

**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)	

REPLY COMMENTS

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THE CONNECTICUT OFFICE OF CONSUMER COUNSEL,¹ in accordance with the Federal Communications Commission's (the "FCC") Public Notice, Report No. DA 04-377², hereby files its Reply Comments in this proceeding.

I. Introduction

The OCC examined the initial comments filed by Gemini Networks CT,

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*")

Inc. (“Gemini”), the Connecticut Department of Public Utility Control (the “Department”), AT&T Corp. (AT&T), MCI, and Covad Communications in preparation for the filing of these Reply Comments. It was gratifying to recognize that without exception, all parties filing comments in this Docket argued strenuously in favor of the FCC not preempting the December 17, 2003 Department Decision (the “Gemini Decision”) sustaining a petition dated January 2, 2003 (the “Gemini Petition”) 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.

If anything, the OCC’s resolve that this course is the correct one is sustained and we accordingly urge the FCC to deny SBC Connecticut’s February 10, 2004 *Emergency Request for Declaratory Ruling and Preemption*, so that the Department’s holding in the Gemini Decision can become effected and competition commence in Connecticut via the HFC Network.

The fundamental question lies in the fact that the FCC has not considered a facility like the HFC Network here at issue in any of its inquiries into the unbundling obligations of incumbent local exchange carriers. The parties unanimously agree that 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. So too does each party urge the FCC, based

on the record evidence and legal foundation relied upon in the Gemini Decision, to refrain from preempting the Gemini Decision and deny the emergency request for declaratory judgment and preemption of SBC Connecticut.

II. USTA // vacated in part certain elements of the TRO, none of which touched on any facility resembling the HFC Network, which is unique in the United States and was not featured in the TRO itself

The OCC will not recite the lengthy legal arguments offered by the parties in support of the Gemini Decision, but by way of highlights will note that the 1996 Telcom Act provides the states with the independent authority to require unbundling beyond the list of UNEs approved by the FCC.³ Connecticut P.A. 94-83 has also provided the Department with the authority to require the unbundling of ILEC network elements.⁴ Conn. Gen. Stat. §16-247b⁵ fully complements the

³ §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.

⁴ 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.

⁵ While C.G.S. §16-247b requires that network elements that are necessary for the provision of telecommunications services, the Gemini Decision

1996 Telcom Act and FCC orders by separately providing the Department with the authority to require the unbundling of network elements.⁶ Finally, the Triennial Review Order,⁷ which serendipitously appeared in the midst of the Gemini Docket, further informed and bolstered the legal foundation for the Gemini Docket.

Several of the parties indicated in quick summary the effects of USTA V. FCC II⁸ which issued just two days prior to the filing date for initial comments in this Docket.⁹ Accordingly, the OCC will devote some discussion to pursuing those cursory observations by several of the parties on the effect of that D.C.

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.

⁶ 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.

⁷ 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").

⁸ *U.S. Telecom Ass'n v. FCC*, No. 00-1012, et al., ___F.3d___, 2004 U.S. App. LEXIS 3960 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

⁹ See e.g., Comments of MCI at 12, 15-16; Opposition of AT&T Corp. at 2, 12, 16, 19, 23, & 28; Opposition of Covad Communications at 6-7, 9; Initial Comments Of Gemini Networks CT, Inc. at 5.

Circuit Court holding on the FCC's TRO.

While *USTA II* has generated a whirlwind of controversy at the FCC, throughout the industry, and for state public utility control agencies throughout the United States, its focus on the TRO necessarily means it deals primarily with the issue of UNE-P. This recent federal holding has no effects of consequence on the Gemini Decision because Gemini does not use UNE-P and thus there is nothing in the *USTA II* that would prevent the FCC from dismissing SBC Connecticut's Emergency Request For Declaratory Ruling And Order and thereby affirming the Gemini Decision.

The Gemini Decision appropriately relied upon state law to hold that the HFC Network is capable of being used to provide telecommunications, that unbundling it is in the public interest and that it is capable of being unbundled and tariffed, and finally, that to unbundle it is consistent with federal law.¹⁰ It is only this last statutory question that has any relation to *USTA II* and, as demonstrated below, the *USTA II* decision firmly affirms the Gemini Decision's legal foundation.

In the fundamental holding of *USTA II*, the three-judge panel of the U.S

¹⁰ These elements are found at C.G.S. § 16-247b(a). Not only is the HFC Network unique in the United States, the Gemini Decision determined that this potential competitor will be at a specific and definite competitive disadvantage if access to SBC Connecticut's HFC Network is denied. It is clear that because of powerful network performance differences inherent to 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. This fact, coupled with the continued stranding of the abandoned facility, provided ample policy foundation for the Gemini Decision.

Appeals Court in Washington vacated in part ¹¹ the FCC's subdelegation of its authority to make impairment decisions ¹² as to the range and composition of UNE-P facilities to state commissions as unlawful because the general conferral of regulatory authority does not empower an agency to subdelegate to outside parties.¹³ The Court further determined that the FCC's nationwide impairment determination that ILECs such as SBC Connecticut had to make mass market switches, DS1, DS3, and dark fiber available to competitive local exchange carriers ("CLECs") as unbundled network elements ("UNEs") could not survive without the subdelegated reviews to the states and thus had to fall.¹⁴

The Court also vacated, *inter alia*, the FCC's decision not to take into account availability of tariffed special access services when conducting the

¹¹ The court temporarily stayed its vacatur for 60 days to provide the FCC with a small window to respond with a new order (the FCC has apparently estimated that a new order could take at least 18 months). The trade press indicates that, in addition to a majority of FCC commissioners who approved the TRO, many state regulators may seek certiorari from the Supreme Court because the Appeals Court's decision to vacate state authority under the TRO would be felt not only in the telecom sector but could also call into question the legality of state regulatory authority in other areas, especially the energy sector.

¹² 47 U.S.C. § 251(d)(2) requires the FCC, in establishing unbundling requirements, to "consider, at a minimum, whether ... 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." The interpretation of the word "impair" has been central to the FCC's unbundling orders, and the various Court opinions interpreting them, now for the third time.

¹³ *USTA II* at Slip Op. at 12 et seq., LEXIS at 18 et seq.

¹⁴ The ILECs, and their groups, such as the U.S. Telecom Association (USTA), plaintiff in *USTA II*, have long argued that requiring them to give their competitors access to their facilities at low rates gives the ILECs no incentive to build new facilities, while the CLECs and their groups have argued that such access is necessary to jumpstart and spur competition. This policy battle stands center in the consideration of the FCC, courts, and Congress. Of course, the industry groups have enormous economic stakes in this controversy, as well

impairment analysis, and the decision that wireless carriers were impaired without unbundled access to ILECs dedicated transport. Similarly, the Court vacated the FCC's subdelegation scheme with respect to dedicated transport elements, as well as the FCC's distinction between qualifying and non-qualifying services with respect to unbundled EELs¹⁵ for provision of long distance exchange service.¹⁶ Clearly, none of these issues has any bearing on the Gemini Decision.

The Appeals Court upheld portions of the TRO that were challenged by competitive local exchange carriers ("CLECs") pertaining to broadband facilities, including for example, the rejection of an unbundling requirement for fiber to the home (FTTH) loops, line sharing, or for a transmission path over hybrid loops utilizing the packet switching capabilities of their DLC systems in remote terminals.¹⁷ Again, Gemini never requested the unbundling of any of these facilities and the Gemini Decision by the Department never addressed any of these facilities.

Nor has it ever been alleged by SBC Connecticut or any other party that

¹⁵ Enhanced Extended Links ("EELs") are typically used to service a large business customer with high-capacity loop/transport combinations between the end user and a central office to provide local exchange services or long-distance calls.

¹⁶ The court remanded the rules governing CLEC access to EELs, in which the FCC had found that unbundling rules applied only to "qualifying services" - those telecom services that competitors provide in direct competition with the incumbent LECs' core services - and that EELs couldn't be used to provide exclusively "nonqualifying services" - namely long distance service.

¹⁷ Related to this point, however, ILECs must still provide unbundled access to a voice grade equivalent channel and high capacity loops utilizing TDM technology, such as DS1s and DS3s.

SBC Connecticut's abandoned HFC Network or the Gemini Decision relates in any way to the TRO proceedings examining UNE-P that had been opened by the Department and other public utility control state commissions across the United States during the past year.¹⁸ Indeed, as a result of *USTA II*, most of those state proceedings have been suspended or otherwise stayed.¹⁹

While the Gemini Decision relied in part upon "qualifying services,"²⁰ the *USTA II* ruling, focusing on facilities bearing no relation to the HFC Network, does not affect the use of the term as applied to the issue in the Gemini Decision. Thus, the Gemini Decision properly applied federal law and regulations relating to qualified services as applicable to Gemini's proposed uses of the HFC Network.

Thus, the *USTA II* specifically vacated certain elements of the TRO, none

¹⁸ There was also never any discussion of Gemini's application to lease SBC Connecticut's HFC Network in Docket No. 03-09-01, *DPUC Implementation of the Federal Communications Commission's Triennial Review Order*. This three-phase docket remains open for the moment, but there have been various motions to stay or abandon it based on the *USTA II*, including those filed by SBC Connecticut; most other states, with very few exceptions, have already done so. The FCC appears divided on the usefulness of the states pursuing these cases for informational value.

¹⁹ The *USTA II* held, at Slip Op. at 16, LEXIS at 26: "While the FCC has sought to characterize the state commissions' role here as fact finding, in fact the order lets the states make crucial decisions regarding market definition and application of the FCC's general impairment standard to the specific circumstances of those markets, with FCC oversight neither timely nor assured." Largely on this basis, the D.C. Circuit Court vacated the states' involvement in these investigations.

²⁰ Gemini Decision at 33, 39 et seq. "As long as Gemini offers the FCC's qualifying services, the Telco's HFC network must be unbundled. Accordingly, the Telco's argument that facilities or network elements must be used for telecommunications services before they can be unbundled is hereby dismissed." *Id.* at 39.

of which touched on any facility resembling the HFC Network which, as has already been discussed in the pleadings filed in this administrative appeal, is unique in the United States and was not featured in the TRO itself.

Consequently, the *USTA II* does not reduce the legal foundations underpinning the Gemini Decision. Indeed, the Gemini Decision is strengthened by this latest test of FCC orders and policy.

III. *USTA II* rests on long-standing public policy goals, both state and federal, that support the unbundling of the HFC Network through affirmation of the Gemini Decision

The primary impact of *USTA II* is based on the Appeals Court vacating key portions of the TRO that were challenged by the ILECs, most notably those pertaining to providing them freedom from unbundling broadband facilities, switching issues, and of course, as noted above, the delegation by the FCC to the fifty states of its authority regarding impairment determinations, none of which relates to the Gemini Decision.²¹

Of equal import is the federal policy of promoting investment in advanced networks and services first enunciated in the 1996 Telcom Act and repeatedly echoed by Congress, the FCC, and even the federal courts throughout the eight

²¹ Although the court acknowledged that the Commission's definition of "impairment" in the TRO was an improvement over past efforts, it said its definition "is vague almost to the point of being empty" in that the "touchstone of the Commission's impairment analysis is whether the enumerated operational and entry barriers 'make entry into a market uneconomic.'" The court asked, "Uneconomic by whom?" *USTA II* at Slip Op. at 24-25, LEXIS at 42.

years since its enactment, and now reinforced by the *USTA II*.²² The TRO specifically referred to this universally-supported public policy²³ and the *USTA II* in no way disturbed that fundamental guiding principle.²⁴

The Gemini Decision also specifically supports that policy since it logically follows that unbundling SBC Connecticut's HFC network will promote competition and thus undoubtedly force further investment by SBC Connecticut and others.²⁵ The OCC and other parties have observed that unbundling SBC Connecticut's HFC network for the narrowband uses intended by Gemini will not in any way deter the deployment of additional broadband in this state since SBC Connecticut has admittedly and permanently abandoned this technology. In fact, SBC has nationally refocused its advanced services efforts and goals in new, well-publicized directions (e.g., Project Pronto, SBC Yahoo! DSL).

The fulfillment of this state and federal policy is obviously demonstrated by

²² State law concurs, indeed led by two years through P.A. 94-83, with this public policy goal: see C.G.S. § 16-247a.

²³ Order ¶ 200. “. . . [t]his unbundling approach – *i.e.*, greater unbundling for legacy copper facilities and more limited unbundling for next-generation network facilities – appropriately balances our goals of promoting facilities-based investment and innovation against our goal of stimulating competition in the market for local telecommunications services.”

²⁴ See *e.g.*, *USTA II* at 31, 37-38.

²⁵ Gemini Decision at 37, 39. “While the TRO does not address the unique circumstances of the HFC network, the FCC recognizes that its obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation. Because incumbent LECs have already made the most significant infrastructure investment, the FCC has sought to encourage both intramodal and intermodal carriers (in addition to ILECs) to enter the broadband mass market and make infrastructure investments in equipment. The FCC also expects that more innovative products and services will follow the deployment of new loop plant and associated equipment. [citing the TRO ¶ 244] In light of the above, the Department reaffirms its conclusion that the HFC network should be unbundled.” *Id.* at 39.

Gemini's willingness and ability to build an innovative network. It has constructed and operates an HFC network of its own in parts of Connecticut and the Gemini Petition argues for a need for access to this SBC Connecticut abandoned facility to achieve a critical mass in order to bring competition to an ever larger number of consumers.²⁶ It is clear that *USTA II* stands firmly upon long-standing public policy goals that demand the unbundling of the HFC Network through affirmation of the Gemini Decision.

IV. Conclusion

As the OCC stated several times during the Gemini Docket and has recommended to the FCC in its Initial Comments, and which was echoed by the other parties, unbundling this unique 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 *USTA II* decision reinforced the need for the well-founded Gemini Decision to be allowed to further the state and federal goals of facilitating the efficient development and deployment of an advanced telecommunications infrastructure, and promote the development of effective competition, while

²⁶ Docket No. 03-01-02, Gemini Petition at 5. Gemini initiated this Docket by petition stating that it wants unbundled access to SBC Connecticut's HFC telecommunications plant in order "to continue with its business plan and proceed with the deployment of voice services in accordance with its CPCN."

encouraging the shared use of existing facilities. Further, *USTA II* in no way impinges upon provisions of the 1996 Telcom Act, upon which both the FCC based its TRO and, at least in part, upon which the Department based its Gemini Decision.

The initial comments of the parties are clear: an entity is willing and able to finance and utilize abandoned network that stretches across much of Connecticut, a company authorized pursuant to state and federal law to bring competition to this market. The agree that the Gemini Decision reflects the public policy goals of Congress and the 1996 Telcom Act, as well as corresponding policies of Connecticut state law, and will 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.

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 *USTA II* provides further substantiation that the Gemini Decision was properly decided on firm and express legal and policy grounds, and its provisions should be permitted to proceed on schedule. 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 forwarded via ECFS, emailed, delivered via commercial overnight courier, or by U.S. Postal Service first-class mail, postage prepaid, this 12th 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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