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

INITIAL COMMENTS OF
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SUMMARY

SBC requests the Commission to discard through preemption a reasoned and detailed *Final Decision* of the Connecticut Department of Public Utility Control ("DPUC") requiring the unbundling of SBC's hybrid fiber-coaxial ("HFC") network. SBC has utterly failed to meet the high burden that would justify preemption of the DPUC's pro-competitive *Final Decision.*

SBC claims that the DPUC's *Final Decision* should be preempted because the HFC facilities are not network elements or part of the SBC network. These arguments fly in the face of the requirements of the Act as applied by the FCC. SBC further asserts that the FCC explicitly decided that facilities like the HFC network need not be unbundled. That argument is a clear misreading of the *Triennial Review Order* SBC claims preemption is justified because Gemini is not now providing "qualifying services." There is no such precondition required by the Act or the FCC Finally, SBC asserts that preemption is justified because the DPUC based its *Final Decision* solely on Gemini's business plan and needs. The DPUC properly considered these among a number of factors in ordering SBC to unbundle the HFC network

Gemini first formally sought nondiscriminatory UNE access to SBC's HFC network in June 2002. After a lengthy proceeding at the DPUC, the *Triennial Review Order* confirmed Gemini's right to unbundled access to the HFC network The recent decision of the D.C. Circuit Court vacating and remanding portions of the *Triennial Review Order* does not alter the analysis performed by the DPUC and, in fact, buttresses Gemini's right to unbundled access to the HFC network. The unbundling ordered by the DPUC is precisely the type of result envisioned by the Commission in the *Triennial Review Order* and the D.C. Circuit Court. State utility commissions are charged with the regulation of UNEs not on the national list, especially where the unique circumstances of individual states and markets require the expertise of the state

commission. This case presents such unique circumstances as intended by the Commission to be dealt with at the state level. No other ILEC in the country owns an HFC network that was intended to replace its traditional copper loop facilities. The Commission should not involve itself in such matters of purely local concern.

The DPUC is the only regulatory body that has the knowledge and expertise to make determinations involving SBC's abandoned HFC network. The *Triennial Review Order* contemplates that the DPUC will embrace such determinations and in so doing promote the competitive goals of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (collectively, the "Act") and incent investment in new technologies and advanced services. These goals have been further reinforced by the D.C. Circuit Court's recent decision concerning the *Triennial Review Order*. Unbundling the HFC network is the only way to fulfill these goals and deliver the benefits of competition to Connecticut residents and small businesses.

Gemini's unbundling request received the support of the Connecticut Office of Consumer Counsel and the Connecticut Attorney General. Despite the recognition by all parties to this proceeding of the benefits of unbundling the HFC network, including the benefits to SBC vis-a-vis the receipt of revenues for abandoned and useless plant, SBC has fought the unbundling of its HFC network in order to prevent competitive entry and maintain its *de facto* monopoly status. There is absolutely no justification for Commission preemption of the DPUC's *Final Decision*. In fact, a careful review of the DPUC's *Final Decision* and the history of the HFC network reveals that unbundling of the HFC network is precisely what the Commission envisioned in crafting the *Triennial Review Order* and implementing Congress' competitive mandates. Unbundling of the HFC network furthers the policy goals recognized by the D.C. Circuit of encouraging investment in broadband technology.

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INITIAL COMMENTS OF GEMINI NETWORKS CT, INC.

GEMINI NETWORKS CT, INC. ("Gemini"), acting through Counsel and in accordance with the Commission's Public Notice, Report No. DA 04-377,[1] hereby files its Initial Comments in this proceeding

I. BACKGROUND AND INTRODUCTION

Gemini is a competitive local exchange carrier ("CLEC") licensed by the Connecticut Department of Public Utility Control ("DPUC") to provide telecommunications services throughout the State,[2] including facilities-based authority to provide wholesale telecommunications and facilities-based and resold local exchange services throughout Connecticut [3]

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1 *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*")

2 Decision, Docket No 99-03-12, Application of Gemini Networks, Inc for a Certificate of Public Convenience and Necessity, Sept 1, 1999 (CT DPUC), Decision, Docket No 00-10-20, Application of Gemini Networks, Inc to Expand its Certificate of Public Convenience and Necessity, Jan 17, 2001 (CT DPUC), Decision, Docket No 01-06-22, Application of Gemini Networks, CT, Inc To Expand its Certificate of Public Convenience and Necessity, Sept 28, 2001 (CT DPUC).

3 Id

Pursuant to the DPUC's interpretation of Connecticut state law, all CLECs are required to provide local exchange service within five years of the date of their certification.[4] To fulfill this requirement, in June of 2002 Gemini sought to negotiate with SBC, pursuant to § 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Telcom Act") (collectively, "Act"), for the use of certain unbundled network elements ("UNEs") consisting of SBC's by then abandoned HFC network Those facilities remain as part of SBC's deployed telecommunications network, occupying the last usable space on many of the poles in the areas in which the HFC network was constructed.[5] SBC adamantly refused to negotiate with Gemini, arguing that the HFC network was not subject to unbundling and did not constitute a UNE for purposes of § 252 and Conn Gen Stat § 16-247b. Accordingly, on January 2, 2003, Gemini asked the DPUC to declare that the abandoned HFC network was subject to unbundling pursuant to state and federal law and require that SBC recommence negotiations for unbundled access to the HFC network pursuant to applicable pricing and regulations.

On December 17, 2003, the DPUC issued its *Final Decision* finding that the HFC network is a part of SBC's network and is subject to unbundling pursuant to state and federal law The DPUC also concluded that, in order for Gemini to gain access to the HFC network

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[4] Decision, 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 Telecommunications Service Policy Issues and the Definition and Components of Basic Telecommunications – Reopening, Feb. 26, 1999 (CT DPUC)

[5] For a complete description and history of the HFC network at issue, see the DPUC Decision, 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, Dec 17, 2003 at 24-28 (the "*Final Decision*") The *Final Decision* is the subject of SBC's Emergency Request for Declaratory Ruling and Preemption and a copy is Exhibit A to SBC's filing

UNEs. Gemini must negotiate and enter into an interconnection agreement with SBC pursuant to §§ 251 and 252 of the Act.

On January 29, 2004, SBC appealed the *Final Decision* to the Connecticut Superior Court for the Judicial District of New Britain. As part of that appeal, SBC sought a stay of the *Final Decision* Prior to the stay being heard, on February 10, 2004, SBC also filed its Emergency Request for Declaratory Ruling and Preemption with the Commission.

On February 11, 2004, in accordance with the *Final Decision*, SBC and Gemini met to commence negotiations for the HFC network UNEs On February 17, 2004 the Connecticut Superior Court denied SBC's request for a stay of the *Final Decision* and set the proceeding on an expedited schedule, with a final ruling on state law issues scheduled to be issued by April 17, 2004 Accordingly, Gemini and SBC are supposed to continue to negotiate with respect to the HFC network UNEs However, SBC has been and continues to be a reluctant negotiator, relying on its failed legal arguments to stall negotiations, frustrate the process and protect its continuing virtual monopoly over the provision of local exchange services to the residents and businesses of Connecticut.

II. THE COMMISSION MUST EXERCISE ITS PREEMPTIVE AUTHORITY WITH DUE CARE

The Commission's exercise of preemption authority is governed primarily by two distinct, but related, standards[6] Section 253 of the Act directs the Commission to preempt any state or local requirement that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," subject to limited exceptions as set forth in the statute. This standard is inapplicable in this case, as the *Final*

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[6] *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 Regulatory Act of 1995* (Memorandum Opinion and Order), 13 FCC Rcd 3460, 3476-3487 (1997)

Decision furthers the ability of Gemini to offer its telecommunications services and does not prohibit SBC from offering its own telecommunications services, which it is already doing.

However, the Commission has the general power to preempt in situations where there exists a conflict between federal and state law. Such a conflict may arise "where compliance with both federal and state law is in effect physically impossible"[7] or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[8] SBC must demonstrate that the facts of this case meet this second standard to warrant Commission preemption of the DPUC's *Final Decision.*

Historically, the Commission does not exercise its preemption authority recklessly, but only with concrete evidence of a conflict between state and federal law. Moreover, it must consider exercise of that power here in light of the pro-competitive mandates set forth in the Act, not decisions long-preceding the clear articulation of those policies.

As demonstrated below, the *Final Decision* precisely tracks this Commission's policy and analyzes that policy as most recently refined in the Commission's *Triennial Review Order.*[9] The *Final Decision* also stands as furthering the pro-competitive policies of the Commission in light of the recent D.C. Circuit Court opinion. The DPUC has made a pro-competitive determination which is fully consistent with the policies and framework of Congress, the Commission, the D.C Circuit Court and harmonious state law provisions. This Commission

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7 Id quoting Louisiana Pub Serv Comm'n v FCC, 476 U S 355, 368 (1986)

8 Id 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

9 Report 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*"), *portions vacated and remanded*, United States Telecom Ass'n v. FCC, No 00-1012, Slip Op March 2, 2004 ("D C Circuit Court Decision") The CT DPUC reopened the underlying administrative proceeding prior to issuing its *Final Decision* for the purpose of having the parties brief the impact of the *Triennial Review Order* on the issues raised in the proceeding See *Final Decision* at 2-3, n 6

must proceed cautiously and review all of the relevant facts and circumstances underlying that *Final Decision* before taking the drastic step of tossing it aside. Such a review will establish that the *Final Decision* is in harmony with federal law and policy. SBC has not justified the Commission's exercise of its preemptive authority in this case.

III. SBC'S PETITION IS WHOLLY WITHOUT MERIT

In reviewing SBC's petition and the DPUC's *Final Decision* in this matter, the Commission must consider several crucial and unique factors. **First**, SBC's HFC network is unique No other ILEC in the country owns an HFC network that was constructed for the provision of ubiquitous voice, data and video services. **Second**, because of the uniqueness of the HFC network, it is not surprising that no law or regulation, including the Commission's *Triennial Review Order* or the D.C Circuit Court decision, deals explicitly with unbundling of such facilities Thus, to fulfill its responsibilities, the DPUC was required to look not only to what Congress, the Commission and the courts have done with respect to unbundling, but also to the policies behind those actions.[10] **Third**, the HFC network has been abandoned by SBC. The HFC network, funded in large part by telephone company ratepayers and approved by the DPUC based primarily on SBC's promises to deliver advanced voice, data and video services to the entire State of Connecticut, has been deliberately left in large part to rot on SBC's poles.

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[10] Significantly, the *Triennial Review Order* contains substantial discussion of policy and analysis by the Commission addressing the application of deregulatory policies to specific circumstances In crafting the *Triennial Review Order*, the Commission was guided by the policy mandates of the Telcom Act Section 7(a) of the Telcom Act states that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public " 47 U S C. § 157(a) The Commission sought to achieve three main goals through the issuance of the *Triennial Review Order* (1) further open the telecommunications market to competition; (2) recognize the barriers faced by new entrants as well as the societal costs of unbundling and (3) provide an incentive for investment in advanced telecommunications infrastructure by both incumbent LECs and competitive LECs *Triennial Review Order* at ¶ 113

A. The DPUC Retains Its State Right To Require Unbundling Of The HFC.

The Commission's *Triennial Review Order* explicitly confirmed the DPUC's right to require unbundling of the HFC Network pursuant to state law. The *Triennial Review Order* reaffirmed the Commission's interpretation of 47 U.S.C. § 251(d)(3)[11] as preserving state authority to require unbundling, so long as the exercise of that authority does not conflict with the Act, as interpreted by the Commission, or substantially prevent the Commission's implementation of the Act.[12] The Commission explicitly rejected the arguments of ILECs, including SBC, that states are preempted as a matter of law from making unbundling determinations.

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.[13]

The D.C Circuit Court did not remand those portions of the *Triennial Review Order* concerning state unbundling rights, nor could it have, as those rights are granted by statute.[14] The only caveat on the DPUC's independent unbundling authority is that any such unbundling

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11 47 U S C § 251(d)(3) provides
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

12 *Triennial Review Order* at ¶¶ 180, 191 In discussing the Supreme Court's ruling in AT&T Corp v Iowa Utilities Board, the Commission noted that "[n]o party challenged the Commission's conclusion that it could authorize the states to apply those standards to require unbundling of additional network elements under federal law" *Triennial Review Order* at n 586

13 *Triennial Review Order* at ¶ 192

14 The D C Circuit Court did state that the language in the *Triennial Review Order* predicting the outcome of certain preemption proceedings concerning state unbundling requirements was not ripe for review D C Circuit Court Decision at 60-61

must be consistent with the requirements of § 251. Gemini's request to unbundle the HFC network is consistent with § 251 and the Commission's *Triennial Review Order* and advances the goals articulated by the Commission, as further discussed below. Importantly, the Commission has not found that there is no impairment with respect to ILEC-owned HFC plant. Nor has the Commission otherwise declined to require the unbundling of ILEC-owned HFC plant on a national basis The uniqueness of this plant provides the rationale for it not being previously addressed by the Commission or the courts.

B. The DPUC's Decision Is Consistent With Federal Law

The DPUC treated Gemini's request to unbundle the HFC network as a request for unbundled access to local loops Although the *Triennial Review Order* deals extensively with the subject of unbundling of local loops, its focus is on the unbundling of traditional network architectures and loops including traditional copper loops, fiber-to-the home ("FTTH") and hybrid copper/fiber loops The *Triennial Review Order* does not specifically address the unbundling of the type of loop at issue in this proceeding – a hybrid-fiber coaxial ("HFC") loop [15] However, this Commission recognized HFC as a form of local loop in the *Triennial Review Order* [16]

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[15] The *Triennial Review Order* discusses hybrid copper/fiber loops, which are distinct from the HFC loops at issue in this proceeding The D C Circuit Court upheld those provisions of the *Triennial Review Order* dealing with hybrid copper/fiber loops A hybrid copper/fiber loop is composed of twisted pair copper facilities, usually two-wire or four-wire analog voice-grade copper cable See, e g , *Triennial Review Order* at ¶ 249 A hybrid copper/fiber loop is a traditional copper loop which has some fiber deployed in the loop, short of FTTH (i e, fiber-to-the-curb, fiber-to-the-node, fiber-to-the-building) Id at n 811 In contrast, HFC is comprised of coaxial cable, bundled with fiber The Commission considers only loops consisting of fiber optic and copper cable to be a hybrid loop *Triennial Review Order* at n 811 Irrespective of this distinction, Gemini has not sought unbundling of any fiber related to the HFC network. Gemini is seeking access only to the coaxial facilities to provide qualifying, voice-grade services Thus, even under the Commission's unbundling analysis for hybrid copper/fiber loops, Gemini is entitled to access, so long as Gemini meets the impairment test, which, as discussed below, it does See *Triennial Review Order* at ¶¶ 285-297

[16] "[C]able technologies provide loop substitutes to support services that compete with incumbent local services" *Triennial Review Order* at ¶ 228, "[T]he cable infrastructure serves as a replacement for loops" Id at ¶ 229

Because the *Triennial Review Order* did not address the unique circumstances of the HFC network, in order to require unbundling of the HFC network, the DPUC had to ensure that such unbundling meets the goals of the Act and the State of Connecticut Unbundling the HFC network meets all of these goals, and, in fact, the DPUC's failure to require such unbundling would have been in contravention of the policy goals articulated by the Congress, Commission and the State of Connecticut

1 "Used" vs "Capable of Use".

SBC's first specific ground for preemption is that the HFC network does not constitute a network element because it has never been used and is not readily capable of being used to provide telecommunications services.

In the *Triennial Review Order*, the Commission settled once and for all the issue surrounding the definition of network element and whether such elements must be used, as argued by SBC, or merely be capable of being used to provide such services, as argued by Gemini. The Commission clearly agreed with Gemini:

> 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**. We note that, by using the terms "features, functions and capabilities," the definition itself uses broad and expansive terminology in defining its scope. For example, the term "capability" is defined in Webster's New College Dictionary as "potential ability." Limiting a requesting carrier's ability to obtain access only to facilities or equipment (and associated features, functions and capabilities) actually used in the provision of a telecommunications service would require a reading in tension with this definition.[17]
>
> * * * * * * * * * *
>
> With regard to the purposes of the Act, as mentioned above, Section 251(d)(2) requires the Commission to consider whether the failure to provide access to a particular network element would impair the ability of a requesting telecommunications carrier "to provide the services that **it** seeks to offer." To

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[17] *Triennial Review Order* at ¶ 59 (internal citations omitted and emphasis supplied).

> interpret the definition of "network element" so narrowly as to mean only facilities and equipment actually used by the incumbent LEC in the provision of a telecommunications service also would be at odds with the statutory language in section 251(d)(2) and the pro-competitive goals of the 1996 Act. Such a finding would deny competitive LECs any certainty about the availability of a network element in a given market unless and until a determination was made about whether the incumbent LEC is actually using that network element in its provision of a telecommunications service in that market. Providing requesting carriers with access only to those facilities and equipment actually used by the incumbent LEC would also lead to such unreasonable results as preventing a spare loop that is capable of providing second-line service from being considered a "network element" if the customer were not purchasing service over that line from the incumbent LEC. Finally, **an alternative reading of the statute would allow incumbent LECs to prevent competitors from making new and innovative uses of network elements simply because the incumbent LEC has not yet offered a given service to consumers. Such a result would stifle a competitor's ability to innovate and could hinder deployment of advanced telecommunications services.**[18]

Yet, despite this clear, definitive ruling, SBC continues to argue in part that its HFC network is not subject to unbundling because it is not being used [19] The DPUC appropriately interpreted state and federal law to mean that network elements capable of being used to provide telecommunications services must be unbundled, irrespective of whether SBC has ever used them, is using them, or ever intends to use them for telecommunications services. SBC's continued arguments on this point are specious.

SBC now concedes that a facility (including the HFC network) is a network element if it is "readily" capable of being used to provide telecommunications services. SBC provides no citation for the addition of the qualifier "readily" to the passage just cited by Gemini. It does not appear in that clear explanation of the "capable-of use" standard.

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[18] Id. at ¶ 60 (1st emphasis in original, 2nd emphasis added)

[19] SBC has also argued, both before the DPUC and in its Emergency Request to this Commission, that network elements must actually be used by the ILEC in order to be unbundled SBC has offered no support for its contention Such an argument is misplaced. If SBC's argument is accepted, dark fiber could not be unbundled The HFC network is clearly capable of use for telecommunications purposes Identical HFC architectures are currently successfully utilized to provide telecommunications services, including voice-grade POTS, by broadband service providers and legacy cable companies

SBC claims its "readily capable" standard is justified by the *Triennial Review Order* admonition that ILECs cannot be required to "alter substantially" their networks, in order to provide access to unbundled network elements. SBC claims that since it is being required by the *Final Decision* to effectively revitalize a network that it let deteriorate, the HFC network is not "readily capable" of being used to provide telecommunications services and therefore cannot be a network element

First, Gemini did not request that SBC alter the HFC network, just give it unbundled access to the coaxial portion thereof that remains strung on SBC's poles throughout the State. Second, sanction of SBC's logic would provide a clever device for any ILEC to avoid unbundling When requested to make available unbundled access to a facility, just delay and deliberately let the facility go to seed Then argue that it is not "readily capable" of use for telecommunications services and therefore is not a "network element" required to be unbundled. Such a tactic hardly comports with the pro-competitive requirements of the Act. Finally, as noted in greater detail below, Gemini is prepared to invest substantial sums in the HFC network to reverse the effects of SBC's deliberate neglect and bring competitive services to the residents and businesses of Connecticut.

2 The HFC Network **Is** Part Of SBC's Network.

Next SBC alleges that the DPUC's *Final Decision* must be preempted because the HFC network is not part of SBC's network and therefore cannot be required to be unbundled.[20] This

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[20] Again, SBC has provided no evidence that the HFC plant is not part of its network, only conclusory and self-serving statements The evidence on the record before the DPUC and upon which the DPUC relied clearly indicates that the HFC plant is part of SBC's network and was always intended to be part of the network On March 18, 2003, Gemini requested that the DPUC take administrative notice of all of the materials filed in each of four dockets (1) Docket No 94-10-03 (concerning the deployment of the network), (2) Docket No 95-03-01 (concerning SBC's alternative regulation plan), (3) Docket No. 96-01-24 (concerning SBC's affiliate's licensure as a CATV provider utilizing the HFC Network), and (4) Docket No 00-08-14 (concerning the relinquishment of SBC's affiliate's CATV license). See Gemini's Request for Administrative Notice and Motion to Lift Protective Orders attached hereto as Exhibit 1 On March 27, 2003, the CT DPUC granted Gemini's motion and took administrative notice of all of the materials in those

is the most implausible of SBC's arguments. The HFC network was and is part of SBC's network SBC is, in fact, currently using the fiber portions (the "F" in "HFC") of the HFC network in its Project Pronto to provide telecommunications services to consumers. The HFC network was built to be part of the network and ratepayers funded, and continue to fund, millions of dollars of its costs.[21]

SBC argued before the DPUC that Gemini had not provided evidence that the HFC network is part of SBC's network In fact, SBC provided that evidence itself. In the Gemini case, the DPUC had before it the entire record of every proceeding dealing with SBC's HFC network, from the initial rate case in which it was introduced, to the request for SBC's cable television affiliate's certificate of public convenience and necessity, to the cost allocation docket where it was determined how much of the HFC network would be funded by telephony ratepayers, to the docket through which SBC relinquished its cable television affiliate's franchise.[22] Prior to Gemini requesting unbundled access to the HFC network, SBC never alleged that the HFC network was not part of its network. To the contrary, SBC has until very recently steadfastly maintained that the HFC network was a telephone company asset and part of SBC's telephony network

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four dockets See Response of the DPUC attached hereto as Exhibit 2 All of this evidence, having been reviewed by the DPUC, led the DPUC to conclude that the HFC plant is part of SBC's network

21 Gemini is not privy to the precise amount of money funded by ratepayers for construction of the HFC network However, it is clear that the amount is substantial See Decision, 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 (CT DPUC) Ratepayers continue to fund this abandoned network as much of SBC's present reserve deficiency is predicated on the substitution of HFC for SBC's copper network The DPUC has recognized this anomaly Decision, Docket No 00-07-17, DPUC Investigation of The Southern New England Telephone Company's Alternative Regulation Plan, May 16, 2001 (CT DPUC) In fact, the DPUC has initiated an investigation into these issues. See Docket No 03-01-11, DPUC Review of the Southern New England Telephone Company's Reserve Deficiency

22 See n 20, supra

In its brief in the DPUC docket in which SBC relinquished its cable television license, for example, SBC asserted:

> SPV, as noted, has never owned or built its own cable network; rather, it has always relied on the Telco's HFC telephony network for delivery of its cable services [23]

Two pages later in the same brief, SBC stated.

> Similarly, no provision in the Telecommunications Act of 1996 ("Telecommunications Act") expressly provides the Department with jurisdiction to assign, sell or order the involuntary transfer of the Telco's HFC network to CTTEL Of course, the Telco does not dispute that the Telecommunications Act requires the Telco to provide for interconnection with, and "unbundling" of, certain portions of its telecommunications network to certified local exchange carriers ("CLECs") through interconnection and access to unbundled network elements See 47 U S.C. §251. Yet, the power to provide CLECs such access remains a far cry from the power to take, sell or transfer the Telco's HFC network to third parties for cable TV services, especially when the party does not even have the requisite certification to provide CATV service. The former power exists, with limits, in the Telecommunications Act; the latter power does not.[24]

SBC further emphasized in that brief that "the Telco is currently using the HFC (Tier 3) fiber to provide other telecommunications services . ."[25] It is the coaxial portions of Tier 3 that Gemini sought to have unbundled.

Fortunately, SBC cannot change the facts before the DPUC or before this Commission. The HFC network was constructed and operated as part of SBC's telephone network. As admitted by SBC in DPUC Docket No. 00-08-14, the HFC network is subject to unbundling for use by CLECs. At the time that SBC sought ratepayer funding for the HFC network, it was a full service telephony network. At the time that Connecticut Telephone sought ownership of the

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23 SBC Brief, Docket No 00-08-14, Application of The Southern New England Telecommunications Corporation and SNET Personal Vision, Inc to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity, filed December 29, 2000 at 34 (emphasis added) attached hereto as Exhibit 3

24 Id at 36 (emphasis added, footnotes omitted)

25 Id at 37 SBC reiterated that it is using portions of the Tier 3 fiber in the Gemini case before the DPUC See SBC's response to GEM-2, attached hereto as Exhibit 4

HFC network to provide cable television service, it was a telephony network The Commission cannot permit SBC to assert that it is part of the network when it serves SBC's purpose and then deny that status at the very time that it may first provide a telecommunications benefit to consumers

SBC utilized millions of dollars of ratepayer funds to construct a purportedly state-of-the-art network capable of delivering advanced voice, data and video services. The HFC network was constructed for the sole purpose of replacing SBC's twisted pair copper network.[26] Connecticut's captive ratepayers were promised the delivery of those advanced services and the benefits of competition through construction and operation of the HFC network. SBC seeks to prevent the very consumers who funded large parts of this HFC network from realizing any of the promises made in support of that involuntary funding.

SBC has abandoned the HFC network and, in effect, stranded a major ratepayer investment The DPUC recognized this inequity and ordered SBC to unbundle the HFC network for competitive use in order to allow ratepayers to realize some of the benefits that were promised in exchange for their involuntary support. Gemini is seeking to exercise its rights to access the HFC network to deliver telecommunications services to consumers. At a minimum, ratepayers are entitled to this return on their investment.

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[26] Pursuant to SBC's arguments, if it had stuck with the HFC network and replaced its entire twisted pair copper network with HFC, competitors would not have UNE access to it in Connecticut Cf, *Final Decision* at 38

> Although the HFC network did not develop in the manner envisioned by the Company, it was intended to provide voice services, and therefore, capable of providing telecommunications services If deployment of the I-SNET network had occurred as intended, the Company would have been well on its way to offering telecommunications services over the HFC network The Telco's deployment of that network began prior to the implementation of the Telcom Act and subsequent FCC orders and Connecticut statutes, and as such, the Company would most likely have been required to permit competitors unbundled access to that network if it were fully functional today

3 The HFC Network Is **Not** A Hybrid Loop.

Next SBC asserts that the DPUC's *Final Decision* must be preempted because it is inconsistent with the *Triennial Review Order* requirements concerning hybrid loop facilities. As previously discussed, the HFC network is not a hybrid copper/fiber loop as defined by the Commission. Nonetheless, if an impairment analysis similar to the one performed for hybrid copper/fiber loops is employed, Gemini is entitled to unbundling as required by the DPUC.[27]

In reviewing whether or not to unbundle hybrid loops, the *Triennial Review Order* evaluated three primary factors in an attempt to craft a balanced approach to determine the most appropriate unbundling regime. The three factors are: (1) the costs of unbundling, specifically focusing on whether refraining from unbundling hybrid loops would stimulate facilities-based investment and promote the deployment of advanced telecommunications infrastructure; (2) the effect of alternatives to mandating unbundled access to hybrid loops; and (3) the state of intermodal competition [28]

Factor number one weighs in Gemini's favor, as a failure to unbundle the HFC network will not incent SBC to invest in it. SBC has already abandoned the HFC network. The only way to stimulate investment in the HFC network is to unbundle it and allow Gemini to upgrade the infrastructure in accordance with its plan to offer voice-grade telephony and other advanced services to consumers. The second and third factors also weigh in Gemini's favor, as the DPUC determined that there are few, if any, competitive providers of voice-grade telephony serving mass market customers in Connecticut to speak of.[29]

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[27] The D C Circuit Court Decision did not disturb the Commission's findings with respect to hybrid copper/fiber loops

[28] *Triennial Review Order* at ¶ 286

[29] AT&T has recently announced that it is leaving the local loop market in Connecticut due to higher than normal UNE rates AT&T's notice to the DPUC and its reasons therefor are attached hereto as Exhibit 5

In its review of all three criteria, the Commission stated that the rules would vary based on whether a competitive provider was seeking access for the provision of broadband or narrowband services.[30] The *Triennial Review Order* required the DPUC to analyze the unbundling determination pursuant to the rules governing the provision of narrowband services. as Gemini has requested unbundling of the HFC network for the provision of narrowband, voice-grade telephony services.[31] SBC's arguments to the contrary, Gemini is a licensed retail voice service provider and, as such, is required to provide ubiquitous local exchange service within five (5) years of the grant of its license. Gemini seeks to fulfill that requirement through the use of an unbundled HFC network. [32]

In its analysis of hybrid loops, the Commission determined that, for narrowband services, an ILEC such as SBC must provide access to portions of the hybrid loop.[33] SBC must provide an entire non-packetized transmission path capable of voice-grade services between the central office and customer's premises.[34] Thus, for hybrid loops, competitive providers are entitled to the non-fiber feeder portion of the loop plant. the non-fiber distribution portion of the loop plant, the attached digital line carrier system and any other attached electronics used to provide a voice-grade transmission path between the customer's premises and the central office.[35] Hybrid loops

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30 *Triennial Review Order* at ¶ 287

31 "Narrowband services include traditional voice, fax, and dial-up modem applications over voice-grade loops." Id at n 849

32 Contrary to SBC's allegation that Gemini always intended to provide broadband services over the HFC network and did not "change its tune" until the issuance of the *Triennial Review Order*, SBC's Emergency Request at 21, Gemini stated in its initial petition for declaratory ruling to the DPUC that: "Gemini currently provides Internet Services in parts of Connecticut and seeks a favorable determination in this proceeding in order that it can proceed with the deployment of voice services in accordance with its CPCN." See Gemini's initial petition to the DPUC, attached hereto as Exhibit 6

33 *Triennial Review Order* at ¶ 296

34 Id

35 Id

can reasonably be analogized to the HFC network at issue in this proceeding. Despite the fact that, under a similar analysis performed for the HFC network Gemini is entitled to all of these equivalent portions of the HFC loop, Gemini has requested unbundling of far less.

Specifically, Gemini has requested unbundling of only the coaxial portion of the loop, not the fiber. Moreover, Gemini has not requested unbundling of any customer drops. And Gemini has not requested unbundling of any packetized features, functions or capabilities. With respect to electronics, Gemini has requested unbundling of only those electronics related to the coaxial plant (i e., amplifiers and line extenders). Gemini fully intends to provide the other associated electronics necessary for use of the HFC network on its own Thus, comparing Gemini's request with respect to the HFC network to the Commission requirements for hybrid copper/fiber, the HFC network is still subject to unbundling in accordance with Gemini's request

Moreover, the unbundling of the HFC network also must be evaluated in accordance with the overall policy goals as articulated by the Commission. The Commission sought to achieve three main goals through the *Triennial Review Order*: (1) implement and enforce the Telcom Act's market-opening requirements; (2) apply unbundling with a recognition of the barriers faced by competitive entrants as well as the societal costs of unbundling; and (3) establish a regulatory foundation that creates an incentive for investment in advanced telecommunications infrastructure by both incumbent LECs and competitive providers.[36] Unbundling of SBC's HFC network satisfies all of these goals

Unbundling of the HFC network will open the market for residential telephony competition, the least penetrated market for telecommunications services in Connecticut.[37] Even

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[36] *Triennial Review Order* at ¶ 113, cited and followed by the DPUC in its *Final Decision* at 2, n.5

[37] The market in Connecticut has grown even smaller since the announcement that AT&T is leaving the local loop market See n 29, supra

considering the use of intermodal (i e., cable company) competition for services in this market, the Commission found that the vast majority of cable companies are using their HFC systems for the deployment of local broadband services in the form of high-speed Internet access via cable modem, not telecommunications services.[38] Although some of these cable companies have begun utilizing their HFC systems for the provision of two-way voice telephony services, the Commission noted that, as of June 2001, only 1% of all local access lines terminated over coaxial cable facilities.[39] Thus, there is little, if any, meaningful facilities-based competition for mass market voice services using such facilities.

Unbundling of the HFC network will also address the competitive barriers faced by a new entrant, such as Gemini, which would otherwise have to construct a costly and duplicative network. The enormous sunk costs and first-mover advantages of SBC create a barrier to entry that Gemini cannot overcome. The need for unbundling the HFC network to overcome this barrier and remedy the undue advantages gained by SBC is made even more necessary by the facts unique to this proceeding – namely that the HFC network **HAS BEEN ABANDONED** by SBC and that, through a lease of these facilities to Gemini, SBC could earn a return on this abandoned network that Connecticut's ratepayers funded. Moreover, the HFC network is currently occupying the last usable space on many of the utility poles, requiring a competitive entrant such as Gemini to pay exorbitant make-ready costs and to replace poles in order to construct duplicative facilities.

Finally, unbundling of the HFC network furthers the goals of the Commission, embraced by the D C. Circuit Court, and the State of Connecticut of encouraging the deployment of

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[38] *Triennial Review Order* at ¶ 229

[39] Id at n 694

advanced facilities.[40] In refusing to permit unbundling of certain fiber facilities (FTTH, some fiber portions of hybrid copper/fiber networks, OCn capabilities, etc.), the Commission sought to encourage ILECs to invest in such advanced networks.[41] The encouragement is found in the promise that if an ILEC invests in an advanced network, it will be able to reap the rewards of such an investment and not have to lease it out to competitors. The unique facts of this proceeding favor Gemini with respect to this goal. SBC has abandoned the HFC network Refusal to unbundle the HFC network will not spur SBC to further invest in it; it has already made and abandoned that investment. SBC takes the position that, from its perspective at least, HFC is a dead technology This unique situation of a deployed, but abandoned network directly contrasts with SBC's argument[42] that the DPUC's *Final Decision* will "blunt the deployment of advanced telecommunications infrastructure" by ILECs and the incentive for ILECs to invest in their own facilities

In contrast, Gemini is prepared to invest in the elements of the HFC network that it will use. Gemini has explicitly stated its intention to upgrade, rebuild and repair those elements.

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40 As stated by the D C Circuit Court

> After all, the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate Rather, its purpose is to stimulate competition - preferably genuine, facilities-based competition Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling

D C Circuit Court Decision at 31

41 We therefore hold that the Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment

D C Circuit Court Decision at 37

42 SBC Emergency Request at 19

Gemini intends to interconnect the HFC network with its own HFC network and then continue building out its HFC infrastructure throughout the State of Connecticut.[43]

The Commission noted that, with HFC networks, significant operational and technical issues must be resolved for the provision of voice telephony.[44] The Commission stated that it is unable to predict at what point cable telephony will be deployed on a widespread and ubiquitous basis due to these technical and operational difficulties.[45] Gemini has resolved those issues in its own HFC network and is prepared to invest in the technical and operational upgrades necessary to deploy mass market telephony services to Connecticut consumers and businesses now. To do so, Gemini needs access to SBC's unused, abandoned infrastructure already in place.

4. Gemini Has Committed To Providing Qualifying Services.

SBC also contends that preemption is warranted because Gemini is not now providing "qualifying services"[46] within the meaning of the Act. Despite SBC's unsupported allegations to the contrary,[47] Gemini has provided ample support for the fact that it will provide qualifying services over the HFC network. Gemini is a licensed CLEC with a DPUC requirement to provide ubiquitous local exchange service within five (5) years of the grant of its license. Gemini currently has on file with the DPUC a tariff for qualifying POTS service [48] The DPUC is experienced in revoking the licenses of CLECs and otherwise penalizing those that do not fulfill

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43 See *Final Decision* at 10, 37

44 *Triennial Review Order* at ¶ 229

45 Id

46 The D C. Circuit Court has vacated the Commission's distinction between "qualifying services" and "non-qualifying services" as it relates to special access and Enhanced Extended Links ("EELs") D C Circuit Court Decision at 56-58

47 See SBC Emergency Request at 21

48 See n 2, 4, supra

their license requirements. Moreover, SBC's argument that Gemini is not currently providing a qualifying service hardly amounts to a valid reason for preempting the DPUC's *Final Decision*. The DPUC's *Final Decision* is premised on the provision of qualifying narrowband services and this Commission has no evidence before it to suggest that the DPUC will not enforce its own orders

SBC's argument that Gemini must provide qualifying services *prior to* seeking unbundling of SBC's facilities[49] is absurd. There is nothing in the *Triennial Review Order* that dictates such a precondition. Acceptance of SBC's argument would essentially preclude all start-up CLECs from seeking access to UNEs

5 The CT DPUC's Decision Is **Not** Based On Gemini's Business Plan.

SBC next claims that preemption is appropriate because the DPUC's *Final Decision* is based solely on Gemini's business plan. But Gemini is not seeking access to the HFC network based on its specific business plan, as the term "business plan" is defined by the Commission. In rejecting an impairment determination based on a specific business plan, the Commission stated:

> [A] subjective, individualized approach could give some carriers access to elements but not others, and could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs. Providing UNEs to carriers with more limited business strategies would also disregard the availability of scale and scope economies gained by providing multiple services to large groups of customers.[50] Thus, an entrant is not impaired if it could serve the market in an economic fashion using its own facilities, considering the range of

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[49] See SBC's Emergency Request at 21

[50] For example, a carrier could claim that it would be unable to pursue a strategy of providing local exchange service to all people with the first name "Sam" Because of the relatively small number of people with that name, the cost of providing such service would likely be very high, and thus entry would be impossible without UNEs However, an entrant could achieve a much lower average cost of service while serving these people, by pursuing a business strategy of providing service to all potential customers in the market. It might be able to further lower its costs by offering other services, such as vertical features and data services Our determination is thus based on an entrant providing the full range of services and to all customers supported by the marketplace Our analysis must, however, take into account diseconomies of scale and scope that might exist, such as limitations on what services customers are willing to purchase as a bundle from a single provider (Footnote in original, citations omitted, emphasis added)

> customers that could reasonably be served and the services that could reasonably be provided with those facilities.[51]

In fact, unbundling of the HFC network will fulfill the very goals that this Commission has articulated: serving the most mass market customers with as many services as possible. Gemini is not seeking unbundling for a specific business plan, but is seeking unbundling of a local loop to serve all comers with a suite of telecommunications services. The HFC network is equivalent to a local loop and it was designed that way and for that purpose. Clearly, it is a different kind of local loop than the traditional copper and hybrid networks used by virtually all ILECs and addressed by the Commission in the *Triennial Review Order*. Nonetheless, it is part of a telephony network and comprises a local loop facility. SBC cannot use the uniqueness of the HFC network to shield it from unbundling obligations, especially when the HFC Network has been abandoned and declared to be valueless by SBC The DPUC very carefully considered SBC's business plan arguments and rejected it, stating:

> The Department is not persuaded by the Telco's argument. The FCC has indicated that it would consider various evidence as part of its impairment analysis. Specifically, the FCC indicated that it would give consideration to cost studies, *business case analyses*, and modeling if they provide evidence at a granular level concerning the ability of competitors economically to serve the market without the UNE in question In light of that discussion, it is clear to the Department that individual business cases may hold some weight in an impairment analysis and not be totally rejected as alleged by the Telco. As indicated above, Gemini has presented strong evidence (in addition to a business case analysis) that it would be impaired without access to the Telco HFC network. In the opinion of the Department, while Gemini has provided convincing evidence of impairment, its business case merely adds more weight to that finding; and therefore, the Telco's argument is dismissed.[52]

SBC's discussion of the Commission's strategy of generally restricting access to broadband facilities to spur investment is equally without merit because that discussion ignores

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51 *Triennial Review Order* at ¶ 115 (emphasis added, footnote in original)

52 *Final Decision* at 43, n 143 (citations omitted, emphasis in original)

the underlying policy behind the Commission's goal. As discussed previously, the policy behind restricting access to ILECs' broadband facilities, such as FTTH and hybrid loops, is to stimulate ILECs to invest in those facilities No such stimulation would be provided by refusing to allow a CLEC access to a facility such as the HFC network. SBC has abandoned the HFC network and is chopping it up and discarding it as scrap. In order to fulfill the policy and mandates of the Commission (and the Connecticut General Assembly) of promoting investment in advanced networks and facilities and delivering advanced services to consumers, the DPUC required SBC to unbundle the HFC network so that Gemini and other potential competitors may invest in and upgrade the HFC network for the benefit of the Connecticut telecommunications consumers and small businesses who funded it.

6. Impairment Analysis

As demonstrated above, the DPUC has clear authority to require the unbundling of additional network elements beyond the national list The Commission appropriately determined that such unbundling must be consistent with the federal framework set forth in the *Triennial Review Order*, including the "impairment" test.[53] There is no dispute that the "necessary test" is inapplicable to the HFC network [54]

The Commission reaffirmed in the *Triennial Review Order* that a carrier like Gemini is impaired when lack of access to an ILEC's network elements poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market

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[53] The D C Circuit Court remanded the subdelegation of the impairment standard, but did not review the impairment standard as a general matter, other than to make a few observations. D C Circuit Court Decision at 24 Nonetheless, Gemini is confident that, under any impairment framework established, Gemini will be impaired without access to the HFC network, especially in light of the uniqueness of the HFC network and the truly granular impairment analysis performed by the DPUC

[54] *Triennial Review Order* at ¶¶ 170-71, *Final Decision* at 30 SBC has never disputed that the "necessary" test is inapplicable the HFC network is not a proprietary element

uneconomic.[55] The *Triennial Review Order* establishes the barriers to entry to be considered in any impairment analysis: scale economies, sunk costs, first-mover advantages, absolute cost advantages, and barriers within the control of the ILEC. In applying the impairment test, the DPUC correctly determined that the sum of these barriers makes Gemini's market entry uneconomic, taking into account any countervailing advantages Gemini might have.[56]

In addressing judicial concerns about its prior application of the impairment standard, the Commission determined that actual marketplace evidence is the most persuasive and useful to any impairment analysis.[57] Consistent with this approach, the DPUC evaluated the extent to which all or any competitors in Connecticut are providing retail services in the relevant market using non-incumbent LEC facilities and the deployment of intermodal technologies. The DPUC is also in the best position to perform the necessary "granular" analysis concerning customer classes, geography and relevant services.

The DPUC's in-depth review of all of these factors demonstrates irrefutably that Gemini is impaired by denial of access to the HFC network. The DPUC also considered the fact that Gemini is seeking access to SBC's HFC loop facilities to provide basic voice-grade telephony services to mass market customers. The Commission concluded in the *Triennial Review Order* that facilities capable of providing such mass market voice-grade services are to be afforded the maximum unbundling because the mass market is the most competitively underserved, especially for basic voice-grade telephony services.[58]

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55 *Triennial Review Order* at ¶ 85

56 The Commission properly refused to consider the availability of non-UNE alternatives, such as tariffed services or resold retail services, as having any bearing on the impairment analysis. Id. at ¶ 94

57 Id. at ¶ 165

58 Id. at ¶ 205 n 711

The greatest impairment factor associated with serving the mass market is the necessary duplication of mass market loop facilities absent any guaranteed return on the investment. At the time that most mass market loops were constructed by the ILECs, the ILECs enjoyed mandated monopolies and captive customers providing regulated rates of return for capital construction. SBC had its own mass market captive customer base and regulated rates to fund the costs of construction of the HFC network.

The Commission has recognized the fixed and sunk costs associated with local loops serving mass market customers. Specifically.

> The costs of local loops serving the mass market are largely fixed and sunk. By fixed we mean that these costs are largely insensitive to the number of customers being served. Much of the cost applies whether a carrier serves a single residential customer or ten thousand residential customers: that carrier must secure rights-of-way, dig trenches or place poles, and run wire underground or along poles Such deployment costs are also sunk. That is, local loop facilities are not fungible because they cannot be used for any other purpose if the investment fails. If a new entrant overbuilds to serve a mass market customer and loses that customer to another carrier, the new entrant cannot economically redeploy that loop to another location. Its investment might be lost unless it could find a particular purchaser for its redundant loops. This is true regardless of whether the new entrant was providing narrowband or broadband service, or both. A carrier will not deploy mass market loops unless it knows in advance that it will have customers that will generate sufficient revenues to allow it to recover its sunk loop investment. This certainly could most easily be achieved through long-term service contracts and a large, guaranteed customer base. In contrast to the enterprise market, however, long-term contracts are not commonplace in the mass market for either the narrow band or the broadband services and we have no information in our record to indicate that consumers ordinarily would accept such terms As new entrants, competitive LECs do not enjoy a large guaranteed subscriber base that would provide a predictable source of funding to offset their local loop deployment costs For these reasons, we find that the costs of self-provisioning mass market loop facilities are demonstrably greater than those faced universally by new entrants in other industries.[59]

The adverse effect of sunk costs is exacerbated by the barriers to entry in the sole control of SBC The DPUC was aware at the time of its *Final Decision* of the exorbitant amount of time

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[59] Id at ¶ 237 (internal citations omitted)

and costs expended by Gemini in securing pole attachment licenses from SBC just for the portions of its own HFC network that Gemini had already constructed. Additionally, as previously stated and as recognized by the DPUC, the HFC network is, in many cases, occupying the last usable space on the poles Therefore, in order to continue to self-provision, Gemini must either pay to remove SBC's HFC network (if SBC decides it will allow the existing HFC network to be removed upon Gemini's request) or replace the entire pole and pay the associated make-ready costs for all existing parties on the pole to shift their facilities. In either event, the associated costs make market entry uneconomic, if not impossible, without access to the HFC network

> When a firm is able to gain an advantage in the marketplace as a result of entering the market first, it is said to have a first-mover advantage. There are a number of sources of first-mover advantages, such as advertising and gaining brand name preference, patents, sunk costs, and rights-of-way.[60]

SBC, unlike Gemini, enjoyed the tremendous advantages of a first-mover as the incumbent ILEC, which it extended to its cable television affiliate, SPV. SBC is either a joint or sole owner of the poles upon which it constructed the HFC network and is, in virtually all cases, the pole custodian. Therefore, SBC did not have to wait to secure pole licenses or pay for the shifting of its facilities. Additionally, at the time of construction of the HFC network, SBC had a captive group of mass market customers to fund the construction of its HFC network. SBC enjoyed its existing pool of skilled labor and back office services in constructing the HFC network Gemini has no such advantages

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[60] Id at n 249 (internal citations omitted)

The Commission also recognizes that Gemini is impaired in overcoming SBC's well-established brand name in order to convince reluctant mass market customers to switch Gemini's basic telephone service offering [61]

In addition to considering the advantages to ILECs such as SBC that impair the ability of Gemini and other CLECs to serve the mass market, the Commission believed it necessary to weigh other considerations that factor into the incentive to deploy advanced networks. These "other considerations" include the incentive to invest in next-generation architecture to deliver advanced telecommunications capability and the upgrading of existing loop plant, and the existence of intermodal competition However, due to the unique facts of this particular situation, even those "other considerations" that typically weigh in favor of the ILEC, actually weigh in favor of Gemini and of the unbundling of the unique HFC network.

The case for not unbundling local loop facilities rests on the resulting incentive for the ILEC to continue deployment of advanced facilities. It cannot be stressed enough that the incentive does not exist in this instance as SBC has already abandoned the HFC network. The only investment to come with respect to the HFC network will come from Gemini or some other competitor that desires to provide local loop services to Connecticut consumers via the HFC network In order to "unleash the full potential"[62] of the HFC network, the HFC network must be unbundled in order that Gemini can invest in the infrastructure and provide more innovative products and services to Connecticut consumers, as discussed below. Additionally, as previously discussed, cable telephony has not developed into a viable competitive alternative for local voice

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61 Id at ¶ 238

62 Id at ¶ 244

telephony[63] In this regard neither has wireless service gained enough of a foothold to be considered relevant to an analysis of intermodal competition for narrowband voice services.[64]

C. SBC Is Not Being Harmed.

Gemini is compelled to address SBC's specious claims that failure to preempt the DPUC's *Final Decision* would cause SBC to be irreparably harmed to the tune of tens of millions of dollars[65] It is important to note that the DPUC's *Final Decision* requires only that SBC negotiate an interconnection agreement with Gemini. As this Commission is well aware, SBC negotiates interconnection agreements with CLECs on a daily basis. In fact, SBC and Gemini have already commenced negotiations, as SBC was unable to obtain a stay of the DPUC's *Final Decision*. At the outset of the negotiations, Gemini clearly and plainly informed SBC, as Gemini had informed the DPUC throughout the course of the underlying administrative proceeding, that Gemini fully intended to lease the HFC network "as is" and take full responsibility for all necessary maintenance, upgrade and repair. The ultimate cost to SBC is nil. In fact, SBC will be receiving revenues for otherwise useless, abandoned plant. The only real harm to SBC is increased competition for services.

CONCLUSION

The Commission cannot cavalierly preempt the detailed DPUC *Final Decision* without solid justification. SBC has utterly failed to provide those grounds. It is clear that the unbundling determination made by the DPUC does not prohibit or restrict the offering of telecommunications services. It is equally clear that the *Final Decision* was made after careful deliberation and in conformance with the pro-competitive policies of the Act and the *Triennial*

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63 Id at ¶ 245

64 Id

65 See SBC Emergency Petition at 4, 16

Review Order. The HFC Network is unique in the nation and the DPUC is best situated to perform the necessary granular analysis to make an unbundling determination. The DPUC's determinations in the underlying administrative proceeding will have no effect on any other ILEC or CLEC in any other State in the nation and this Commission should not involve itself in such purely local issues based on SBC's claims.

Respectfully Submitted,

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