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

In the Matter of	)	
	)	
The Southern New England Telephone Company	)	
	)	
	)	WC Docket No. 04-30
Emergency Request For Declaratory Ruling And Order Preempting A Decision By The Connecticut Department Of Public Utility Control	)	

INITIAL COMMENTS

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INITIAL COMMENTS

THE CONNECTICUT OFFICE OF CONSUMER COUNSEL,[1] in accordance with the Federal Communications Commission's (the "FCC") Public Notice, Report No. DA 04-377[2], hereby files its Initial Comments in this proceeding.

I. Introduction

In its December 17, 2003 Decision (the "Gemini Decision"), the Connecticut Department of Public Utility Control (the "Department") issued a declaratory ruling sustaining a petition dated January 2, 2003 (the "Gemini Petition") filed by Gemini

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[1] The Office of Consumer Counsel ("OCC"), a party to the state administrative proceeding below, is a state agency empowered by Conn. Gen. Stat. § 16-2a to represent and advocate the interests of the customers in utility related matters.

[2] *Pleading Cycle Established For Comments On SBC's Emergency Request For Declaratory Ruling And Preemption,* FCC Public Notice, Report No. DA 04-377, released February 12, 2004 ("*Public Notice")*

Networks CT, Inc. ("Gemini") requesting that certain hybrid fiber coaxial facilities (the "HFC Network") owned by The Southern New England Telephone Company ("SBC Connecticut") be deemed unbundled network elements ("UNEs") and accordingly offered to potential competitors on an element by element basis at total service long run incremental cost ("TSLRIC") pricing.

On February 10, 2004, SBC Connecticut filed an Emergency Request for Declaratory Ruling and Preemption with the FCC (the "Emergency Request") requesting that the FCC issue a declaratory ruling and order preempting the Gemini Decision by reason of inconsistency with the 1996 Telcom Act[3] and the Triennial Review Order,[4] and otherwise frustrates the implementation of federal law.

The OCC joins with Gemini and the Department in urging the FCC to deny SBC Connecticut's Emergency Request for Declaratory Ruling and Preemption.

II. The Gemini Decision Is Solidly Founded On Express Legal Authority

The FCC's preemption authority is governed in two different ways, by §253 of the 1996 Telcom Act [5] and, more relevantly for this issue, in situations where there exists a conflict between federal and state law. As for the conflict provision,[6] this basically

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[3] Publ. L. No. 104-104, 110 Stat. 456 (1996), codified throughout 47 U.S.C. (the "Telcom Act")

[4] *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "TRO"), *portions vacated and remanded*, *United States Telecom Ass'n v. FCC*, Nos. 00-1012, 00-1015, 03-1310 *et al.* (D.C. Cir. March 2, 2004) (D.C. Court 2004 Remand").

[5] 47 U.S.C. Section 253 provides for preemption of any state or local requirement which essentially disrupts or prevents an entity from providing any interstate or intrastate telecommunications service. This is irrelevant in this instance since the Gemini Decision promotes the offering of telecommunications services by both Gemini and in no way impacts SBC Connecticut's offerings.

[6] *See* Memorandum Opinion and Order, *In the Matter of The Public Utility Commission of Texas; Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility*

requires it to be physically impossible to comply with both the state and federal laws, or when public policy directives of Congress are negatively impacted. As extensively reviewed in these Initial Comments, the Gemini Decision is firmly based upon state and federal policies mandating competition in telecommunications and the unbundling of network facilities like those in issue here upon review by an appropriate state agency, such as the Department. Accordingly, based on the record evidence and legal foundation relied upon in the Gemini Decision, the FCC should not preempt the Gemini Decision and deny the emergency request for declaratory judgment and preemption of SBC Connecticut.

SBC Connecticut also appealed and sought a stay of the Department's Gemini Decision to the Connecticut Superior Court for the Judicial District of New Britain on January 29, 2004.[7]

Gemini has satisfactorily demonstrated that access to SBC Connecticut's HFC Network is necessary for the provision of its own services pursuant to the pro-competitive provisions of Connecticut Public Act ("P.A.") 94-83,[8] specifically, Conn. Gen. Stat. ("C.G.S.") §16-247b(b).[9] Additionally, Gemini will be impaired as it will

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Regulatory Act of 1995, FCC 97-346 (rel. Oct. 1, 1997), quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986), and citing Fidelity Federal Sav. And Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982); accord Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. at 370.

[7] SBC Connecticut and Gemini have met once to commence negotiations for the HFC Network UNEs pursuant to the orders of the Department contained in the Gemini Decision. The Connecticut Superior Court denied SBC Connecticut's request for a stay on February 17 at oral arguments and set an expedited schedule for the proceeding with a final decision scheduled to be issued by April 17.

[8] References to P.A. 94-83 shall collectively include the revisions to Title 16 of the Conn. Gen. Stat. enacted by P.A. 99-222, where applicable.

[9] Conn. Gen. Stat. §16-247b(b) requires in part that:

"Each telephone company shall provide reasonable nondiscriminatory access and pricing to all telecommunications services, functions and unbundled network elements and any combination thereof necessary to provide telecommunications services to customers. . . .The rates for interconnection and

experience a number of barriers to entry as identified by the 1996 Telcom Act and the FCC in various orders, including the Triennial Review Order.[10]

SBC Connecticut's HFC Network is capable of providing telecommunications services and, for purposes of this proceeding, is subject to state and federal unbundling requirements. Unbundling that network is consistent with the 1996 Telcom Act, the FCC's First Report and Order, [11] and Connecticut's P.A. 94-83 because it accomplishes the statutory intentions, namely to afford potential competitors access to UNEs they do not already possess in order to provide service offerings in direct competition with the incumbent local exchange carriers ("ILECs"), in this case, SBC Connecticut.

The Department expressly determined after reviewing the record evidence that the HFC Network meets the 47 U.S.C. 153(29) definition of a "network element," and therefore it must be unbundled.[12] In light of the TRO, the Department properly found that the HFC Network was intended by SBC Connecticut to provide a full complement of voice data and video services. In the opinion of the Department, the capability existed

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unbundled network elements and any combination thereof shall be based on their respective forward looking long-run incremental costs, and shall be consistent with the provisions of 47 USC 252(d)."

[10] The OCC would note that the D.C. Court 2004 Remand did not affect the legal or policy analysis conducted in the Gemini Decision by the Department, nor did it reach a determination concerning the state statutes relevant in this case. The D.C. Court 2004 Remand did, however, leave in place the public policy goals that factor so centrally to the Gemini Decision.

[11] CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and CC Docket No. 95-185, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order ("FRO"), August 8, 1996, ¶265. This FCC order declared that the 1996 Telcom Act requires the ILECs to make available to CLECs, access to UNEs at reasonable, nondiscriminatory terms and conditions. This means ILECs must provide carriers with the functionality of a particular element, separate from the functionality of other elements, and must charge a separate fee for each element.

[12] Id. The FCC concluded that access to an UNE refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service. Therefore, pursuant to the terms of §§251(c)(2), 251(c)(3) and 251(c)(6) of the 1996 Telcom Act, an ILEC's duty to provide access constitutes a duty to provide a connection to a network element independent of any duty imposed by §251(c)(2) of the 1996 Telcom Act and that such access must be provided under the rates, terms, and conditions that apply to unbundled elements.

for provision of those services and as such, the HFC Network should be unbundled. Additionally, the Department correctly rejected SBC Connecticut's argument that it is not required to make available unbundled access to these facilities because Gemini will only be offering broadband services. The Department properly noted that 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. In short, a win/win situation for all concerned, consumers and the competitive market, SBC Connecticut, and Gemini.

The 1996 Telcom Act provides the states with the independent authority to require unbundling beyond the list of UNEs approved by the FCC.[13] P.A. 94-83 has also provided the Department with the authority to require the unbundling of ILEC network elements.[14] Conn. Gen. Stat. §16-247b [15]complements the 1996 Telcom Act and FCC orders by separately providing the Department with the authority to require the

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[13] §251(d)(3) of the 1996 Telcom Act states:

PRESERVATION OF STATE ACCESS REGULATIONS- 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.

[14] Conn. Gen. Stat. § 16-247b requires the unbundling of network elements, services and functions used to provide telecommunications services which are in the public interest, consistent with federal law and technically feasible of being tariffed and offered separately or in combinations at rates, terms and conditions that do not unreasonably discriminate among actual and potential users and providers of such local network services.

[15] While C.G.S. §16-247b requires that network elements that are necessary for the provision of telecommunications services, the Gemini Decision determined that this potential competitor will be at a definite competitive disadvantage if access to SBC Connecticut's HFC Network is denied. It is clear that powerful network performance differences through the use of the HFC Network versus copper, the network infrastructure already in operation by Gemini would be rendered useless because of interconnection problems in fulfilling its business plan or offering services to its customers.

unbundling of network elements.[16]

The FCC also noted that many states have exercised their authority under state law to add network elements to the national list.[17] More importantly however was the FCC's disagreement with incumbent LECs (specifically, SBC Communications Inc., SBC Connecticut's parent) which argued that the states are preempted from regulating in this area as a matter of law. According to the FCC, if Congress had intended to preempt the field, Congress would not have included §251(d)(3) in the 1996 Telcom Act.[18]

This authority was recently reaffirmed by the FCC during its Triennial Review Proceeding[19] as expressed in the Triennial Review Order (the "TRO").[20] In particular, the FCC noted that §251(d)(3) of the 1996 Telcom Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the 1996 Telcom Act and its purposes or the Commission's implementing regulations. As noted above, C.G.S. §16-247b is consistent with the 1996 Telcom Act.

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[16] C.G.S. §16-247b(a). That statute provides in part, that:

> On petition or its own motion, the department shall initiate a proceeding to unbundle the noncompetitive and emerging competitive functions of a telecommunications company's local telecommunications network that are used to provide telecommunications services and which the department determines, after notice and hearing, are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.

[17] TRO, fn.586.

[18] TRO., ¶192 and fn. 609.

[19] See CC Docket No. 01-339, In the Matter of 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; CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability (Triennial Review Proceeding).

[20] TRO, ¶191.

III. SBC Connecticut Incorrectly Claims A Due Process Violation: the Scope of Proceeding Expressly Provided For The Decision Rendered

SBC Connecticut makes the claim that the Gemini Decision is the product of arbitrary and unlawful procedures, alleging that there is essentially no evidence in the record to support the Department's conclusions.[21] Gemini submitted a Request For Administrative Notice And Motion To Lift Protective Orders ("Gemini Motion No. 10"), dated March 18, 2003, which the Department granted on March 27, 2003 [22] and expanded on April 8, 2003, in order to overcome a refusal by SBC Connecticut to answer certain interrogatories.[23] By this grant of administrative notice, the Department incorporated into the record evidence of the Gemini Docket essentially a decade of information pertaining to the design, construction, and disposition of the subject facilities. For its part, SBC Connecticut refused to answer most interrogatories posed to it and joined the other parties in waiving its right to a full hearing on the issues in the Gemini Docket.

In its refusal to comply,[24] SBC Connecticut claimed that administrative notice of only the Decision in would be sufficient for the Department to make its determination in the Docket, arguing that the Docket No. 00-08-14 decision "contained the necessary information for the Department to review any issue regarding the Telco's actual use of

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[21] SBC Connecticut Request at 34-37.

[22] Department Approval of Motion No. 10, March 27, 2003 at 1. "The Department has reviewed Motion No. 10 and the Telco Response and has determined that Gemini's requests possess merit. Accordingly, the Department will grant Gemini's requests and will also require that any materials needing protection will be covered by the protective order previously approved in this proceeding."

[23] The dockets of which administrative notice was taken are: Docket No. 94-10-03, DPUC Investigation into The Southern New England Telephone Company's Infrastructure Depreciation; Docket No. 95-03-01, Application of The Southern New England Telephone Company for Financial Review and Proposed Framework for Alternative Regulation; Docket No. 96-01-24, Application of SNET Personal Vision, Inc. for a Certificate of Public Convenience and Necessity to Provide Community Antenna Television Service; and 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.

[24] SBC Connecticut Opposition, March 21, 2003.

the HFC network." Gemini countered that nothing in the Decision in Docket No. 00-08-14 addresses the crucial issue in this proceeding of whether the network is a telecommunications network and is capable of being used as such. The addition of the records of the four earlier dockets provided the record in the Gemini Docket with the evidence required for the Department to substantiate its rulings in the Gemini Decision.

In its February 10, 2003 response ("Scope Letter") to Motions Nos. 2 and 5 from SBC Connecticut,[25] the Department framed the legal foundation of the Gemini Petition to be the seeking of a determination of whether the HFC Network was subject to unbundling pursuant to the C.G.S. §16-247b(a).[26] Stated another way, the Gemini Petition requested the Department to declare the HFC Network to be a UNE so that it could commence interconnection negotiations with SBC Connecticut to obtain access to certain of the unbundled network elements pursuant to applicable pricing and regulations.[27]

The Scope Letter established a procedural schedule and divided the Docket into two phases.[28] The Scope Letter expressly rejected suggestions made by SBC

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[25] SBC Connecticut January 23, 2003 motion ("SBC Connecticut Request"), at 1. This was two motions, to dismiss or alternatively bifurcate the proceeding.

[26] In the Gemini Decision, the Department determined a state-law determination must first be made that the HFC Network may be unbundled pursuant to C.G.S. §16-247b(a) before these network facilities could be subject to arbitration regarding the negotiation and enter into of an interconnection agreement with SBC Connecticut pursuant to §§ 251 and 252 of the Telecommunications Act of 1996 (the "1996 Telcom Act").

[27] While SBC Connecticut claims that § 252 negotiation deadlines should have applied and preempted this declaratory judgment docket, it was clear that in negotiations initiated by Gemini prior to the commencement of the Gemini Docket to discuss unbundling, SBC Connecticut refused to negotiate the lease of these facilities because SBC Connecticut did not consider these facilities to even be UNEs. Therefore, SBC Connecticut itself preempted § 252 negotiations by claiming that the HFC Network was not subject to unbundling or regulation as unbundled network elements and thus there were in fact no § 252 negotiations ever started.

[28] Scope Letter at 5. "The Department believes that the Petition first seeks a determination as to whether the HFC network is subject to unbundling pursuant to Conn. Gen. Stat. §16-247b(a). As such, the Department is not persuaded by the Telco's argument that this is an arbitration proceeding. Rather, it is an

Connecticut requesting that the Department order that "phase one does not require any discovery or hearings; or that discovery be limited to information that is required to resolve legal issues."[29] The Department found these suggestions to be "too constraining and would limit the Department's investigation."[30]

By coincidence, the FCC issued the Triennial Review Order, a fundamental decision concerning UNEs among other matters, in the midst of the Gemini Docket, and the Department promptly ordered briefs from the parties regarding the impact of the TRO's provisions on the issues in the Gemini Docket. Thus, the Gemini Decision is based upon the latest pronouncements of the FCC, which are in turn based upon the latest federal caselaw.[31] Importantly, the FCC reaffirmed its definition of a "network element" as requiring ILECs to make available to requesting carriers network elements that are capable of being used in the provision of a telecommunications service.[32]

In the TRO, the FCC noted that a narrow reading of the "used or capable of being used" standard for network elements could lead to "unreasonable results" and thus was to be avoided.[33] This isn't the only potential gamesmanship that would be possible: the TRO observed that ILECs could further prevent competitors from entering a market with UNEs by failing to offer a given service to consumers. By using their vast market power

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unbundling proceeding established to permit the Department to investigate Gemini's request that certain elements of the HFC network be unbundled. Petition, p. 1. "

[29] Scope Letter at 6.

[30] *Id*.

[31] As detailed in SBC Connecticut's Memorandum of Law In Support Of Its Motion For Partial Summary Judgment, dated February 27, 2004 and filed with this Court ("SBC Connecticut Memo"), at 8 fn. 3, SBC Connecticut's parent, SBC Communications Inc. and other ILECs have challenged various provisions of the TRO relating to unbundling in the D.C. Circuit Court, a matter that has been argued and remains pending decision.

[32] TRO, ¶58. Citing to 47 U.S.C. §153(29), the FCC stated that a network element includes features, functions and capabilities that are provided by means of such facility or equipment.

[33] TRO ¶ 59-60. The TRO properly cited the example of a spare loop that, while perfectly capable of providing second-line service for a potential competitor, would fail to be a "network element" if that facility was not being "used" by the ILEC.

and fully diverse portfolio of services in every possible niche, ILECs could squeeze potential competitors from the market and thus "stifle a competitor's ability to innovate and could hinder deployment of advanced telecommunications services."[34]

Accordingly, the Scope Letter ordered, as a general matter, that phase one was a contested-case investigation into the C.G.S. §16-247b(a) unbundling procedures and the relevance of those procedures to the facts inherent in the Gemini Petition and the history of SBC Connecticut's HFC Network, a topic long familiar to the Department. The Scope Letter thus left only Gemini's request for a cost study and inventory to phase two.[35] The Scope Letter found that while the Docket's first phase would resolve the legal issues of the Petition, the Department additionally held that "the nature of the underlying facts of the issues of this proceeding require greater discovery."[36] The Department pointed out that it retained its authority to rule on the relevance of data requests and other discovery to the issues presented in phase one. It also expressly rejected SBC Connecticut's notion that no discovery be held in phase one and instead directed that discovery sufficient to develop an adequate record be conducted in order for it to decide whether the HFC Network was a UNE or not.

It is thus apparent that the Department had determined that it would develop record evidence sufficient for it to reach an opinion concerning the applicability of the subject HFC Network to the UNE statutes, specifically C.G.S. §16-247b which in turn is

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[34] *Id*.

[35] Scope Letter at 6. "Finally, the Department believes the Telco's proposal to bifurcate the instant proceeding into two phases with only the legal issues being addressed in phase one and addressing Gemini's request for a cost study and inventory in phase two, to be of merit."

[36] *Id*.

subject to §251(d)(3).[37] The Gemini Decision is accordingly based on a sufficient statutory basis and record for the holdings reached.[38]

SBC Connecticut's HFC Network is a unique facility and was not addressed by the TRO.[39] The Department properly took this key fact into account and was therefore correct in using the context of the Docket and the facts presented by the parties in the record evidence to use its state and federal authority, specifically, the TRO to order the unbundling of this abandoned network for use in providing narrowband services, with the option to layer on broadband. Consequently, the Gemini Decision reflects the public policy goals of Congress and the 1996 Telcom Act, as implemented by the FCC, which serve to properly reduce the market barriers to entry faced by potential competitors, as well as the societal costs of unbundling. This squarely rests on the policy concerns enunciated by the FCC in the TRO in order to ensure investment in advanced telecommunications infrastructure while preserving a market in the narrowband arena to allow new entrants the opportunity to gain customers and begin the process of developing market share. By this business progression, it is believed that new entrants can support the capital intensive requirements of providing telecommunications across the full spectrum of market niches while encouraging the ILECs to invest in advanced services

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[37] *Id*., at 5. "The Department also believes that before these network facilities can be subject to arbitration (as provided for by §252 of the Telcom Act), a determination must first be made that the HFC facilities may be unbundled pursuant to Conn. Gen. Stat. §16-247b(a). Accordingly, the Telco's request to dismiss the Petition is hereby denied."

[38] SBC Connecticut voluntarily agreed with the other parties to cancel the public hearings that had been noticed for June 23-24, 2003. SBC Connecticut Verified Complaint, January 29, 2004 at ¶ 66.

[39] In fact, while there were a number of HFC networks at one time, around 1996, many of the companies that had once begun to implement the technology, began to reject the concept as not technologically and economically viable. In addition to SBC Connecticut, these companies included Pacific Bell (now an affiliate of SBC Connecticut and a sister subsidiary of SBC Communications Corporation, Inc. (SBC)), NYNEX, Bell Atlantic, (currently a part of the Verizon Corporation) and Time Warner. Today, no ILEC offers both telephony and CATV services over an HFC network.

technology.

Perhaps most importantly in terms of this case, the Gemini Decision squarely satisfies the express policy positions of Congress and the FCC: unbundling SBC-SNET's HFC network for the narrowband uses intended by Gemini will not in any way deter the deployment of additional broadband in Connecticut. It is obvious that the contrary holding, that is, releasing SBC-SNET from the requirement that it unbundle its HFC network, will in no way spur this particular ILEC to upgrade that network for broadband use since SBC-SNET has admittedly and permanently abandoned this technology.[40]

While the TRO did not specifically examine facilities like the unique HFC Network owned by SBC Connecticut, the FCC recognized that its public policy obligations primarily include encouraging investment in advanced infrastructure in order to promote competition and innovation. It also explicitly tackled legacy loops such as the HFC Network (repeatedly admitted by SBC Connecticut to be useless for its own advanced services purposes, and thus abandoned) at issue here by recognizing that the current narrowband networks of the ILECs may become inadequately utilized as services are shifted onto advanced networks. Therefore, federal policy is to encourage both potential competitors in intramodal applications (e.g., CATV providers, ISPs, etc., along with ILECs) to invest in the broadband arena, while providing opportunities for sharing narrowband networks in order to continue utilizing this capacity.[41]

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[40] Indeed, SBC itself has decreed an end to this technology for its entire 13-state territory, proceeding in a new direction entitled "Project Pronto", a $6 billion dollar SBC company-wide initiative designed to upgrade loop facilities and further deploy advanced broadband services to all of SBC's operating regions, including Connecticut.

[41] TRO, ¶244.

IV. Network Element Definition: The HFC Network Was Sold To The Department On The Basis Of A Replacement Network For All Services, A Projected Use For Which SBC Connecticut Received Favorable Regulatory And Financial Treatment Over The Last Decade

SBC Connecticut has vociferously argued as its central contention that the HFC Network was not used in the provision of telecommunications service and thus cannot fulfill the state and federal tests for unbundling, specifically claiming that the coaxial cable facilities at issue in this proceeding are not a network element that the company is obligated to unbundle.[42] Citing the TRO, SBC Connecticut maintains that these facilities do not constitute a network element because they are neither a part of the Company's network nor capable of being used to provide a telecommunications service without significant modifications that go beyond those the FCC has required ILECs to make in the provision of UNEs.[43] SBC Connecticut also argues that the FCC declined to require incumbent LECs to provide unbundled access to their "hybrid loops" for the provision of broadband services. Finally, according to SBC Connecticut, the FCC found that ILECs are not required to unbundle their next generation network, packetized capability of their hybrid loops to enable requesting carriers to provide broadband services to the mass market.[44]

To the contrary, however, the Department thoroughly examined and soundly

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[42] *See* SBC Connecticut Memo at 2, 5, 9-10 et seq.; *see also* SBC Connecticut's September 26, 2003 Reply Comments at 13-18. Cf., SBC Connecticut Response to Gemini Interrogatory, GEM-2, dated March 4, 2003 in the Gemini Docket, in which SBC Connecticut responded that it continues to use "some" Tier 3 fiber cables in its current telecommunications operations. While SBC Connecticut continues to use the fiber aspect of the HFC Network, it is the Tier 3 coaxial facilities that interest Gemini and which were designated UNEs by the Department it is Gemini Decision.

[43] *Id*.

[44] SBC Connecticut Memo at 15-16; SBC Connecticut September 26, 2003 Reply Comments, at 23-24.

rejected this argument based on state and federal statutes, federal caselaw[45] and FCC regulations.[46] The Department also properly relied upon the FCC's recent clarification of its requirement that unbundled access to network elements that are "capable of being used" be provided to competitors because they constitute network elements eligible for unbundling.[47]

Contrary to the arguments of SBC Connecticut, the TRO held that providing requesting carriers such as Gemini with access only to those facilities and equipment actually used by the ILEC would lead to unreasonable results and is not state or federal public policy.[48] The FCC carefully fashioned a platform to reach policy goals and in the instant case, Gemini has committed to offering the specific qualifying services required by the TRO over facilities that have been abandoned by SBC Connecticut.[49] As detailed below, the HFC Network was conceived and designed, indeed financed with ratepayer and shareholder money over many years, to completely replace the network in place at the time (and still functioning today). In short, at the time of its abandonment, SBC Connecticut was in the process of converting its copper, circuit-based network to the

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[45] *See AT&T Communications of Va., Inc. v. Bell Atlantic – Va., Inc.,* 197 F.3d 663, 672 (4th Cir. 1999). The ILEC claimed that its equipment must be in actual use, and not merely capable of being used in order to qualify as a network element. This argument was rejected by the Fourth Circuit which held that such an interpretation placed undue weight on the word "used" and was contrary to the Supreme Court's acknowledgement that "network element" was broadly defined.

[46] *See discussion*, Gemini Decision at 35-36, *citing* the FCC's UNE Remand Order, ¶¶327 and 328. The FCC determined that an element is subject to unbundling if it is already installed and called into service.

[47] TRO, ¶¶59 and 60.

[48] TRO, ¶60. The FCC observed that holding otherwise would allow ILECs to prevent competitors from making new and innovative uses of network elements simply because the ILEC has not yet offered a given service to consumers.

[49] Throughout its September 26, 2003 Reply Comments, at 24, 25 (and fn. 63) and 26, SBC Connecticut maintains that Gemini is prohibited from offering "broadband" services over its HFC Network. In the Gemini Decision, however, the Department staunchly holds to the view that Gemini's commitment to provide "qualifying services" is valid and meets the requirements of the TRO at ¶¶143 and 146. See Gemini Decision at 13, 20, 35, and 40-42,

HFC Network, in stages, but pursuant to an express plan.

As noted above concerning the scope of the Gemini Docket and its legal underpinnings, SBC Connecticut has made much of an alleged lack of evidence in this Docket, further claiming its ability to conduct discovery was restricted by the Department. With regard to the HFC Network, however, the Department has had a long period over which to develop record evidence and regulate SBC Connecticut's HFC Network. There have been multiple dockets involving this infrastructure before the Department over the last decade, with much reporting and briefing of issues concerning its implementation and maintenance throughout the period. Thus, there has been little required by way of revelation for the Department to comprehend the nature and scope of the HFC Network at issue in this Docket. Again, contrary to SBC Connecticut's claims, there has been sufficient discovery made concerning the present condition and status of the HFC Network for the Department to properly make its determinations in the Gemini Decision.

The history of the HFC Network is well known. It was developed under the name "I-SNET" and was designed to allow SBC Connecticut to provide a complete array of services (i.e., voice, data, or video, narrowband and broadband).[50] The HFC Network was intended to replace the existing copper, circuit-based infrastructure and combine narrowband (for voice and "low-speed" data applications) and broadband (for video and "high-speed" data applications) functions through one network across the entire spectrum of the company's services in every market niche.

It was anticipated that this infrastructure deployment would begin in 1994 and be

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[50] SBC Connecticut filed its I-SNET Technology Plan with the Department on December 29, 1994, as revised on April 11, 1995.

completed in 2009, evolving from an electronic, circuit-based technology into a streamlined, all digital platform. Key to the promotion of this expensive, decade-long project by SBC Connecticut to the Department was the declaration that the existing embedded base of copper cable, circuit, switching, computing and associated common and complementary assets paid for by ratepayers over the course of over 100 years of rate-of-return regulation would be replaced and retired.

To help facilitate the cost recovery of this build-out, the Department held that SBC Connecticut be permitted to include for purposes of depreciation, an allowance for the plant that would be retired due to the I-SNET deployment, to be recovered from SBC Connecticut's ratepayers.[51] In Docket No. 00-07-17, *DPUC Investigation of the Southern New England Telephone Company's Alternative Regulation Plan*, the Department determined that a sizable portion of the reserve deficiency remained unsatisfied at the expiration of the 5-year period and it accordingly opened Docket No. 03-01-11, *DPUC Review of The Southern New England Telephone Company's Reserve Deficiency* to determine whether there was a continuing need for any further recovery beyond the extended monitoring period and to determine the total amount of recovery since the Alt Reg Plan was initiated in Connecticut.

Also as part of its sales pitch to the Department, SBC Connecticut claimed vast improvements to its service quality every year during the deployment of the HFC Network and enhanced service standard objectives were implemented to account for

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[51] Docket No. 94-10-03, DPUC Investigation into The Southern New England Telephone Company's Intrastate Depreciation Rates, Decision, Nov. 21, 1995 (the "Depreciation Decision"), at 19-20. *See also* C.G.S. § 16-247k(c).

these expected productivity gains.[52] Based on that projected use of the HFC Network, SBC Connecticut fought for and received favorable regulatory treatment which aided it throughout its business over the last decade or longer.[53]

These hopes were short-lived as SBC Connecticut and other ILECs like it discovered that DSL technology could utilize their existing copper and circuit-based infrastructure to deliver similar services.[54] This DSL technology allowed the ILECs to forgo the capital expense and technological difficulties[55] of replacing their existing infrastructure and they quickly began marketing the full array of narrowband and broadband services earlier envisioned to be provided via HFC.

Thus, the HFC Network was obviously intended to replace SBC Connecticut's existing infrastructure so that the company could effectively and efficiently meet the anticipated enhanced service requirements of the future. A central quality of replacing its entire network was the clear inability to identify or differentiate which facilities were designated specifically for telecommunications services (i.e., voice and data) versus facilities specific to broadband or cable television. The HFC Network was slowly, but

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[52] Docket No. 95-03-01, Application of the Southern New England Telephone Company for Financial Review and Proposed Framework for Alternative Regulation, Decision, March 13, 1996. The services standards in place were programmed to, over the course of the Alt Reg Plan, increase annually based on SBC Connecticut's expected improvement in service quality, subject to penalties for failure to meet these standards.

[53] *See* Docket No. 01-10-06, DPUC Review Of Telecommunications Policies: Infrastructure Modernization, Competition, Pricing Principles And Methods Of Regulation, which contained the "network modernization plan" filed by SBC Connecticut on January 21, 1992, which became the "base case" against which the HFC Network was compared, representing "a complete replacement of twisted copper pair technology over a 15 year period to Hybrid Fiber Coax facilities along with the acceleration of the switching modernization plan." *See* Docket No. 99-04-02, SBC Connecticut Response to OCC-22, dated July 1, 1999.

[54] Many large telecommunications companies like the ILECs began to retreat from HFC leading to Lucent's 1996 abandonment of the HFC technology.

[55] *E.g.*, In February 1997, the National Electric Safety Code standards subcommittee denied the Company'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.

surely integrating itself throughout the existing SBC Connecticut network, on its way to replacing the existing network for telephony and advanced services alike, without distinction between the functions.

As noted above, the alternative regulatory paradigm developed exclusively for the HFC Network development for purposes of depreciation and regulation was expressly based upon creating a new network capable of supporting all services to be offered by SBC Connecticut. It is important to note that there was never a plan for "only broadband" or "only cable" or even "only telephony" ever expressed during the years of investigations before the Department**:** the HFC Network was sold to the Department by SBC Connecticut on the basis of a replacement network for *all* services. Thus, it was built to encompass the entire franchise area and to deliver all services to all customers. It was quite simply a *replacement* network, not an add-on or infrastructure only intended for broadband applications, as SBC Connecticut now maintains.

Although the HFC Network did not develop according to the plan promoted a decade ago by SBC Connecticut, it was expressly intended to replace the existing copper, circuit-based infrastructure of the day, indeed, the very network still in place today. It was of course therefore intended to provide telecommunications services of all kinds, including basic voice services. If deployment of the HFC Network had occurred as intended it would have fully replaced the legacy network still operating today in Connecticut and it would therefore most probably be required to be unbundled as are the company's current basic network facilities pursuant to the provisions of P.A. 94-83, the 1996 Telcom Act, and FCC orders.

While SBC Connecticut is correct that the Department allowed it to relinquish its

obligations regarding the HFC Network based on its claims in 2000 that the HFC network was not compatible with its business plan for delivering services, that fact is irrelevant to whether the HFC Network is today capable of being used for the competitive provision of telecommunications services.[56] The Department properly analyzed the statutes and caselaw, as well as the facts before it, and determined that the network could be effective today in the hands of potential competitors such as Gemini to deliver telecommunications services. The unique circumstances of this case have led to what can only be described as a "win/win" for all parties and it is high time that Gemini is allowed the opportunity it seeks to deliver competitive telecommunications services over this otherwise dormant HFC Network owned by SBC Connecticut.

V. Necessary and Impaired Standard: The HFC Network Elements Requested By Gemini Are Essential To Its Ability To Provide The Telecommunications Services That It Seeks To Offer In Connecticut, Cost-Effectively Expanding Its Existing Connecticut HFC Network

While SBC Connecticut has attempted to narrow the "necessary and impair standard" to an unworkable extent in clear contradiction of FCC orders,[57] the record evidence in the Docket demonstrates that the Department conducted a thorough examination of the facts and properly applied the relevant legal principles in the Gemini Decision. The Department also carefully assessed the possibility of substituting alternative technologies or UNEs for the subject facilities and correctly rejected that

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[56] *See generally*, Docket No. 99-04-02, *Application of SNET Personal Vision, Inc. to Modify Franchise Agreement*, Decision, August 25, 1999; see also 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, March 14, 2001 ("Franchise Relinquishment Decision") (attached as Exhibit B to SBC Connecticut's Administrative Appeal).

[57] SBC Connecticut Memo at 18-19.

option.

a. The Department Properly Resolved The Issues Surrounding Whether Unbundling Of This UNE Was Necessary And Whether Failure To Do So Would Impair Gemini, And The Gemini Decision Stands On Firm Legal And Factual Grounds

The "necessary and impair" standards required by §251(d) of the 1996 Telcom Act have been the focus of much litigation since this statute was enacted eight years ago.[58] Because of these pitched and perennial battles, this issue thus has a greater maturity in many ways than other aspects of the 1996 Telcom Act and the Department properly analyzed its history in its Decision.[59]

Basically at this point, the term "necessary" means that an element must be a prerequisite for competition[60] and while the 1996 Telcom Act has no express definition of "impair," several possible meanings are possible for determining impairment to a potential competitor.[61]

The 1996 Telcom Act required the FCC to consider whether the failure to provide

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[58] 47 U.S.C. § 251(d) provides in pertinent part as follows:

> "(d) Implementation.
> …
> (2) Access Standards.
>
> In determining what network elements should be made available for purposes of (c)(3) of this section, the [Federal Communications] Commission should consider at a minimum whether –
>
> (A) Access to such network elements are as proprietary in nature is necessary; and
>
> (B) The failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." [Bracketed material supplied.]

[59] Gemini Decision at 29-31.

[60] TRO, ¶282.

[61] UNE Remand Order, ¶¶ 35 and 36. The FCC has determined that the "necessary standard" applies only to proprietary network elements, adopting standards that aid in the determination of whether a network element is proprietary in nature.

access to network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[62] The FCC also concluded that the "necessary" standard differed from the "impair" standard because a "necessary" element would, if withheld, prevent a carrier from offering service, while an element subject to the "impair" standard would, if withheld, merely limit a carrier's ability to provide the services it seeks to offer.

Thus, the impair standard requires the FCC and states agencies to consider whether the failure of an incumbent to provide access to a network element beyond those identified by the FCC 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 ILEC's network. As noted above, the HFC Network is unique and has not been expressly considered by the FCC so the Department was right to make its own determination based on its examination of the underlying FCC orders, caselaw, and statutes.

Basically, the FCC concluded 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.[63] This investigation is clearly within the Department's expertise and the record evidence supported its finding, including evaluating whether the quality of

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[62] *Id.*, ¶71.

[63] UNE Remand Order, ¶51. In the TRO, the FCC resolves the contention offered to this Court by SBC Connecticut (and earlier to the Department) that the UNE Remand Order was overturned and does not carry any weight with regard to the evaluation of these standards. The Gemini Decision correctly notes that the TRO, at ¶¶ 171, states that the D.C. Circuit Court did not remand this issue back to the Commission, vacate the necessary standard, nor did it instruct the FCC to consider it further. Specifically, in USTA, the D.C. Circuit was very deliberate in vacating only that portion of the FCC's order pertaining to line sharing and not the necessary standard provided for in the UNE Remand Order.

telecommunications service provided by a potential competitor will be diminished or the cost of providing the service increased without access to the requested element.

b. The Department Properly Determined That There Exist In This Case "Barriers To Entry" Which Serve To Prevent Potential Competitors From Entering This Market Without Access To The HFC Network

Most importantly with respect to this legal action, the FCC has found impairment when lack of access to an ILEC UNE posed a barrier to entry that are likely to make entry into a market uneconomic.[64] Therefore, to further determine whether a UNE is necessary under law, the barriers to entry that are possible include sunken costs, scale economies, scope economies, absolute cost advantages, capital requirements, first-mover advantages, strategic behavior by the incumbent, product differentiation, long-term contracts, and network externalities.[65] The Department found that there existed sufficient market barriers to entry into this market by potential competitors such as Gemini that the HFC Network needed to be unbundled to relieve that hindrance.

The Department compared the federal statutes with the facts developed in the Docket and determined that a requesting carrier such as Gemini could be impaired operationally if it were required to purchase inferior network facilities and that it could be impaired economically if required to construct its own facilities.[66] As is evident with all ILECs with their lengthy history of monopoly status in their respective markets, SBC Connecticut has enjoyed long-standing access to the public rights of way which has

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[64] TRO, ¶84.

[65] The Department examined the provisions of the TRO relative to this issue., at ¶74-75.

[66] The FCC has committed to considering business cases analyses if they provide evidence at a granular level concerning the ability of competitors economically to service the market without the UNE in question. TRO, ¶99.

provided it with access to every corner of its franchise area and every market niche. Of course, unlike its potential competitors, SBC Connecticut has the opportunity to build on this historic base and continuing regulated revenue stream to competitive position itself in the future market.

Based on many years of rate-of-return regulation, lately enhanced by preferential alternative regulation, SBC Connecticut today possesses substantial financial coverage for infrastructure investment over a considerable period of time (e.g., $40 million has been allocated without substantiation since 2000 toward the reserve deficiency that supported implementation of the now-defunct HFC Network).[67] That continuing regulatory paradigm enabled SBC Connecticut to construct and maintain the HFC Network at issue in this case and was the direct result of its status as a regulated monopolist for about a century.[68]

c. Consideration Of The Availability Of Alternative Elements Outside An Incumbent's Network

The basic definitions "necessary" and "impair" also require consideration of the availability of alternative elements outside an incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational

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[67] Docket No. 00-07-17, *DPUC Investigation of the Southern New England Telephone Company's Alternative Regulation Plan*, at 36 which simply left this charge in rates without discussion or investigation though it had expired by the terms of SBC Connecticut's alternative regulation plan. The Department has opened but not convened a docket ostensibly to investigate the continued imposition of this charge, Docket No. 03-01-11, *DPUC Review of The Southern New England Telephone Company's Reserve Deficiency*.

[68] These advantages also create the so-called "first-mover advantage" barriers to entry suffered by potential competitors facing huge investments with no guarantee of reimbursement, as well as brand name preference among customers long accustomed to the ILEC, and finally the extraordinary costs of locating facilities in the public rights of way, coincidentally owned and operated by none other than SBC Connecticut (in conjunction with the two public utility electric companies).

matter, preclude a requesting carrier from providing the services it seeks to offer.[69]

SBC Connecticut has asserted that potential competitors should be content with various alternative means to provide customers with telecommunications and that accordingly its HFC Network need not be unbundled.[70] The FCC has generally addressed this contention and the Department has properly examined the FCC's directives on the issue. [71]

SBC Connecticut has claimed that the Department has improperly considered only the business plan of one potential competitor in terms of impairment.[72] But in truth, this Docket serves to open the HFC Network up to all comers willing to shoulder the burdens of utilizing this particular UNE. While it appears that only Gemini is interested at the moment, there is at least one cable company participating in the docket and it is quite likely that innovative potential competitors are out there qualified and capable of utilizing this UNE, should it be unbundled.

In any case, SBC Connecticut is guilty of its own charge: it insists that potential competitors utilize *its* business plan at the expense of their own by claiming that Gemini must only avail itself of various alternative facilities currently offered by SBC Connecticut. SBC Connecticut is insisting on imposing existing services and methods of its choosing, all of which are in fact far more costly and cumbersome than the use of the HFC Network would be in the event a potential competitor attempts to enter this market.

In this case, the potential competitor has already commenced offering services

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[69] *See* §251(d)(2)(A) of the 1996 Telcom Act

[70] SBC Connecticut Memo at 30-31.

[71] *See* TRO, ¶199. The FCC did not address a facility like the HFC Network at issue here, but it did examine whether unbundled access to subloops, spare copper loops, and the nonpacketized portion of ILEC hybrid loops, as well as remote terminal collocation, offer suitable alternatives to unbundling ILEC facilities in general.

[72] SBC Connecticut Memo at 18, 30.

utilizing a network utilizing hybrid-fiber coax trunks like the HFC Network and it is obviously unfair to require Gemini to utilize alternative UNEs simply to avoid offending SBC Connecticut's business plan.[73] Additionally, the TRO provided that requesting carriers cannot be required to utilize ILEC resold or retail tariffed services to provide their retail services as alternatives to UNEs, thus overruling the contentions of the ILECs that such alternatives avoid a holding of impairment.[74] Accordingly, the Department rightly determined that reasonable alternatives did not exist for Gemini or similarly situated potential competitors (i.e., those utilizing HFC infrastructures to provide services), and that the federal statutory scheme does not require them to utilize alternative ILEC facilities or services that do not fulfill their business plans.[75]

In most dramatic fashion, SBC Connecticut charged that the Department favorably but improperly compared the HFC Network with the hybrid-***copper*** fiber loops[76] examined in detail in the TRO and improperly concluded that largely because of that comparability the HFC Network should be unbundled.[77] This is a blatant mischaracterization of the express holding of both the Gemini Decision and the relevant TRO provisions.

The Department properly analyzed the FCC's TRO and determined that it provided that hybrid-***copper*** fiber loops used *for broadband purposes only* would not

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[73] TRO, ¶84. The Department found that such a demand conflicts with the FCC's finding that lack of access to an ILEC incumbent network element would make entry into a market uneconomic and of course would require Gemini to construct a parallel network to the existing HFC Network (which is abandoned and unused). *See* C.G.S. §16-247a(5) regarding sharing and efficiencies required by state policy with regard to network facilities.

[74] TRO, ¶102. Such a holding, the FCC observed, would quickly lead to gamesmanship by the ILECs by voluntarily making elements available at extraordinary prices or engage in price squeezes.

[75] Gemini Decision at 9.

[76] *Note*: the technology in question in this case is hybrid fiber ***coax*** loops.

[77] SBC Connecticut Memo at 15-18.

qualify for unbundling and that alternatives to unbundling them must be utilized if the ILECs chose that route.[78] In truth, the Department held that the FCC had considered the effect of *alternatives* to mandating unbundled access to the specific hybrid loops of ILECs detailed in the FCC TRO Order, which as noted above, did not include any discussion regarding hybrid fiber-coax loops.

In terms of alternatives in the ***narrowband*** arena, again expressly not broadband, the FCC allowed unbundling to allow potential competitors the opportunity to continue to offer narrowband services via UNEs. That is, potential competitors could use such loops without being obligated to utilize ILEC-offered alternatives such a specialty copper runs, as described by SBC Connecticut. Frankly, SBC Connecticut is disingenuously mixing its arguments and its contentions must be rejected.

Similarly, SBC Connecticut also attempts to use a generic term "hybrid loops" to include all loops other than pure copper, not at all the usage in the TRO.[79] By use of this practice, SBC Connecticut has attempted to allege that the FCC conclusion regarding "hybrid loops" and an ILEC's unbundling obligations for a CLEC's deployment of broadband service supports SBC Connecticut's position that it cannot be obligated to unbundle its HFC Network *coaxial* facilities. As indicated above, the Department's reading of the TRO is correct and SBC Connecticut's intentional mangling of terms does not change the legal analysis: the HFC Network, used for narrowband services, qualifies for unbundling as a network element, and no alternatives are required to be used in order to be deemed impaired without such access.

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[78] FRO, ¶285-6. The FCC rejected the related interpretations that carriers are not impaired if they can obtain elements from another source, or if they can provide the proposed service by purchasing the service at wholesale rates from a LEC.

[79] SBC Connecticut Memo at 17-18.

VI. Technical Feasibility Was Thoroughly Examined By The Department And A Reasonable And Practical Implementation Course Ordered

SBC Connecticut has also alleged that the technical feasibility of unbundling and leasing the HFC Network, an element of §16-247b, was not considered nor was discovery allowed to substantiate SBC Connecticut's claims.[80] It is clear that SBC Connecticut has the burden of demonstrating technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier once a presumption is established that a network element must be unbundled.[81]

SBC Connecticut's allegations that it will be "subsidizing" the efforts of a potential competitor to enter this market are also unfounded.[82] The Department specifically found, based on record evidence, that Gemini had committed to funding and performing the necessary upgrades and repair to the HFC Network to accommodate its provision of qualifying services.[83] In historic ILEC fashion, SBC Connecticut countered with the perennial argument of "network integrity" in which complete chaos will reign unless the ILEC, and only the ILEC, has complete control over every inch of telecommunications facilities.[84]

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[80] SBC Connecticut Memo at 3-4, *and generally et seq*. "In fact, not only did the DPUC fail to address technical feasibility in its *Final Decision*, but also the DPUC also repeatedly blocked the Telco's efforts to discover and to introduce evidence relevant to this determination on the grounds that the issue was not relevant to Phase I of the proceedings."

[81] 47 C.F.R. § 51.5. "An incumbent LEC that claims it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access or methods would result in specific and significant adverse network reliability impacts."

[82] SBC Connecticut Memo at 29-31.

[83] Gemini Reply Comments, September 26, 2003, in which it committed to provide voice-grade narrowband services, including POTS (plain old telephone service), over the HFC Network once unbundled.

[84] *Id*. *Cf*., SBC Connecticut Memo at 28-29, at which SBC Connecticut recites the hardships it will face, including millions of dollars in investments and the required hiring of personnel, should it be required to unbundle the HFC Network.

This argument has been long refuted at least since the days of Carter Phone[85] as evidenced by the profound network changes that have evolved since that time, including the success of facilities-based long distance competition and likewise in the global interconnections of the Internet today. All of which has occurred without the "sky is falling" myths of the ILECs coming true. It is exceedingly likely that SBC Connecticut's claims that the HFC Network is not capable of providing telecommunications services without significant modification or fantastic expense on its part are not true. At the least, the Department will have the opportunity in phase two of the Gemini Docket to examine SBC Connecticut's claimed expenses regarding network implementation and judge them at that time, subject to a full hearing with the parties' involvement.

The fact that the HFC Network has been abandoned and is being incrementally dismantled by SBC Connecticut in the course of its ordinary business,[86] was correctly determined to be irrelevant under the particular circumstances in this case as to whether the plant is "used" by SBC Connecticut at this time, for purposes of unbundling. The conditions of SBC Connecticut's business plan, which it again is attempting to impose on all potential competitors, which may have properly precipitated the relinquishment some years ago of its obligations relating to the HFC Network, are not identical to those of Gemini today.

The truth of this is most easily demonstrated by the fact that Gemini is clearly

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[85] *Carter v. American Tel. & Tel. Co*., 365 F.2d 486, 494-95 (U.S. App. 5th Cir. , 1966). "The Federal Communications Commission (the Commission) has the power to order a telephone company to provide additional facilities for the performance of its duties as a public utility, if such addition is in the interest of public convenience and necessity or the expense involved therein will not impair the ability of the carrier to perform its duty to the public. 47 U.S.C.S. § 214(d)."

[86] *E.g*., when a pole is damaged and requires replacement, the HFC Network elements present are dismantled, discarded, and not replaced. This continued activity is permitted pursuant to the terms of a settlement reached by the parties to this case in this Court on April 15, 2003.

ready and willing to lease the property in its entirety and at its own expense for commercial narrowband use, as allowed by federal law as interpreted by the TRO. If, to use FCC's analogy,[87] this were merely an unused spool of cable lying dormant in a warehouse,[88] it is highly unlikely that Gemini would be interested in pursuing the matter to the extent it has in the Gemini Docket. This highlights the wisdom of the statutory structure: Congress and the FCC certainly never intended for incumbent local exchange carriers such as SBC Connecticut to subsidize entry into the market by potential competitors to an absurd degree. The Department has followed this federal policy to the letter in the Gemini Decision and it remains for phase two of the docket for cost implications to be evaluated pursuant to a full hearing and due process.

Again, contrary to SBC Connecticut's anxious contentions, Gemini has demonstrated a commitment to this project with effort and finances well in excess of that displayed by SBC Connecticut, which of course abandoned the facilities and is stripping it away through attrition. While SBC Connecticut claims that Gemini's promises are essentially worthless and that it could be left with expenses without reimbursement, the OCC would note that the Department is well-versed in controlling promises made by regulated utilities. Finally, the interconnection agreement between the parties required by the Gemini Decision should also provide ample opportunity for the parties to contractually gain comfort in the boundaries of their obligations to one another.

As for the "qualifying services" required by the TRO that Gemini must provide in

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[87] UNE Remand Order, ¶¶327 and 328.

[88] In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696, 325-28 (1999) ("Third Report and Order"). In Gulf Power Co. v. FCC, 208 F.3d 1263, 1278 (11th Cir. 2000), the Eleventh Circuit held that dark fiber is "bare capacity" and accordingly does not constitute a "telecommunications service." This issue is distinct from the issue at hand of whether unused capacity in the form of the HFC Network constitutes a "network element." See MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., 112 F. Supp. 2d 1286, 1295 n.12 (2000).

order to qualify to provide broadband services, these are basically telecommunications services that have been traditionally the exclusive or primary domain of the ILECs. [89] The progression is simple and clearly understandable in spite of the fog attempted to be spread across it by SBC Connecticut: once a requesting carrier has obtained access to a UNE in order to provide a qualifying service, the potential competitor may use that UNE to provide any additional services, including non-qualifying telecommunications and information services.[90] Of course this procedure fits perfectly with the state and federal public policy goals of utilizing legacy equipment, promoting investment in advanced services, and creating bundles of local, long distance, international, information, and other services tailored to the customer. [91]

Gemini has put its money where its mouth with a genuine commitment to this venture by venturing to singly create a competitive market in this state by expending effort and finances well in excess of that displayed by SBC Connecticut, which of course abandoned the facilities.[92] While SBC Connecticut may have legitimate concerns regarding reimbursement for any expenditures it may make to upgrade various facets of the HFC Network, the market for telecommunications is as vibrant today as in any point in its history, in spite of the recent financial turmoil it has experienced. It is apparent that there exists a market for this "useless" and abandoned asset, and SBC Connecticut is obligated by law to lease it to qualified applicants.

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[89] TRO, ¶ 135. Relative to "qualifying services," the FCC has determined that in order to gain access to UNEs, carriers must provide qualifying services using the UNEs to which they seek access. Those services include local exchange service, such as POTS and access services, such as xDSL and high capacity circuits.

[90] TRO, ¶143.

[91] TRO, ¶146. *See also* C.G.S. § 16-247a.

[92] Gemini Reply Comments, September 26, 2003, in which it committed to provide voice-grade narrowband services, including POTS, over the HFC Network once unbundled.

SBC Connecticut is now regulated by alternative regulation and portrays itself as innovative and creative in the business world: this is an opportunity to show off that prowess. At the least, Gemini is a very attractive fish on the hook: it is now a matter of reeling it in and reaping revenues from an abandoned property. That qualifies as making lemonade from lemons, certainly a better course of action for SBC Connecticut than the otherwise sour arguments put forth in this case.

VII. Conclusion

This case is clear: an abandoned network hangs from poles across Connecticut and an entity is willing and able to finance and utilize that plant for the purposes for which it was intended. At base, Gemini is authorized to do so pursuant to state law through the certification process and by federal law through recent pro-competition findings at the FCC, the TRO. The Gemini Decision was properly decided on firm and express legal and policy grounds, and it should be permitted by the Court to proceed on schedule.

Consequently, the Gemini Decision reflects the public policy goals of Congress and the 1996 Telcom Act, and serves to properly reduce the market barriers to entry faced by potential competitors, as well as the societal costs of unbundling. This squarely rests on the policy concerns enunciated by the FCC in the TRO in order to ensure investment in advanced telecommunications infrastructure while preserving a market in the narrowband arena to allow new entrants the opportunity to gain customers and begin the process of developing market share.

The Gemini Decision furthers the C.G.S. §16-247(a) goals of Connecticut to

promote the development of effective competition, facilitate the efficient development and deployment of an advanced telecommunications infrastructure and encourage the shared use of existing facilities. As the OCC stated several times during the Gemini Docket, unbundling this particular facility will provide benefits for all parties by providing competitive pressures on the market, improving service quality and possibly lower rates for consumers, quickly expand the ability of Gemini and other potential competitors in expanding its network and services, and provide revenue to SBC Connecticut from this abandoned network.

The FCC should deny SBC Connecticut's Emergency Request for Declaratory Ruling and Preemption.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Comments was mailed, commercial overnight courier, or by U.S. Postal Service first-class mail, postage prepaid, this 4th day of March 2004, in accordance with Section 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, as follows:

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