

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)

Southern New England Telephone)
Company)

Petition for Declaratory Ruling and Order) WC No. 04-30
Preempting the Connecticut Department of)
Public Utility Control's Decision Directing)
the Southern New England Telephone)
Company to Unbundle its Hybrid Fiber)
Coaxial Facilities)

OPPOSITION OF AT&T CORP.

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INTRODUCTION AND SUMMARY

The Petition invites the Commission to commit a very public betrayal of its declared policy goals of promoting broadband infrastructure investment, facilitating advanced services deployment and encouraging facilities-based competition. Although the state commission order at issue unquestionably serves each of these policy goals, reflects the exercise of independent *state* law authority, and deals solely with *coaxial*-fiber facilities that the Commission has never even addressed under federal unbundling law, SBC claims that the state order will so “directly frustrate[] the implementation of federal law” that the Commission must immediately strike it down. Pet. at 1. In an era of increasingly silly Bell petitions, SBC has set a new standard.

The Connecticut Department of Public Utility Control (“DPUC”) ordered the unbundling of certain hybrid fiber-coaxial loops (“HF-Coaxial”) that Southern New England Telephone Company (“SNET”) deployed for the purposes of providing a bundle of voice, data and video services, but then *mothballed* after its acquisition by SBC.¹ These facilities lie fallow today and SBC has no plans to put them to productive use. Although leasing (or selling) the mothballed facilities would allow SBC to earn a return on an investment that is generating absolutely *no* income, SBC flatly refuses, for purely anticompetitive reasons, to do either. The competitive carrier that has requested access to the HF-Coaxial loops, Gemini Networks CT (“Gemini”), has pledged to upgrade the loops so that they can be used to provide a fully array of services, to undertake all required maintenance, and even to expand the footprint of the existing network. The unbundling ordered by the DPUC will therefore mean more broadband facilities investment, more advanced services deployment and more competitive choices for Connecticut consumers.

¹ Final Decision, *Petition of Gemini Networks, CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company’s Unbundled Network Elements*, Docket No. 03-01-02 (DPUC Dec. 17, 2003) (“*Final Decision*”).

Given that the DPUC's decision ensures that loop facilities that would otherwise be gathering dust can be used to offer consumers innovative packages of voice and next-generation services, SBC does not even attempt to show that the DPUC's decision frustrates any fundamental Commission policy. Instead, SBC complains that the DPUC's requirements go beyond the requirements of federal law. Even if that were true, it would provide no basis for the relief SBC seeks. The DPUC ruled that it has independent *state* law authority to require SBC to lease its abandoned HF-Coaxial loops to Gemini. Thus, to prevail, SBC must demonstrate both that the DPUC misapplied federal law *and* that allowing Connecticut to enforce its independent state law determination that the public interest would be served by requiring SBC to lease these abandoned facilities would so interfere with federal requirements and policies that the state law requirement must be preempted. SBC has done neither.

First, the DPUC's federal law unbundling findings are fully consistent with the Act, the Commission's regulations, the *Triennial Review Order*, 18 FCC Rcd. 19020 (2003), and the Commission's announced policies. The threshold "legal hurdles" that SBC advances – that the spare loops in question (i) are not "network elements," (ii) are not part of SBC's "local network," and (iii) will not be used by Gemini to provide "qualifying services" – are makeweights. As the DPUC found, the HF-Coaxial facilities are indisputably network elements within the meaning of § 3(29). These facilities are owned by an incumbent local exchange carrier ("ILEC") and capable of providing telecommunications services – indeed, that was their intended purpose. And with regard to the latter two claims, SBC's arguments are based on Commission findings that were just *reversed* by the D.C. Circuit in *United States Telecom Ass'n v. FCC*, No. 00-1012, slip op. (D.C. Cir. March 2, 2004) ("*USTA IP*"). The DPUC thus properly determined that the facilities in question are subject to §§ 251 and 252.

The DPUC likewise properly applied the federal impairment standard. Like all local loops, the HF-Coaxial loops are quintessential natural monopoly facilities. Relying on basic economics, the findings that the Commission made in requiring unbundling of “analogous” HF-Copper loops, and a detailed record regarding the specific infeasibility of duplicating HF-Coaxial loops, the DPUC appropriately concluded that Gemini would be “impaired” within the meaning of § 251(d)(2) without access to these facilities. The DPUC’s findings are unassailable – for the same reasons that the Commission identified in the *TRO*, competitive local exchange carriers (“CLECs”) cannot economically self-deploy mass market loop facilities (using any technology) or purchase loop access from third parties. SBC certainly provides no record for the Commission to substitute its judgment for the DPUC’s record and experience-informed decision with respect to these particular facilities.

SBC suggests that the Commission’s fiber-*copper* loop analysis in the *TRO* supports a finding that Gemini should have no access to SBC’s fiber-*coaxial* facilities; in fact, the opposite is true. The Commission determined that CLECs are impaired without access to hybrid fiber-copper (“HF-Copper”) loops and required unbundling of the narrowband and broadband capabilities of those loops with one specific limitation that plainly does not apply here – transmission paths that are used to transmit packetized information. The HF-Coaxial loops at issue are not used to transmit packetized information (or anything else), and indeed, are not even connected to any packet switching equipment. Moreover, the Commission policy on which the HF-Copper unbundling limitation is based – the goal of encouraging additional investment in such facilities and the deployment of advanced services over them – could not even support a packet-switching limitation with respect to the fiber-coaxial facilities at issue for the simple reason that SBC had made abundantly clear even before the DPUC order that it had no plans to

deploy any further HF-Coaxial facilities and indeed that it never planned to use even the facilities that it had already deployed. Thus, the broadband policy concerns announced in the *TRO* support *full* and unqualified unbundling of these facilities to allow them to be used by the only carriers with the desire to expand them and use them to provide advanced services – competitive carriers.

SBC's fallback argument that no unbundling of the HF-Coaxial facilities is appropriate because CLECs can lease *other* SBC loops disregards both the DPUC's finding that Gemini could not provide the services it seeks to provide over other SBC loops and the Commission's own *TRO* analysis. With regard to the latter, the Commission considered other unbundling opportunities only in concluding that the costs of denying CLECs full access to HF-Copper loops in the face of clear impairment were mitigated by the availability of other loop unbundling and that, as mitigated, the costs of impairment were outweighed by the benefits of increased investment and advanced services deployment that would follow from limiting unbundling. Here, as noted, there are no broadband benefits that would accrue by allowing SBC to leave the facilities in question idle and thus the availability of other, inferior unbundling opportunities is simply irrelevant. In short, the DPUC properly applied federal law in requiring SBC to unbundle the HF-Coaxial loop facilities. *See Part I infra.*

But even if the DPUC's decision could not be supported under federal law, the DPUC had clear state law authority for its decision. SBC contends that the mere fact that a state commission imposes unbundling that goes beyond that required by federal law warrants preemption, but that is clearly wrong. The history, terms, structure, and purposes of the 1996 Act irrefutably demonstrate that § 251 and the Commission's implementing regulations are

minimum requirements that establish a federal “floor” and that states can impose additional unbundling obligations under state law. *See Part II infra.*

The Petition must be denied.

ARGUMENT

I. THE DPUC CORRECTLY APPLIED FEDERAL LAW.

The DPUC mandated unbundling on both federal and state law grounds. SBC claims that the DPUC mandated unbundling that is broader than that required by federal law. As explained in Part II below, even if true, this claim would be patently insufficient to justify preemption. In any event, SBC’s claim is false. Contrary to SBC’s misrepresentations, the unbundling ordered by the DPUC is fully consistent with federal law standards, including the Commission’s *Triennial Review Order*.

A. SBS’s Threshold Objections To The Application Of Sections 251 And 252 To Its HF-Coaxial Loop Facilities Are Meritless.

SBC first claims that the local loops at issue are not subject to unbundling analysis at all. Each of the three arguments advanced by SBC to support this contention is meritless. Under the plain terms of the 1996 Act and the Commission’s rules and precedents, SBC’s HF-Coaxial loops are “network elements,” are “within” SBC’s “local network” and will be used by Gemini to provide a “qualifying service.”

1. The HF-Coaxial Facilities Are “Network Elements.” A network element is “a facility or equipment used in the provision of a telecommunications service.” 47 U.S.C. § 153(29). SBC argues that although its HF-Coaxial facilities were designed, constructed and intended to be “used in the provision of a telecommunications service,” and although Gemini seeks to use the facilities for that purpose, they cannot be “network elements” because they were mothballed before *SNET* used them to provide telecommunications services. Pet. at 15-17. This

argument that the network element determination turns on the incumbent's use of facilities has already been rejected at least twice by the Commission.

Most recently, in the *TRO*, the Commission “reaffirm[ed its] previous interpretation of the definition of “network element,” set forth in § 3(29) of the Communications Act, as requiring ILECs to make available to requesting carriers “network elements that are *capable of being used* in the provision of a telecommunications service.” *Id.* ¶ 58 (citing *UNE Remand Order*, 15 FCC Rcd. 3696, ¶ 329 (1999)) (emphasis supplied). The Commission held that “taken together, the relevant statutory provisions and the purposes of the 1996 Act support requiring ILECs to provide access to network elements to the extent that those elements are capable of being used by the requesting carrier in the provision of a telecommunications service.” *Id.* ¶ 59.

As the Commission explained, “[t]o interpret the definition of ‘network element’ so narrowly as to mean only facilities and equipment actually used by the incumbent LEC in the provision of a telecommunications service . . . would be at odds with the statutory language in section 251(d)(2) and the pro-competitive goals of the 1996 Act.” *Id.* ¶ 60. The former “requires the Commission to consider whether the failure to provide access to a particular network element would impair the ability of a requesting telecommunications carrier ‘to provide the services that *it* seeks to offer,’” not the services offered by the ILEC. *Id.* (quoting § 251(d)(2)(B)). With respect to the latter, the narrow interpretation of “network element” “would deny competitive LECs any certainty about the availability of a network element in a given market unless and until a determination was made about whether the incumbent LEC is actually using that network element in its provision of a telecommunications service in that market.” *Id.* It would also, as here, “lead to such unreasonable results as preventing a spare loop that is capable of providing second-line service from being considered a ‘network element’ if the customer were not

purchasing service over that line from the incumbent LEC.” *Id.* “Finally, an alternative reading of the statute would allow incumbent LECs to prevent competitors from making new and innovative uses of network elements simply because the incumbent LEC has not yet offered a given service to consumers,” stifling “a competitor’s ability to innovate” and hindering “deployment of advanced telecommunications services.” *Id.*

SBC fails even to acknowledge these Commission holdings. Instead, it notes that the DPUC, in applying the Commission’s definition of network element, analogized the HF-Copper facilities at issue to the dark fiber facilities that the Commission held were network elements in the *UNE Remand Order*, and argues that this analogy is inapposite. Pet. at 16. SBC contends that the Commission treated dark fiber as a network element only because it is “routinely used to provision telecommunications service” and “easily called into service,” *id.*, and says that its HF-Coaxial facilities satisfy neither criterion.

This is nonsense. The Commission made the statements SBC cites when contrasting *deployed* dark fiber with equipment stored in a warehouse awaiting future deployment:

We acknowledge that it would be problematic if some facilities that the incumbent LEC customarily uses to provide service were deemed to constitute network elements (e.g., *unused copper wire stored in a spool in a warehouse*). Defining such facilities as network elements would read the “used in the provision” language of section 153(29) too broadly. Dark fiber, however is distinguishable from this situation in that it is physically connected to the incumbent’s network and is easily called into service.

UNE Remand Order ¶¶ 59-60 (emphasis supplied).

Deployed facilities like the spare loops at issue here are not remotely analogous to spooled wire in a warehouse. The DPUC found that the HF-Coaxial facilities have “already been deployed and could be placed into service by Gemini.” *Final Decision* at 36. The DPUC further found that the facilities were “constructed in part and intended by the Company to provide a full

complement of voice[,] data and video services” and that Gemini has “committed” to providing telecommunications services with these facilities. *Id.*

SBC’s additional contention that HF-Coaxial facilities are not “routinely” used to provide telecommunications service, simply because *SNET*’s HF-Coaxial services were never used to do so, is also without merit. Pet. at 16. In fact, although the services have not yet been widely deployed, a number of cable operators *are* using HF-Coaxial facilities to provide telecommunications services. In any event, the Commission’s precedents make clear that the test is not whether a particular carrier currently uses the facility to provide service, but whether the facility is of a type that is “capable of being used” to provide service, as HF-Coaxial facilities are. Indeed, in light of the purposes of the 1996 Act, innovative use of HF-Coaxial facilities to provide telecommunications services is more reason, not less, to treat such ILEC facilities as network elements.

SBC claims that its HF-Coaxial loops could be used to provide telecommunications services only if SBC made costly modifications to its network to call those facilities into service. Pet. at 16-17. But the “modifications” SBC identified in the one and half page declaration that it submitted to the DPUC – *e.g.*, activating mothballed power supplies, amplifiers, and nodes (and redeploying such equipment that was removed when SBC shut down the facility) – are no different in kind than the types of activities (*e.g.*, adding electronics) that ILECs or CLECs routinely perform in using unbundled network elements such as dark fiber and that have been required by the Commission. *TRO* ¶ 637. In this regard, the *TRO* squarely held that ILECs must “engage in activities necessary to activate loops that are not currently activated in the network.” *TRO* ¶ 633. These mandatory activities include (but are not limited to) “rearrangement or splicing of cable; adding a doubler or repeater; adding an equipment case; adding a smart jack;

installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer” (*id.* ¶ 634) and encompass the type of routine activities at issue here. As the Commission observed in adopting these rules, absent such requirements “the incumbent LECs would have the ability to dictate the parameters of their unbundling requirements and thereby readily thwart competitors’ ability to obtain access to high-capacity loops.” *Id.* ¶ 633. On appeal, the D.C. Circuit upheld these rules as “clear and reasonable.” *USTA II*, slip op. at 34.

In all events, there is *no* basis for SBC’s assertion that *it* will be obliged to incur any such expenses – much less any unreimbursed expenses. The DPUC expressly found that “Gemini has committed to performing the necessary upgrades and repair to the HF[-coaxial] network to accommodate its provision of qualifying services” and therefore that SBC’s “concern that the HF[-coaxial] network is not capable of providing telecommunications services without significant modification is also without merit.” *Final Decision* at 39. The Commission has no basis to “overrule” the DPUC’s factual finding.

2. The HF-Coaxial Facilities Are Part Of SBC’s “Local Network.” Although HF-Coaxial facilities at issue are simply wires that connect customer premises to SBC’s central offices – *i.e.*, local loops – SBC contends that they are not part of its local network and therefore not subject to federal unbundling requirements. Pet. at 18 (citing *TRO* ¶ 366). But, the D.C. Circuit in *USTA II* expressly rejected the Commission’s findings upon which SBC relies. Rather, it held that so long as the facilities meet the statutory definition of “network element” – and, as detailed above, SBC’s HF-Coaxial facilities clearly do – and, as here, are owned or controlled by an ILEC, they are subject to § 251 unbundling analysis. *USTA II*, slip op. at 47.

In all events, contrary to SBC’s claim, its HF-Coaxial facilities plainly are part of its “local network” as the *TRO* used that term. In the section of the *TRO* that SBC cites, the

Commission drew a distinction between an incumbent's own transport facilities, so-called "*intra*-incumbent LEC transmission facilities," *TRO* ¶ 367 n.1119, and "entrance facilities" linking an incumbent's network with a competitor's network. *Id.* The Commission had previously considered both kinds of transport facilities to be dedicated transport facilities subject to unbundling. In the *TRO*, however, the Commission decided that it would no longer require the unbundling of *inter*-network transport facilities that are used for the purpose of interconnecting the ILEC's network to a CLEC's network:

We find that transmission facilities connecting incumbent LEC switches and wire centers are an inherent part of the incumbent LEC's local network Congress intended to make available to competitors under section 251(c)(3). On the other hand, we find that transmission links that simply connect a competing carrier's network to the incumbent LEC's network are not inherently a part of the incumbent LEC's local network. Rather, they are transmission facilities that exist *outside* the incumbent LEC's local network [and] are not appropriately included in the definition of dedicated transport.

TRO ¶ 366.

The Commission explained its change of course by pointing out that while competing carriers have control over the locations of their own networks and can minimize the costs of interconnection with an incumbent LECs network, they have "no such choice in seeking to obtain transport *within* the network of incumbent LECs." *Id.* ¶ 367 (emphasis supplied). Moreover, the Commission found that competitive LECs often "self-deploy" entrance facilities "because of the cost savings [that] aggregation [of traffic at this point] permits." *Id.* Thus, the Commission concluded that limiting the definition of transport is "consistent with the Act because it encourages competing carriers to incorporate those costs within their control into their network deployment strategies rather than to rely exclusively on the incumbent LEC's network." *Id.*

Here, Gemini is not seeking facilities merely to “interconnect” its network with SBC’s, but is seeking to lease core last-mile facilities that are entirely within SBC’s network – as SBC’s own “evidence” shows. *See* Pet., Exh. B (showing that the “equipment requested by Gemini” is the loop between SBC’s central office and the end user). The HF-Coaxial facilities unquestionably are *intra*-ILEC facilities. Indeed, the loop facilities at issue are quintessential intra-network facilities, indistinguishable for these purposes from the all copper and HF-Copper loops that SBC itself concedes are “intra-network” facilities. *Id.*

The fact that SBC “purchased and deployed an entirely new and different type of equipment” from that previously utilized is entirely irrelevant to the question whether the new and different equipment was deployed within SBC’s system or in order to connect SBC’s system to the system of a competitive LEC. And, the rationales the Commission used to exclude inter-system transport from the unbundling requirements have no application here: Competitive LECs do not routinely self-deploy competing HF-Coaxial loops (or any other mass market loops).

Thus, the *TRO*’s treatment of dedicated transport used as “entrance facilities” in no way supports SBC’s contention that its HF-Coaxial facilities are not part of its local network. But if SBC were correct that the HF-Coaxial facilities are entirely separate from SBC’s local network and thus not covered at all by Title II unbundling requirements or policies, that would only establish an additional reason why SBC’s request that the Commission preempt Connecticut’s independent state law unbundling requirement must be denied: SBC could hardly establish an inconsistency between state law HF-Coaxial requirements and federal laws and policies that do not even apply to those facilities.

3. Gemini’s Request Satisfies The Commission’s “Qualifying Service” Rule. In determining whether to order unbundling, the Act directs state commissions to consider whether

denial of unbundled access to a particular network element “would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” 47 U.S.C. § 251(d)(2)(B). The Commission has concluded that the term “services” in § 251(d)(2) means “qualifying services” – “those telecommunications services that competitors provide in direct competition with the incumbent LECs’ core services.” *TRO* ¶ 139.

SNET claims that Gemini will not be offering a “qualifying service” over the HF-Coaxial facilities and, therefore, that these facilities are not subject to unbundling. Pet. at 20-21. Again, this claim is doomed by *USTA II*. There, the D.C. Circuit found that the Commission’s definition of “qualifying services” was arbitrary and the Commission vacated it. *USTA II*, slip op. at 56-58, 62. There can be no “preemption” by a rule that has been vacated.

In all events, the DPUC’s finding that Gemini was offering a “qualifying service” within the meaning of the now vacated rules was clearly correct. *Final Decision* at 38 (“Gemini has committed to offering the [Commission’s] qualifying services over facilities that have been abandoned by [SBC.]”); *id.*, Findings of Fact and Conclusions of Law (“FOF COL”) ¶ 28 (“Gemini has committed to offering qualifying telecommunications services over the HF[-coaxial] network”). Before the DPUC, SBC simply “fail[ed] to acknowledge Gemini’s commitment [to offer qualifying services].” *Id.* at 38 & n. 112 (citing *TRO* ¶¶ 143, 146). That SBC failure continues here. The DPUC has made a finding; SBC points to nothing that could warrant overturning that finding.

SBC now appears to be arguing that as a matter of law, Gemini does not “seek[] to offer” a qualifying service because the HF-Coaxial facilities require “upgrades and repair . . . to accommodate [Gemini’s] provision of qualifying services.” Pet. at 21. The plain language of § 251(d)(2), however, requires only that a carrier “seek[] to offer” a qualifying service, a

requirement that is surely satisfied, as the DPUC found, by a carrier that commits to performing the upgrades and repair necessary to provide qualifying service if it is granted access. *See Final Decision*, FOF COL ¶ 31 (“Gemini has committed to performing the necessary upgrades and repair to the HF[-coaxial] network to accommodate its provision of qualifying services”).

Alternatively, SBC contends that as a matter of law, “Gemini must offer qualifying telecommunications services *prior to* utilizing the HF[-coaxial] facilities to provide its intended broadband services” in order to lease a unbundled network element (“UNE”). Pet. at 21 (emphasis in original). This argument makes a hash of the plain language of the statute which requires only that a carrier *seek* to provide qualifying service, not that the carrier provide such service already. Specifically, SBC’s construction of the statute would produce absurd and starkly anticompetitive results. It would preclude new entrants that can provide mass market telecommunications services only if they obtain access to the ILEC’s bottleneck loop facilities from ever getting the access that would allow them to begin providing those services. It is not surprising, accordingly, that SBC cites nothing in support of its proposition – there is nothing to cite.

SBC’s argument also fails because it is based on an incorrect view of what constitutes a “qualifying service.” In SBC’s view, “broadband services” can never be qualifying services; SBC suggests that only “basic telephone services” satisfy the definition of qualifying service. Pet. at 20. In its rules codifying the definition of qualifying service (47 C.F.R. § 51.5), however, the Commission held that a “qualifying service” is *any* “telecommunications service that competes with a telecommunications service that has been traditionally the exclusive or primary

domain of incumbent LECs” and that these services include “digital subscriber line services and high-capacity circuits” – *i.e.*, broadband transport services.²

B. The Commission’s *TRO* Analysis Supports Unbundling Here.

Unable to show that the HF-Coaxial loops are beyond the scope of the Act’s unbundling obligations, SBC contends that the Commission should “apply” the *TRO* and make a new finding that unbundling is contrary to the standards of § 251(d). Doing so would invite almost certain reversal by the court of appeals.

The Commission’s findings in the *TRO* with respect to all-copper loops, all-fiber loops and hybrid fiber-copper loops were based on a massive record. The Commission had before it detailed economic analyses of the costs of deploying those facilities, the revenue potential from those facilities, and the impact that unbundling might have on ILEC and CLEC investment. Here, by contrast, SBC has offered not a shred of hard evidence that there is no “impairment” with respect to HF-Coaxial loops, much less that impairment is outweighed by the broadband investment concerns that led the Commission to place one specific limit on HF-Copper loop unbundling. In short, SBC is asking the Commission to apply its *TRO* framework in a factual void. This is a patently insufficient basis to override presumptively lawful state impairment determinations. If SBC wants a ruling that federal law does not require *any* unbundling of HF-Coaxial loops or that some policy-based limits on such unbundling are appropriate, it must present the Commission with a full-blown impairment case. Given the economic and operational characteristics of the facilities in question, that would be an impossible showing; and that is why

² Furthermore, as the Commission is aware, one court of appeals has concluded that even retail broadband Internet access services include a “telecommunications service” component that is unquestionably a “qualifying service.” *See Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003). On this reading of the statute, of course, a carrier would be entitled to use network elements to provide stand-alone broadband Internet access services.

SBC does not even attempt it. It is patently insufficient for SBC simply to take pot shots at the DPUC's reasoning in hopes that the Commission will take on the role of a federal court conducting arbitrary and capricious review. SBC can pursue such claims in the courts (and has already begun to do so). *See* Pet. at 4 n.3.

But to the extent that the findings made by the *TRO* can substitute for specific evidence with regard to the HF-Coaxial facilities here, the *TRO* fully supports the DPUC's actions. The Commission found that that CLECs were generally impaired without access to local loops, including copper, copper-fiber, and all-fiber loops used to serve enterprise business customers. *TRO* ¶¶ 248, 285-97, 311-27. As the Commission concluded, local loops have substantial natural monopoly characteristics that cause impairment. "The costs of local loops . . . are largely fixed and sunk." *Id.* ¶ 237. In addition, "[i]ncumbent LECs also enjoy first-mover advantages that work with the[se fixed and sunk] costs . . . to compound the entry barriers associated with local loop deployment." *Id.* ¶ 238; *see also id.* ¶¶ 303-04.

The Commission also made specific findings that CLECs could not compete with ILECs by simply deploying their own fiber-coaxial networks as incumbent cable companies have done. As the Commission explained, "cable operators have been able to overlay additional capabilities onto networks that they build for other purposes, often under government franchise, and therefore have first-mover advantages and scope economies not available to other new entrants." *TRO* ¶ 98.

SBC makes no mention of these findings. Instead, SBC claims that HF-Coaxial facilities are like HF-Copper facilities and that the Commission ruled in the *TRO* that "incumbents need not unbundle" such "hybrid loop facilities." Pet. at 19. In fact, the Commission expressly limited its "hybrid" loop analysis, determinations and rules to *copper*-fed loop facilities. *See* 47

CFR 51.319(a)(2) (“A hybrid loop is a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant”). And the DPUC expressly held that “[t]he [SBC] HF[-coaxial] network and hybrid facilities differ from those addressed by the FCC in the *TRO*.” *Final Decision* at 37; *see also id.* (the SBC “network is unique”).

Moreover, the *TRO* analysis of HF-Copper facilities only confirms that the DPUC properly applied federal law to SBC’s HF-Coaxial facilities. In the *TRO*, the Commission found impairment and required broad unbundling of HF-Copper loops. *TRO* ¶ 291; *see also USTA II*, slip op. at 37-41 (finding that CLECs are impaired without access to the full capabilities of HF-Copper loops). Contrary to SBC’s claims, the Commission required unbundling of both narrowband *and* broadband capabilities of HF-Copper loops. *Id.* ¶¶ 199 & n. 627, 294; 47 C.F.R. § 51.319(a)(2)(ii). To be sure, the Commission on *policy* grounds limited the unbundling of HF-Copper loops notwithstanding impairment, but that was only in one very specific respect not relevant here. *TRO* ¶¶ 286, 288. The Commission held that an ILEC is “not required to provide unbundled access to the packet switched features” of HF-Copper loops. 47 C.F.R. § 51.319(a)(2)(i). The Commission enacted this narrow limitation in order to “incent” the deployment of next generation, packetized networks. *TRO* ¶ 288. Thus, CLECs are entitled to “access to *all* features, functions, and capabilities of the hybrid loop that are not used to transmit packetized information.” 47 C.F.R. § 51.319(a)(2)(ii).³

³ SBC engages in outright misrepresentation when it claims that under the Commission’s rules, it “*need not* unbundle hybrid loops so long as the incumbent offers a copper loop alternative.” Pet. at 13 (emphasis in original). The ability of an ILEC to offer spare “home run” copper instead of access to the copper-fiber loop itself is available only when the requesting carrier is seeking to provide only “narrowband” service, 47 C.F.R. § 51.319(a)(2)(ii) & (iii); Gemini is seeking to provide broadband services too and is therefore entitled to “access to *all* features, functions, and
(continued . . .)

In light of the foregoing, “analogizing” HF-Copper loops to HF-Coaxial loops is fatal to SBC’s claim. Gemini is not seeking access to any “transmission path over a fiber transmission facility between the central office and the customer’s premises (including fiber feeder plant) that is used to transmit packetized information.” *TRO* ¶ 288. SBC, having mothballed these facilities, has not installed any packet switching capabilities (indeed, SBC claims to have removed most of the electronics from the facilities). This is demonstrated by the very diagram attached by SBC to its brief that shows the HF-Coaxial loops requested by Gemini are *not* connected to SBC’s packet switching facilities. Pet., Exh. B. Thus, all that Gemini is seeking is access to “bare” HF-Coaxial loops and, to the extent that HF-Coaxial loops are “analogous” to HF-Copper loops, that access would be authorized by the *TRO*.

Moreover, the Commission’s stated policy basis for the packet-switching limitation on the unbundling of HF-Copper loops – promoting “the deployment of advanced telecommunications infrastructure” (*TRO* ¶ 288) – would be *undermined*, not served, by the ruling SBC seeks here. SBC has made clear that it has no plans for further deployment of HF-Coaxial plant and, indeed, that it has no plans even for HF-Coaxial plant that it has *already* deployed. Gemini, on the other hand, is willing to make the substantial investments necessary to use (and expand the reach of) these fallow facilities to provide the advanced services the Commission seeks to encourage. *Final Decision* at 10. The DPUC’s order will mean more broadband investment, more advanced services deployment and more competitive choices for Connecticut consumers. Accordingly, the *TRO* reasoning compels unbundling here.

(... continued)
capabilities of the hybrid loop that are not used to transmit packetized information.”
Id. § 51.319(a)(2)(ii)

SBC complains that instead of considering impairment, the “DPUC’s *Final Decision* focuses exclusively on the prospective impairment that *Gemini* faces in implementing its business plan in the absence of unbundling” and that “the DPUC never considered whether competitive carriers generally face impairment in the absence of unbundling.” Pet. at 23. As noted above, if that claim had any merit, SBC should make it to a reviewing court, not to the Commission. In fact, the claim, which reflects a complete mischaracterization of the DPUC’s decision, has no merit at all.

The DPUC’s decision expressly lays out and addresses this Commission’s impairment standard. *Final Decision* at 40-43. First, the DPUC explained that the Commission “consider[s] whether the failure to provide access to network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” *Id.* at 41 (citing *TRO* ¶ 71). More specifically, the Commission identified “barriers to entry” that could impair prospective competitors seeking to enter a market, “including operational and economic barriers that are likely to make entry into a market uneconomic.” *Id.* (citing *TRO* ¶ 84). Applying the Commission’s impairment standard, the DPUC found as follows:

Gemini could be impaired operationally if it were required to purchase network facilities that it deems inferior to that of the HF[-coaxial] network. Likewise, Gemini could be impaired economically if it were required to construct its own facilities. Gemini also, in light of the TRO, experiences “first-mover advantage” barriers to entry . . . because [SBC] has experienced preferential access to rights-of-way, and possesses sunken capacity, and operational difficulties that have already been addressed when it constructed its HF[-coaxial] network as a monopolist. Gemini also suffers from brand name preference (another first mover advantage barrier) that [SBC] currently enjoys. Gemini would also be at a disadvantage in constructing its own network relative to [SBC] because the Company was able to construct its HF[-coaxial] network with revenues generated from its monopoly customers.

Final Decision at 41; see also *id.* at 41 n.135 & 42 (detailing further barriers to entry).

The DPUC also found that “[o]nly [SBC’s] HF[-coaxial] facilities . . . can satisfy [Gemini’s] service needs.” *Id.* at 42. This is the relevant question as § 251(d)(2) requires that “impairment” be determined with respect to the services that the competitive LEC “seeks to offer.” The “provision of telecommunications services over the HF[-coaxial] network is far superior in speed and consistency than over the existing copper network,” and thus the DPUC decided that requiring Gemini to accept the alternative UNEs proposed by SBC would “force an architecture consisting of technologically inferior facilities.” *Id.* Plainly, SBC’s argument that the DPUC did not “consider the availability of facilities from alternative sources” (Br. at 23) is flatly wrong. And SBC certainly offers no evidence that calls the DPUC’s factual findings into question.

To the extent that SBC is arguing that the Commission held has a matter of law that access to copper sub-loops and the TDM capabilities of HF-Copper loops means that there can be no “impairment” with respect to HF-Coaxial loops, that is clearly false. *See* Pet. at 24 (citing *TRO* ¶ 291). Foremost, the Commission did not find that these “alternatives” eliminated the impairment faced by CLECs denied access to the packetized portion of HF-Copper loops, but only that it *ameliorated* to some extent this impairment to the level where it would be outweighed by the broadband investment “benefits” of limiting unbundling to non-packetized capabilities. *See TRO* ¶ 295. The D.C. Circuit in *USTA II* likewise agreed that these alternatives are only “partial substitute[s]” and do “not eliminate . . . CLEC impairment.” *USTA II*, slip op. at 41. The Commission made no findings that access to copper subloops and the TDM capabilities of HF-Copper loops substantially diminished the impairment that a CLEC would suffer without access to HF-Coaxial loops. And certainly there is no finding in the *TRO* that this impairment is outweighed by the benefit that eliminating unbundling would have by increasing

SBC's incentive to invest in HF-Coaxial facilities. Of course, as explained above, such a finding is not even theoretically possible because SBC has made it abundantly clear that it has no HF-Coaxial deployment plans and, indeed, that it wants to prevent the productive use of its existing HF-Coaxial facilities.

Finally, the DPUC itself expressly addressed SBC's argument that it could not find impairment based on the difficulties that a denial of access would pose for a particular business plan. *Final Decision* at 43 n.143. The DPUC pointed that the Commission "indicated that it would give consideration to cost studies, *business case analysis*, and modeling if they provide evidence at a granular level concerning the ability of competitors economically to serve the market without the UNE in question." *Id.* (citing *TRO* ¶ 99) (emphasis supplied). In addition and dispositively, the DPUC expressly found that:

Gemini has presented strong evidence (*in addition to a business case analysis*) that it would be impaired without access to the [SBC] HF[-coaxial] network. In the opinion of the Department, while *Gemini has provided convincing evidence of impairment, its business case merely adds more weight to that finding.*

Id. (emphasis supplied). SBC simply ignores these findings, and its contention that the DPUC unlawfully relied exclusively on Gemini's individual business plan is obviously wrong.

II. THERE IS NO BASIS FOR PREEMPTION OF THE DPUC'S STATE LAW UNBUNDLING REQUIREMENT.

SBC's Petition is based on a fundamentally flawed understanding of both Connecticut law and basic preemption analysis. Contrary to SBC's contention, the DPUC has broad state law authority to grant unbundling that it finds to be in the public interest." And the DPUC's state law determination is unassailable – it will plainly serve the public interest to allow productive use of facilities that SBC, for purely anti-competitive reasons, would leave idle.

Nor is there any basis for finding that there is a "conflict" between Connecticut state law unbundling and the 1996 Act. SBC's analysis rests entirely on the notion that any state law that

orders unbundling beyond the federal “floor” is necessarily preempted. The opposite is true. The 1996 Act’s four savings clauses establish that states can impose additional unbundling obligations under state law that go beyond what is mandated by federal law.

A. The *Final Decision* Is Amply Supported By State Law.

SBC tries to brush aside the state law aspect of the DPUC’s ruling on the grounds that Connecticut law provides that the DPUC may only order unbundling that is “consistent with federal law” (Conn. Gen. Stat. § 16-247b(a)) and, therefore, that “Connecticut law incorporates federal law.” Pet. at 7. This is a gross misreading of Connecticut law.

That Connecticut law must be “consistent with” federal law does not mean that it must be construed as imposing no obligations beyond those mandated by the 1996 Act. Rather, in the preemption context, there is an established meaning for whether a state law is consistent with (or inconsistent with) federal law, and that precedent makes clear that state law is “consistent” with federal law so long as it is “possible to comply with the state law without triggering federal enforcement action.” *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977). Thus, the provision of Conn. Gen. Stat. § 15.247b(a) cited by SBC merely confirms the commonsense proposition that the DPUC cannot require SBC to undertake an obligation that makes it impossible for SBC simultaneously to comply with federal law.

In all events, the DPUC clearly rejected SBC’s proposed construction of Connecticut law. The DPUC held that Conn. Gen. Stat. § 16-247b(a) expressly authorizes it to order unbundling of network elements in addition to those expressly mandated by the Commission. *Final Decision* at 35, 40. The Commission has no authority to construe Connecticut law differently. *See, e.g., Texas Preemption Order*, 13 FCC Rcd. 3460, ¶ 10 (1997).

B. There Would Be No Justification For Preemption Even If The DPUC's State Law Unbundling Requirement Went Beyond The Requirements Of Federal Law.

SBC contends that preemption is established once it is shown that the DPUC's definition of "network element" is broader than the 1996 Act's and that the DPUC unbundled network facilities that do not have to be unbundled under federal law (either because they are beyond the scope of federal unbundling obligations or because there is no impairment). SBC Br. at 2-3, 25. In other words, SBC attempts to establish preemption not by demonstrating inconsistency but merely by showing that the DPUC mandated unbundling that is different than that required by federal law. As demonstrated above, SBC's premise that the DPUC's unbundling decision cannot be supported by federal law is meritless, but even if SBC were correct, its arguments are insufficient to justify preemption.

Preemption is always a question of congressional intent. The preemption analysis thus must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Morales v. TWA, Inc.*, 504 U.S. 374, 383 (1992) (internal quotation marks omitted), and with recognition of the "presumption against the pre-emption of state police power regulations," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). Moreover, here Congress affirmatively specified that the "Act shall not be construed to modify, impair, or supersede . . . State[] or local law unless expressly so provided." 1996 Act § 601(c)(1), 110 Stat. at 143. Congress included this provision, entitled "[n]o implied effect," to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." H.R. Conf. Rep. No. 104-458, at 201, *reprinted in* 1996 U.S.C.A.N. at 215. *See also City of Dallas, Tex. v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999); *AT&T Communications of Ill., Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003).

The history, terms, structure, and purposes of the 1996 Act irrefutably demonstrate that § 251 and the Commission's implementing regulations are *minimum* requirements that establish a federal "floor" and that states can impose additional unbundling obligations under state law. The 1996 Act was enacted against the background of the states' historic *exclusive* jurisdiction over intrastate telecommunications under § 2(b) of the Communications Act, 47 U.S.C. § 152(b). Many states exercised this power by prohibiting competitive local services, but other states used their jurisdiction to impose unbundling requirements analogous to those authorized by § 251.

Rather than displace state authority generally, the 1996 Act expressly preempts only state law entry barriers to competition, *see* 47 U.S.C. § 253(b), while enacting four separate savings clauses that authorize states to enact or enforce additional procompetitive requirements under state law so long as they do not "lower" the federal floor. *See* 47 U.S.C. §§ 251(d)(2), 252(e)(3), 261(c); Act § 601(c)(1), 110 Stat. at 143; *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent").

The 1996 Act is therefore analogous to the numerous other federal statutes that place a floor under state regulation of the same subjects but not a ceiling above them.⁴ These decisions

⁴ *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 216 (1997) ("We conclude that state law sets the standard of conduct as long as the state standard (such as simple negligence) is stricter than that of the federal statute. The federal statute nonetheless sets a 'gross negligence' floor, which applies as a substitute for state standards that are more relaxed."); *Old Bridge Chems., Inc. v. New Jersey Dep't of Env'tl Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992) ("[A]lthough waste management may be an area of overriding national importance, in legislating in this field Congress has set only a floor, and not a ceiling, beyond which states may go in regulating the treatment, storage, and disposal of solid and hazardous wastes."); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1454 (6th Cir. 1991) (CERCLA savings clause, 42 U.S.C. § 9614(a), like § 252(e)(3), permits states to impose "additional . . . requirements" beyond federal law; "CERCLA sets only a floor, not a ceiling, for environmental protection. Those state laws which establish more stringent environmental standards are not preempted by CERCLA."); *Wastak v.* (continued . . .)

recognize the general principle that “a state or locality’s imposition of additional requirements above a federal minimum is unlikely to create a direct and positive conflict with federal law.” *Southern Blasting Servs., Inc. v. Wilkes County, N.C.*, 288 F.3d 584, 591 (4th Cir. 2002). See also *Southwestern Bell Tel. Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 821 (5th Cir. 2000) (“Nothing in the [1996 Act] forbids such combinations [ordered by the state commission]. Even if the Eighth Circuit’s decision [vacating a regulation mandating the provision of certain combinations] is correct . . . it does not hold that such arrangements are prohibited; rather, it only holds that they are not required by [federal] law”). SBC’s fundamental contention – that federal law forbids whatever it does not require – cannot be squared with this compelling analysis.⁵

Any remaining doubt is put to rest by the plain text of the 1996 Act’s savings clauses. Section 252(e)(3) represents “an explicit acknowledgment that there is room in the statutory scheme for autonomous state commission action.” *Puerto Rico Tel. Co. v. Telecommunications Regulatory Board of Puerto Rico*, 189 F.3d 1, 14 (1st Cir. 1999). It provides that, subject *only* to § 253’s ban on state-law entry barriers, additional state unbundling requirements can be established or enforced *without limitation* in State commission proceedings that approve negotiated or arbitrated interconnection agreements. See 47 U.S.C. § 252(e)(3) (“[S]ubject to

(. . . continued)

Lehigh Valley Health Network, 342 F.3d 281, 295 n.8 (3d Cir. 2003) (Older Workers Benefit Protection Act “was enacted to establish a floor, not a ceiling” (internal quote marks and alterations omitted)).

⁵ Similarly, in *MCI Telecomms. Corp. v. US West Comm.*, 204 F.3d 1262 (9th Cir. 2000), the Ninth Circuit upheld the state’s new combinations requirements (even though the parallel federal rules had been vacated) because, rather than “violate[]” the Act, they are procompetitive and a reasonable means of preventing discrimination. *Id.* at 1268. The Court took explicit note of the fact that in addition to the states’ right to implement federal law, the Act generally “reserves to
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section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.”)⁶

Similarly, § 261(c) provides that “[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.” This provision authorizes a state to impose any state law “requirement[]” on a carrier if the requirement is both “necessary to further competition in the provision of telephone exchange service or exchange access” and not “inconsistent” with the 1996 Act’s local competition provisions and regulations thereunder. 47 U.S.C. § 261(c). The first condition is met by a state public interest determination that additional unbundling requirements on a monopolistic incumbent carrier are needed to promote competition. The second condition is satisfied so long as it is possible for a carrier to comply with both federal and state law. As explained above, the word “inconsistent” (like the word “consistent” in § 251(d)(3)) is a term of art in preemption law: State regulations are “consistent” with federal law so long as it is

(... continued)

states the ability to impose additional requirements [under state law] so long as the requirements are consistent with the Act and ‘further competition.’” *Id.* at 1265.

⁶ The Act thus bars State commissions considering interconnection agreements from adopting or enforcing measures that would preclude or substantially prevent the use of network elements to provide competing services but does *not* bar state law requirements promoting competition. See *Southwestern Bell Tel. v. Public Util. Comm’n*, 208 F.3d 475, 481 (5th Cir. 2000) (§ 252(e)(3) “obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements”); *AT&T Communications v. BellSouth Telecomms., Inc.*,

(continued ...)

“possible to comply with the state law without triggering federal enforcement action.” *Jones*, 430 U.S. at 540.⁷

Finally, § 251(d)(3), entitled “Preservation of State access regulations,” specifies:

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3).

Taken together, the savings clauses cannot colorably be read to prohibit states from imposing duties beyond those required by federal law, as SBC claims. When Congress intends federal regulations to operate as both a floor and as a ceiling, Congress adopts preemption provisions that – in sharp contrast to the terms of the 1996 Act – expressly preclude states from imposing requirements that “differ” from, are “in addition to,” or are not “identical” to, federal

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238 F.3d 636, 642 (5th Cir. 2001) (“Subject to § 253, the state commission may also establish or enforce other requirements of state law in its review of an agreement.”).

⁷ See also, e.g., *E.B. Elliott Adver. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1150 (5th Cir. 1970) (“The word ‘inconsistent’, as used in [a preemption provision] means contradictory in the sense of legislative provisions which cannot co-exist.”); *Illinois Ass’n of Mortgage Brokers v. Office of Banks & Real Estate*, 308 F.3d 762, 765-66 (7th Cir. 2002) (state law is “inconsistent” with a federal statute only if it is “more tolerant than the federal floor”); *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1113 (3d Cir. 1985) (“A state or local law is ‘inconsistent’ with federal requirements under the HMTA when it is not possible to comply with both, or where state requirements are an obstacle to an execution of federal law.”).

obligations.⁸ Congress did not use any of these time-honored formulations in the 1996 Act. Instead, the 1996 Act expressly *permits* states to impose additional access obligations so long as they are not “inconsistent” with federal law, *see* 47 U.S.C. § 261(c), or do not create barriers to entry, *see id.* § 253.

If SBC’s contrary arguments were accepted, the various savings clauses adopted by the 1996 Act would impermissibly be treated as nullities. *But see Geier v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000) (where Congress includes an express savings clause in a statute, that clause must be construed to have independent, operative effect). The only way to give independent effect to the savings clauses is to acknowledge that individual state commissions are free to impose additional unbundling requirements on their incumbent carriers based on local conditions and their different perceptions of the appropriate tradeoffs of the costs and benefits of unbundling.

But SBC never even attempts to show how the DPUC’s unbundling requirements, even if they go beyond federal unbundling requirements, “conflict” with any federal requirement or policy. SBC merely claims that any decision by a state to order unbundling beyond that imposed by the Commission is automatically preempted. *Pet.* at 25. In light of the strong “presumption against the pre-emption of state police power regulations” (*Cipollone*, 505 U.S. at

⁸ *See, e.g.*, Medical Device Amendments Act, 21 U.S.C. § 360k(a)(1) (“no State . . . may establish or continue in effect . . . any requirement which is different from, or in addition to, any requirement applicable under this chapter”); Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (preempting state “law or regulation . . . that is not identical to a regulation prescribed under section 4302 of this title”); Consumer Product Safety Act, 15 U.S.C. § 2075(a) (“no State or political subdivision of a State shall have any authority [to establish a safety requirement], unless such requirements are identical to the requirements of the Federal standard”); Federal Hazardous Substances Act, 15 U.S.C. § 1261 note (b)(1)(A) (“no State . . . may establish or continue in effect a . . . requirement applicable. . . unless such . . . requirement is identical to the labeling requirement [such regulations].”).

518), and the “burden” on the party claiming preemption to demonstrate its existence (*Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)), SBC has clearly defaulted.

The reason that SBC does not attempt the required showing, of course, is because no such showing is possible. The DPUC’s unbundling order is entirely consistent with the 1996 Act and the regulations thereunder and, indeed, furthers the purposes of that Act by restoring the use of abandoned facilities to create competition in highly concentrated markets. As discussed, the unbundling mandated by the DPUC is fully consistent with the Commission’s stated goal of promoting “the deployment of advanced telecommunications infrastructure” that was the basis for the limitation on access to packet switching features of HF-Copper loops. *TRO* ¶ 288; *see also id.* ¶ 176 (“section 706(a) directs the Commission . . . to encourage the deployment of advanced services”). It is undisputed that the facilities at issue were deployed by SBC for the purpose of providing “advanced services,” that SBC “abandoned” these facilities, and that SBC has no plans to use them. Further, it is undisputed that Gemini is willing to make the substantial investments necessary to use these now fallow facilities to provide advanced services. Gemini has also committed to expanding the reach of the existing SBC HF-Coaxial network. *Final Decision* at 10. There is simply no way in which allowing SBC to mothball facilities that could be used to provide broadband services promotes the deployment of advanced services to all Americans and is consistent with the goals of § 706.

In addition, after pointing out that the *TRO* did not address the “unique” facilities at issue here, the DPUC observed that the broader purpose of the *TRO* is to overcome the “market barriers to entry faced by new entrants” as well as “to ensure that investment in telecommunications infrastructure will generate substantial long term benefit for all consumers.”

Id. at 37 (citing *TRO* ¶ 5). The state commission concluded that unbundling the facilities at issue would serve these purposes of the 1996 Act:

Connecticut has before it a competitive service provider that is willing to invest in the state's telecommunications infrastructure, a portion of which has been abandoned by [SBC]. Gemini has not only committed to investing in that network, but has also committed to offering a full panoply of telecommunications services to consumers. In the opinion of the Department, access to the HF[-coaxial] network by Gemini will meet the Telcom Act and FCC pro-competitive goals (as well as those outlined in Conn. Gen. Stat. § 16-247a) by providing for increased competition in the Connecticut local exchange service market. Unbundling of the HF[-coaxial] network will encourage the deployment of advanced facilities by Gemini as evidence by its commitment to invest in that network.

Id. (emphasis supplied); *see id.* at 39 (explaining that unbundling the HF-Coaxial facilities at issue will facilitate competition and promote innovation). It would be hypocritical in the extreme for the Commission to strike down the DPUC's pro-competitive efforts to carry out the congressional command to the "Commission and each State commission with regulatory jurisdiction over telecommunications services" to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" (1996 Act, § 706) – a congressional command that the Commission has elsewhere proclaimed of paramount importance.

CONCLUSION

Under federal and state law, the DPUC had the authority to order the unbundling of SBC's abandoned HF-Coaxial facilities. Far from being preempted, the DPUC's decision was wholly consistent with federal and state law. The Commission should deny SBC's request for an emergency declaratory ruling.

Respectfully submitted,

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March 4, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2004, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: October 29, 2003
Washington, D.C.

/s/ Peter M. Andros

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