

March 3, 2004

Marlene H. Dortch,
Office of the Secretary
Federal Communications Commission
Portals II
445 12th Street, S.W.
Suite TW-A325
Washington, D.C. 20554

Re: WC Docket No. 04-30 SBC Emergency Request for Declaratory Ruling
and Preemption

Dear Ms. Dortch:

Enclosed please find the Connecticut Department of Public Utility Control's
comments filed in response to the Federal Communications Commission's February 12,
2004 Public Notice in the above noted docket.

Sincerely,

DEPARTMENT OF PUBLIC UTILITY CONTROL

Louise Rickard
Acting Executive Secretary

Enc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
The Southern New England Telephone Company)
)
Petition for Declaratory Ruling and Order)
Preempting the Connecticut Department of)
Public Utility Control's Decision Directing)
The Southern New England Telephone Company)
To Unbundle its Hybrid Fiber)
Coaxial Facilities)

COMMENTS OF THE CONNECTICUT
DEPARTMENT OF PUBLIC UTILITY CONTROL

Donald W. Downes
Chairman

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Vice-Chairman

John W. Betkoski, III
Commissioner

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Commissioner

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Commissioner

March 3, 2004

Connecticut Department of
Public Utility Control

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I. INTRODUCTION AND SUMMARY

On February 10, 2004, the Southern New England Telephone Company (Telco or Company) filed an emergency request for a declaratory ruling and order with the Federal Communications Commission (Commission or FCC) requesting that a decision by the Connecticut Department of Public Utility Control (CTDPUC) be preempted.¹ In particular, the Telco filed the Emergency Request with the Commission in response to

¹ The Southern New England Telephone Company Petition for Declaratory Ruling and Order Preempting the Connecticut Department of Public Utility Control's Decision Directing the Southern New England Telephone Company to Unbundle its Hybrid Fiber Coaxial Facilities, WC Docket No. 04-30 (filed February 10, 2004) (Emergency Request).

the CTDPUC's December 17, 2003 Decision in Docket No. 03-01-02 (Gemini Decision),² wherein after concluding that the Telco must unbundle its abandoned hybrid fiber coaxial (HFC) facilities, the CTDPUC ordered the Company and Gemini Networks CT, Inc. (Gemini) to negotiate the terms and conditions of an interconnection between the two networks. While claiming that the Gemini Decision was inconsistent with the Telecommunications Act of 1996 (Telcom Act) and the "federal implementing regime in at least five respects,"³ the Telco argued that the Gemini Decision: 1) directed the Telco to subsidize the business plan of a single competitive local exchange carrier (CLEC); 2) was inconsistent with congressional intent, and would substantially prevent implementation of the federal unbundling regime; and 3) would frustrate the Commission's efforts to promote a vibrant market for broadband services.⁴ Additionally, the Telco asserted that it faces imminent and irreparable injury; would force the Company to spend millions of dollars to upgrade and maintain the HFC facilities for the benefit of a single competitor; and that the Telco would be forced to hire and train employees in the operation and maintenance of a technology that it does not and would never use to serve its own customers.⁵

As discussed in greater detail below, the CTDPUC considered the provisions of the Telcom Act, Commission Orders (including the TRO),⁶ Court Rulings, Connecticut statutes and Connecticut appellate court rulings and earlier CTDPUC Decisions when

² Docket No. 03-01-02, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements (Gemini Decision).

³ Emergency Request, p. 2.

⁴ Id., p. 3.

⁵ Id., p. 4.

⁶ CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 96-98, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; and CC Docket No. 98-147, Deployment of Wireline Services Offerings

the CTDPUC ordered the unbundling of a network the Telco has chosen to abandon. In preparing the Emergency Request, the Telco has overlooked earlier CTDPUC Decisions wherein the Telco was afforded favorable regulatory treatment for purposes of depreciation and alternative regulation when it proposed, and the CTDPUC accepted, its HFC network deployment. The Telco also overlooked its 15% allocation of the HFC network costs to its telephony operations and the CTDPUC's requirement that the Company make available to any party, its HFC network as ordered in the Relinquishment Decision.⁷ The CTDPUC believes that the Telco has ignored these rulings and the record of Docket No. 03-01-02 when seeking relief from the Commission. Consequently, the CTDPUC recommends that the Commission deny the Emergency Request.

II. DISCUSSION

A. HFC HISTORY

In 1992, the Telco considered modernizing its copper distribution telephony plant and sought to construct a network that would provide cost efficiencies and enable competitively-priced delivery of a full product line, including information, communication and entertainment applications. At that time, several of the nation's largest telephone and cable television companies had already chosen the HFC technology for full service networks. In 1994, the Telco entered into a contract with Lucent Technologies as its primary HFC vendor. On December 29, 1994, the Telco announced its I-SNET Technology Plan, which included statewide outside plant modernization utilizing HFC

Advanced Telecommunications Capability; Report and Order and Order on Remand and Further Notice of Proposed Rule Making, rel. August 21, 2003 (TRO).

and switch upgrades (I-SNET). According to the Telco, when conversion to the HFC network was complete, it expected the network operating costs to be significantly less per access line than with the legacy twisted copper pair. The goal of I-SNET was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications.⁸ I-SNET was also intended to supersede the Telco's existing infrastructure and address the state's emerging broadband, communications requirements.

In support of I-SNET, the Telco asserted that the existing telecommunications infrastructure was capable of providing high quality voice-oriented communications and a variety of existing data communications applications. As customer requirements and communications technologies evolved to support other modes of communications, and as industry changes introduced competition and new open-access requirements, it was anticipated that new and varied communications mandates would be imposed on the infrastructure. Those functional requirements were addressed by I-SNET and were expected to range from narrowband (for voice and "low-speed" data applications) to broadband (for video and "high-speed" data applications).⁹

⁷ Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity Decision, dated March 14, 2001 (Relinquishment Decision).

⁸ Docket No. 99-04-02, Application of SNET Personal Vision, Inc. to Modify its Franchise Agreement (Modification Proceeding), the Telco testified that it anticipated significant opportunities for efficiencies in terms of operation, maintenance and ability to quickly provide telecommunications services to customers. The Telco also testified that I-SNET was "proved-in" based on telephony cost savings alone and that potential video revenues were incremental revenues to the cost savings the Telco expected to realize.

⁹ As part of I-SNET, the Telco was to deploy over 200,000 plant miles of broadband transmission media, comprised of optical fiber and coaxial cable. Statewide deployment of Synchronous Optical Network (SONET) interoffice transport systems, digital switching, Signaling System Number 7 (SS7), Advanced Intelligent Network (AIN) and Integrated Services Digital Network (ISDN) capabilities were also to occur by 1999 that would complement the Telco's fiber and coaxial installation. The Telco expected to deploy this infrastructure by 2009. Additionally, as part of that plan, the Telco's analog and digital switches were

In the Depreciation Proceeding,¹⁰ the CTDPUc concluded that it was in the public interest that the Telco be afforded the opportunity to provide business and residential customers the benefits of new telecommunications technologies. Thus, the CTDPUc permitted the Telco to include for purposes of depreciation, an allowance for the plant that would be retired due to the I-SNET deployment. This allowance is being recovered from the Telco's ratepayers.

Additionally, as part of the Telco's approved Alternative Regulation Plan (Alt Reg Plan), the Telco proposed quality of service standards that were based on the expected service performance and deployment of I-SNET. The CTDPUc accepted those representations and approved the Telco's Alt Reg Plan.¹¹

Moreover, in its application for a CATV franchise, the Telco subsidiary, SNET Personal Vision (SPV) proposed to rely on the Telco's HFC infrastructure for delivery of

to form the backbone of its switching network. (The Telco's modernization of switches from analog to digital was completed in the fourth quarter of 2001). During the time period of 1994-1999, electronic aggregate was to evolve into streamlined, all digital platform complemented by ISDN-based digital access, SS7 signaling and AIN call control. Further, broadband infrastructure deployment was to begin with: (i) the total migration of the interoffice transport network to SONET-based digital broadband platform; (ii) initial broadband switch deployment (for data and video applications) with AIN-like call control capability; (iii) full deployment of the broadband operations management platform. These activities were also to result in the retirement of: (i) the embedded base of analog switches and asynchronous interoffice transmission systems; (ii) significant portions of the embedded base of digital switching system; (iii) asynchronous loop transmission systems; (iv) copper loop plant; and (v) an associated variety of common and complementary systems and subsystems. During the 2000-2004 period, broadband modernization was expected to cover 84% of Connecticut's access lines. The Telco also intended to introduce multimedia (voice, data, video), optimized broadband switching systems in the network, that would leverage and further consolidate the Company's switching consolidation efforts. During the final stage of the I-SNET deployment between 2005 and 2009, the Telco expected to complete the transformation of its infrastructure to an end-to-end broadband network, capable of providing full service network capabilities to all Connecticut subscribers. The existing embedded base of copper cable, circuit, switching, computing and associated common and complementary assets were to be replaced and retired. During the I-SNET deployment, the Telco's network infrastructure was expected to evolve from the current 125 switching locations comprised of 145 switches to 41 switching locations containing approximately 50 switches. According to the Telco, such consolidation would facilitate evolution to a unified, broadband, multimedia network based on SONET transport and Asynchronous Transfer Mode (ATM) switching as defined by the broadband-ISDN architecture.

¹⁰ Docket No. 94-10-03, DPUC Investigation into the Southern New England Telephone Company's Intrastate Depreciation (Depreciation Proceeding), November 21, 1995 Decision.

its CATV services (i.e., as HFC facilities were deployed in the Telco's infrastructure, SPV would lease network capacity and independently deploy its own CATV services). Under that arrangement, SPV was financially responsible for all direct costs associated with providing video services and 50% of the HFC costs. In October 1995, the Telco began an HFC telephone trial in Stamford and expanded it to 2,000 customers with primary lines supported by HFC, without copper line back-up.¹² When the Telco's supplier of HFC-related components withdrew from the market, the Telco undertook its own HFC review and ultimately decided to continue deployment of an HFC-based infrastructure, despite the need to change vendors. In February 1997, the National Electric Safety Code Standards Subcommittee denied the Telco's request for a modification to allow placement of an independent power supply source as part of the fiber strand in the communications "gain" on telephone poles. Consequently, the Telco terminated its 2,000-customer HFC-based telephone trial and removed the independent power supplies previously deployed. The Telco asserted that at about that time, many of the companies which had deployed HFC-related technology in their networks started to report that provision of telephone service over an HFC network was not technologically and economically viable. The CTDPUc can only reiterate at this point that the Telco's termination of its telephone trial was not the failure of the HFC network; rather it was the sequence of events described above.

In the Modification Proceeding, the Telco claimed that it had not found a cost-effective means to provide an independent power supply source and had used commercial power with battery back-up and portable generators. The Telco stated that

¹¹ Docket No. 95-03-01, Application of The Southern New England Telephone Company for Financial Review and Proposed Framework for Alternative Regulation, March 13, 1996 Decision, pp. 46 and 47.

while such an arrangement was an acceptable approach for a very small number of customers, it was not suitable for broad scale use.¹³

On August 11, 2000, the Telco and SPV requested the CTDPUc's endorsement of their decision to relinquish SPV's state-wide Certificate of Public Convenience and Necessity (CPCN).¹⁴ The CTDPUc found substantial evidence supporting the Telco's assertion that HFC, as deployed by the Telco, had not proven financially viable.

The CTDPUc adopted SPV's overall marketplace exit plan. The CTDPUc's acceptance of the Telco's proposed treatment of the cost of 85% of the assets (per the FCC, according to the Company), which were not used or useful for telecommunications at that time, as a below-the-line cost was not, and never was intended to be, a finding that those assets are "non-telecommunications" assets and that they cannot ever be used in the provision of telephony.¹⁵ More importantly however was the CTDPUc's requirement in the Relinquishment Decision that:

the Telco's Hybrid Fiber Coaxial (HFC) infrastructure is available to Connecticut Telephone, and other third parties, under terms and conditions prescribed by tariffs. It is also the opinion of the Department that tariff provisions made for network access do not preclude use in the competitive provisioning of services that may include cable services.¹⁶

Further, the CTDPUc, in recognition of its competitive service goals, encouraged the Telco and SPV to work cooperatively with those parties interested in utilizing the Telco's HFC network, or portions thereof, in the provision of competitive services, including cable television.

¹² Modified Decision, p. 21.

¹³ *Id.*, p. 5.

¹⁴ Relinquishment Decision, p. 1.

¹⁵ The remaining costs were allocated to the Telco's telephony operations.

¹⁶ Relinquishment Decision, p. 1.

Finally, it is important to note that, if successfully deployed, I-SNET and the HFC network would have afforded the Telco the ability to offer a full set of telecommunications services effectively and efficiently and in light of the current regulatory environment, would have been unbundled for its competitors' use. In its I-SNET Plan, the Telco did not identify or differentiate the network facilities that would be used for telecommunications services (i.e., voice and data) from those that would be used to support the offering of CATV services. Rather, in approving I-SNET for purposes of depreciation allowance and alternative regulation, the CTDPUC was led to believe that one network would support a full service offering package. Based on those representations, the Telco sought and was granted favorable regulatory treatment relative to depreciation and alternative regulation.

B. EMERGENCY REQUEST

The Telco argues that the Gemini Decision is inconsistent with the Telcom Act and the federal implementing regime in at least five respects.¹⁷ The Telco also argues that the Gemini Decision directs the Company to subsidize the business plan of a single CLEC, is inconsistent with congressional intent, and would substantially prevent implementation of the federal unbundling regime. In addition, the Telco argues that the Gemini Decision would frustrate the Commission's efforts to promote a vibrant market for broadband services.¹⁸ The CTDPUC disagrees. As discussed below, the Telco has strayed from an accurate interpretation of the Telcom Act, the FCC regime and more importantly, the Gemini Decision, all in an attempt to lead the Commission to a

¹⁷ Emergency Request, pp. 2 and 3.

¹⁸ *Id.*, p. 3.

conclusion that will harm local competition in Connecticut. Therefore, the CTDPU respectfully requests that the Emergency Request be denied.

1. THE HFC FACILITIES ARE NETWORK ELEMENTS AND ARE SUBJECT TO UNBUNDLING

The Telco argues that the CTDPU's requirement that it unbundle its HFC facilities is contrary to federal law because they are not network elements as defined in 47 U.S.C. §153(29). The Telco's argument has no merit. The HFC network was approved by the CTDPU to supersede the Company's existing infrastructure and to support a variety of information, communications and entertainment applications.¹⁹ If it had been fully deployed, the HFC network would have been utilized by the Telco to provide narrowband and broadband services prior to enactment of the Telecom Act.

While the entire HFC network is not presently used by the Telco to provide telecommunications services, that network qualifies as an UNE because it was and is unquestionably capable of being used to that end. In drafting the Gemini Decision, the CTDPU relied in part on the UNE Remand Order²⁰ wherein the Commission stated:

Rather, we agree with the Illinois Commission that the term 'used in the provision of telecommunications service' in section 153(29) refers to network facilities or equipment that is 'customarily employed for the purpose' of providing a telecommunications service. Although particular dark fiber facilities may not be 'lit' they constitute network facilities dedicated for use in the provision of telecommunications service, as contemplated by the Act. Indeed, most other network elements have surplus capacity or can be upgraded to provide additional capacity and therefore are not always 'currently used' as the term is interpreted by incumbent LECs. For example, switches, loops, and other network

¹⁹ Emergency Request, p. 15.

²⁰ FCC Docket No. 99-238, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Rel. November 5, 1999 (UNE Remand Order).

elements each may have spare, unused capacity, yet each meets the definition of a network element.²¹

The FCC emphasized that such reading of the term “used” comports with its interpretation of the term “provide” in the context of 47 U.S.C. §271. Specifically, the FCC rejected the argument that the term “provide” means “to actually furnish.”

Rather, the Commission concluded that the term ‘provide’ requires incumbent LECs to ‘make available’ to requesting carriers the checklist item in question upon reasonable demand. Similarly, we interpret the term ‘used’ in the definition of a network element to mean ‘capable of being used’ in the provision of a telecommunications service.²²

The FCC reaffirmed its interpretation of the definition of “network element” in its TRO, when the Commission stated:

We find that, taken together, the relevant statutory provisions and the purposes of the 1996 Act support requiring incumbent LECs 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.²³

The FCC further stressed that §251(d)(2) of the Telcom Act required 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.”²⁴ According to the Commission, to interpret the definition of the term narrowly “would be at odds with the statutory language in §251(d)(2) and the pro-competitive goals of the 1996 Act.”²⁵

²¹ UNE Remand Order, ¶327. See also ¶328 where the Commission took issue with facilities that the ILECs customarily use to provide services, (e.g., unused copper wire, but are stored in a spool in a warehouse). According to the FCC, defining such facilities as network elements would read the used in the provision language of section 153(29) too broadly.

²² *Id.*, ¶329.

²³ TRO, ¶59.

²⁴ *Id.*, ¶60 (italics in the original).

²⁵ *Id.*

The CTDPUC notes that the Commission's broad construction of the term "network element" was upheld by the U.S Supreme Court. Given the breadth of Congress's network element definition, it is impossible to credit the incumbents' argument that a 'network element' must be part of the physical facilities and equipment used to provide local telephone service.²⁶ Similarly, the Fourth Circuit Court of Appeals rejected the argument that equipment must be in actual use, and not be merely capable of being used, to qualify as a network element. In its opinion, the Court of Appeals for the Fourth Circuit held that such an interpretation placed undue weight on the word "used" and was contrary to the Supreme Court's recognition that "network element" was broadly defined.²⁷ Thus, an element is subject to unbundling if it is, inter alia, already installed and called into service.

Relative to Gemini, the Telco's HFC network has already been deployed and could be placed into service by Gemini. Gemini has requested unbundled access to the coaxial portion of the loop and the electronics related to that plant. Additionally, Gemini has committed to providing voice-grade narrowband services over the HFC network. Because Gemini is authorized to offer retail facilities-based and resold local exchange telecommunications services throughout Connecticut, it is permitted to offer local exchange flat rate, measured rate, operator access, residential customer and class features, basic business exchange services, intrastate toll, directory assistance,

²⁶ AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 387, 119 S.Ct. 721, 142 L.Ed.2d 834 (1999). See also United States Telecom Ass'n v. FCC, 290 F.3d 415, 430 (D.C. Cir. 2002) (USTA) (upholding the FCC's decision that the high frequency portion of the loop is a capability of the loop, and stating that the Commission's view is convincing.) It is important to note that the D.C. Circuit vacated **only** the portion of the UNE Remand Order that pertains to line sharing.

²⁷ AT&T Communications of Virginia, Inc. v. Bell Atlantic, Inc., 197 F.3d 663, 672 (4th Cir. 1999).

residential ancillary and operator services to business and residential customers throughout Connecticut.

The CTDPUC believes that while the Telco's HFC network and associated facilities differ from those specifically addressed by the FCC in the TRO, they are analogous. That is, the hybrid loop components that the FCC has required to be unbundled are equivalent to those in the HFC network that Gemini seeks access to in support of its provision of **narrowband** services. Thus, Gemini meets the FCC's requirement to provide qualifying services²⁸ using the UNEs to which it seeks access. Once a requesting carrier has obtained access to a UNE to provide a qualifying service, the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services.²⁹

Finally, the Commission has required ILECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed and does not need the construction of new wires. Loops consisting of either all copper or hybrid copper/fiber facilities must also be provided on an unbundled basis so that requesting carriers may provide narrowband services over them.³⁰

²⁸ Qualifying services are defined as "telecommunications services offered by requesting carriers in competition with those telecommunications services that have been traditionally the exclusive or primary domain of incumbent LECs. They include, for example, local exchange service, such as POTS, and access services, such as xDSL and high-capacity circuits." TRO, ¶¶135 and 140.

²⁹ TRO, ¶143.

³⁰ *Id.*, ¶199. ILECs must continue to provide unbundled access to the TDM features, functions and capabilities of their hybrid loops. According to the FCC, this will allow CLECs to continue providing both traditional narrowband services (e.g., voice, fax, dial-up Internet access) and high-capacity services like DS1 and DS3 circuits. *Id.*, ¶199 fn. 627. The Telco contends that the FCC did not require the unbundling of hybrid loops for the provision of voice service if the incumbent offered a copper loop alternative, and that hybrid loops need never be unbundled for the provision of broadband services. The CTDPUC believes that the Telco is wrong. The FCC declined to require ILECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market. *Id.*, ¶¶288, 290 and 296. In the Gemini case, Gemini is merely seeking

Further, the Telco argues that 1) it would need to expend more than ten million dollars for the HFC facilities to be called into service; 2) the Company would be required to develop new operating and support systems (OSS) for the ordering, provisioning, maintenance, repair and billing of the HFC facilities; and finally, 3) the Telco would be forced to hire and maintain a dual workforce as well as operate the HFC network at an annual cost of nearly five million dollars.³¹ In response to those claims, CTDPUC directs the Commission to the Gemini Decision, p. 45, wherein the Telco and Gemini were ordered, during interconnection negotiations, to address the costing and pricing of the HFC UNEs (in accordance with federal and state law) and the development of an HFC network OSS as part of those negotiations.³² As the Gemini Decision and the draft Gemini Decision indicate, the Telco would not be required to subsidize Gemini's operations and the CTDPUC has made the necessary provisions to ensure that the Company is compensated for use of its HFC network as well as any other costs that it may incur (e.g., OSS). Consequently, in light of the above and the instructions provided to the parties in the Gemini Decision, the Telco's concerns expressed throughout the Emergency Request relative to subsidization of Gemini's Connecticut operations and

access to the Telco's HFC facilities for its provision of narrowband services. The FCC does require ILECs to provide an entire non-packetized transmission path capable of voice-grade service between the central office and customer's premises. Id., ¶296.

³¹ Emergency Request, p. 16.

³² In the draft Gemini Decision, the CTDPUC originally determined that the Telco should not be responsible for the costs associated with maintaining the HFC network. Similarly, the CTDPUC did not expect the Telco to be responsible for the costs associated with the development and provisioning of an HFC network OSS. November 3, 2003 draft Decision, p. 45. Specifically, the Telco was instructed to cost and price the HFC network UNEs in accordance with established CTDPUC requirements (i.e., Total Service Long Run Incremental Costs). In addition, Gemini was to be responsible for any costs associated with the development of the HFC network OSS and in the event that other carriers were provided unbundled access to the Telco's HFC network, they too, would be responsible for a portion of those costs. Docket No. 03-01-02 draft Decision, p. 45. Therefore, Gemini and the Telco were well aware of the CTDPUC's intent relative to purposes of cost recovery (i.e., Gemini would be responsible for the majority, if not all of the costs to place the HFC network in operation). Nevertheless, in the final Gemini

the Company's concerns that it would incur unnecessary costs to make the HFC network operational are unfounded.

In summary, Gemini has committed to perform the necessary upgrades and repair the HFC network to accommodate its provision of qualifying services. Gemini also made clear its willingness to invest in the state's telecommunications infrastructure, a portion of which was abandoned by the Telco. Gemini also committed to offering a full panoply of telecommunications services to consumers as envisioned by the FCC in the TRO. The Company's HFC was intended to provide voice services, and therefore, be capable of providing telecommunications services. If deployment of I-SNET network had occurred as intended, the Telco would have been well on its way to offering telecommunications services over the HFC network and the Company would have been required to permit competitors unbundled access to that network.

2. THE HFC FACILITIES ARE A PART OF SBC CONNECTICUT'S LOCAL NETWORK

The CTDPUUC also disagrees with the Telco that the HFC facilities were not a part of its local network.³³ As discussed above, the HFC facilities were deployed to supersede the Telco's existing infrastructure to support a variety of information, communications and entertainment applications including telephony. If that network had been fully deployed by the Telco, the Company would be well on its way to offering telecommunications services over the HFC facilities today. The Telco's deployment of that network began prior to implementation of the Telcom Act and subsequent FCC orders and Connecticut statutes, and as such, the Company would have been required to permit competitors unbundled access to that network if it were activated today. It is

Decision, the Telco and Gemini were directed to negotiate an interconnection agreement that addressed the costing and pricing of the HFC UNEs and the development of an HFC network OSS.

important to note that Connecticut ratepayers funded the design and construction of the HFC network as an indivisible, fully integrated network to be used for telecommunications and cable television purposes.

Additionally, while the Telco argues that these facilities are not “network elements” subject to unbundling under the Telcom Act because they have not been used to provide telecommunications services, the CTDPUC directs the Commission’s attention to the Relinquishment Decision wherein the Company has allocated a portion of the HFC network costs to its telephony operations.³⁴ If these facilities are not part of the HFC network used to provide telecommunications services, the Telco should not have allocated these costs to the Company’s telephony operations.

3. THE TELCO IS WRONG IN THAT THE COMMISSION HAS ALREADY HELD THAT INCUMBENTS NEED NOT UNBUNDLE ANALOGOUS HYBRID FACILITIES

The CTDPUC also disagrees with the Telco argument that the Commission has already held that incumbents need not unbundle analogous hybrid facilities.³⁵ As these facilities were deployed by the Telco well before the TRO, the concerns expressed by the FCC “that any unbundling requirements of broadband facilities would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities” should not be an issue for Gemini.³⁶ The record of the Docket No. 03-01-02 clearly demonstrates that Gemini has implemented a technical plan that complements and relies in part, on the Company’s HFC network. Acceptance of the Company’s other services as a means of offering its own services would require Gemini to construct a duplicate network and would also

³³ Emergency Request, p. 18.

³⁴ Relinquishment Decision, p. 15.

³⁵ Emergency Request, p. 19.

conflict with Conn. Gen. Stat. §16-247a(a)(5).³⁷ More importantly, however, is Gemini's commitment made throughout Docket No. 03-01-02 to make all the necessary upgrades at its expense and provide the required investment to make that network operational.

The Telco's HFC network is unique. While the TRO did not specifically address the network facilities that are the subject of this proceeding, the FCC crafted this order to reflect the intent of the Congress and the Telcom Act. In particular, the FCC recognized the market barriers to entry faced by new entrants as well as the societal costs of unbundling. Indeed, the CTDPUC believes that the Commission has correctly established a regulatory foundation that seeks to ensure that investment in telecommunications infrastructure will generate substantial, long term benefit for all consumers.³⁸ Gemini has committed to make the necessary investment in the Telco's telecommunications infrastructure. Unbundling of the Telco's HFC network will encourage the deployment of advanced facilities by Gemini as evidenced by its commitment to invest in that network.

During Docket No. 03-01-02, Gemini proved a need for certain facilities that offer the functions and features that can be provided from the HFC network. Only the Telco's HFC network facilities (together with the requirement that it make those facilities available to competitors) can satisfy those service needs. Gemini's provision of telecommunications services over the HFC network would be far superior in speed and consistency than over the existing copper network, based on its own experience operating its HFC network. While the Telco was unable to successfully utilize the HFC

³⁶ TRO, ¶288.

³⁷ Conn. Gen. Stat. §16-247a(a)(5) requires the shared use of existing facilities and cooperative development of new facilities where legally possible, and technically and economically feasible.

³⁸ TRO, ¶5.

network for telephony purposes, Gemini believes it can make that network useful. Therefore, the Commission's concern that unbundling of the Telco HFC network "would blunt the incentive for competitive LECs to invest in their own facilities" has been addressed.

4. THE DPUC HAS CORRECTLY ORDERED SBC CONNECTICUT TO UNBUNDLE FACILITIES FOR GEMINI TO USE IN OFFERING BROADBAND SERVICE THROUGHOUT CONNECTICUT BASED ON GEMINI'S COMMITMENT TO OFFER A QUALIFYING SERVICE TO SOME CUSTOMER, SOMEWHERE IN THE STATE

The Telco argues that Gemini does not provide qualifying services in Connecticut,³⁹ even though Gemini was authorized to provide retail facilities-based and resold local exchange telecommunications services throughout Connecticut by the CTDPUC's September 28, 2001 Decision in Docket No. 01-06-22, Application of Gemini Networks, CT, Inc. to Expand its Certificate of Public Convenience and Necessity.⁴⁰

While the Telco may be correct that Gemini has not yet offered narrowband voice service to any of its customers, the Telco ignores the CTDPUC's requirement that certified CLECs offer local service to any customer that requests it within five years from the date the carrier receives certification to offer local service in the state or risk losing its CPCN.⁴¹

In Gemini's case, this means that it must begin offering local service by September 2006, because a loss of its CPCN would, in part, deny Gemini the benefits that certificated carriers enjoy, such as access to the Telco's utility poles and the public

³⁹ Emergency Request, p. 20.

⁴⁰ Gemini Decision, p. 1.

⁴¹ See the February 26, 1999 Decision in Docket No. 94-07-03, DPUC Review of Procedures Regarding the Certification of Telecommunications Companies and of Procedures Regarding Requests to Expand Authority Granted in Certificates of Public Convenience and Necessity - Reopening; Docket No. 94-07-04, DPUC Investigation into the Competitive Provision of Local Exchange Service in Connecticut – Reopening; Docket No. 94-07-07, DPUC Investigation of Local Service Options, Including Basic

right of way, or the advantages CLECs normally experience from negotiated interconnection agreements. Therefore, the Telco's suggestion that "Gemini's unenforceable promise to offer qualifying services to a customer . . . cannot justify an order . . . to unbundle facilities that will be used throughout the state to provide broadband services,"⁴² is without merit. Again, Gemini's authority to provide services is at stake, and loss of that authority would deny Gemini the ability to offer not only narrowband services, but broadband services as well.

The Telco has also ignored Gemini's commitment to provide voice-grade narrowband services, including POTS, over the HFC network.⁴³ As noted above, Gemini has committed to performing the necessary upgrades and repair to the HFC network to accommodate its provision of qualifying services. Gemini has committed to offering the FCC's qualifying telecommunications services over that network, and in accordance with the TRO, other services (e.g., broadband) may also be offered.

Gemini also maintains that the provision of telecommunications services over the HFC network is far superior in speed and consistency than over the existing copper network, based on its own experience operating its HFC network. While the Telco was unable to successfully utilize the HFC network, Gemini maintained that it possessed a business plan and the ability to make that network useful. Additionally, Gemini is of the opinion that its HFC-based architecture is faster and would provide more consistent

Telecommunications Service Policy Issues and the Definition and Components of Basic Telecommunications – Reopening.

⁴² Emergency Request, p. 3.

⁴³ The Telco's argument that Gemini must first provide the qualifying services over unbundled facilities before offering broadband services (Emergency Request, p. 21) is a stretch and disingenuous at best. The intent here is to ensure a long term benefit for all consumers, which the Telco appears to argue, that it should be the only provider of that benefit to customers.

speeds for data transmission than that would not be available over the facilities that the Telco was willing to provide to Gemini (e.g., the twisted copper network).

5. THE DPUC'S UNBUNDLING ANALYSIS WAS CONSISTENT WITH THE TRIENNIAL REVIEW ORDER

The Telco's asserts that the CTDPUc's unbundling analysis during Docket No. 03-01-02 was inconsistent with the TRO.⁴⁴ During the Docket No. 03-01-02, Gemini proved a need for certain facilities that could offer the functions and features that would be provided from the HFC network. The CTDPUc determined that only the Telco's HFC network facilities (together with the requirement that those facilities be made available to competitors) could satisfy Gemini's service needs. Acceptance of the Telco's proposed alternative UNEs would force an architecture consisting of technologically inferior facilities. Therefore, the CTDPUc believes that the type of network architecture planned by Gemini should not be considered a factor against requiring the unbundling of the Telco's HFC network.

It should also be noted that the CTDPUc followed closely the guidelines enunciated by the FCC in the TRO, ¶¶61-169 during Docket No. 03-01-02. Indeed, the CTDPUc's findings and conclusions are consistent with those guidelines and are supported by the substantial evidence in that proceeding's administrative record. The CTDPUc further notes that in the context of §251(d)(B), the Commission construed "impair," which applies to non-proprietary elements, as to make or cause to become worse; diminish in value.⁴⁵ In that order, the Commission stated that:

⁴⁴ Emergency Request, p. 22.

⁴⁵ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, 11 FCC Rcd 15499, (First Report and Order), ¶285.

We believe, generally, that an entrant's ability to offer a telecommunications service is 'diminished in value' if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises. ... Accordingly, we interpret the 'impairment' standard as requiring the Commission and the states, when evaluating unbundling requirement beyond those identified in our minimum list, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network.⁴⁶

The Commission rejected the notion that ILECs must provide unbundled elements only when the failure to do so would **prevent** a carrier from offering a service, and that they are relieved from such obligation if CLECs can obtain elements from another source, or if they can provide the proposed service by purchasing the service at wholesale rates from an ILEC.⁴⁷

In the UNE Remand Order, the Commission concluded that the failure to provide access to a network element would impair the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the ILECs' network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element **materially** diminishes a requesting carrier's ability to provide the services it seeks to offer.⁴⁸ In that Order, the Commission found that:

a materiality component, although it cannot be quantified precisely, requires that there be substantive differences between the alternative outside the incumbent LEC's network and the incumbent LEC's network element that, collectively, 'impair' a competitive LEC's ability to provide

⁴⁶ *Id.*, ¶285.

⁴⁷ *Id.*

⁴⁸ UNE Remand Order, ¶51.

service within the meaning of section 251(d)(2). We therefore agree ... that where a competing LEC's 'ability to offer a telecommunications service in a competitive manner is materially diminished in value without access to that element,' the competitor's ability to provide its desired services would be impaired.⁴⁹

Further, following USTA, the Commission revisited the impairment standard and continued to interpret it, though, as less demanding than the "necessary" standard.⁵⁰ While the Telcom Act provides no definition of "impair," the Commission recognized a number of possible definitions available to determine when impairment exists.⁵¹

Moreover, the Commission identified several "barriers to entry" that may cause impairment to prospective competitors entering a market.⁵² Based on the evidence in the record, the CTDPUc determined that Gemini met these elements of the "barriers to entry" test. Gemini will be impaired operationally if it were required to purchase facilities that it deems inferior to those of the HFC network. Gemini will also be impaired economically, if it were required to construct its own facilities.⁵³

The CTDPUc further determined that Gemini will encounter "first-mover advantage" barriers to entry. Importantly, the Telco experienced preferential access to rights-of-way, and its sunken capacity and operational difficulties were addressed when it constructed the HFC network as a monopolist. Gemini also suffers from brand name preference that the Company currently enjoys. Additionally, Gemini is at a disadvantage in constructing its own network since the Telco was able to construct its HFC network with revenues generated from its monopoly customers. Gemini will also

⁴⁹ *Id.*

⁵⁰ TRO, ¶71.

⁵¹ *Id.*, ¶74.

⁵² *Id.*, ¶84.

⁵³ Gemini Decision, p. 41.

incur prohibitive costs to secure pole attachment licenses from the Telco for its own network if access to the Company's HFC facilities is denied.⁵⁴ Specifically, Gemini will unnecessarily experience make ready costs to either remove the Telco's existing facilities from its utility poles or replace those poles in their entirety to accommodate the addition of Gemini's facilities.⁵⁵

The CTDPUc also considered the possibility of destroying (at least seriously harming) Gemini's business plan and business if the Company were to impose its existing services and require Gemini to use them.⁵⁶ Gemini has implemented a technical plan that relies in part, and complements the Company's HFC's network. To require Gemini to utilize the Company's other UNEs rather than the HFC network, conflicts with the FCC's finding that lack of access to an ILEC network element would make entry into a market uneconomic.⁵⁷ Moreover, should Gemini be forced to use the Company's other services as means of offering its own services, Gemini will have to construct a duplicate network frustrating the intent of Conn. Gen. Stat. § 16-247a(a)(5).⁵⁸

It should be emphasized that Gemini sought access to features and functions provided with the assistance of HFC network. The Company's HFC network is the only one that can satisfy Gemini's needs. In the opinion of the CTDPUc, the Telco is

⁵⁴ *Id.*, pp. 41 and 42.

⁵⁵ *Id.*, p. 42.

⁵⁶ *Id.*

⁵⁷ In particular, the Commission has determined that requesting carriers are impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic. That is, whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have. TRO, ¶184.

⁵⁸ Gemini Decision, p. 42.

obligated to make those facilities available to its competitors.⁵⁹ Based on its own experience operating its HFC network for CATV services, Gemini's HFC network was far superior in speed and consistency than was operating over the Telco's existing copper network. Clearly, the CTDPUC was correct to refuse to consider Gemini's network architecture as a factor against requiring the unbundling of the Telco's HFC network in Docket No. 03-01-02.

Finally, the CTDPUC properly rejected the Telco's argument that Gemini is not impaired because it can use the Company's resold or retail tariffed services. The TRO supports the CTDPUC's position. The Commission stated therein:

We reaffirm our prior conclusion in the *UNE Remand Order* to afford little weight to evidence that requesting carriers are using incumbent LEC tariffed services as relevant to our unbundling determination. ... We conclude that it would be inconsistent with the Act if we permitted the incumbent LEC to avoid all unbundling merely by providing resold or tariffed services as an alternative. Such an approach will give the incumbent LECs unilateral power to avoid unbundling at TELRIC rates simply by voluntarily making elements available at some higher price. ... In addition, resold and retail tariffed offerings present different opportunities and risks for the requesting carrier than the use of UNEs or non-incumbent LEC alternatives. Also, forcing requesting carriers to rely on tariffed offerings would place too much control in the hands of the incumbent LECs, which could subsequently alter their tariffs and thereby engage in a vertical price squeeze.⁶⁰

Based on the evidence in the administrative record of Docket No. 03-01-02 and the application of governing federal statutes and regulations to such evidence, the CTDPUC concluded that denying access to the HFC facilities in question would impair Gemini's entry into the market and its service offering to consumers. This conclusion

⁵⁹ Relinquishment Decision, p. 39.

⁶⁰ TRO, ¶102.

reflects a reasoned decision-making process and a reasonable application of relevant statutory provisions and standards to the substantial evidence on the administrative record.

III. CONCLUSION

In light of the above discussion, CTDPUC submits that the Gemini Decision to require the unbundling of the Telco's HFC network is consistent with the Telcom Act, federal rules and regulations and Connecticut statutes. Therefore, the CTDPUC urges the Commission to deny the Emergency Request so that the Telco can unbundle its HFC network in order for Gemini to begin offering its services to the Connecticut public.

Respectfully submitted,

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March 3, 2004

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CERTIFICATION

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