.

It is unnecessary here, and this is not the place, to stress the importance of

[21] Letter to Michael Powell, Chairman. FCC, from Matthew Flanigan President, TIA, November 25. 2002. at 10

[22] Id

[23] For examples of early PFF works advocating a uniform deregulatory regime for broadband, see Donald W McClellan, "A Containment Policy for Protecting the Internet from Regulation The Bandwidth Imperative.' Progress *on Point* **4** 5, August 1, 1997, Comments of The Progress and Freedom Foundation Inquiry Concerning the Deployment of Advanced Telecommunications Capability. CC Docket No 98-146. filed with the FCC on September 14, 1998; Randolph J May, "On Unlevel Playing Fields The FCC's Broadband Schizophrenia," Progress on *Point* 6 11. December 1959, and the earlier PFF works cited therein <http //www pff org/POP_6 11 htm>

[24] The *practical* effect *of compliance* with *this* second benchmark may *overlap* to a significanl extent with the impact of the first benchmark in that most (but not all) newly installed facilities will be used to provide broadband Services Presently, the Commission uses the term "advanced Services" to describe services and *facilities* with an upstream and downstream transmission speed of more than 200 kbps See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans, CC Docket No 98-146 FCC 02-33, February 6, 2002, at para 9 For present purposes, I am assuming that the definition of 'broadband' would comport with this standard. To the extent that newly installed non-copper facilities are not used to provide broadband services, as broadband may be defined **by** the Commission, these new facilities should not be subject to the unbundling and sharing rules

widespread deployment of broadband to the telecom and high-tech sectors, the overall economy. and, more broadly, society in general. Suffice it to say that no one was heard to contradict Chairman Powell in October 2001, when he declared that: "The widespread deployment of broadband infrastructure has become the central communications policy objective today. It is widely believed that ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance many other worthy objectives—such as improving education, and advancing economic opportunity for more Americans."[25]

In light of the substantial investment required to build-out broadband networks, Chairman Powell stressed that, "broadband service should exist in a minimally regulated space," and, "we should limit regulatory costs and regulatory uncertainty." In furtherance of that end, in the *Wireline* Broadband *NPRM,* released in February 2002, the Commission tentatively concluded that wireline broadband Internet access service is an "information" rather than a "telecommunications" service, and, therefore, not subject to the Title II common carriage requirements.[26] The Commission determined that providers of wireline broadband Internet access service, which typically allows subscribers to access the World Wide Web and interact with information stored on remote computers, offers more than a transparent path to end users. According to the Commission, because they offer enhanced capabilities, their services are properly classified as an "information service." In other words, the Commission views wireline broadband Internet access service "as not consisting of two separate services, but as a single integrated offering to the end user."[27]

In the *Wireline* Broadband *NPRM,* the Commission observed that it would strive to develop an analytical framework that is consistent, to the extent possible, across multiple platforms, in light of the fact that "there are overarching policy objectives that are similar regardless of platform and should be harmonized to the greatest extent possible"[28] Thus, in March 2002, the Commission followed the *Wireline* Broadband *Notice* by declaring that high-speed cable modem service is also properly classified as an "information" service, not a "cable" service. As it did with respect to wireline broadband Internet access, the Commission ruled that there is no separate offering of telecommunications service when cable operators offer high-speed Internet access.[29]

I commend the Commission for taking a positive step a year ago in concluding that wireline and cable modem broadband services (and broadband services offered over other technology platforms) "should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[30] Now, without further

[25] Michael Powell, "Digital Broadband Migration—Part II," October 23, 2001

[26] Wireline Broadband Notice, at paras. 17-29

[27] Id , at para 22 The Cornmission also tentatively concludes that "an entity is providing a 'telecommunications service' to the extent that such entity provides only broadband transmission on a stand-alone basis without a broadband Internet access service " Id , at para 26

[28] Id , ai para 7

[29] Cable High Speed Access Proceeding, at para 7

[30] Wireline Broadband Notice, at 4

delay. the Commission must take the follow-on steps necessary to implement this deregulatory impulse.

In the *Wireline* Broadband Notice, the Commission solicited comment concerning whether, despite concluding that traditional common carriage requirements are not applicable, it should nevertheless apply, pursuant to its Title I "ancillary" jurisdiction, Computer *//////*-type nondiscriminatory access and unbundling obligations to wireline broadband services, or some form of "alternative access obligations."[31] And in the Cable High-speed Access proceeding, the Commission asked for further comment concerning whether, again pursuant to its Title I ancillary jurisdiction, cable broadband providers should be subject to some form of regulation, including mandates to allow multiple Internet Service Provider ("ISP") access to the cable platform.[32]

The Commission should definitively decide, without seeking any further comment, that neither wireline nor cable broadband service providers are subject to regulation including especially Computer *II/III*-type access or unbundling requirements. In order to support imposing these traditional public utility requirements, which typically include some form of rate regulation of a mandated access entitlement, the Commission would have to believe the broadband market is not competitive. But, in fact, the Commission has determined over and over again that providers of broadband service are operating in a competitive environment.

In the *Wireline* Broadband NPRM the Commission summarized this way: "As we have noted in the past, broadband is evolving across multiple electronic platforms as traditional wireless, cable, satellite and wireline providers have expended substantial investments in broadband capable infrastructures. . [B]y promoting the development and deployment of multiple platforms, competition in the provision of broadband capabilities can thrive, and thereby ensure that the needs and demands of the consuming public are met "[33]

The competitiveness of the marketplace (and the current lagging marketplace position of the telephone companies) is confirmed in the Commission's most recent broadband reports. In the July 23. 2002 report, reflecting data as of December 31, 2001. the Commission stated that there were 12.8 million high-speed lines connecting homes and businesses to the Internet. Approximately 3.9 million were telephone company-provided DSL lines and approximately 7.1 million were cable operator-provided cable modem service lines, with the remaining number fiber, satellite, and

[3] Id at para 50

[32] Cable High-speed Access Declaratory Ruling and Notice, at para. 74 The Commission previously has rejected regulating cable modem service, including imposing access obligalions, on an industry-wide basis See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans (Second Section 706 Report), 15 FCC Rcd 20913. 20918 (2000) But in the context of approving the AOL and Time Wamer merger, it did impose certain regulatory restrictions relating to nondiscriminatory access and quality of service AOL Time Warner Merger Order, 16 FCC 6547, 6588-92 (2001)

[33] Wireline Broadband Notice, at para 4

[34] News Release, "FCC Releases Data on High-speed Services lor Internet Access." July 23, 2002

wireless [34] In the most recent broadband report, released December 17, 2002, the number of high-speed lines had increased, as of June 30, 2002, from 12.8 to 16 2 million Of these 16.2 million lines, 5 1 million were telephone company-provided DSL and 9.2 million were cable broadband. There were about 750,000 fiber, satellite, and wireless lines.[35] So, as of June 30, 2002, while the number of DSL lines grew a bit faster than cable modem lines, cable still held nearly a two-to-one lead over the telephone companies.[36]

In light of the competitive pressures in this environment, there is no basis for the Commission to conclude that it needs to mandate some form of unbundling and nondiscriminatory access requirement to ensure that consumers' needs are met. The marketplace will do that. If a broadband service provider favors its affiliated information sources and disfavors non-affiliated information sources, rivals will exploit this conduct if consumer demands will be better met by different choices.

Moreover, and even assuming for the sake of argument that the broadband marketplace is not yet effectively competitive, there is a substantial body of economic literature to the effect that in technologically dynamic industries such as telecommunications, imposition of "open access" and sharing duties on the supposed monopolist causes overall efficiency losses. Professor Christopher Yoo considers this literature in depth in a recent article in the *Yale Journal of Regulation,* in which he concludes.

> Access remedies cause even greater problems in terms of dynamic efficiency. The central problem is that forcing a monopolist to share an input rescues other firms seeking access to that input from having to develop alternative sources of supply. Access remedies thus can entrench the existing monopoly by depriving firms interested in competing with the monopoly of their natural strategic partners. As a result, the economic literature cautions against compelling access whenever the bottleneck resource is available from another source, even if it is only available at significant cost and in the relatively long run. This is particularly true in technologically dynamic industries in which the prospects of developing new ways either to circumvent or to compete directly with the bottleneck are the highest.[37]

Because cable operators are presently not subject to such *Computer //////*-type unbundling or "open access" requirements, and should not be, in order to achieve the *uniform* deregulatory regime and regulatory certainty that is necessary, the Commission should not keep open any longer the question of whether the telephone companies

[35] News Release, "FCC Releases Data on High-speed Services for Internet Access,' December 17, 2002

[36] In the Wireline Broadband NPRM, the Commission acknowledged ""In the broadband arena, the competition between cable and telephone companies is particularly pronounced, with cable modem platforms enjoying an early lead in deployment" Para 37

[37] Christopher S Yoo *Vertical* integration *and* Media Regulation in *the New* Economy, 19 Yale J on Reg. 171, 179-80 *(2002)*

should be subject to such obligations. The Commission already has solicited comment on this issue, so as a matter of law, there is certainly no need to do so again.[38]

Furthermore. even envisioning such a construct is fundamentally at odds with the Commission's articulated information service classification rationale. As the Commission says in the Notice, "we view wireline broadband Internet access service as not consisting of two separate services, but as a single integrated offering *to* the end-user."[39] It is illogical, and likely to confuse any court reviewing the Commission's action, to require a service somehow to be "unbundled" for purposes of imposing common carrier-type regulatory obligations at the same time the Commission concludes the service is a "single integrated offering" and not "two separate services" for the purpose of removing the offering from common carrier obligations

In order to encourage substantial investments in the deployment and development of advanced broadband infrastructure and innovative broadband applications, the Commission needs to implement a "minimally regulated space." It should determine definitively that telephone, cable, or broadband service providers using other technology platforms will not be subject to regulation, including any *Computer //////*-type unbundling or "open access" requirements.

3. Local Switching Should Be Removed **Promptly From** The Unbundling **And** Sharing Regime

There does not seem to be much dispute that CLECs are not "impaired" from self-provisioning or obtaining switching from non-ILEC sources in the sense that competitive supply is feasible without being economically wasteful. And there is not much dispute that CLECs are employing non-ILEC switches in many markets to serve not only business but residential customers as well. That being the case, switching is ripe for a deregulatory action

In the UNE Fact Report 2002 submitted by the Bell Companies in April 2002, they maintained that, as of year-end 2001, wireline CLECs had deployed at least 1300 identifiable local circuit switches and 1700 known packet switches.[40] The Bell Companies claim that the CLECs. as of year-end 2001, were using their own switches to serve at least 16 million local lines, of which 3 million were residential customers. CLEC switches are deployed in central offices that contain over 85% of the four Bell Companies' access lines.[41] The New Paradigm Resources Group, Inc., a research

[38] Obviously, it is always possible for the Commission to revisit its determinations in light of future marketplace developments and impose regulations consistent with its statutory authority See Telocator Network of America v. FCC, 691 F 2d 525, 550 n 191 (D C Cir 182); Geller v FCC, 610 F 2d 973, 980 (1979) Thus, if it turns out the broadband marketplace in the future develops in a way that is not sufficiently competitive to protect consumers, the Commission could reconsider at that time whether it should impose some form of mandatory access requirement

[39] Wireline Broadband Notice, at para 21

[40] UNE Fact Report Prepared for and Submitted by BellSouth, SBC Qwest, and Verizon. CC Docket No 01-338 April 2002 at I-2.

[41] Id. at I-2

group unaffiliated with the ILECs, reports that even the sluggish year 2002 saw a 2% increase in the number of operational CLEC voice switches.[42] (It is important to have in mind that the above figures relate to CLEC-provided *wireline* service and do not account for the 130 million wireless subscribers or the 2.6 million cable *telephony* subscribers.)[43]

I understand that the above figures concerning switch deployment were submitted by the Bell Companies. But, as far as I am aware, they have not been seriously challenged, at least in terms of their order of magnitude. And some facilities-based (at least with regard to switches) CLECs have provided the Commission with information corroborating the extent of their self-provisioning of switches. For example, on December 17, 2002, McLeodUSA informed the Commission that, as of September 30, 2002, about 46% of its access lines were served with its own switches. McLeod says it has migrated approximately 250,000 lines from UNE-P or resale to its own switches in the last 18 months.[44] In an ex *parte* presentation submitted on December 13, 2002, Allegiance Telecom told the Commission that, with operations in 36 Tier 1 cities using 31 of its own Class 5 CO switches and over 835 collocations in ILEC wire centers, it "is a true facilities based local service provider "[45]

Even with the evidence showing that it is economically feasible for CLECs who wish lo pursue at least a partial facilities-based strategy to deploy their own switches or use non-ILEC switches. and to do so basically on a national basis, most CLECs nevertheless continue to argue as strongly as ever that the Commission should not eliminate switching from the UNE list. These arguments illustrate why, if the Commission hopes ever to move towards a regime that will encourage more facilities investment, rather than one that simply "manages competition," it must act with some boldness.[46]

On the one hand, the CLECs recently have advanced the contention that local switching should remain a UNE because mass market competition requires scale and the CLECs simply cannot match the "scale and ubiquity" of the ILEC networks.[47] COMPTEL says "[i]t is important to appreciate that potential scale (i.e., the addressable market) is, in large part, beyond the control of a new entrant...because the consumers and businesses that comprise the mass market are themselves geographically

[42] 'The Slate of the CLEC Sector,"Competilive Telecom Advisor. New Paradigm Resources Group, Inc., December 23, 2002

[43] News Release, "FCC Releases Data on Local Telephone Competition " December 9, 2002

[44] Letter from McLeodUSA to William Maher FCC, CC Docket No 01-338, December 17. 2002. at 2

[45] Letter from Allegiance Telecom to Marlene Dortch, CC Docket No. 01-338, December 13, 2002.

[46] In his partial dissent in the *UNE* Remand proceeding, now over three years ago, then Commissioner Powell expressed disappointment that 'we cannot admit thal evidence of CLEC switch deployment strongly suggests that the CLECs are significantly impaired without access to unbundled switching, both in areas in which CLECs have deployed switches and areas in which they have not done so" Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 Rcd 3696, 1734 (1339)

[4] Letter from COMPTEL and PACE to Marlene Dortch FCC CC Docket No 01-338 December 11 2002

[48] Id at 3

dispersed?[a]

This is another way of saying, of course, that the telecommunications business is one that is and always has been extremely capital intensive, in part because all of the customers are not located in one place. No one doubts there are real scale economies at work due in no small measure to the fact that the mass market is dispersed. In any industry in which scale economies exist, a new entrant may find it relatively more costly—on a unit cost basis—to compete as it builds up its customer base. But this fact of economic life does not justify retaining an element as a UNE under the "impairment" standard of Section 251(d)(2).[49]

Referring to the switching element, the D.C. Circuit disposed of the CLEC argument in its *USTA* opinion when it stated: "To rely on cost disparities that are universal as between new entrants and incumbents in any industry is to invoke a concept too broad, even in support of an initial mandate, to be reasonably linked to the purpose of the Act's unbundling provisions."[50] The court rebuked the Commission for linking the impairment analysis to universal characteristics, rather than to natural monopoly characteristics that would make competitive supply wasteful. No one seriously argues that the manufacture and supply of local switching is economically wasteful.

Rather than arguing primarily on the economic grounds that the act more clearly contemplates, of late the CLECs have based their resistance most heavily on the potential difficulties of effecting a large number of "hot cuts" to their switches. They state that "it is important to appreciate that even when a competitor owns a switch or obtains switching from a third-party, the competitor faces significant impairment in terms of cost, reliability, time and scale when accessing the ILECs' loop facilities, commonly referred to as the 'hot cut' problem. This problem is particularly acute for entrants that seek to serve mass-market residential and small business customers."[51] In short, the CLECs claim that if and when they do install their own switches they may not be able to realize the switch's full economic value—thus constituting an "impairment"—unless the ILEC can cut over lines just as quickly as the CLEC potentially is able to sell them.[52]

[49] 47 U S C § 251(d)(2) Again Chairman Powell put this point aptly over three years ago in his partial dissent from Ihe *UNE* Remand order "I am also uncomfortable with the extent to which the Order suggests that the primary reason CLECs have not deployed in some smaller markets is that they lack adequate access to the incumbent's network There are other obvious reasons why CLEC deployment has not yet reached some smaller markets CLECs are profit maximizers and thus it is unremarkable that they first deploy circuit and packet switches in **denser** areas where they can reach mare customers at lower cost' 15 Rcd at 1734

[50] 290 F 3d at 427

[51] Letter from COMPTEL to Marlene Dortch. FCC. CC Docket No. 01-338. October 31, 2002, at 1 I **do** not mean to imply that the CLECs abandon their argument about scale economies, only that their focus has shifted decidedly *to* the "hot cut" problem

[52] I note that in a November 22 order the New York Public Service Commission concluded that "The current loop migration process, involving manual cut-over of individual loops. is working and, although certain problems may arise from time to time on orders the process is well refined and seems to do what was intended—at least as current volumes Therefore, no further examination of the current hot cut process is required' Order Instituting Proceeding Case No. 02-C-1425, NYPSC, November 22, 2002

It is by no means clear that the sufficiency of the ILECs' performance of "hot cuts" is legally cognizable under the statutory impairment analysis. But assuming that it is, the way to deal with this issue is to set and enforce realistic and objectively-verifiable performance standards that ILECs are required to meet for effecting cut-overs. The performance standards might be expressed, for example, in terms of the minimum number of lines required to be cut-over per month per central office of a certain density size. In most areas, such standards already exist, having been devised initially by the states, and reviewed by the FCC as part of the Section 271 application process. To the extent that they do not already exist or need modification to account for recent developments, the Commission can do so quickly based on the available models. In applying such standards in a way that is realistic and fair, the Commission should also take into account the indisputable fact that implementing "hot cuts" requires cooperation, competence, and a commitment of resources on the part of the CLECs. and that the CLECs themselves are often responsible for cut-over problems.

In addition to imposing forfeitures for failure to comply, the Commission could also require that an ILEC continue to provide switching at the TELRIC price for as long as it is unable to meet the pertinent performance metric for cut-overs. Presumably, the ILECs would then have a strong incentive to meet the performance standard in order to avoid the requirement to continue to provide switching at TELRIC prices.

In short, to the extent that timely provisioning adversely impacts the CLECs' competitive efforts, the Commission could deal with this issue by establishing a default mechanism for continued availability of TELRIC pricing. With the adoption of some form of mechanism like this, switching should be discontinued promptly as an element of the UNE platform.

On December 23. the independent New Paradigm Resources Group, Inc., which tracks the CLEC industry as closely as anyone, concluded that it is the incumbents and not the CLECs that reasonably may be at a competitive disadvantage: "[A]s packet systems take hold. it will become more and more obvious that the main benefit of open networks—the inherent flexibility to creatively tailor solutions to narrower customer classes if not specific customers—will favor smaller competitors."[53] If the Commission does not act decisively to remove the switching element from the UNE-P, an element so readily susceptible to alternative supply, the agency will send a marketplace signal that it is not really serious about adopting a regime that encourages greater reliance on facilities-based competition.

The Commission recognized that as CLECs volumes increase, the cut-over process may need to be made more efficient

[53] "The State of the CLEC Sector." Competitive Telecom Advisor, New Paradigm Resources Group, Inc December 23, 2002

4. Inter-Office Transport and High Capacity Loops Should Be Removed Promptly From The Unbundling And Sharing Regime And "Special Access" Should Not Be Re-Regulated

It has been over 15 years since Teleport, Metropolitan Fiber Systems, and the other pioneering "competitive access providers" or "CAPs" appeared on the scene building their own fiber facilities—initially in urban areas to be sure—to compete with the ILECs And it has been a decade since the Commission ordered ILECs to allow CAPS—now CLECs—to collocate their facilities with those of the ILECs in order to facilitate competition.[54] Even before passage of the 1996 Telecommunications Act, 29 CAPs had deployed fiber networks, consisting of more than 21,000 fiber route miles, in about 100 cities.[55] The Commission is now in a position to take some credit for the success of its competition-promoting policies, rather than ignoring the extent to which the competitive landscape has changed.

Due to FCC reporting requirements, there is not much dispute that, as of year-end 2001, at least one CLEC had obtained collocation for fiber facilities in 13% of Bell Company wire centers that contain 54% of the business lines and 44% of all access lines served by these incumbents. Or that in the 25 largest metropolitan areas served by the BOCs, one or more CLEC has obtained fiber-based collocation in 35% of the wire centers served by the BOCs containing 61% of all lines within those areas. Even in smaller wire centers with 5000 or less business lines, one or more CLECs are collocated with fiber in nearly 50% of these offices. Wire centers with over 30,000 business lines have at least one collocated CLEC in 87% *of* the offices.[56] Obviously, CLECs in significant numbers have calculated that it is economically feasible to use non-ILEC inter-office facilities, initially, of course, in areas with greater density.

Indeed, the CLECs' current financial woes are most often attributed to the fact that new entrants have installed too much fiber, not too little. As early as June 2001, the Wall Street Journal reported that 39 million miles of fiber optic cable had been laid in the U S., with Merrill Lynch estimating only 2.6% of the capacity actually in use. The story's headline—like so many similar ones—said it all: "How the Fiber Barons Plunged the U.S. into a Telecom Glut."[57] How many times have we read reports to the effect that "[m]any of the industry's current problems can traced to overcapacity" of fiber cable?[58] In September 2002, the Wall Street Journal reported that Telegeography Inc. claims only 2.7% of installed fiber is actually being used—and that the "dark fiber"—that not already lit with electronics—"may remain dormant forever."[59]

[54] See Expanded Interconnection with Local Telephone Company Facilities. 7 FCC Rcd 7369 (1992)
[55] Connecticut Research, 1995/1996 Local Telecommunications Competition, at Table II-2 (7th ed 1995)
[56] UNE Fact Report Prepared for and Submitted by BellSouth, SBC, Qwest, and Verizon, CC Docket No 01-338 April 2002, at III-2.3 I do not believe the above figures which are taken from the UNE Fact Report have been disputed, at least with regard to their order *of* magnitude
[57] Wall Street Journal A1 June 18, 2001
[58] "Telecom Industry Leaders Struggle With Growing Debt, Overcapacity," Wall Street Journal, A1, March 13 2002
[59] ' Behind the Fiber Glut,' Wall Street Journal, B1, September 26, 2002

Of course, not all (or perhaps even the majority of the route miles) of this fiber is inter-office local transport as opposed to truly long-haul, and a reliable breakdown is not easy to come by, nor really even necessary for the point here. The point is the CLECs have touted the fact that, "since 1997, CLECs have invested $65 billion in infrastructure that will carry the next generation *of communications*."[60] As far as I am aware, the Commission has shown little interest, despite the well-publicized CLECs' financial troubles over the past couple of years, in getting a good breakdown of how the $65 billion in infrastructure actually was spent. Nevertheless, because we know that very little of it was spent by CLECs in laying "last mile" fiber to the home or small businesses, it is reasonable to assume, assuming booked capital expenditures were for actual facilities and not capacity lease swaps, that billions were spent in installing high-capacity inter-office transport facilities and high-capacity lines to connecting large business end users (in other words, the same type of facilities that the ILECs make available as "special access" services).

The CLECs even tout that their capital investment since 1997 exceeded that of the cable industry by $15.4 billion. Thus, ALTS states: "With both industries competing for many of the same voice and data customers, the intense rivalry contributed to the rapid growth of high-speed broadband services in the United States."[61] In these circumstances, and in light of the acknowledged fiber glut, it strains credulity for the CLECs to argue that they are precluded as a practical, economic, or operational matter from self-provisioning or acquiring inter-office and high-capacity facilities from one of the many independent network operators.

Granted, the incredible amount of lit and unlit fiber already installed does not necessarily track the routes the CLECs might prefer to serve the precise locations they would wish In other words, to reach a CLEC customer, the CLEC might still have to invest in new facilities –on top of the claimed $65 billion already invested--to complete a connection. But isn't that what the Telecommunications Act and the Commission's implementing policies envision should happen? The Commission has said over and over again that, in the interest of creating sustainable competition to the ultimate benefit of the consumer, its policies should promote facilities-based competition.[62]

In the face of evidence indicating the economical feasibility of competitive supply of transport and high-capacity lines, the CLECs are left pretty much to suggest that the Commission must perform a route-by-route economic analysis before eliminating the

[60] 'The State of Local competition 2002, ALTS Annual Report, at 11 For a study raising questions about the quality and quantity of the CLEC infrastructure facilities investment and other expenditures, see Larry F Darby Jeffrey **A** Eisenach, and Joseph S Kraemer, "The CLEC Experiment Anatomy of a Meltdown," *Progress on Point* 9 23 (September 2002) (Washington, D C The Progress & Freedom Foundation)

[61] **Id**

[62] UNE Triennial Review NPRM CC Docket N 01-338, December 20. 2001, at para. 9 (The Commission emphasized that 'unbundling rules that are based on a preference for development of facilities-based competition in the long run will provide incentives for both incumbents and competitors to invest and innovale, and should allow the Commission to reduce regulation once true facilities-based competition develops

unbundling requirement. ALTS and COMPTEL remarkably contend that collocation has "no implications...for the collocated CLECs in situations where they seek to serve end user customers not reached by competitive distribution facilities."[63]

Thus, the CLECs argue that "a test that relies solely upon the existence in a wire center of a competitive transport provider that owns its own distribution facilities underscores the dangers posed by any **'test'** that disregards the highly fact-specific environment in which CLECs actually make their transport acquisition decisions "[64] Well, there you have it. The CLECs suggest that "highly fact-specific" determinations based on analysis of particular routes must be made in order to determine whether inter-office transport and high-capacity lines should remain available as UNEs. Surely, even the loosest interpretation of the statutory impairment analysis requires no such thing

And it should go without saying the Commission should not re-regulate ILEC "special access" services for which regulatory constraints already have been relaxed based on showings that competitive facilities are available.[65] By the same token, the Commission must maintain in place restrictions that prevent CLECs from taking special access lines and converting them to facilities governed by the UNE rules.

AT&T's recent petition asking the Commission to re-regulate special access is striking in the boldness with which it seeks to confuse what should be the agency's deregulatory focus. Amidst all the claims, based on the ILECs' supposed rate of return, of ILEC market power in the special access segment of the market, AT&T's pleading contains virtually no data whatsoever on the costs competitors would incur to provide these facilities themselves. And it doesn't provide data on the competitors' own rates of return."' In reality, these "special access" services are for the most part the functional equivalent of high capacity inter-office facilities, and, however denominated for marketing or tariff purposes, they should not be re-regulated. Nor should they be subjected to unbundling and sharing requirements.

The fact that, more than a decade after central office collocation was first required for competitive high capacity lines, the CLEC argument has been reduced mostly to suggesting that competitors are impaired from providing facilities on certain routes as a result of "highly fact-specific" factors, should convince the Commission that it must promptly remove these facilities from the UNE platform. Any sunset period should be brief and fixed.

5. A Presumptive Sunset Regime With Competitive Triggers **Should** Be

[63] See Letter of ALTS/COMPTEL to Marlene Dortch FCC CC Docket No 01-338 October 28 2002 at 2
[64] Id
The CLEC focus on and inroads in this market segment were noted in the Commission's August 1999 Local Cornpetition Report when it Commission stated the revenues of competitive LECs come primarily from special access and local private line services rather than from switched service to end users FCC Local Competition August 1999 at 1
[66] See AT&T Petition for Rulemaking RM-10593 filed Oclober 15 2002

Established For The Removal Of Copper Local Loops **From** The Unbundling And Sharing Requirements

I have suggested above that the switching element should be removed promptly from the UNE-platform and that inter-office and high-capacity lines should be removed within a brief fixed period. In light of economic feasibility of competitive supply, to do otherwise would flout the market-oriented principles that should guide the Commission in this era of dynamic technological change.

Despite the significant progress wireline, cable, and wireless firms[67] already have made in their battle against the ILECs for end user customer lines,[68] there is no basis for suggesting that ILEC voice grade copper local loops should be eliminated on a flash-cut nationwide basis from the unbundling and sharing obligation.[69] At least in a general "on average" sense, a new entrant providing voice service remains significantly more impaired with regard to using non-ILEC local loops as opposed to local switching and inter-office and high-capacity loops. This is likely to remain the case for several more years.

It is time, however, for the Commission to establish a transitional regime pointing towards the eventual sunsetting of copper local loops as UNEs. In the context of achieving this, it would be appropriate for the Commission to consider incorporating into the sunset regime some form of granular analysis along the lines suggested by the *USTA* court. For example, the Commission may want to key staggered sunset date targets *to* locations correlated to population densities In this way, the Commission can take into account the cost variations based on geography that are relevant to the economic feasibility of alternatives. Within reasonable limits. the sunset date chosen is not as important as the fact that one is established. A sunset date will send a marketplace signal that in light of the continued rapid technological changes occurring in the telecommunications industry the Commission envisions reaching a deregulatory "end game" consistent with the intent of the 1996 Telecommunications Act.

Because local loop competition significantly lags that of other network elements, and the immediate competitive prospects, at least in certain geographical locations, are considerably more uncertain, it would be reasonable for the Commission to make the sunset date (or dates, assuming a granular approach is adopted) subject to a rebuttable presumption. In other words, the network element would sunset on the scheduled date

[67] The Cornmission reports that. as of June 2002. the number of cable telephony lines had increased to 2 6 million, an increase of 16% Since the beginning of the year The number of wireless subscribers exceeded 128 million See FCC. "Local Telephone Competition Status as of June 30, 2002," December 2002 at Tables 5 and 11 The Wall Street Journal reported on January 7, 2003, that the Yankee Group forecasts cable companies to have over 14 million customers **by** 2007 "Shine May Return to the Bells." Wall Street Journal January 7 2003, at **A2**

[68] At least one CLEC was providing local telephone service to end-user customers in 67% of *the* nation's zip codes at the end of June 2002 FCC, 'Local Telephone Competition Status as of June 30, 2002," December 2002, at Table 12.

[69] Recall that the first benchmark is the removal of all newly installed fiber and other *non-copper* facilities from the unbundling and sharing requirement

absent a showing by clear and convincing evidence that competitive supply is not yet economic.

By allowing competitors to rebut the presumption that unbundling is no longer required. the regulatory certainty that is a feature of a firm sunset regime is sacrificed to some extent. In this instance, however, the trade-off probably makes sense. The Commission will have taken an important step in the direction of reducing regulation consistent with sound predictive judgment, while assuring an opportunity will be available to show that predictive assumptions concerning end user loop competition have not yet come to pass. In any event, by virtue of the presumption, a degree of certainty will have been introduced that exceeds what reasonably would be expected from a series of start-from-scratch periodic reviews.

7. The Commission Should Preempt The States From Mandating Unbundling And Sharing Requirements That Exceed The Scope Of The Federal Obligations

There is no doubt that the FCC should maintain an important consultative role for the states in determining whether network elements should remain subject to the unbundling and sharing requirement. But there is also no doubt that the Commission should not allow the states to mandate unbundling requirements that exceed those established by the Commission.

Pursuant to a specific statutory direction, the Commission must consult with the states before making determinations on Section 271 applications,[70] and certainly the advice and input of the state commissions generally has proved valuable. With regard to determinations concerning UNE mandates, the state commissions should continue to play a similar valuable advisory role. This is especially so with respect to determinations relating to impairment in the provision of local loops, for example, in the sunset regime recommended above. If the rebuttable sunset presumption is put at issue, the state commissions' input should be welcomed by the FCC before it makes a final determination.

The state commissions, however, are asking the Commission to grant them much more than a consultative role in determining the scope of the UNE regime. They are asking **that** they be allowed to impose unbundling obligations that exceed those required by the FCC. On the theory that they are in a better position than their federal counterparts to assess what is needed to promote local competition, 80 state commissioners from 34 states have requested the FCC authorize them "to add to any national list of UNEs."[71] These state commissioners want to be able to prevent the removal of an existing element, such as switching, from the UNE-platform And they want to be able to create new UNEs as well.[72]

47 U S C § 271(d)(2)(B)

Letter from NARUC State Commissioners to FCC dated November 20 2002

[2] **Id**

In the interest of the development of sound communications policy, as well as compliance with the intent of the 1996 Act, it is important that the Commission resist the states' entreaties and make clear its intention to preempt any state action that interferes with the federal role in determining the scope of the UNE regime. As a matter of policy, it does not make sense for states to be able to impose unilaterally a hodge-podge of different unbundling requirements on what everyone recognizes is now essentially a system of multiple integrated interconnected regional and national telecommunications networks From a technical configuration and economic perspective, these network respect no state boundaries.[73] This is not to say that there are not variations in the competitive environment in different states due to cost differentials attributable to geography, state policies regarding local rates or rights-of-ways, and the like. It is to say. however. that the societal costs of allowing each state to have final authority in determining UNE mandates—as opposed to devising a meaningful advisory role—outweigh the benefits. To the extent necessary, the FCC can, with state input, devise its rules with sufficient granularity to account for variations affecting the Section 251 impairment analysis.

No doubt having these considerations in mind, Congress established federal preeminence with regard to implementation of the network unbundling requirements and the states do not appear to maintain otherwise. Section 251(d) grants the FCC the authority to determine network unbundling requirements.[74] While the states are granted authority to determine the rates for network elements, subject to compliance with the FCC-specified methodology, Section 251(d)(3) specifically provides that states may only impose interconnection and access obligations that are consistent with the FCC's unbundling rules and which do not substantially prevent their implementation.[75]

If any doubt existed concerning the FCC's authority under the 1996 Telecommunications Act to preempt inconsistent UNE rules, such doubt was removed by the Supreme Court's decision in *AT&T Corp v.* Iowa Utilities Board. There, the Court upheld against state (and ILEC) challenge the FCC's promulgation of the TELRIC methodology to be followed by the states in pricing UNEs. As Justice Scalia put it:

> [T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States With regard to matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new federal regime is to be guided by federal agency regulations. If there is any 'presumption' applicable to this question, it should arise from the fact that a federal

[73] In terms of impairment analysis, we know there are not meaningful differences in the telephone networks which span the metro Washington, DC area, even though the networks cross state boundaries And there are almost certainly no significant diflerences in the networks that connect Kansas City, MO, and Kansas City. KN

[74] 47 U S C § 251(d)(1) and (2)

[75] 47 U S C § 251(d)(3)

> program administered by 50 independent state agencies is surpassing strange.[76]

That Congress rejected the "surpassing strange" idea of having 50 independent state agencies setting national telecommunications policy is made abundantly clear at the very outset of the 1996 Act's legislative history The act's framers stated that it was intended "to provide for a pro-competitive, deregulatory national policy framework."[77] In revising the UNE regime, the Commission should remain true both *to* the deregulatory purpose of the 1996 Act and the framers' manifest intent that a national policy framework be maintained as a means of moving in that direction. Within that context, the states have an important role to play in achieving the pro-competitive and deregulatory objectives of the act.

8. Elements That Have Been Removed From The Unbundling And Sharing Regime Should **Not** Be Considered On The "Competitive Checklist" **For** Evaluating Section **271** Applications

To borrow Justice Scalia's phrase, it also would be "surpassing strange" if, after the Commission eliminates a network element from the UNE list, say, local switching, it continued to apply that element for purposes of evaluating a Bell Company Section 271 application. At least from a common sense point of view, once the Commission has determined that CLECs are no longer impaired in competing absent ILEC provision of that element, there is no basis for requiring that it be considered for purposes of Section 271. The purpose of the Section 271 inquiry, of course, is to determine whether the particular Bell Company's local market is open to competition. It certainly is with regard to network elements for which competitive impairment no longer exists.

Although as a matter of law the issue is not free from doubt, it appears the Commission may exercise its authority under Section 10 to forbear from applying those provisions of Section 271 that relate to UNEs.[78] Having made a determination based on a lengthy (some might say interminable) record that a particular element (this time, for example, inter-office transport) is no longer mandated as a UNE, the Commission's decision necessarily would encompass those Section 10 criteria relating to prohibiting undue discrimination, protection of consumers, and furtherance of the public interest lhat are requisite *to* a forbearance finding.[79]

While Section 10(d) provides that the Commission may not forbear from applying the Section 251 unbundling obligations, this limitation applies only until "the

[76] 119 S Ct 721, 730 (1999) (Emphasis in original) Note that even the dissenters in *Iowa Utilities Board* did not argue that the state had authority to act inconsistently with the FCC's action regarding the scope of the Commission's unbundling rules Thus, Justice Thomas stated that, pursuant to Section 251, "[t]he FCC has the authority tro regulate on the subject *of* . those network elements lhat the carrier must make available on an unbundled basis for purposes of § 251(c),251(d)(2) " 119 S *Ct* at 743

[77] H R Conf Rep No 104-458 at 113 (Emphasis added)

[78] *47 U.S.C § 160*

[79] 47 U C S § 160(a)

Commission determines that those requirements have been *fully implemented*."[80] The Commission's decision to remove an element from the UNE-platform after due consideration would seem to be just the sort of "fully implemented" determination that Section 10 envisions. We must assume that Congress intended the "fully implemented" language to be given meaning and effect.

Not to construe the provision this way leads to the absurd result that, for those jurisdictions in which the Cornmission has yet to consider Section 271 applications, whatever actions it may have taken with regard to UNEs in the generic rulemaking proceeding are for naught The 1996 Act does not appear to dictate such a nonsensical and counter-productive result.

CONCLUSION

There are surely many other discrete choices that the Commission will make in the *UNE* Triennial Review. *Wireline* Broadband, and Cable High-speed Access proceedings. No doubt many of these choices will have important consequences as well. It is fair to say, however, that the legacy of this particular Commission will be determined largely by whether its actions comport with the benchmarks set forth above. If they do, and it chooses the Dynamic Deregulation Vision over the Static Regulated Competition Vision, investment in advanced telecommunications facilities will be stimulated, innovation in new communications services will be spurred, Competition among services providers will be strengthened, and America's consumers will be the beneficiaries.

[80] 47 U S C § 160(d) (Emphasis supplied)

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Publications on Related Topics

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Larry F Darby, Jeffrey A Eisenach and Joseph S Kraemer. "The CLEC Experiment Anatomy of a Meltdown,' Progress on Point 9 23 (September 2002) (Washington, D C The Progress 8 Freedom Foundation)

Randolph J May and Larry F Darby. Reply Comments of The Progress 8 Freedom Foundation, *In the Matter* of the Review *of* the Seclion *251 Unbundling* Obligations *of* Incumbent Local Exchange Carriers, CC Docket 01-338, July 2002

Randolph J May "To Litigate or Deregulate Chairman Powell's Defining Moment," Progress on Point 9 20 (June 2002) (Washington, D C The Progress & Freedom Foundation).

Joseph S Kraemer and Randolph J May, "Local Exchange Cornpetition Progress in Maryland,' Progress *on Point* 9 16 (May 2002) (Washington, D C The Progress & Freedom Foundation)

Randolph J May, "Broadband Gets A Breaux-Nickles Boost,' Progress on Point 9.15 (May 2002) (Washington, D C · The Progress & Freedom Foundation)

Randolph J May and Larry F Darby, Comments of The Progress 8 Freedom Foundation, In the Matter *of the* Review *of* the Section *251 Unbundling* Obligaalions *of* Incumbent Local Exchange Carriers. CC Docket 01 338 April 2002

Randolph J May C Lincoln Hoewing Peter Pitsch John D Windhausen Jr and Thomas Hazlett Broadband Regulation Should Conqress Act? Progress on Point 9 5 (February 2002) (Washington *D* C The Progress 8 Freedom Foundation)

Randolph J May The Tech Community Fashions a Deregulatorv Broadband Policy *Progress* on Point 9 3 (February 2002) (Washington, D.C The Progress & Freedom Foundation]

Jeffrey A Eisenach and Randolph J May, Comments to *the* FCC on the Deployment *of* Advanced *Telecommunications* Capability. CC Docket *No 98-146* (September 24. 2001)

Jeffrey **A.** Eisenach and Randolph J May, *Communications* Deregulation and FCC Reform, (Washington DC Kluwer Academic Publishers and The Progress 8 Freedom Foundation,2001)

Joseph S Kiaemer and Randolph May, "Local Exchange Competition Progress in New Jersey," Progress on *Point* 8 16 (July 2001) (Washington. D C The Progress 8 Freedom Foundation)

Randolph May, Steven Berry, Michael Chappell, Joseph Gattuso, Thomas Sugrue, "*ABC's of Getting* lo *3G* Wireless – *Another* Broadband Alternative Wailing *to* be Born A Symposium," Progress on Point 8 15 (July 2001) (Washington, D.C. The Progress 8 Freedom Foundation)

Randolph J May. "A Reform Agenda for the New FCC," Progress on Point 89 (May 2001) (Washington, D C The Progress 8 Freedom Foundation)

Randolph J May, Moderator Robert Blau. Kevin Joseph, John Malone Dorothy Attwood. and Maureen McLaughlin, "The Local Telecommunications Marketplace Are New Policy Directions Needed?." Progress on Point 8 7 (March 2001) (Washington, D.C The Progress 8 Freedom Foundation).

The Honorable W J "Billy" Tauzin, "Telecom Deregulation, Broadband Deployment, And Economic Growth" Progress on Point 85 (April 2001) (Washington, D C The Progress 8 Freedom Foundation)

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