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

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

REPLY 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 Reply Comments in this proceeding.

I. SUMMARY

After thoroughly reviewing the initial comments filed by all interested persons in this matter, Gemini finds it telling that **no party** filed comments in support of SBC's request for preemption in this matter. The reason is simple – there is no basis or justification for preemption of the Connecticut Department of Public Utility Control's ("DPUC") pro-competitive unbundling determination. The DPUC properly exercised its authority pursuant to state law, consistent with the federal framework established by the Communications Act ("Act") as implemented by the Commission, and ordered the unbundling of legacy local loop facilities after finding such to be in the public interest and in furtherance of the goal of providing incentive for

[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*").

investment in advanced networks and technology. As SBC has utterly failed to provide any justification for preemption of the DPUC's decision, the Commission must reject SBC's request.

II. GEMINI GENERALLY AGREES WITH THE COMMENTS OF OTHER PARTIES

Gemini generally supports and agrees with the comments filed by the DPUC, the State of Connecticut Office of Consumer Counsel, AT&T and MCI. Gemini disagrees with the comments filed by Covad Communications Company ("Covad") to the extent that Covad asserts that the hybrid fiber coaxial ("HFC") facilities owned by SBC in Connecticut constitute a cable television network. Gemini believes that Covad's assertion is based on a misunderstanding of the unique nature and history of SBC's HFC facilities in Connecticut. Covad notes that SBC fails to admit in its filing that the HFC facilities constitute a cable television system. The simple reason is that the HFC facilities do not constitute such a system. For SBC to assert such a claim would turn ten years of regulatory treatment of the HFC facilities on its head.

As amply detailed in the DPUC's *Final Decision*, the SBC's HFC network was constructed as a full service telephony network, capable of providing a complete suite of voice, video, data and entertainment services. The HFC network was constructed to replace SBC's legacy copper telephone network. As such, the HFC network was accorded favorable regulatory treatment by the DPUC, including subsidization by captive telephone ratepayers – treatment that SBC would not have received if the HFC network had been constructed as a stand-alone cable television system.

The DPUC carefully detailed the history and composition of the HFC network in its *Final Decision*. The Commission cannot substitute its own factual conclusions for those of the DPUC on such issues of local regulatory categorization, especially in light of the past regulatory

treatment of the facilities at issue. The HFC network is part of SBC's telephony network. Assertions of Covad to the contrary must be disregarded.

III. THE USTA II DECISION DOES NOT JUSTIFY GRANT OF SBC'S REQUEST

On March 2, 2004, the District of Columbia Circuit Court of Appeals issued a decision vacating and remanding portions of the *Triennial Review Order*. United States Telecomms. Ass'n v. FCC, No. 1012 et al., slip op. (D.C. Cir. Mar. 2, 2004) ("USTA II").[2] The USTA II decision does not disturb the important state unbundling rights which were relied on by the DPUC and are the focus of SBC's request for preemption. Nor could it have done so, as those rights are statutory and not subject to administrative or judicial compromise.

The USTA II decision vacates the Commission's subdelegation of federal impairment determinations concerning mass market switching to the state commissions, which is not an issue in the Gemini proceeding. USTA II at 12. The USTA II decision does not in any way disturb the statutory power of a state commission to address network elements not otherwise addressed by the Commission.[3] In fact, USTA II supports the DPUC's conclusions and further compels that the Commission reject SBC's preemption request.

The DPUC has independent authority under 47 U.S.C. § 251(d)(3)[4] and 47 C.F.R. § 51.317[5] to unbundle the HFC Network. As this Commission stated in its UNE Remand Order:

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2 The USTA II decision, by its own terms, stayed the Court's mandate for 60 days. Slip Op. at 62.

3 Notwithstanding the fact that the USTA II decision has no effect on this case, Gemini is confident that the D.C. Circuit Court's decision will not withstand higher judicial scrutiny.

4 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

> [47 U.S.C. § 251(d)(3)] allows state commissions to establish access obligations of local exchange carriers that are consistent with our rules implementing section 251. We believe that section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework instituted in this Order.

In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, 15 FCC Rcd. 3696, 3767 at ¶ 154 (1999) ("UNE Remand Order") (emphasis added). This Commission has, in fact, ruled that state authority for additional unbundling is "required" by the Act.

> Therefore, as required by section 251(d)(3). . . our rules will permit states to go beyond the national rules discussed below, and impose additional procompetitive interconnection requirements, as long as such requirements are otherwise consistent with the 1996 Act and the Commission's regulations.

Id. at ¶ 180 (emphasis added).

Section 251(d)(3) of the Act provides that the Commission shall not preclude the enforcement of any state commission regulation that is consistent with the Act. See n.2, supra. Similarly, Section 261(b) of the Act states:

> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.[6]

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

5 51.317(b)(4) provides:

If an incumbent LEC is required to provide nondiscriminatory access to a network element in accordance with Sec. 51.311 and section 251(c)(3) of the Act under Sec. 51.319 of this section or any applicable Commission Order, no state commission shall have authority to determine that such access is not required. A state commission must comply with the standards set forth in this Sec. 51.317 when considering whether to require the unbundling of additional network elements. With respect to any network element which a state commission has required to be unbundled under this Sec. 51.317, the state commission retains the authority to subsequently determine, in accordance with the requirements of this rule, that such network element need no longer be unbundled.

6 "This part" refers to Part II – Development of Competitive Markets, 47 U.S.C. §§ 251-261.

The Commission determined the standards to be followed by a state commission in unbundling portions of an ILEC's network that go beyond the national list in Section 51.317 of its rules.

> Section 51.317 of the Commission's rules codifies the standards state commissions must apply to add elements to the national list of elements we adopt in this order . . . [M]odification of this rule will enable state commissions to add additional unbundling obligations consistent with sections 251(d)(3)(B) and (C) of the Act.

UNE Remand Order at ¶ 155 (emphasis added). Accordingly, the Commission codified in 47 C.F.R. § 51.317 the independent unbundling authority, utilizing the "necessary" and "impair" standards that the Act directly provides to state commissions.

That the DPUC must act consistently with federal law does not mean that it cannot impose obligations beyond those mandated by the Act. Rather, as noted by AT&T in its initial comments in this proceeding,[7] there is an established meaning for whether state action is consistent with federal law. Legal precedent makes clear that state law is consistent with federal law so long as it is "possible to comply with the state law without triggering federal enforcement action." Jones v. Rath Packing Co., 430 U.S. 519, 540 (1977). Thus, the DPUC cannot require SBC to do something that would make it impossible to simultaneously comply with federal law. The DPUC's *Final Decision* in no way affects SBC's compliance with federal law mandates, even in light of USTA II.

The *Triennial Review Order*[8] explicitly confirmed the Department's right to unbundle the HFC network pursuant to state law. The Commission reaffirmed its interpretation of 47 U.S.C. §

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7 AT&T Initial Comments at 21.

8 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.

251(d)(3) as preserving state authority to unbundle, 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. Id. at ¶¶ 180, 191. In discussing the Supreme Court's ruling in AT&T Corp. v. Iowa Util. Bd., 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." Id. at n.586. The Commission rejected the arguments of incumbent LECs, 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.

Id. at ¶ 192. No party challenged this finding on appeal to the D.C. Circuit and the USTA II decision does not alter these statutory state rights.

Pursuant to applicable Connecticut state law,[9] to justify unbundling the DPUC must find (1) that the element at issue is capable of being used to provide telecommunications services; (2) that unbundling of the element is in the public interest; (3) that the element is capable of being unbundled and tariffed; and (4) that to unbundle is consistent with federal law. The DPUC appropriately made all four findings in reaching its *Final Decision*. The first three factors constitute findings made on granular basis, with reliance on the specialized knowledge of the DPUC concerning the HFC facilities, which the Commission should not disturb. The only one of the four factors affected by the USTA II decision of concern to the Commission is the status of federal law. For the reasons discussed below, the USTA II decision actually supports the DPUC's reasoning on this factor and commands rejection of SBC's preemption request.

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[9] Conn. Gen. Stat. § 16-247b.

It is important to recognize that the *Triennial Review Order* does not address the type of HFC facilities at issue in this case. The *Triennial Review Order* found that CLECs are generally impaired without access to local loops, including copper, copper-fiber and all-fiber loops used to serve enterprise business customers. *Triennial Review Order* at ¶¶ 185-97, 248, 311-27. Local loops have natural monopoly characteristics that cause impairment. The *Triennial Review Order* made very specific findings that CLECs could not compete with ILECs by constructing their own HFC networks as most incumbent cable companies have done. "[C]able operators have been able to overlay additional capabilities onto networks that they build for other purposes, often under government franchise, and therefore have first mover advantages and scope economies not available to other new entrants." Id. at ¶ 98.

The rationale employed by the Commission in declining to unbundle hybrid copper-fiber loops was to promote "the deployment of advanced telecommunications infrastructure." Id. at ¶ 288. The USTA II decision does not disturb this important goal, and, in fact, reinforces it. The stated policy basis of the Commission, reinforced by the USTA II decision, would be directly undermined by preempting the DPUC's *Final Decision.*

The USTA II decision reinforces the Commission's policy goals, as relied on by the DPUC, concerning stimulating investment in advanced facilities in several places:

> 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.

USTA II at 31 (emphasis added).

> 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.

Id. at 37.

> The Commission explained that its decision would stimulate the infrastructure investment contemplated by § 706 in two ways. First, limiting access to the fiber portion of the hybrid loops would give ILECs incentives to deploy fiber (both feeder fiber and, eventually, [fiber-to-the-home]), along with associated next-generation networking equipment, and to develop new broadband offerings for mass market consumers. Because unbundling orders reduce return on investment, such orders would inhibit ILECs from making risky investments in next-generation technology. Second, denying CLECs access to ILEC broadband capabilities will stimulate *them* to seek innovative access options for broadband, including self-deployment of new facilities; unbundling, by contrast, would be likely to blunt innovation by locking the CLECs into technological choices made by the ILECs.

Id. at 37-38 (internal citations omitted).

Thus, it is clear that the USTA II decision emphasizes the need to stimulate investment in next-generation technologies. SBC has made it perfectly clear that it has no plans for further deployment of HFC facilities and, moreover, does not intend to even utilize the abandoned facilities currently left in place which are blocking new facilities from being strung. On the contrary, Gemini is willing to make the substantial investment necessary to upgrade, repair, maintain and use these unused and abandoned facilities to provide the next-generation technology sought by the Commission and supported by USTA II. The direct result of the DPUC's *Final Decision* is additional telecommunications service options, more advanced services (including broadband deployment) and more competitive choices for Connecticut telecommunications consumers.

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CONCLUSION

No party filing comments in this proceeding supports SBC's preemption request. SBC has failed to justify Commission action in this purely local matter. The USTA II decision leaves undisturbed, and reinforces, the policy mandates of the Commission to encourage investment in new technology and provide advanced services to consumers. The Commission should reject SBC's request.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was mailed, commercial overnight courier, or by U.S. Postal Service first-class mail, postage prepaid, or sent by electronic mail this 15th 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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