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EX PARTE

July 26, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 01-338 and 96-98.*

Dear Ms. Dortch:

The attached memorandum and its associated attachment are being filed today for inclusion in the record in the above-captioned proceedings.

In accordance with Commission Rule 47 C.F.R. § 1.49(f), this *ex parte* is being filed electronically for inclusion in the public record of the above-referenced proceedings pursuant to Commission Rule 47 C.F.R. § 1.1206.

Sincerely,
/s/ Cronan O'Connell

Attachment

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MEMORANDUM

THE FCC'S PERMANENT UNBUNDLING RULES FUNDAMENTAL PRINCIPLES

JULY 26, 2004

The Federal Communications Commission ("FCC" or "Commission") is preparing to initiate a proceeding to adopt permanent unbundling rules. This will be the Commission's fourth attempt to adopt unbundling rules that comply with Section 251 of the Telecommunications Act since the original rules were adopted in August of 1996. In response to each of the previous attempts, the Supreme Court and D.C. Circuit provided guidance to the FCC regarding the proper interpretation of Section 251. This memorandum identifies the key principles that were established in the *Iowa Utilities Bd.*, *USTA I*, and *USTA II* decisions[1] and discusses how those principles will apply to the areas that the FCC must address in the current remand proceeding. These principles set forth a reasonable manner in which network elements that are truly vital for the development of competition (*i.e.*, those that meet the "impairment test" established under the Act) should be made available on an unbundled basis, while other network elements and services will be available in a free marketplace in which true competition for customers based on service and price will be encouraged.

In addition to addressing the particulars of unbundling specific network elements in a manner consistent with the Act and the guidelines established in the key judicial decisions, two vital and related matters must also be taken into consideration in considering and adopting new permanent unbundling rules. First, the FCC's unbundling rules must take account of the status of state jurisdiction over those network elements that are not required to be unbundled pursuant to

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom.*, *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded*, *AT&T v. Iowa Utils. Bd*, 525 U.S. 366 (1999) ("*Iowa Utilities Bd.*"). *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *rev'd in part and remanded in part sub nom., United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied sub nom., WorldCom, Inc. v. United States Telecom Ass'n*, 538 U.S. 940 (2003). *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *aff'd in part, remanded in part, and vacated in part, sub nom.*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *pets. for cert.* filed, Nos. 04-12, 04-15, 04-18 (S. Ct. June 30, 2004).

Section 251(c)(2) of the Act because they do not meet the terms of the "impairment test" established in Section 251(d)(2). These network elements are subject to federal, not state, jurisdiction, and the FCC's permanent rules should clearly so specify. This memorandum (and the accompanying memorandum attached as Attachment A) analyze the legal bases for the Commission's jurisdiction over such elements and the proper method of FCC regulation of the offering of such elements in a market-focused environment. Second, as Qwest's experience with negotiation of contracts for network elements that do not meet the impairment test has verified, commercial agreements for these network elements are both feasible and superior to regulatory mandates. Any rules that the Commission adopts must be tailored so as to reward, not penalize, carriers (CLECs and ILECs alike) who seek to resolve interconnection issues through negotiation based on market principles, not litigation or governmental coercion.

I. Principles Governing Permanent Rules For Network Elements

The key challenge to the FCC in its further remand proceeding will be to conform its new rules to the principles enunciated in the *Iowa Utilities Bd.* and *USTA* decisions. The following ten principles are particularly relevant to permanent rules to be adopted in the remand proceeding.

1. *Limited State Role. The FCC cannot delegate final "decision-making" authority to the states regarding which network elements must be unbundled. As part of its responsibility, the FCC, rather than the states, must define the relevant market for the unbundling inquiry.*

In the primary holding in *USTA II*, the D.C. Circuit held that the FCC's "subdelegation" of authority to the states to make critical federal unbundling issues in the *Triennial Review Order* was unlawful. The court faulted the Commission for delegating "almost the entire determination of whether a specific statutory requirement – impairment – has been satisfied." *USTA II*, 359 F.3d at 567. The court suggested that the FCC could validly delegate only limited authority to the states.

The sole statutory responsibility for determining whether network elements meet the impairment test and can lawfully be required to be unbundled pursuant to Section 251(c)(2) of the Act lies with the FCC. Given the compressed schedule under which the FCC is operating, it is virtually impossible for the Commission to delegate any responsibility to the states in this proceeding. Of course, states are free to participate in the comment period like other parties and to submit opinions and data consistent with this Commission's rules. It must be recognized, however, that the records compiled in the *Triennial Review Order* nine-month proceedings varied tremendously from state to state, and are based on impairment standards that have been vacated. Once it became apparent that the D.C. Circuit was going to invalidate the *Triennial Review Order* unbundling rules, most of the state commissions in Qwest's region suspended their nine-month proceedings. Furthermore, Qwest withdrew its high capacity loop and transport cases in most of its states due to the immense administrative burden of a route-by-route or customer-by-customer standard, a standard that was vacated by the D.C. Circuit in *USTA II*. Of course, an ILEC's decision not to pursue unbundling relief under the *Triennial Review Order's* now-invalidated unbundling standard can have no bearing on the FCC's determination of impairment in a validly-defined market.

2. <u>Need for Impairment Finding</u>. *The Commission cannot order unbundling of a network element in the absence of a valid impairment finding, based on market characteristics linked in some degree to natural monopoly.*

In its past three *Local Competition Orders*, the Commission has always, sometimes implicitly and sometimes explicitly, found that unbundling could be ordered even when a finding of impairment could not be made, at least not in all instances. For example, in the *Triennial Review Order*, the Commission adopted a nationwide unbundling requirement for mass market switching and some high capacity loops and transport, even though it suggested that CLECs were not impaired in certain areas. The *USTA* decisions have made it clear that unbundling is not the unmitigated good that the FCC and the CLECs have suggested in the past, and that unbundling decisions must take account of the economic harms that excessive unbundling will cause. In other words, in the absence of evidence of impairment, the FCC may not lawfully order unbundling. Establishing a presumption of impairment and requiring ILECs to rebut that presumption is not consistent with the Act.

The D.C. Circuit has also held that the Commission must differentiate "between those cost disparities that a new entrant in *any* market would be likely to face and those that arise from market characteristics 'linked (in some degree) to natural monopoly . . . that would make genuinely competitive provision of an element's function wasteful.'" *See USTA II*, 359 F.3d at 562 (quoting *USTA I*, 290 F.3d at 427). Only the latter forms a valid basis for a finding of impairment. A CLEC is not "impaired" under the Act simply because it might be easier for the CLEC to compete using the ILEC's TELRIC-priced facilities than it would be for the CLEC to use the alternatives that the market makes available (including the ILEC's tariffed facilities).

3. <u>Evidentiary Record</u>. *The evidentiary record on impairment will be a vital factor in the rulemaking.*

In the *Triennial Review Order* and *UNE Remand* proceedings, the Commission believed it lacked sufficient disaggregated data to undertake a market-by-market analysis on its own. Although the absence of sufficient data on which to base a conclusion must ultimately lead to a finding of non-impairment, the detailed evidentiary submissions by the ILECs (primarily in the form of the UNE Fact Report) must be carefully analyzed because in many instances they affirmatively demonstrate on their own that there is no impairment in a particular market or for a particular network element.

4. <u>Sensible Market Definitions</u>. *The FCC must conduct the impairment inquiry for each relevant market, which must be defined in a "sensible" manner.*

The relevant court decisions require the FCC to adopt a "sensible" market definition that is something less than the entire nation, but greater than a particular route or location. In *USTA I*, the D.C. Circuit objected to the nationwide findings adopted in the *UNE Remand Order*, which would apply "in every geographic market and customer class, without regard to the state of competitive impairment in any particular market." 290 F.3d at 422. The court found that the FCC is obligated to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation. *Id.* at 426. In *USTA II*, the court once again criticized the FCC for making nationwide findings of impairment, despite evidence of non-impairment in certain markets. This time, the court also faulted the FCC for examining things in too granular a manner, by adopting a route-by-route analysis for dedicated transport. The court suggested that a more appropriate market definition would have been based on geography (*e.g.*, MSA) or customer class. The FCC is required on remand to examine markets based on relevant economic factors.[2]

5. *Costs of Unbundling. The FCC cannot ignore the costs of unbundling.*

The D.C. Circuit has held that the statute requires the FCC to "'balance' between the advantages of unbundling (in terms of fostering competition by different firms, even if they use the very same facilities) and its costs (in terms both of 'spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities')[.]" *USTA II*, 359 F.3d at 563 (quoting *USTA I*, 290 F.3d at 427). The FCC has chosen to consider such costs through the "at a minimum" language of Section 251(d)(2), and the D.C. Circuit has upheld that approach. *Id.* at 579-80. Thus, even where impairment can be lawfully found, the FCC can decline to require unbundling where it appears likely to undermine important goals of the Act.

6. *Alternatives to Unbundling. The FCC must consider less intrusive alternatives to unbundling.*

In light of the costs of unbundling, the D.C. Circuit concluded in *USTA II* that the FCC must consider more narrowly-tailored alternatives to a blanket requirement that mass market switches be made available as UNEs, such as approaches that would reduce the impact of hot cuts. *Id.* at 570. The same analysis applies to other network elements as well.

7. *Intermodal Competition. The FCC cannot ignore intermodal alternatives.*

In *USTA I*, the D.C. Circuit vacated the FCC's line sharing rules, because the Commission had completely failed to consider the relevance of competition in broadband services from cable and other intermodal providers. *USTA I*, 290 F.3d at 428. In *USTA II*, the D.C. Circuit affirmed its holding that the FCC cannot ignore intermodal alternatives. *USTA II*, 359 F.3d at 572-73. It agreed with the FCC that "robust intermodal competition from cable providers -- the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60%, [*see Triennial Review Order,* 18 FCC Rcd at 17151-52 ¶ 292] -- means that even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs." 359 F.3d at 582. Obviously, the broad array of other "intermodal" competitors will likewise need to be considered in a proper impairment analysis.

[2] There is nothing inconsistent between requiring the FCC to take market factors into account when making impairment decisions and prohibiting the FCC from delegating unbundling decisions to state regulators.

8. *Availability of Tariffed Alternatives. The FCC cannot ignore the impact of tariffed services provided by the ILEC.*

In *USTA II*, the court held that "the Commission's impairment analysis must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired." *Id.* at 577. The court concluded that none of the FCC's justifications for treating special access availability as irrelevant to the impairment analysis withstood scrutiny. *Id.* As a result, "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates, *i.e.*, under § 251(c)(4), precludes a finding that the CLECs are 'impaired' by lack of access to the element under § 251(c)(3)." *Id.* at 593. The availability of tariffed special access services should generally preclude a valid order directing that the same types of circuits be unbundled as unbundled network elements.

9. *Impact of TELRIC. The Commission must consider the impact of TELRIC rates.*

In *USTA II*, the D.C. Circuit held that "the fact that the Commission and the Court have deemed TELRIC a reasonable methodology for pricing UNEs doesn't require the Commission to blind itself to the fact that TELRIC may itself be imperfect and may be implemented still more imperfectly. While the Commission might modify its UNE pricing rules to adequately reduce the negative impacts that it fears, until it has done so it must consider real-world risks in deciding what elements to unbundle." *Id.* at 580. The FCC has recognized in its pending *TELRIC NPRM* that application of the TELRIC pricing rules may result in understating forward-looking costs and thereby thwarting facilities-based competition.[3] It is unlikely that the FCC will complete TELRIC reform prior to adopting permanent unbundling rules, and the ultimate nature of such reform remains speculative. Thus, the Commission will need to consider in its impairment determinations the extent to which the application of TELRIC has hampered (or will hamper) the deployment of facilities-based entry by CLECs.

10. *Independent Section 271 Obligation. BOCs have an independent unbundling obligation under Section 271 for some elements that do not meet the impairment test.*

ILECs are required to offer unbundled access to loops, switching and transport as part of the obligations they assumed in order to obtain long distance authority under Section 271. The FCC has stated that the pricing of these elements will not be based on TELRIC and presumptively will be considered just and reasonable if in line with the BOC's tariffed prices for analogous services. The D.C. Circuit upheld this portion of the *Triennial Review Order*. The FCC also held that it, and not the states, have jurisdiction over Section 271 elements. As noted below, it is imperative for the Commission to confirm its plenary authority over these elements.

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[3] *In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking*, 18 FCC Rcd 18945, 18947 ¶ 3 (2003).

II. The Commission Should Make It Clear That States Have Only Limited Jurisdiction Over Network Elements That Do Not Meet The Impairment Standard Set Forth In Section 251(d)(2) Of The Act

It is now beyond peradventure that at least some network elements that were initially prescribed as unbundled network elements (either in the original *Local Competition Order*, the *UNE Remand Order* or the *Triennial Review Order*) will, when permanent rules have been established, be subject to an affirmative finding by the Commission that they do not meet the Section 251(d)(2) impairment test. Even if the entirety of the *Triennial Review Order* had been affirmed by the court in *USTA II*, this would still be the case because of the Commission's findings on line sharing, OCN loops and transport, enterprise switching, and other network elements that the Commission removed from the list of unbundled network elements.[4] As the Commission has correctly concluded, these elements often remain subject to federal unbundling jurisdiction pursuant to Section 271(c)(2)(B) of the Act, but under terms and conditions and at prices that reflect market principles rather than the regulatory assumptions underlying network elements unbundled under Section 251(c)(3).[5] Because it is in the best interests of both ILECs and CLECs that they reach commercially reasonable arrangements for these elements (which by definition are subject to competitive market forces), it is important that regulation of these elements be no more burdensome than experience proves necessary. Prior pronouncements by the Commission indicate that it recognizes this important principle.[6]

However, actions by state regulators threaten to disrupt development of a market approach to these network elements. State regulation in this regard manifests itself in two ways: 1) state regulators seeking to use state law to overturn FCC findings of non-impairment and require unbundling in contradiction to the Act; and 2) state regulators seeking to regulate the agreements between ILECs and CLECs for these network elements through the filing and approval processes of Sections 252(a) and (e) of the Act (or under state law). The Commission should clarify that the FCC's jurisdiction to establish unbundled network elements under the Act is plenary in those areas where the Commission has actually examined a particular element under the impairment test, and that states have no regulatory authority over agreements between carriers for those network elements that have been declared outside the purview of Section 251(c)(2) of the Act by a valid finding of "non-impairment" by the Commission.

1. States do not have authority to overrule a federal finding of non-impairment.

The FCC has already recognized (and almost decided) this issue: once the FCC has examined a network element and determined that it does not meet the impairment standard of Section 251(d)(2), states cannot reverse this decision under federal or state law. Unfortunately, the Commission stopped just short of issuing a preemptive decision to this effect, which led the *USTA II* Court to dismiss a judicial attack on the Commission's most fundamental authority in this area. The Commission's words in the *Triennial Review Order* accurately summarize the law:

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[4] *See Triennial Review Order*, 18 FCC Rcd at 16988-90 ¶ 7.
[5] *See id.* at 17385-89 ¶¶ 655-64.
[6] *See e.g.*, News Release, dated June 14, 2004, FCC Chairman Michael K. Powell Announces Plans for Local Telephone Competition Rules, "Commercial agreements remain the best way for all parties to control their destiny."

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has found either no impairment—and thus has found that unbundling that element would conflict with the limits in section 251(d)(2)—or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.[7]

This correctly states the law. Given the absolute necessity for uniform rules and principles governing unbundling,[8] the FCC should make this preemption explicit. That is, the FCC must state conclusively what it found in the abstract in the *TRO*: states may not require the unbundling of network elements that do not meet the impairment test. If the FCC has found that an element does not meet the impairment test, such a decision is conclusively binding on state regulators, acting both under color of the Act or under color of state law.

2. *States do not have the authority to require filing of, or to approve or disapprove, agreements between carriers for network elements that do not meet the standards of the impairment test for unbundled network elements.*

A related jurisdictional question involves state regulatory authority over agreements between carriers (primarily ILECs and CLECs) dealing with network elements that do not meet the impairment test and cannot be ordered to be unbundled under Section 251(c)(2) of the Act. These agreements must be treated as commercial agreements that are not subject to the provisions of Sections 251(b) or (c) of the Act. Accordingly, they are not subject to state authority under Sections 252(a) or (e) of the Act, or to state reserved authority over intrastate services. It is important that the FCC state plainly that it has plenary jurisdiction over such agreements, and that they must be filed with the FCC under Section 211(a) of the Act until and unless the FCC determines to exempt such contracts from Section 211(a). States do not have jurisdiction over agreements that are not entered into pursuant to Sections 251(b) or (c) of the Act.

Attached hereto as Attachment A[9] is a detailed legal analysis of the jurisdictional principles that must govern market-based agreements between carriers that are not entered into pursuant to Sections 251(b) or (c). The basic principles are as follows:

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[7] *Triennial Review Order*, 18 FCC Rcd at 17101 ¶ 195.

[8] The requirement that the FCC make impairment decisions that recognize that some markets have different impairment characteristics than others is completely consistent with the necessity for national standards.

[9] States Do Not Have Jurisdiction Over RBOC Contracts With CLECs For Functions And Facilities That Have Been Determined Do Not Meet the 'Impairment Test' for Unbundled Network Elements Under the Communications Act, July 26, 2004. Attachment A also addresses a closely related issue, applying these same principles to network elements where an impairment finding has been judicially invalidated. Because we deal here only with permanent rules, which will presumably be accompanied by a valid impairment analysis, we do not discuss that issue in this memorandum.

- State regulators have no jurisdiction under Sections 252(a) and (e) of the Act over network elements that have been found, directly or indirectly, to not meet the impairment test of Section 251(d)(2).

- State regulators have no jurisdiction over agreements between carriers for these network elements because all unbundled network elements are subject to FCC jurisdiction except where the 1996 Act has delegated power to the states. Such delegation is limited to the case of network elements that meet the Section 251(d)(2) impairment standard.

- This federal jurisdiction is made even more explicit by virtue of Section 271(c)(2)(B) of the Act, which requires the unbundling of certain network elements as a prerequisite to RBOCs obtaining the authority to provide long distance service. This is an entirely federal requirement having nothing to do with states.

- Filing of contracts for these elements is governed by Section 211(a) of the Act.

- To the extent that state regulators attempt to interfere with the offering of these elements, including attempting to assert a right of review, approval, disapproval or modification of any such agreement, federal preemption is appropriate and necessary.

The FCC should clarify and solidify these key conclusions in its final rules for unbundled network elements.

III. Permanent Unbundling Rules Must Encourage, Not Penalize, Market Focused Negotiations Between Carriers

Even though the 1996 Act evidences a clear Congressional intent to encourage carriers to negotiate interconnection agreements among themselves, almost all interconnection activity since the passage of the Act has been directed at litigation and arbitration, not negotiation. We submit that, despite the best efforts of regulators at all levels, interconnection agreements that are imposed by regulatory fiat on ILECs, and which area generally perceived by ILECs as confiscatory and unfair (whether such a characterization is reasonable or not) cannot possibly form the basis for a sound telecommunications infrastructure in the future. It is clear that, to the extent possible, the Commission's unbundling rules should favor negotiations, not additional regulations. Of course, the Act itself recognizes this critical fact and is predicated on the efficacy of "binding negotiations" wherever possible.[10]

In this regard, it cannot be overemphasized that, no matter what the preferences of ILECs, CLECs or regulators, competition is rapidly overtaking the entire telecommunications market sector. This competition obviously requires a market response by ILECs, and ILECs will ultimately be driven by market forces to actively seek wholesale customers for their services and facilities. In other words, market forces will require ILECs to tailor their offerings to meet the needs of CLECs -- albeit that these market-based offerings will not necessarily resemble the offerings that regulators have imposed on ILECs over the past eight years.

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[10] 47 U.S.C. § 252(a)(1).

Two recent developments highlight the importance of ensuring that rules do not impede the ability of carriers to negotiate reasonable interconnection agreements among each other. First, immediately after the issuance of the *USTA II* decision, Qwest embarked on a course of seeking to negotiate commercial agreements with other carriers for those elements that the Court had found were not subject to a valid impairment finding. These efforts have included mediated negotiation sessions attended by more than fifty CLECs, and individual negotiations with any CLEC desirous of negotiating meaningful commercial agreements for such network elements. Qwest has entered into negotiated agreements with COVAD for line sharing, and with MCI for a UNE-P commercial product called "Qwest Platform Plus."[11] Both of these agreements are available to other carriers willing to accept their terms and conditions, and Qwest remains committed to negotiating reasonable terms and conditions with other CLECs whose market and business needs may differ from those that led to the COVAD and MCI agreements.

Second, in its *Second Report and Order* in CC Docket No. 01-338,[12] which was released on July 13, 2004, the Commission expressly recognized that one of its rules, the so-called "pick and choose" rule, affirmatively stifled negotiations among carriers for interconnection and interconnection-related services. The Commission found that eliminating that rule would "promote more 'give-and-take' negotiations which will produce creative agreements that are better tailored to meet carriers' individual needs."[13] The Commission's correct conclusion with regard to the viability of contracts for network elements that meet the statutory impairment test is even more vital when dealing with network elements that do not meet that test.

The point is, commercial negotiations based on market reality ultimately have a far more positive effect on competition than do coerced arrangements, especially when one party to the coerced arrangement is firmly convinced that it is unfair and confiscatory. The eight years of litigation over the Commission's broad unbundling policy is a vibrant testament to this truism. In analyzing new permanent rules for unbundling, the Commission must recognize, as part of its overall analytical posture, that market-based agreements are both possible and beneficial for those elements for which impairment is not validly found. Rather than trying to expand the scope of impairment wherever possible, the Commission should focus on establishing a structure wherein only those network elements supported by a valid impairment finding are subject to the unbundling requirements of Section 251(c) of the Act -- with all other network elements left to the proper functioning of the marketplace to determine whether CLECs will purchase the elements from the ILEC or from other carriers, construct the elements themselves, or choose other market sources to provide the inputs to their own services.

[11] Both of these agreements have been filed with the Commission pursuant to Section 211(a) of the Communications Act.
[12] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-164, rel. July 13, 2004.
[13] Id. ¶ 1.

IV. Conclusion

The eight and a half years since enactment of the 1996 Act have been a period of frustration to many industry participants, ILECs and CLECs as well. To a large extent this frustration (and its accompanying market confusion and ultimately market losses) have been caused by the consistent signals that CLECs have received that they will be able to use practically all ILEC facilities and functions at a considerably smaller cost than they would incur if they constructed such facilities themselves or went to other market sources for them, as well as considerably lesser price than the ILECs had incurred in constructing the facilities. As a result, the FCC's own unbundling rules, at times aided by bizarre TELRIC pricing decisions by state regulators, often acted to disrupt and prevent the very competition that the Act was meant to promote and facilitate. In the proceeding for permanent rules for unbundling on remand from the court -- the FCC's fourth effort to construct lawful unbundling rules -- the FCC has a chance to look at the real market and the real economy and develop rules that are actually pro-competitive and pro-competition. The principles in this memorandum present a blueprint for such action.

Qwest
Spirit of Service

ATTACHMENT A

M E M O R A N D U M

DATE: July 26, 2004

RE: STATES DO NOT HAVE JURISDICTION OVER RBOC CONTRACTS WITH CLECs FOR FUNCTIONS AND FACILITIES THAT HAVE BEEN DETERMINED DO NOT MEET THE "IMPAIRMENT TEST" FOR UNBUNDLED NETWORK ELEMENTS UNDER THE COMMUNICATIONS ACT

The purpose of this memorandum is to explain why commercial agreements between ILECs, especially RBOCs, and CLECs for access to network elements that have not been determined to have met the statutory "impairment" standard for unbundling under Section 251(d)(2)(B) of the Telecommunications Act of 1996 ("1996 Act"), are not subject to the jurisdiction of state regulatory agencies.[1]

I. BACKGROUND AND INTRODUCTION

Following the decision of the United States Court of Appeals for the D.C. Circuit in *USTA v. FCC*,[2] at the urging of all five of the FCC's commissioners, Qwest Corporation[3] commenced negotiations with various CLECs for the purpose of entering into commercially reasonable

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[1] This memorandum focuses on state authority over commercial agreements for such non-Section 251 network elements. The memorandum does not address the related issue of state commission authority under state law to require the unbundling of network elements that the Federal Communications Commission's ("FCC" or "Commission") Section 251 rules do not require to be unbundled. Rather, we assume here the validity of the position that only the FCC has the authority to determine that a particular network element be unbundled under Section 251(c) of the 1996 Act. To the extent necessary, we will further address the fact that states are absolutely precluded from ordering the unbundling of network elements.

[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *vacating in part and remanding in part*, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003) ("*Triennial Review Order*").

[3] Qwest Corporation ("QC") is an ILEC and an RBOC (as the successor to U S WEST Communications, Inc., which was formed from three BOCs that were divested from AT&T on January 1, 1984). It is affiliated with Qwest Communications Corporation, an interexchange carrier and other non-ILEC interests. Unless otherwise specified in this memorandum, all references to QC and to Qwest are to Qwest Corporation, the Qwest ILEC.

agreements for the provision of unbundled switching, transport and high capacity loops -- network elements that do not meet the statutory "impairment test" for unbundling under the 1996 Act. Once such agreements are reached, it is Qwest's intention to file them with the FCC under Section 211(a) of the Communications Act, and two such agreements have already been concluded and filed.[4] They have been filed with the FCC on the basis that the agreements are not subject to the filing and review provisions of Sections 252(a) and (e) of the 1996 Act, and need not be filed with state regulators thereunder. Because the agreements are subject to exclusive federal jurisdiction, states are without independent authority to review them under state law.[5]

In *USTA II,* the Court of Appeals for the D.C. Circuit vacated the FCC's determinations that mass market switching, transport and high capacity loops were required to be made available as unbundled network elements under Section 251(c)(3) of the 1996 Act. The Court held that the FCC had not sufficiently supported the classification of these elements as UNEs under the statutory "impairment test" established in Section 251(d)(2)(B) of the 1996 Act. In addition, the FCC's decision that line sharing and a number of other network elements did not meet the impairment test was affirmed by the Court. Based on these decisions, Qwest commenced negotiations with various CLECs to attempt to reach commercially reasonable agreements for the provision of network elements that did not meet the "impairment test." In at least two instances (COVAD and MCI), actual agreements have been reached for network elements that are not required to be unbundled.

Qwest's position in these negotiations is very simple. While the coerced sale of Qwest's network functionality at below-cost rates cannot conceivably form the foundation of a competitive marketplace, Qwest and other ILECs have a significant economic incentive to actively seek and attract wholesale purchasers of network elements on terms and conditions that are mutually beneficial. The public interest is far better served if these agreements can be developed within a competitive market structure.[6]

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[4] 47 U.S.C. § 211(a). In fact, Qwest recently filed a commercial line sharing agreement and a commercial "platform" agreement with the FCC under Section 211(a). *See* letter from Craig J. Brown, Qwest, to Marlene H. Dortch, Secretary, FCC (May 25, 2004). Under this agreement, Qwest will make the "line sharing" network element available to COVAD at commercially reasonable rates, following the transition period in the *Triennial Review Order* for the phase-out of line sharing as an unbundled network element (or "UNE"). *See* letter from Craig J. Brown, Qwest, to Marlene H. Dortch, Secretary, FCC (July 19, 2004). Under this agreement Qwest offers the commercial Qwest Platform Plus service to MCI on terms and conditions that make economic sense to both parties.

[5] States have only limited review authority over negotiated agreements (47 U.S.C. § 252(e)(2)(A)). Qwest's position is that states do not possess even this limited authority over agreements that do not include network elements designated by the FCC for unbundling under Section 251(c) of the 1996 Act.

[6] *See* Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations, filed May 3, 2004 by SBC Communications, Inc., for a delineation of the public interest benefits of commercial negotiations for these elements, as opposed to regulation of the process by state regulatory authorities.

However, certain state regulators have been increasingly insistent that they have the authority to review and approve such commercial agreements. The issue was squarely presented by SBC on May 3, 2004, when it filed an "Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations." In that Petition, SBC alleged that at least several state regulators were actively seeking the filing of a commercial agreement that it had reached with a CLEC with the express intention of reviewing (and possibly modifying or disapproving) it. It has also been raised in the July 1, 2004 BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action, in which a specific assertion of jurisdiction by The Tennessee Regulatory Authority over the same type of commercial agreement has been challenged by BellSouth.[7] Qwest is faced with state regulators indicating the possibility that they will assert jurisdiction over the Qwest agreements with MCI and COVAD. As is demonstrated herein, state regulators have no such jurisdiction, and may not lawfully compel either SBC or BellSouth to take the action that is being demanded of them. Qwest is not required to file its commercial agreements with state regulators either (although we agree that they must be filed with the FCC under Section 211(a) of the Communications Act).

Qwest limits its analysis here to a special class of network elements -- those elements that have been specifically removed from the list of required UNEs by FCC or court action, so that the elements are not required to be offered under Sections 251(b) or (c) of the 1996 Act. For purposes of action in the immediate future, we include within this class four types of network elements – line sharing, mass market switching, certain high capacity (*i.e.*, DS1, DS3, and dark fiber) loops, and certain high capacity (*i.e.*, DS1, DS3, and dark fiber) transport -- that have been removed from the list of UNEs now that the mandate in *USTA II* has issued. Should agreements for other network elements that do not meet the impairment test be reached (*e.g.*, hybrid fiber loops), this analysis will apply to these items as well. We do not seek to extend the analysis in this memorandum beyond the scope of network elements actually examined by the FCC under the "impairment test." Because of their unique circumstances, mass market switching, high capacity loops and transport are included in this category. As line sharing was removed by the Commission itself, it is clear that it does not meet the "impairment test" under any analysis.

In addition, it is Qwest's intention that its commercial agreements and its interconnection agreements will be separate contracts. To the extent appropriate, Qwest's existing interconnection agreements will be amended to remove network elements that are no longer required to be offered as UNEs pursuant to the FCC's Section 251(b) and (c) unbundling rules, and these amendments will be filed with state regulators under Sections 252(a) and (e).[8] But Qwest's commercial agreements for non-Section 251(b) and (c) elements will not be a part of

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[7] The FCC has established a comment cycle for this petition. *See Pleading Cycle Established for Comments on BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action*, DA 04-2028, WC Docket No. 04-245, rel. July 6, 2004.

[8] Obviously if a state attempted to undercut the federal regulatory structure by refusing to approve such an amendment it would be subject to preemption by the FCC as well as to reversal by an appropriate federal district court under Section 252(e)(6) of the 1996 Act.

Qwest's interconnection agreements, and will be filed with the FCC under Section 211(a) of the Communications Act.[9]

Finally, Qwest will comply with applicable federal rules regarding contracts between carriers. These rules include the filing of such agreements under Section 211(a) of the Communications Act and basic non-discrimination responsibilities. While it may be appropriate for the FCC to forbear from enforcing or continuing these rules with regard to this type of commercial agreement in the future, such action has not been taken at this time, and Qwest does not seek forbearance here.

Qwest's position is simple.

- State regulators have no jurisdiction under Sections 252(a) and (e) of the 1996 Act over agreements for network elements that do not meet the "impairment test" of Section 251(d)(2). This is because Sections 252(a) and (e) apply only to agreements for elements required to be made available under Sections 251(b) and (c) of the 1996 Act, and such elements (including line sharing, switching, high capacity loops and transport) are not being offered subject to these sections of the 1996 Act.[10] Unbundling of these elements is within the sole jurisdiction of the FCC.

- State regulators have no jurisdiction over agreements for these elements under their residual state jurisdiction because these elements are subject to FCC jurisdiction except where the 1996 Act has delegated power to the states.

- Filing of contracts for these elements is governed by Section 211(a) of the Communications Act -- which requires filing at the FCC, not at the states.

- For RBOCs, such as Qwest, the federal jurisdiction is made even more explicit because of the federal requirement that many of these network elements must be made available on an unbundled basis under Section 271(c)(2)(B) of the 1996 Act.

- To the extent that state regulators attempt to interfere with the offering of these elements (including attempting to assert a right to review, approve, disapprove or modify such an agreement), federal preemption is in order because it is necessary to protect the FCC's federal jurisdiction over these elements. In the case of network

[9] Qwest is offering to combine network elements covered by commercial agreements with UNEs covered by interconnection agreements, even though it is not required to do so by the 1996 Act or the FCC's rules. *Triennial Review Order*, 18 FCC Rcd. at 17385-86 ¶ 655 n.1990. Qwest's commitment to combine these elements will be part of the commercial agreements, not the interconnection agreements that will be filed with the states under Sections 252(a) and (e).

[10] Because of the unique circumstances under which the industry labors in the wake of the *USTA II* decision, these network elements include switching, high capacity loops and transport, in addition to line sharing and other network elements specifically removed from the list of UNEs by action of the FCC.

elements that are not subject to a valid finding of "impairment," this preemption is automatic and does not need additional action by the FCC.

II. CONTRACTS FOR NETWORK ELEMENTS THAT HAVE NOT BEEN FOUND TO MEET THE STATUTORY "IMPAIRMENT STANDARD" ARE NOT SUBJECT TO STATE JURISDICTION UNDER SECTIONS 252(a) AND (e).

One of the specific regulatory powers vested in the states by the 1996 Act is the authority to review and approve "interconnection agreements" entered into under Sections 251 and 252 of the 1996 Act.[11] Agreements can be either voluntary or, if necessary, the result of state-conducted arbitrations.[12] The state's authority with regard to negotiated agreements is limited to approval or disapproval (on very limited grounds as specified in Section 252(e)(2)(A)) and enforcing the "opt-in" requirements of Section 252(i).[13]

However, not all agreements between carriers are subject to state filing and approval jurisdiction under Sections 252(a) and (e) of the 1996 Act. The relevant question is whether the agreement is an "interconnection agreement" for purposes of Sections 251(b) and (c) of the Act. Section 252(e) requires the filing and approval of "any interconnection agreement adopted by negotiation or arbitration." Section 252(a)(1) specifically references agreements "pursuant to section 251. . ." Agreements for network elements that are not required to be unbundled because of a ruling that they do not pass the "impairment test" are not "interconnection agreements" for purposes of Sections 252(a) and (e).

The term "interconnection agreement" is not defined in the 1996 Act. The Commission has defined the term as "any 'agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation. . .'"[14] The term "network element" is defined broadly in the 1996 Act as "a facility or equipment used in the provision of a

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[11] State approval is necessary for "any interconnection agreement adopted by negotiation or arbitration. . ." Section 252(a)(1) ("The agreement. . . shall be submitted to the State commission under subsection (e) of this section") and Section 252(e)(1) ("Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.").

[12] 47 U.S.C. § 252(b).

[13] The FCC recently eliminated the "pick and choose" aspects of the opt-in requirements of Section 252(i) of the Act. *See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-164, CC Docket No. 01-338, rel. July 13, 2004.

[14] *In the Matter of Qwest Corporation*; *Apparent Liability for Forfeiture*, 19 FCC Rcd. 5169, 5180-81 ¶ 22 (2004), citing *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1)*, 17 FCC Rcd. 19337, 19340-41 ¶ 8 (2002) ("*Declaratory Ruling Order*").

telecommunications service,"[15] but the term "unbundled network element" is not defined and is found only in Section 251(c) of the 1996 Act.[16] A "network element" includes almost any aspect of interconnection, while an "unbundled network element" includes only those designated elements that pass the statutory impairment test. The FCC has ruled that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed . . ." under Sections 252(a) and (e).[17] In other words, only agreements relating to *unbundled* network elements must be filed under Sections 252(a) and (e), not **all** agreements relating to network elements, and state jurisdiction is limited to those agreements covered by the Section 252(a) and (e) filing requirements. The determining factor in the case of a network element is whether the element is covered by the unbundling provisions of Section 251(c)(3) -- that is, whether the FCC has made a valid determination that it meets the statutory "impairment test" for unbundling under Section 251(d)(2)(B).

In this respect, the FCC has established a test for determining whether a network element is subject to the filing requirements of Sections 252(a) and (e). The 1996 Act grants state regulators the authority to demand the filing of a contract for a network element only if: 1) the element is classified properly as an "unbundled network element," and 2) the element fits within the confines of Sections 251(b) or (c). Network elements that have been examined by the FCC and have not been found to meet the statutory "impairment test" meet neither of these standards.

Section 251(b) deals with five specific obligations applicable to all LECs (including CLECs), and does not include any obligations regarding network elements, unbundled or not. Section 251(c) contains the mandatory requirements for the offering of "unbundled network elements" (which are subject to Section 252(e) filing), but does not apply by its terms to elements that have not been required to be unbundled based on a valid finding by the FCC (*i.e.*, elements that have been removed from Section 251(c)). The full relevant language of footnote 26 of the *Declaratory Ruling Order* makes this point clearly:

> We therefore disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. *See* Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, we find that *only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)*.[18]

The filings in the proceeding leading up to the *Declaratory Ruling Order* are instructive in this respect. In 2002, Qwest had filed a declaratory ruling petition requesting a declaration that

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[15] 47 U.S.C. § 153(29).

[16] The independent unbundling requirements of Section 271(c) of the 1996 Act do not use the term "unbundled network element."

[17] *Declaratory Ruling Order*, 17 FCC Rcd. at 19341, n.26.

[18] *Id.* (emphasis added).

certain types of agreements did not need to be filed under Sections 252(a) or (e). Part of that petition noted that agreements for the purchase of network elements that did not need to be unbundled under Section 251(c) did not need to be filed under Sections 252(a) or 252(e), precisely the issue under consideration here:

> Nor do the Section 251/252 rules apply to network elements, such as local switching for large business customers in major metropolitan areas, that the FCC has concluded do not qualify for unbundling under the "necessary" and "impair" standards of Section 251(d)(2), nor to the transport and termination of non-local types of traffic, such as information access.[19]

The *Declaratory Ruling Order* treated the Qwest position on this issue as part of the Qwest request for a declaratory ruling.[20] The FCC never challenged the premise of the position -- that network elements not subject to mandatory unbundling were not subject to Sections 251(b) or (c) and that they were accordingly not subject to the filing requirements of Sections 252(a) and 252(e). In fact, in context, the statement in footnote 26 of the *Declaratory Ruling Order* that only Sections 251(b) and 251(c) services are covered by the Sections 252(a) and 252(e) filing requirements confirms Qwest's position that contracts for the sale of network elements not required to be unbundled under the "impairment test" do not need to be filed under those sections of the 1996 Act.[21]

Agreements between Qwest and CLECs for the provision of network elements that the Commission's rules do not require be unbundled based on a lawful application of the statutory impairment test are not interconnection agreements as that term is used in Sections 252(a) and 252(e) of the 1996 Act. Accordingly, they are not subject to state filing and approval rules under those sections of the 1996 Act.

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[19] Petition for Declaratory Ruling of Qwest Communications International Inc., WC Docket No. 02-89, filed Apr. 23, 2002, pp 36-37 (footnotes omitted). *And see* Qwest Reply Comments, WC Docket No. 02-89, filed June 20, 2002, pp 20-23.

[20] "According to Qwest, the following categories of incumbent LEC-competitive LEC arrangements should not be subject to section 252(a)(1): . . .(iii) agreements regarding matters not subject to sections 251 or 252 (*e.g.*, interstate access services, local retail services, intrastate long distance, and *network elements that have been removed from the national list of elements subject to mandatory unbundling)." Declaratory Ruling Order*, 17 FCC Rcd. at 19338-39 ¶ 3 (emphasis supplied).

[21] *See id.* at 19341, n.26.

III. EXCEPT AS PROVIDED IN SECTIONS 252(a) AND (e), AUTHORITY OVER CONTRACTS FOR NETWORK ELEMENTS THAT HAVE NOT BEEN FOUND TO MEET THE STATUTORY "IMPAIRMENT STANDARD" IS VESTED IN THE FCC, NOT THE STATES.

Network elements that do not meet the impairment test and are offered pursuant to contract to competing carriers are subject to federal law and federal jurisdiction under the Communications Act. In the case of network elements that meet the "impairment test" under the 1996 Act (*i.e.*, "unbundled" network elements), state regulatory agencies have been delegated certain limited authority to review such agreements. In the case of network elements that do not meet this test, the federal jurisdiction remains plenary and states have no authority to review any agreements pertaining to their offering. In other words, when a contract for a network element is no longer subject to the state's delegated authority under Sections 252(a) and (e) of the 1996 Act, regulatory authority over the element reverts almost entirely to the FCC, including leaving the FCC with the sole power to review and regulate contracts between carriers for such network elements.

Prior to the 1996 Act, states generally retained jurisdiction over intrastate telecommunications services and facilities except to the extent that the Communications Act specified otherwise or the FCC acted to preempt state jurisdiction based on state regulation interfering with the FCC's exercise of its own jurisdiction over interstate telecommunications. However, the 1996 Telecommunications Act changed that balance for matters addressed in the 1996 Act, vesting plenary power in the FCC, subject to specific "carve-outs" where states were delegated the authority to act. The sole basis for exercise of state authority to review agreements for network elements is delegation pursuant to the 1996 Act itself (or, possibly, lawful order of the FCC). States have been delegated authority to review "interconnection agreements" addressing matters covered by Sections 251(b) and (c) of the 1996 Act. States have not been delegated further authority to review agreements for other matters covered by the 1996 Act, including the network elements removed from the scope of Section 251(c).

States are delegated authority to review and approve "interconnection agreements" pursuant to Sections 252(a) and (b) of the 1996 Act. States are also delegated the authority to maintain and adopt state rules relating to telecommunications competition so long as they are "not inconsistent with [the 1996 Act] or the Commission's regulations to implement [the 1996 Act]."[22] These statutory *delegations* of authority to the states for those services and facilities covered by the 1996 Act are limited delegations, quite unlike the broad *reservation* of power to states for intrastate services covered by Section 2(b) of the Act.[23]

Agreements for these network elements (including switching, high capacity loops and transport) are subject to federal, not state, jurisdiction after having been removed from the federal list of

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[22] 47 U.S.C. §§ 261(b) and (c). *See also* 47 U.S.C. § 251(d)(3), pertaining to state interconnection regulations.

[23] 47 U.S.C. § 152(b). *See Indiana Bell Telephone Company v. McCarty*, 362 F.3d 378 (7th Cir. 2004).

unbundled network elements for three reasons: 1) In many cases, the elements are required under federal law to be provided on an unbundled basis by RBOCs such as QC under Section 271(c)(2)(B) of the 1996 Act. Thus the unbundling obligation is federal, as is the jurisdiction to review the contracts for these elements. 2) The elements remain subject to federal jurisdiction even after they have been removed from the list of Section 251(c)(3) "unbundled network elements." The FCC does not lose its jurisdiction over network elements simply because the impairment test is not met. 3) Some of the elements (*e.g.*, line sharing used for DSL services) are jurisdictionally interstate and not subject to state jurisdiction in any event.

First, in the case of QC (and other RBOCs), there is an independent investiture of federal jurisdiction under the 1996 Act. Many of the elements which have been removed from the list of unbundled elements must still be unbundled pursuant to Section 271(c)(2)(B) of the 1996 Act.[24] The offering of the switching element, for example, on an unbundled basis pursuant to Section 271(c)(2)(B)(vi) is subject to federal jurisdiction.[25] The filing and review (if any) of contracts entered into pursuant to Section 271(c)(2)(B) of the 1996 Act is a federal matter which has not been delegated to the states.[26]

Second, network elements made available under the 1996 Act are subject to the jurisdiction of the FCC (subject to specific exceptions).[27] The FCC's jurisdiction is not diminished whenever such a network element is removed from the FCC's list of unbundled elements.[28] What this jurisdictional structure means is that a valid federal policy (in this case the policy favoring market agreements for network elements that have not met the impairment test) is presumptively preemptive of inconsistent state regulations because the federal nature of the service/facility under the 1996 Act automatically brings them into the zone of federal jurisdiction.[29] State filing and review requirements are not permissible because they are inconsistent with this preemptive federal policy. The mere fact that the FCC's action in this regard is deregulatory, not regulatory,

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[24] *Triennial Review Order*, 18 FCC Rcd. at 17383-84 ¶ 652.

[25] The FCC, in the *Triennial Review Order*, confirmed this jurisdiction, noting that it would enforce compliance with Section 271 offerings (*id.* at 17385-86 ¶ 655) and that it would apply Sections 201 and 202 of the Act to such offerings (*id.* at 17389 ¶ 663).

[26] Of course, state jurisdiction over Section 271 issues is considerably more limited than is the case with Section 251, and is advisory only. *See* 47 U.S.C. § 271(d)(2)(B).

[27] *See Triennial Review Order*, 18 FCC Rcd. at 17100-01 ¶¶ 194-95; *USTA II*, 359 F.3d at 594.

[28] *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999): "Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions. . ."

[29] In other words, the contrary presumption for services assigned to the intrastate jurisdiction by Section 2(b) of the Act does not apply because federal jurisdiction is established *a priori*. *See California v. FCC,* 798 F.2d 1515, 1520 (D.C. Cir. 1986). The landmark case for the premise that the Commission's jurisdiction to preempt on policy grounds is limited to where it has federal jurisdiction in the first place is *Louisiana Public Service Commission v. FCC,* 476 U.S. 355 (1986). This limitation does not apply to facilities and services committed to the federal jurisdiction under the 1996 Act.

is irrelevant, because deregulatory action by the FCC (*e.g.*, removing a network element from the list of elements that must be unbundled pursuant to the "impairment test") does not reduce either the federal jurisdiction pursuant to which the deregulation was accomplished or the FCC's ability to preempt inconsistent state regulations.[30] Likewise, a reviewing court's vacation and remand of an FCC unbundling rule does not reduce the FCC's jurisdiction over that element. In *USTA II*, for example, the D.C. Circuit clearly expects the FCC, rather than the states, to determine the unbundling obligations, if any, applicable to the network elements that are the subject of the court's vacation and remand.

Finally, some network elements, such as line sharing, are used almost exclusively for the provision of services that themselves fall within the federal jurisdiction because they are interstate in nature. Line sharing (leasing the high frequency portion of a copper loop to a CLEC which uses this frequency for the provision of DSL service) is within the federal jurisdiction because DSL service is a service that itself is jurisdictionally interstate irrespective of any provisions of the 1996 Act.[31] Because states do not have jurisdiction over interstate DSL service, they do not have jurisdiction over agreements between ILECs and CLECs to offer the network elements used to provide DSL service.

Accordingly, states have no regulatory jurisdiction over those network elements that do not meet the impairment test (and have been declared as such by either the FCC or a court of competent jurisdiction). The delegations of authority found in Sections 251(d)(3) and 261(b) and (c) of the Act do not operate to grant or reverse such authority to state regulators.

IV. THE FCC HAS THE AUTHORITY UNDER SECTION 211(a) OF THE ACT TO REQUIRE THE FILING OF AGREEMENTS FOR NETWORK ELEMENTS THAT DO NOT MEET THE STATUORY "IMPAIRMENT TEST."

Contracts between carriers for network elements that do not meet the "impairment test" also fall within express federal filing jurisdiction. That is, the FCC has the authority to require that all such contracts be filed with the agency and to enforce the Communications Act's Section 202(a) non-discrimination requirements with regard to them. As a matter of rule the FCC has exempted non-dominant carriers from the federal filing obligations applicable to such contracts.[32] No such exemption exists for contracts between ILECs (which are subject to dominant carrier regulation) and CLECs. Furthermore, unlike access services, the Commission has not directed the ILECs to

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[30] *See Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana Pub Serv Comm'n v. FCC*, 461 U.S. 938 (1983).

[31] *In the Matter of GTE Telephone Operating Cos.*, *GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order*, 13 FCC Rcd. 22466, 22474-75 ¶ 16 (1998), *recon. denied*, 17 FCC Rcd. 27409 (1999).

[32] *See In the Matter of Amendment of Sections 43.51, 43.52, 043.53, 43.54 and 43.74 of the Commission's Rules To Eliminate Certain Reporting Requirements*, *Report and Order*, 1 FCC Rcd. 933 (1986).

provide these network elements as tariffed offerings. These contracts therefore must be filed with the FCC, but are not subject to prior FCC approval. Concomitantly, states have no authority to duplicate this federal filing requirement (beyond reviewing such contracts for informational purposes only).

Section 211(a) of the Communications Act requires that:

> Every carrier subject to this [Act] shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.[33]

This statutory language provides an affirmative grant of power to carriers to order their affairs with other carriers by way of contract unless the FCC's rules (or other provisions of the Communications Act) provide otherwise, even when the same business relationship with an end-user customer would need to be dealt with in a tariff.[34] It stands for the legal proposition that Qwest may enter into commercial negotiations with CLECs for the sale of network elements not subject to Sections 251(b) or (c), and may enter into binding agreements with those CLECs for the sale of those network elements (even though untariffed sales to end-user customers would generally not be lawful). The general prohibition against "unreasonable discrimination" applies to such contracts.[35] Carriers may, of course, purchase services from the tariffs of another carrier or choose to tariff their inter-carrier offerings -- Section 211(a) provides carriers a choice in those instances where the FCC has not acted to actually require either a contract (unbundled network elements) or a tariff (exchange access). In point of fact, the current structure whereby interexchange carriers purchase access to local exchange carrier facilities and services pursuant to tariff is of relatively recent origin,[36] and the access tariff regime replaced a system governed largely by inter-carrier contracts and partnerships.[37]

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[33] This statutory provision is implemented in Section 43.51 of the Commission's rules. Non-dominant carriers are exempt from the filing requirements of this section. *See* note 32 *supra.*

[34] *Bell Telephone of Pennsylvania v. FCC*, 503 F.2d 1250, 1277 (3d Cir. 1974). *See also In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, *Implementation of Section 254(g) of the Communications Act of 1934, as amended*, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 7141, 7190 ¶ 97 (1996); *In the Matter of the Applications of American Mobile Satellite Corporation*, *Order and Authorization*, 7 FCC Rcd. 942, 945 ¶ 15 (1992); *In the Matter of Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, *Notice of Proposed Rulemaking*, 84 FCC 2d 445, 481 ¶ 95 (1981).

[35] *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988).

[36] *See In the Matter of MTS and WATS Market Structure*, *Second Supplemental Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 224, 226-31 ¶¶ 12-35 (1980).

[37] *See In the Matter of MTS and WATS Market Structure, Third Report and Order*, 93 FCC 2d 241, 246 ¶ 11, 254 ¶ 39, 256-60 ¶¶ 42-55 (1983).

These statutory federal filing requirements are important because they show a federal regulatory regime (already in place) that deals with the precise issue (filing of contracts for interconnection services not covered by Sections 251(b) or (c)) that conflicts directly with state filing requirements applicable to those same agreements. State filing requirements, thus, would not simply contradict the federal jurisdiction over the network elements covered by the agreements; they would traduce a federal regulatory structure that is already in place.

V. CONCLUSION

Agreements between QC and CLECs for network elements that are not covered by Sections 251(b) or (c) do not need to be filed with state regulatory authorities, nor can states demand the right to review such agreements. The agreements are instead subject to federal law and to the federal filing requirements of Section 211(a). The filing requirements in the 1996 Act itself (Sections 252(a) and (e)) do not apply to such agreements because they are not "interconnection agreements" as that term has been defined by the FCC for filing purposes. Other statutory delegations to the states (either under the general reservation provisions of Section 2(b) or the specific delegation provisions of Sections 261(b) and (c) and 251(d)(3)) do not cover the filing of these agreements. What is more, the FCC's interest in preserving the ability of the marketplace to govern the negotiation and implementation of these agreements would be subject to significant interference if state regulators were to successfully assert the jurisdiction to review these agreements.

To the extent necessary to clear up any confusion in this area, it is incumbent on the FCC to take appropriate action to preserve the federal jurisdiction and its own authority over these agreements.