Before the
Federal Communications Commission
Washington, D.C. 20554

In Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: April 8, 1999 **Released: April 16, 1999**

By the Commission: Chairman Kennard, Commissioners Furchtgott-Roth and Powell issuing separate statements.

Comment Date: [30 Days after Publication in Federal Register]
Reply Date: [45 Days after Publication in Federal Register]

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I. INTRODUCTION

1. On January 25, 1999, the United States Supreme Court upheld all but one of the Commission's local competition rules that had been challenged before the United States Court of Appeals for the Eighth Circuit (Eighth Circuit). The Supreme Court rejected, in part, the Commission's implementation of the network element unbundling obligations set forth in section 251(c)(3) of the Telecommunications Act of 1996,[1] and concluded that section 51.319 of the Commission's rules should be vacated.[2] Section 51.319, which was adopted in the *Local Competition First Report and Order*, CC Docket No. 96-98,[3] sets forth the minimum set of network elements that incumbent local exchange carriers (LECs) must make available on an unbundled basis to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2). The Supreme Court found that the Commission, in determining which network elements must be unbundled pursuant to section 251(c)(3), had not adequately considered the "necessary" and "impair" standards of section 251(d)(2).[4] By this Second FNPRM, we seek to refresh the record in CC Docket 96-98, specifically on the issues of: (1) how, in light of the Supreme Court ruling, the Commission should interpret the standards set forth in section 251(d)(2); and (2) which specific network elements the Commission should require incumbent LECs to unbundle under section 251(c)(3).

2. The ability of requesting carriers to use unbundled network elements, including combinations of unbundled network elements, is integral to achieving Congress' objective of promoting rapid competition in the local telecommunications market. Our identification of the network elements that must be unbundled pursuant to section 251 is therefore a critical tool for

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act).

[2] *AT&T Corp., et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct. 721 (1999).

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*).

[4] *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. at 733-36.

promoting the goals of the 1996 Act. In this proceeding, we seek to move forward quickly to resolve the issue of which network elements incumbent LECs must make available on an unbundled basis, in order to reduce uncertainties in the marketplace and to allow carriers to make informed and rational business decisions in order to provide service on a competitive basis to consumers.

3. We seek to build on industry experience and technological changes that have occurred in the telecommunications marketplace since the 1996 Act was enacted three years ago. Today, both incumbent LECs and requesting carriers are at the early stages of deploying innovative technologies to meet the ever-increasing demand for high-speed, high-capacity advanced services. In order to encourage competition among carriers to develop and deploy new advanced services, it is critical that the marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers. Accordingly, as we revisit our rule implementing the network unbundling obligations of the Act, we will consider, as well, how the unbundling obligations of the Act can best facilitate the rapid and efficient deployment of *all* telecommunications services, including advanced services.

4. We need to move quickly in this proceeding but, as always, we must also move with precision. The Supreme Court's opinion requires the Commission to take a hard look at the question of when an incumbent local exchange carrier must make parts of its network available to competitors at cost-based rates. In the words of the Court, we are to "determine on a rational basis which network elements must be made available taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[5] We therefore seek further comment to refresh the record in this proceeding in order to identify those network elements to which incumbent local exchange carriers must provide nondiscriminatory access -- giving substance to the requirements of section 251(d)(2).

II. BACKGROUND

5. On August 8, 1996, the Commission adopted the *Local Competition First Report and Order*, implementing the local competition provisions of the 1996 Act. In that order, the Commission established rules governing the obligations and responsibilities of incumbent LECs to open their local networks to competition pursuant to the requirements of section 251 of the 1996 Act. Among other things, the order adopted rules implementing the network unbundling requirements of sections 251(c)(3) and 251(d)(2) of the 1996 Act. Section 251(c)(3) imposes a duty on all incumbent LECs to provide to competitors access to network elements on an unbundled basis.[6] Section 251(d)(2) provides that, in determining which network elements should be unbundled under section 251(c)(3), the Commission shall consider, "at a minimum, whether --

[5] *Id.* at 736.

[6] Certain rural telephone companies may be exempt from the unbundling provisions of section 251. *See* 47 U.S.C. § 251(f).

(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network element would impair the ability of the telecommunications

carrier seeking access to provide the services that it seeks to offer."[7]

6. In the *Local Competition First Report and Order*, the Commission applied its interpretation of the "necessary" and "impair" standards of section 251(d)(2) to the unbundling requirements of section 251(c)(3). Specifically, the Commission defined "necessary" to mean "an element is a prerequisite for competition,"[8] and it defined "impair" to mean "to make or cause to become worse; diminish in value."[9] The Commission also determined that a requesting carrier's ability to offer service is "impaired" ("diminished in value") if "the quality of the service the entrant can offer, absent access to the requested element, declines" or if "the cost of providing the service rises."[10]

7. After addressing the "necessary" and "impair" standards, the Commission adopted rule 51.319, which sets forth the network elements that incumbent LECs must make available to requesting carriers on an unbundled basis.[11] Section 51.319 of the Commission's rules required incumbent LECs to make available, on an unbundled basis, the following network elements: (1) local loops; (2) network interface devices; (3) local switching; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) operations support systems; and (7) operator services and directory assistance.[12]

8. Following adoption of the *Local Competition First Report and Order*, incumbent LECs and state commissions filed various challenges to the Commission's rules; these appeals were consolidated in the Eighth Circuit. Among other holdings, the Eighth Circuit rejected incumbent LECs' argument that, in determining which elements were subject to the unbundling requirements, the Commission had not properly applied the "necessary" and "impair" standards of section 251(d)(2).[13] Accordingly, the Eighth Circuit upheld section 51.319. A number of parties sought and were granted review of the Eighth Circuit's decision by the Supreme Court.

9. In its January 25, 1999 opinion, the Supreme Court reversed the Eighth Circuit's decision on this issue, stated that section 51.319 should be vacated, and remanded the matter for

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[7] 47 U.S.C. § 251(d)(2).

[8] *Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, para. 282.

[9] *Local Competition First Report and Order*, 11 FCC Rcd at 15643, para. 285 (quoting *Random House College Dictionary* 665 (rev. ed. 1984)).

[10] *Local Competition First Report and Order*, 11 FCC Rcd at 15643, para. 285.

[11] *Local Competition First Report and Order*, 11 FCC Rcd at 15683, para. 366.

[12] 47 C.F.R. § 51.319. We note that the Commission's rules allowed states to impose additional unbundling requirements pursuant to the Commission's interpretation of section 251(d)(2). *Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, paras. 281-83.

[13] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 808-10 (8th Cir. 1997) (*Iowa Utils. Bd.*).

further proceedings.[14] The Court concluded that the Commission had not adequately considered the "necessary" and "impair" standards of section 251(d)(2). The Court found, among other things, that the Commission, in deciding which elements must be unbundled, did not adequately take into consideration the "availability of elements outside the incumbent's network."[15] The Court also faulted the Commission's "assumption that *any* increase in cost (or decrease in quality) imposed by a denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services."[16] In addition, the Court criticized the Commission's interpretation of section 251(d)(2) because it "allows entrants, rather than the Commission, to determine" whether the requirements of that section are satisfied.[17]

III. REQUEST FOR FURTHER COMMENTS

10. In response to the Supreme Court ruling, we must further consider the "necessary" and "impair" standards of section 251(d)(2) in identifying network elements that are subject to the unbundling requirements of section 251(c)(3). Although we retain the right to consider and rely upon comments previously filed in this docket, any comments parties want the Commission to consider on this issue must be filed in response to *this* Notice, and commenters should not simply incorporate by reference previous arguments made in this proceeding.

11. We seek comment on a number of issues related to the interpretation of section 251(d)(2), including identification of unbundled network elements on a nationwide basis, the interpretation of the "necessary" and "impair" standards of section 251(d)(2), and the criteria the Commission and states should consider in determining whether a network element is subject to the unbundling obligations of section 251(c)(3) of the 1996 Act. In determining which network elements are subject to the unbundling obligations of section 251(c)(3), we seek comment on an

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[14] *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. at 733-36. As already noted, the Supreme Court upheld all but one of the local competition rules that had been challenged. The Supreme Court held that the Commission has general jurisdiction to implement the 1996 Act's local competition provisions, and the Commission's rulemaking authority extends to sections 251 and 252. Specifically, the Court found that the Commission's rules governing unbundled access are, with the exception of identifying unbundled network elements under section 251(d)(2), consistent with the 1996 Act: (1) the Commission's interpretation of "network element," as including operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided to competitors, is reasonable; (2) the Commission reasonably omitted a facilities-ownership requirement; (3) the Commission's rule 51.315(b), which forbids incumbents to separate already-combined network elements before leasing them to competitors, reasonably interprets section 251(c)(3) of the 1996 Act; and (4) the Commission's "pick and choose" rule that requires an incumbent LEC to make available to any requesting carrier any individual interconnection, service, or network element arrangement contained in any state-approved agreement "upon the same rates, terms, and conditions as those provided in the agreement" is a reasonable interpretation of section 252(i) of the 1996 Act. *Id.* 724-29.

[15] *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. at 735.

[16] *Id*. at 733-36 (emphasis in original).

[17] *Id*. at 735.

approach that would allow sunset or modification of the unbundling obligations as technology and market conditions evolve over time. Such an approach would allow the Commission and the states to identify particular network elements that should be sunsetted or removed from, or added to, the initial list of elements subject to the unbundling obligations of the Act, as warranted.

12. As we have stated, the Supreme Court found that the Commission, in deciding which elements must be unbundled, did not adequately take into consideration the availability of elements outside the incumbent's network. More generally, we note that application of the "necessary" and "impair" standards that we develop pursuant to section 251(d)(2) may be relatively fact-intensive. At the same time, we recognize that in resolving these fact-intensive questions, particularly in an expedited time frame, it may be beneficial to consider what evidentiary standards and presumptions are most appropriate, both in the context of the initial designation of network elements subject to unbundling requirements, and any subsequent proceedings to modify the unbundling obligations. We ask parties to comment on the types of evidentiary standards or approaches that should govern application of the section 251(d)(2) standards in determining which network elements must be unbundled. Commenters should address which parties should bear the burdens of proof and production, whether any presumptions should apply, and why. Commenters are also requested to justify the evidentiary standards or approaches they advocate, especially in light of the kinds of data that can be made available in this proceeding, the purposes and structure of the Act, and the identity of the parties most likely to be in control of relevant data.

A. Identification of Unbundled Network Elements on a Nationwide Basis

13. In the *Local Competition First Report and Order*, the Commission concluded that, by identifying a specific list of network elements that must be unbundled, applicable uniformly in all states and territories, we would best further the "national policy framework"[18] established by Congress to promote competition. In particular, a national list would: (1) allow requesting carriers, including small entities, to take advantage of economies of scale; (2) provide financial markets with greater certainty in assessing requesting carriers' business plans; (3) facilitate the states' ability to conduct arbitrations; and (4) reduce the likelihood of litigation regarding the requirements of section 251(c)(3).[19] Accordingly, the Commission adopted a minimum list of network elements that must be unbundled on a national basis, and permitted states to impose additional unbundling requirements.[20]

14. We find nothing in the Supreme Court's decision that calls into question our decision to establish minimum national unbundling requirements. We therefore tentatively conclude that the Commission should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis. We seek comment on this tentative conclusion. We

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[18] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

[19] *Local Competition First Report and Order*, 11 FCC Rcd at 15616-27.

[20] *Local Competition First Report and Order*, 11 FCC Rcd at 15616-27, paras 226-48; 15641-42, paras. 281-83.

also seek comment on whether the existence of geographic variations in the availability of elements outside the incumbent LEC's network is relevant to a decision to impose minimum national unbundling requirements. We also seek comment on the relevance, if any, to the interpretation of the "necessary" and "impair" standard, that we are reexamining these issues today, more than three years after passage of the Act. We note that, under our rules, the states have authority to impose additional unbundling requirements, pursuant to our interpretation of section 251(d)(2).[21] We do not propose to eliminate the states' authority to impose additional unbundling requirements, pursuant to the standards and criteria we adopt in this proceeding. In addition, we seek comment on whether states may, consistent with the Supreme Court's decision, apply our interpretation of section 251(d)(2) to determine in the first instance that a network element need not be unbundled in light of the availability of that element outside the incumbent's network in that state. If so, under what circumstances, if any, should the Commission review state decisions?

B. Interpretation of the Term "Proprietary" in Section 251(d)(2)(A)

15. Section 251(d)(2)(A) refers to network elements that are "proprietary" in nature. We seek comment on the meaning of the term "proprietary" for purposes of this section. In the *Local Competition First Report and Order*, the Commission referred to proprietary network elements as including, for example, "those elements with proprietary protocols or elements containing proprietary information."[22] The Commission also concluded that the incumbent LEC's signaling protocols that adhere to Bellcore standards are not proprietary in nature because they use industry-wide, rather than LEC-specific, protocols.[23] We seek comment on whether we should consider network elements as non-proprietary if the interfaces, functions, features, and capabilities sought by the requesting carrier are defined by recognized industry standard-setting bodies (*e.g.*, ITU, ANSI, or IEEE), are defined by Bellcore general requirements, or otherwise are widely available from vendors. We also seek comment on whether non-carrier specific standards can be proprietary. What effect, if any, could Commission action have on whether a network element is proprietary? Commenters should discuss whether the term "proprietary" should be limited to information, software, or technology that can be protected by patents, copyrights, or trade secrecy laws, or whether it can also apply to materials that do not qualify for such legal protection. If a network element contains what parties assert to be proprietary information, but access to that information is not accessible by third parties seeking access to a

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[21] *Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, paras. 281-83; 47 C.F.R. § 51.317. Although the Supreme Court's analysis of section 251(d)(2) may have a bearing on Rule 317, which allowed states to identify additional network elements for unbundling, the court did not directly address that role. The Commission has asked the Eighth Circuit for a voluntary remand of Rule 317 so that the Commission may consider it further in light of the Supreme Court's decision.

[22] *Id.* at 15641, para. 282. For most network elements required to be unbundled under section 51.319, the Commission noted that parties had not identified any proprietary concerns. For those network elements where parties did identify proprietary concerns, the Commission found that access to such networks was "necessary." *Id.* at 15694, 15697, 15710, 15720, 15739, 15744-45, 15748, 15766, 15774, paras. 388, 393, 419, 446, 481, 490, 497, 521, 539.

[23] *Id.* at 15739, para. 481.

particular element, should the entire element be considered "proprietary" for purposes of section 251(d)(2)(A)? We also seek comment on whether the term "proprietary" refers solely to proprietary interests the incumbent LEC may have in an element, or whether it may also refer to proprietary interests of third parties (*e.g.*, vendors).

C. Interpretation of "Necessary" in Section 251(d)(2)(A)

16. In the *Local Competition First Report and Order*, the Commission defined a "necessary" network element as one that is a "prerequisite" to competition. The Commission stated that "in some instances, it will be 'necessary' for requesting carriers to obtain access to proprietary elements (*e.g.*, elements with proprietary protocols or elements containing proprietary information), because without such elements the ability of requesting carriers to compete would be significantly impaired or thwarted."[24] We seek comment on the definition of "necessary" for the purpose of determining proprietary network elements that must be unbundled pursuant to the requirements of section 251(d)(2)(A).

D. Interpretation of "Impair" in Section 251(d)(2)(B)

17. Section 251(d)(2)(B) requires us to consider whether the failure to provide access to an element would "impair" the ability of a new entrant to provide a service it seeks to offer. In the *Local Competition First Report and Order*, the Commission adopted a dictionary definition of the term "impair" that means "to make or cause to become worse; diminish in value."[25] The Commission stated that "generally . . . an entrant's ability to offer a telecommunications service is 'diminished in value' if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises."[26] We seek comment on the meaning of the term "impair." Should the Commission adopt a standard by which we examine whether the new entrant's ability to offer a telecommunications service in a competitive manner is materially diminished in value? Would a new entrant be "impaired" from providing service in a certain area if there is no additional collocation space available in the incumbent LEC's central office?

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[24] *Id*. at 15641, para. 282.

[25] *Id.* at 15643, para. 285 (citing *Random House College Dictionary* 665 (rev. ed. 1984)).

[26] *Id.* The Commission concluded that the "impairment" standard of section 251(d)(2)(B) "required the Commission and the states, when evaluating unbundled requirements beyond those identified in our minimum list, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."

E. The Difference Between the "Necessary" and "Impair" Standards

18. We seek comment on the difference between the "necessary" standard under section 251(d)(2)(A) and the "impair" standard of section 251(d)(2)(B). Since the 1996 Act employs two different terms, must the Commission apply different criteria to determine whether a network element meets these standards? To the extent parties propose using the same criteria, we seek comment on the legal basis for applying the same criteria as well as on how we should apply the criteria to differentiate between the "necessary" and "impair" standards.

19. In the *Local Competition First Report and Order*, the Commission found that the "necessary" standard only applies to "proprietary" network elements, and that the "impair" standard applies to "nonproprietary" network elements. This construction was also applied by the Eighth Circuit and, apparently, by the Supreme Court in reviewing the Commission's analysis of unbundling requirements under section 251(d)(2).[27] We seek comment on whether our understanding of the courts' interpretation should govern in this proceeding.

F. Criteria for Determining "Necessary" and "Impair" Standards

20. In this section, we seek more specific comment on what factors or criteria the Commission should adopt in determining whether access to network elements is necessary and whether failure to provide such access would impair an entrant's ability to provide service. The Supreme Court has provided some guidance in this respect. The Court stated that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do."[28] The Court stated further that "[w]e cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included section 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided."[29]

21. Although the Supreme Court acknowledged incumbent LEC arguments that section 251(d)(2) codifies "something akin" to the essential facilities doctrine, the Court did not find that section 251(d)(2) mandates that standard. We nevertheless seek comment on the significance of the essential facilities standard under section 251(d)(2). Next, the Supreme Court concluded that we must take into account the availability of substitutes for incumbent LEC network elements outside of the incumbent's network. We thus seek comment on when we should deem a substitute sufficiently available so as to render access to the incumbent's network element unnecessary. Finally, the Court found that the Commission erred in concluding that "any"

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[27] *Iowa Utils. Bd.*, 120 F.3d at 811 n.31; *see also AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 735 (stating that "the Commission's judgment allows entrants, rather than the Commission, to determine whether access to proprietary elements is necessary, and whether the failure to obtain access to nonproprietary elements would impair the ability to provide services").

[28] *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 734-35.

[29] *Id*. at 735.

increase in cost or decrease in quality resulting from the failure to gain access to a network element satisfied the necessary and impair standard. We therefore seek comment on whether and the extent to which an increase in cost or decrease in quality caused by the inability of obtaining access to an incumbent's network element meets the "necessary" or "impairment" standard. In addressing these factors, commenters should distinguish between the "necessary" and "impair" standards if appropriate to do so in light of the factor being discussed.

1. Essential Facilities Doctrine

22. In their arguments before the Supreme Court, incumbent LECs asserted that section 251(d)(2) codifies a standard similar to the "essential facilities" doctrine, as defined in antitrust jurisprudence.[30] We ask parties to describe this doctrine and how it should be applied, if at all, to the determination of which network elements incumbent LECs must provide on an unbundled basis pursuant to sections 251(c)(3) and 251(d)(2). Parties should also cite any relevant legislative history that would indicate Congress' views on this standard or any similar standard.

23. In discussing the "essential facilities" doctrine, the Supreme Court observed that "it may be that some other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind."[31] Accordingly, we seek comment on alternative standards that should be considered in determining which network elements must be unbundled pursuant to sections 251(c)(3) and 251(d)(2).

2. Availability and Cost of Network Elements Outside the Incumbent LEC's Network

24. The Supreme Court stated that, in determining the list of elements that incumbent LECs must provide on an unbundled basis pursuant to sections 251(c)(3) and 251(d)(2) of the Act, the Commission must take into consideration the availability of network elements outside the incumbent's network.[32] We seek comment on how the Commission should consider the availability of network elements outside of the incumbent's network. We ask commenters to discuss potential alternative sources of network elements from other competing carriers, as well as availability of network elements through self-provisioning. We also ask commenters to provide information on the costs of alternatives, the length of time it takes to obtain alternatives, and the extent to which alternatives to unbundled elements are being utilized now. We also seek comment on how the Commission, in assessing potential alternative sources of network elements, should evaluate alternatives available from other competing carriers if those carriers are not subject to unbundling obligations of 251(c)(3).

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[30] *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 734 (referencing P. Areeda & H. Hovenkamp, *Antitrust Law* at 771-773 (1996)).

[31] *Id.*

[32] *Id.* at 735.

25. In determining whether a requesting carrier's ability to provide a service would be impaired if it did not obtain a network element on an unbundled basis from the incumbent LEC, how should we assess and treat the additional cost of utilizing an alternative source for that element? The Supreme Court found insufficient the Commission's "assumption that *any* increase in cost would impair a requesting carrier's ability to provide service."[33] We therefore seek comment on whether and the extent to which the Commission should consider differences in costs between obtaining the network element from the incumbent versus through self-provisioning or from an alternative source. Should the Commission adopt a standard under which we examine whether the difference in cost between obtaining a network element from an incumbent LEC as opposed to obtaining it through self-provisioning or from an alternative source is a "material" difference? If so, what constitutes a "material" difference? For example, if the cost of obtaining the network element from the incumbent LEC is half of the cost of obtaining it from another source, should the incumbent be required to unbundle it? How would this work in practice? Should the threshold vary by the network element?

26. We also seek comment on what specific cost differences the Commission should include in evaluating the "necessary" and "impair" standards. In the *Local Competition First Report and Order*, the Commission stated that incumbent LECs "have economies of density, connectivity, and scale . . . [that must] be shared with entrants."[34] We seek comment on the extent to which we should consider cost differences based on economies of density, connectivity, and scale in determining whether a network element must be unbundled pursuant to sections 251(c)(3) and 251(d)(2). We also seek comment on whether the Commission should evaluate "sunk" costs that would be incurred by requesting carriers if they were to obtain the network elements through self-provisioning or from other sources outside the incumbent LEC's network (*e.g.*, those costs associated with entry that are not fully recoverable if the requesting carrier exits the market).

27. We seek comment on the extent to which we should consider the quantity of facilities that may be necessary for competitors to obtain in order to compete effectively. For example, a competitor's ability to compete may not be "impaired" if it is required to self-provision only one switch. With respect to some entry strategies, however, in order to compete effectively, the new entrant may need to obtain multiple switches. Accordingly, we ask parties to comment on the extent to which such factors as economies of scale, penetration assumptions, and the requesting carrier's particular market entry strategies should be considered as part of the "necessary" and "impair" analysis.

28. In addition to cost, we seek comment on other factors that the Commission should consider in evaluating the availability of network elements from alternative sources. For example, how should the Commission assess factors such as the difference in the length of time it takes to obtain a network element from an incumbent LEC versus obtaining it from an alternative source. We seek comment, in particular, on whether and the extent to which the language of the statute

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[33] *Id.*

[34] *Local Competition First Report and Order*, 11 FCC Rcd at 15508-09, para. 11.

and the Supreme Court's opinion constrain the factors that we can or should consider in evaluating the availability of elements outside the incumbent's network. We also seek comment on whether differences in quality that result from acquiring a network element from the incumbent LEC compared to an alternative source are relevant to our analysis of the "necessary" and "impair" standards of section 251(d)(2). Parties advocating the application of such factors for analyzing unbundling requirements under the "necessary" and "impair" standards of section 251(d)(2) should discuss specific methods for measuring and applying those differences to specific network elements.

G. Weight to be Given to Various Factors

29. Section 251(d)(2) states that the Commission shall "consider, at a minimum" whether access is necessary or lack of access would impair a requesting carrier's ability to provide service. In explaining the Commission's duty when directed by Congress to "consider" a particular factor, the D.C. Circuit has held: "That means only that [the Commission] must 'reach an express and considered conclusion' about the bearing of a factor, but is not required 'to give any specific weight' to it."[35] At the same time, the Supreme Court observed in its remand of the *Local Competition First Report and Order* that, in determining which network elements must be unbundled, "the Commission cannot consistent with the statute, blind itself to the availability of elements outside the incumbent's network."[36] The Court also observed that "giving some substance to the "necessary" and "impair" requirements . . . is not achieved by disregarding entirely the availability of elements outside the network . . . ."[37] What weight, then, should the Commission attach to the 'necessary' and 'impair' requirements of section 251(d)(2)? In particular, commenters should address how much weight the Commission must give to these requirements in order to satisfy section 251(d)(2) and the Supreme Court decision.

30. We also seek comment on what other factors the Commission should consider, in addition to the "necessary" and "impair" standards, in determining whether a particular network element should be unbundled, and on how any proposed additional criteria would interrelate with the "necessary" and "impair" standards set forth in the statute. Commenters should specifically identify any factors deemed sufficiently important in meeting the goals of the 1996 Act to require the unbundling of a network element, even if such unbundling did not otherwise meet the "necessary" or "impair" standards of sections 251(d)(2)(A) or (B) standing alone.

31. Finally, we ask commenters addressing particular standards and criteria for interpreting the "necessary" and "impair" standards of section 251(d)(2) to discuss how those standards and criteria are consistent with, and further the goals of the 1996 Act.

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[35] *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (quoting *Central Vermont Ry. v. ICC*, 711 F.2d 331, 336 (D.C. Cir. 1983)).

[36] *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. at 735.

[37] *Id*. at 736.

H. Application of Criteria to Previously Identified and Other Network Elements

32. As discussed above, in the *Local Competition First Report and Order*, the Commission identified seven network elements that were subject to the unbundling obligations of section 251(c)(3).[38] We note that in the *Local Competition* proceeding, even incumbent LECs agreed that the local loop is a network element that must be unbundled pursuant to sections 251(c)(3) and 251(d)(2) of the Act.[39] It is our strong expectation that under any reasonable interpretation of the "necessary" and "impair" standards of section 251(d)(2), loops will be generally subject to the section 251(c)(3) unbundling obligations. We seek comment on this analysis. We also see nothing in the statute or the Supreme Court's opinion that would preclude us from requiring that loops that must be unbundled must also be conditioned in a manner that allows requesting carriers supplying the necessary electronics to provide advanced telecommunications services, such as digital subscriber line technology (xDSL).[40] We seek comment on this analysis.

33. Parties are requested to apply their proposed standards and criteria, as well as other proposed standards, to the loop and the other six network elements previously identified in the *Local Competition First Report and Order.* Parties should also apply their proposed standards and criteria to any other network elements they contend should be unbundled. For example, we seek comment on whether, due to technology changes, we should require sub-loop unbundling at the remote terminal or at other points within the incumbent LEC's network. Parties should also comment on situations where the incumbent LEC owns facilities on the end user's side of the network demarcation point and whether those facilities should be unbundled under section 251(c)(3). In light of the Supreme Court decision, we also seek comment on whether the Commission can require incumbent LECs to combine unbundled network elements that they do not already combine (*e.g.*, an unbundled loop combined with unbundled transport).[41] To the extent parties advocate that certain network elements fail to meet the "necessary" or "impair" standard, we ask that parties provide the Commission sufficient information regarding the

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[38] *See* section II, *supra*.

[39] *See, e.g.*, USTA Initial Comments at 28; GTE Initial Comments at 32-37; BellSouth Initial Comments at 37-40; and Bell Atlantic Initial Comments at 22.

[40] In our decision *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188, para. 52 (released Aug. 7, 1998), we concluded that under section 251(c)(3) and our rules, incumbent LECs are required to provide unbundled loops conditioned in a manner that allows requesting carriers to provide advanced services such as xDSL.

[41] Rule 315(c) required incumbent LECs to combine network elements on behalf of requesting carriers. 47 CFR §51.315(c). The Eighth Circuit vacated Rule 315(c) because the Court found that "the plain language [of section 251(c)(3)] of the Act indicates that the requesting carriers will combine the unbundled elements themselves[.]" *Iowa Utilities Bd*. 120 F.3d at 813. The Commission has filed a motion before the Eighth Circuit seeking a voluntary remand of the Commission's Rules 315 (c-f) and 311(c). Response of Federal Respondents to Local Exchange Carriers' Motion Regarding Further Proceedings on Remand and Motion for Voluntary Partial Remand, 8th Cir. No. 96-3321 (and consolidated cases), (filed Mar. 2, 1999). This motion is still pending.

competitive availability of alternatives to such network elements. Parties are requested to include specific costs and availability of such network elements, on an element-by-element basis. Additionally, we ask commenters to provide factual information comparing the quality of alternatives to those network elements that they request to be unbundled.

34. We also ask parties to comment on whether, in light of technological advances or experience in the marketplace since adoption of the *Local Competition First Report and Order*, the Commission should modify the definition of any of its previously identified network elements. For example, should we modify the definition of "loops" or "transport" to include dark fiber?

35. In light of the Supreme Court remand, we seek additional comment on whether network elements used in the provision of advanced services should be unbundled, as discussed in the *Advanced Services NPRM*.[42] For example, parties should comment on whether digital subscriber line access multiplexers and/or packet switches should be unbundled pursuant to section 251(c)(3). Parties should also comment on whether there is any basis for treating network elements used in the provisioning of packet-switched advanced services any differently than those used in the provisioning of traditional circuit-switched voice services.

I. Modifications to Unbundling Requirements

36. Given that technological, competitive, and economic factors may, over time, affect the availability of network elements from sources outside the incumbent LEC's network, we seek comment on whether the Commission should adopt a mechanism by which network elements would no longer have to be unbundled at a future date. In particular, we seek comment on whether affirmative steps by the parties or the Commission should be necessary to remove a particular element from unbundling requirements, or whether affirmative action should be necessary to continue requiring the unbundling of particular elements. Commenters should address this question in light of the language and purposes of the statute, as well as the Supreme Court's opinion. If there subsequently is a modification to an unbundling requirement, should an incumbent LEC be required to continue to unbundle that element identified in an interconnection agreement until the date that the agreement expires? Under such a scenario, should an incumbent LEC be able to refuse to unbundle a network element that is no longer required when negotiating a new contract with other parties?

37. Parties advocating that we adopt a mechanism for removing particular elements from the unbundling requirements should provide specific details and explain the legal basis under section 251(d)(2) for doing so. Parties should discuss what factors the Commission should consider in determining whether to remove an element from the unbundling obligations of section 251(c)(3), how the Commission should apply those factors to the particular element, and what conditions would trigger removal from the unbundling requirements. If the Commission adopts a mechanism for removing the unbundling obligation for specified network elements, to what extent should the Commission consider whether to phase out the use of such unbundled network elements in a manner that avoids market disruptions? Should the incumbent LEC bear the burden

[42] *Id.*

of demonstrating to the Commission that a particular network element no longer need be unbundled, and what showing should be necessary to overcome any presumption in favor of continuing the unbundling requirement? Alternatively, should competing LECs bear the burden of demonstrating that unbundling is still required pursuant to section 251(d)(2)? Should we restrict incumbents from seeking removal of certain network elements from the unbundling requirements for a specific period of time following implementation of our new unbundling rules (*e.g.*, two years), or in the case of regional Bell Operating Companies (BOCs), until after section 271 authority is obtained?

38. We also seek comment on whether section 251(d)(2), or any other provision of the Act, provides the Commission with the authority to delegate to the states responsibility for removing network elements from any national unbundling requirements, applying the standards of section 251(d)(2) we adopt in this proceeding. If we were to delegate such responsibility to the states, what procedure should apply for appeals to the Commission from a state's determination that a network element no longer qualified for unbundling under section 251(c)(3)?

39. We also seek comment on whether the Commission has authority to adopt a "sunset" provision under which unbundling obligations for particular elements or all elements would no longer be required, upon the passage of time or occurrence of certain events, without any subsequent action by the Commission. Inasmuch as Congress included "sunset" provisions in other parts of the 1996 Act, how does the lack of reference to one here affect our authority to adopt such a provision? We seek comment on specific criteria that the Commission should consider in determining whether to "sunset" a requirement to provide unbundled network elements, if the Commission has such authority. Parties should comment on what predictive judgments about the future would be needed, if any, and they should provide the information the Commission would need in order to make a determination that a "sunset" provision is appropriate. Parties advocating a sunset provision should address any possible uncertainties and incentives created by such an approach and any possible effects on local competition and future new entrants.

40. We also seek comment on the extent to which adoption of a "sunset" provision would constitute forbearance prohibited under section 10(d) of the Act. Section 10(d) forbids the Commission from forbearing "from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."[43] We also seek comment on the meaning of "fully implemented" in this provision of the Act. Would it be considered forbearance if unbundling of a particular element were no longer required because that element no longer satisfied the requirements of section 251(d)(2)?

J. Additional Questions

41. We seek comment on what effect, if any, the fact that Congress required BOCs seeking in-region interLATA authority to unbundle certain network elements should have on our interpretation of section 251(d)(2). For example, should there be a presumption that the network

[43] 47 U.S.C. § 160(d).

elements set forth in the competitive checklist of section 271(c)(2)(B) are subject to the unbundling obligation contained in section 251(c)(3)?[44] Conversely, what would be the effect on future 271 applications of concluding that a network element identified in section 271(c)(2)(B) is not subject to the 251(c)(3) unbundling obligations? For example, if after considering the "necessary" and "impair" standards of section 251(d)(2) we determine that a network element need not be unbundled pursuant to section 251(c)(3), what terms and conditions would still apply to that element if it must be provided as part of the competitive checklist of section 271? Commenters should address what pricing standard, if any, would apply in such a situation, and what pricing rule would govern in arbitrations where the parties had been unable to negotiate a price.[45]

42. In addition, we seek comment on whether the existence of a competitive market for a network element is necessary to demonstrate that an element is sufficiently available outside the incumbent's network so that failure of the incumbent to provide the element would not be "necessary" or would not "impair" a carrier's ability to provide service. What relevance is the fact that those entities that could provide alternative sources of the element do not have a legal obligation to unbundle that element? For example, section 251(b)(3) requires all local exchange carriers to provide operator services and directory assistance (OS/DA) to competing providers of telephone exchange carriers.[46] Assuming there is a competitive market for OS/DA, and LECs are obligated to provide those services under section 251(b), is a competitor's ability to compete "impaired" if these functions are not provided by incumbent LECs as an unbundled network element under section 251(c)(3)?

43. In the *Local Competition First Report and Order*, the Commission explicitly rejected the argument that would allow incumbent LECs to deny access to unbundled elements if the element is equivalent to a service available at resale.[47] The Commission stated that such a conclusion would lead to impractical results, because incumbents could completely avoid section 251(c)(3) unbundling obligations by offering unbundled elements to end users as retail services.[48] In light of the Supreme Court decision, we seek comment on the extent to which, if any, the availability of resold services obtained from the incumbent LEC should be considered in determining whether a particular network element should be unbundled. More specifically, we ask parties to apply their interpretations of the "necessary" and "impair" standards in light of the availability of incumbent LEC resold services. Is there a legal or policy basis for concluding that

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[44] Prior to obtaining authority to provide long distance service, section 271(c)(2)(B) requires Bell Operating Companies to demonstrate, among other things, that they are providing or "generally offering" to requesting carriers the following network elements: local loops, transport, switching, databases and signalling. 47 U.S.C. § 271(c)(2)(B).

[45] Network elements unbundled pursuant to section 251(c) must comply with the pricing standards of section 252(d)(1). 47 U.S.C. § 251(c)(3).

[46] 47 U.S.C. § 251(b)(3).

[47] *Local Competition First Report and Order*, 11 FCC Rcd 15644, para. 287.

[48] *Id.*

the inability to obtain access to combinations of network elements could impair a requesting carrier's ability to provide service to residential customers, but not business customers?

44. Parties should submit the text of any proposed rules they urge the Commission to adopt as part of their filings in this proceeding.

IV. PROCEDURAL ISSUES

A. *Ex Parte* Presentations

45. The matter in Docket No. 96-98, initiated by this Second FNPRM, shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[49] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[50] Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) as well. Interested parties are to file with the Secretary, FCC, and serve Janice Myles and International Transcription Services (ITS) with copies of any written *ex parte* presentations or summaries of oral *ex parte* presentations in these proceedings in the manner specified below for filing comments.

B. Supplemental Initial Regulatory Flexibility Analysis

46. In the *Local Competition First Report and Order*, the Commission prepared a Final Regulatory Flexibility Analysis (FRFA) addressing the impact of the local competition rules on small businesses,[51] including section 51.319.[52] In *AT&T v. Iowa Utils. Bd.* the Supreme Court vacated section 51.319 because it found that the Commission had not properly considered and applied the "necessary" and "impair" standards of section 251(d)(2) when it identified network elements that must be unbundled pursuant to section 251(c)(3) of the Act. This proceeding will further consider, in light of the Supreme Court's decision in *AT&T v. Iowa Utils. Bd.*, how the Commission should interpret the standards set forth in section 251(d)(2), and which network elements should be unbundled under section 251(c)(3). This may require modification of the portion of the *Local Competition First Report and Order* FRFA addressing former section 51.319. Therefore, we have prepared this Supplemental Initial Regulatory Flexibility Analysis (SIRFA) to address any possible significant economic impact on small entities that may result

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[49] *See Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Report and Order, 12 FCC Rcd 7348, 7356-57, para. 27 citing 47 C.F.R. § 1.1204(b)(1) (1997).

[50] *See* 47 C.F.R. § 1.1206(b)(2), as revised.

[51] *Local Competition First Report and Order*, 11 FCC Rcd at 16143-79.

[52] *Id.* at 16161-64, paras. 1374-83.

from our further consideration.[53] Written public comments are requested on this SIRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of the Second FNPRM, but they must have a separate and distinct heading, designating the comments as responses to the SIRFA. The Commission will send a copy of the Second FNPRM, including this SIRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[54] In addition, the Second FNPRM and SIRFA (or summaries thereof) will be published in the Federal Register.[55]

47. *Reason for Action:* This further proceeding is required by the remand following the Supreme Court order vacating section 51.319.

48. *Objectives:* The objective of this Second FNPRM is to afford the public the opportunity to supplement the record previously adduced concerning the "necessary" and "impair" standards of section 251(d)(2) and the identification of network elements that are subject to the unbundling requirements of section 251(c)(3).

49. *Legal Basis:* Sections 1-4, 10, 201, 202, 251-254, 271, and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 151-154, 160, 201, 202, 251-254, 271, and 303(r).

50. *Description and estimate of the number of small entities affected:* We anticipate no change in the description and estimate of the number of small entities that might be affected by our further consideration from the description and estimate adopted in the *Local Competition Report and Order* FRFA.[56]

51. *Description of projected reporting, recordkeeping, and other compliance requirements.* None are anticipated from the further consideration.

52. *Federal rules that may duplicate, overlap, or conflict with the proposed rule:* None.

53. *Any significant alternatives minimizing the impact on small entities consistent with the stated objectives:* We have outlined and sought comment on the many issues involved in the further consideration. We seek comment on any interpretation of the "necessary" and "impair" standards of section 251(d)(2) used to identify network elements that are subject to the unbundling requirements of section 251(c)(3) that would minimize the impact on small entities.

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[53] *See* 5 U.S.C. § 603.

[54] 5 U.S.C. § 603(a).

[55] *Id.*

[56] *See* 11 FCC Rcd at 16149-57; *see also id.* at 16144-49 (discussing our treatment of small LECs).

C. Comment Filing Procedures

54. Interested parties may file any comments in response to this Second FNPRM to no later than **[30 days after Publication in the Federal Register],** with the Secretary, FCC, at 445 12th Street, S.W., Washington, D.C. 20554. Oppositions or responses to these comments and petitions may be filed with the Secretary, FCC, no later than **[45 days after Publication in Federal Register]**. **All pleadings are to reference CC Docket No. 96-98.** Interested parties should file an original and 12 copies of all pleadings. An additional copy of all pleadings must also be sent to Janice M. Myles, Common Carrier Bureau, FCC, 445 12th Street, S.W., Room 5-C327, Washington, D.C. 20554, and to the Commission's contractor for public service records duplication, ITS, 1231 20th Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for inspection and copying during normal business hours in the FCC's Reference Center, 445 12th Street, S.W., Washington, D.C. 20554. Copies also can be obtained from ITS at 1231 20th Street, N.W., Washington, D.C. 20036, or by calling ITS at (202) 857-3800 or faxing ITS at (202) 857-3805.

55. Parties are required to file a copy of all pleadings electronically via the Internet to <http://www.fcc.gov/e-file-ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form ,your e-mail address." A sample form and directions will be sent in reply.

D. Further Information

56. For further information, contact Jake Jennings or Claudia Fox, Policy and Program Planning Division, Common Carrier Bureau, at (202) 418-1580.

V. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4, 201-205, 251, 256, 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, and 271, the SECOND FURTHER NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

58. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this SECOND FURTHER NOTICE OF PROPOSED RULEMAKING, including the SIRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*. (1981).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

Re: Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996
(CC Docket No. 96-98)

I am pleased that we are initiating this proceeding in response to the Supreme Court's directive that we re-consider the manner in which we identify those network elements that an incumbent local exchange carrier must unbundle for use by competing carriers under sections 251(c)(3) and 251(d)(2) of the Communications Act.

I wish to note my strong support for our tentative conclusion that the Commission should adopt a uniform, national list of network elements that must be available from all incumbent carriers. In the Telecommunications Act of 1996, Congress designed, and directed this Commission to implement, a "national policy framework" to promote competition.[57] Our establishment, in 1996, of a uniform list of network elements has helped allow new entrants to develop business plans calling for competitive entry on a national, regional, or state-wide basis, secure in the knowledge that the rules of competition would not vary significantly, or arbitrarily, depending upon which of these entry strategies they choose. I believe that this regulatory certainty, established at the federal level, best serves the national, pro-competitive framework established by Congress.

The Supreme Court has now affirmed that Congress intended federal implementation of the 1996 Act, rather than a state-by-state approach, and that the 1996 Act "requires the Commission to determine on a rational basis which network elements must be made available . . . ."[58] While the Supreme Court directed us to reconsider the manner in which we determined which specific network elements should be on the list of available elements, at no point did the Supreme Court question the establishment of a single, national list. Therefore, in considering the "necessary" and "impair" standards, we properly have decided to begin with the assumption that those standards should inform, not undermine, the creation of a uniform national list of available elements.

Further, I am quite comfortable with our prediction that the local loop will be on that list. In light of my assessment that the 1996 Act calls for a national list of available elements, it is inconceivable to me that the local loop would not be on that list, under any rational application of the "necessary" and "impair" standards.

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[57] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

[58] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

I share my colleagues' sense of urgency concerning the need to complete this proceeding as quickly as we can. Indeed, another benefit of articulating tentative conclusions is that they help focus the record and thus are conducive to a more prompt resolution of the issues.

Finally, I would like to thank the staff of the Common Carrier Bureau for their diligent work in support of this effort.

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: 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; (CC Docket Nos. 96-98, 95-185).

While I support this Order, I write separately to express my reservations with reaching any tentative conclusions at this time. I may ultimately agree with these conclusions, but I would first like the benefit of a public record. I believe the Commission should have first sought comment on the standard for unbundling network elements consistent with the Supreme Court's remand, prior to concluding, even tentatively, that there should be nationwide unbundling or what any particular unbundled network element might be. Indeed, even such tentative conclusions may fail to adequately take into account the Supreme Court's mandate that we look at the competitive availability of elements in determining our approach to the necessary and impair standard. Instead, the Commission should have sought general comments immediately after the Supreme Court issued its opinion. The Commission could have issued a Public Notice promptly after the Supreme Court issued its opinion on January 25, 1999, simply asking for any and all comments on how the Court's opinion should impact the Commission's unbundling rules, without reaching any tentative conclusions. Unfortunately, that is not the path the Commission chose. Instead, the Commission has wasted valuable time, potentially delaying our ultimate resolution of issues that are vital to local competition.

STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: *Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98).

I firmly support the Commission's decision to open a record in response to the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities* to vacate our unbundled network element Rule 319 and remand the issue for further consideration.[59] As I have said on a number of occasions, this proceeding must be considered "priority one" in this Commission's ongoing efforts to promote local competition.

I disagree sharply, however, with today's action to the extent it tentatively concludes, at the inception of this proceeding, that we should designate the same elements of the incumbent's network for unbundling in every region of the nation. Although I have no objection to setting national unbundling *standards* pursuant to section 251(d)(2).[60] I fail to see how we can tentatively conclude that those standards will yield precisely the same *results* nationwide without first addressing how such a "one-size-fits-all" approach can faithfully accommodate the Court's demand that we consider the availability of elements outside the incumbent's network. Thus, notwithstanding the commendable efforts that went into preparing this *Notice*, I do not fully support it.

As Explained by the Court, Congress Recognized That Fundamental Principles of Competition Necessitate Limiting Access to Essential Elements of the Incumbent's Network.

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[59] *See AT&T Corp. et al. v. Iowa Utils. Bd. et al.*, 119 S. Ct. 721 (1999).

[60] Section 251(d)(2) provides:

> [i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether -- (A) access to such network elements as are proprietary in nature is *necessary*; and (B) the failure to provide access to such network elements *would impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

See 47 U.S.C. § 251(d)(2) (1999) (emphasis added). The Court concluded that the Commission did not adequately consider the "necessary" and "impair" requirements when, by adopting section 51.319 of the Commission's rules, it gave requesting telecommunications carriers blanket access to virtually all network elements. The court vacated Rule 319 and remanded the issue to the Commission.

In *Iowa Utilities Board*, the Supreme Court found that section 251(d)(2) establishes a "limiting standard" that restricts entrants' access to the incumbent's network elements.[61] The Court recognized that section 251(d)(2) evidences Congress' understanding that, although requiring access to incumbent carriers' facilities may be useful (*e.g.*, overcoming insurmountable economies of scale), *unconstrained* access would eviscerate incentives for entrants to install their own facilities and thereby inhibit the type of competition most likely to spur innovation, provide price discipline and otherwise benefit consumers.[62] Indeed, underlying the Court's insistence that section 251(d)(2) establishes a limiting standard is its understanding that facilitating competition under the 1996 Act requires a careful balance between aiding new entrants and not making access to the incumbent's facilities too easy. Making such access too easy or attractive will only ensure that the entrant's relationship to the incumbent is characterized more by one-sided dependence than true rivalry.[63]

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[61] The Court stated:

> [T]he Act requires the FCC to apply *some limiting standard*, rationally related to the goals of the Act, which it has simply failed to do.

119 S. Ct. at 734-35 (emphasis added). The Court stated further that:

> [w]e cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.

119 S. Ct. at 735. In addition, the court concluded that the Commission was "undoubtedly wrong" in its belief that the requirement for incumbent LECs to unbundle "at any technically feasible point" meant that every element that can be unbundled must be unbundled. Thus, the Court harshly criticized whether the Commission could sweep all elements of the incumbent's network into the unbundling requirements consistent with the statute.

[62] *See cf.*, John T. Soma *et al.*, *The Essential Facilities Doctrine in the Deregulated Telecommunications Industry*, 13 Berkeley Tech. L. J. 565, 607 (1998) (arguing that unbundling requirements may "discourage incumbents and competitors from directing their efforts toward alternative technologies and delivery systems"); J. Gregory Sidak & Daniel F. Sperber, *Deregulation and Managed Competition in Network Industries*, 15 Yale J. on Reg. 117, 145 (1998) (indicating that certain forms of unbundling "will induce inefficient decisions by entrants concerning whether to build facilities or merely resell services that use the incumbent's existing facilities").

[63] As Justice Breyer indicates, for example, pervasive dependence by new entrants on incumbent carriers' facilities would require regulators to intervene constantly to establish reasonable terms and condition: "Rules that force firms to share every resource or element of a business would create, not

Justice Breyer's concurrence in *Iowa Utilities* insightfully describes this fundamental tenet of competition. As he says succinctly:

> It is in the *unshared, not the shared*, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share every resource or element of a business would create, not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.[64]

By his words, Justice Breyer correctly recognizes that meaningful, robust competition requires that rival firms vie for customers based on the distinct assets and capabilities each brings to the market. Justice Breyer's view is consistent with Justice Scalia's indication, in the majority opinion, that the limiting standard under section 251(d)(2) would be akin to the "essential facilities" doctrine in antitrust, where access to a private firm's assets is mandated when those assets are *essential* to the provision of a competing service.[65] This view is also consistent with the Court's indication, twice in the majority opinion, that issues related to virtually unlimited access to the incumbent's facilities (such as under the so-called unbundled network element "platform" or "UNE-P") could easily become irrelevant if the Commission gives meaningful effect to the "necessary" and "impair" standards of section 251(d)(2).[66]

Thus, the Commission's charge on remand is to give real effect to the limiting principles established in section 251(d)(2) in a manner that will foster, rather than inhibit, meaningful competition.

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competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms." 119 S. Ct. at 754. Thus, overdependency by entrants on the incumbent's network elements will likely prove inconsistent with the Act's procompetitive, deregulatory purpose.

[64] *See Iowa Util. Bd.*, 119 S. Ct. at 754 (citing 3A P. Areeda & H. Hovenkamp, Antitrust Law 771-73 (1996)) (emphasis added).

[65] 119 S. Ct. at 734.

[66] Under the Commission's original pricing principles, the merits of which are currently under consideration by the Eighth Circuit Court of Appeals, access to the UNE-P by competitors generally would have allowed them essentially to resell the incumbent's service at deeper discounts than the statute prescribes for purposes of resale. Though the court agreed that the statute did not prevent the Commission from requiring the UNE-P consistent with the statute, it twice suggested that the platform question may be largely "academic." 119 S. Ct. at 736, 737. These two references, taken together with Justice Breyer's concurrence, evidence the Court's expectation that, if the Commission limits unbundling by giving meaningful effect to the "necessary" and "impair" standards, there would not be a full platform for competitors to buy.

The Court Insisted That Any Meaningful Limiting Standard Would Have to Account for the Availability of Elements Outside the Incumbent's Network.

My objection to the tentative conclusion in favor of a nationwide approach to designating unbundled network elements derives from several concerns.

As a preliminary matter, I note that making this tentative conclusion at this stage of the proceeding appears to conflict directly with the logical progression by which the Court envisioned network elements would be designated for unbundling. The Court concluded that the previous Commission had not interpreted or applied section 251(d)(2) in a reasonable fashion because it had not developed and then applied standards pursuant to that section that gave meaningful effect to the ordinary and fair meaning of the terms "necessary" and "impair." Fundamentally, then, the Court's remand requires that we correct this deficiency by first *developing* and then *applying* a standard pursuant to section 251(d)(2) that can be used to determine whether access to particular proprietary elements is "necessary" and whether the unavailability of non-proprietary elements would "impair" a competitor's ability to provision service. Making a tentative conclusion in favor of unbundling the same elements nationwide disregards the fact that we have not yet developed (or received adequate public input regarding) interpretations of the "necessary" and "impair" standards under section 251(d)(2). Consequently, I worry that this tentative conclusion will amount, in the Court's mind, to putting our analytical "cart" before the horse.

My considerable discomfort with the tentative conclusion in favor of unbundling the same elements nationwide extends beyond mere concerns of logic, however. Rather, this discomfort encompasses more troubling concerns regarding the Commission's role in promoting competition pursuant to the Act.

The primary manifestation of the Commission's failure to articulate a limiting standard pursuant to section 251(d)(2) was the Commission's failure, in the Court's view, to consider whether elements were available to entrants from sources outside the incumbent's network. The Court stated:

> The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network. That failing alone would require the Commission's rule to be set aside.[67]

Thus, under the Court's interpretation, the Act requires that the Commission, at a minimum, examine the extent to which elements are available from sources other than the incumbent.

The availability of elements outside the incumbent's network could potentially turn on many factors, such as the existence of vendors and distribution channels, the presence of competing facilities-based LECs and the price of non-incumbent elements relative to the requesting competitor's ability to pay. These factors are likely to vary significantly from one market to the next. It is beyond question, for example, that given the presence of facilities-based

[67] 119 S. Ct. at 735.

competitors in the ore lucrative urban markets,[68] a new entrant to an urban market will be faced with many more potential sellers of leased switching capacity than a new entrant to less dense and rural areas where competition has not yet taken hold. Further, to the extent other facilities-based competitors do *not* use elements of the incumbent's network, the presence of those competitors in a particular market should be probative in evaluating whether other firms would be "impaired" in their ability to provide service in that market absent mandated access to the incumbent's elements. It follows directly, then, that assessments of whether an element is necessary to provide service or whether failing to mandate access to that element would impair a new entrant's ability to provide service will vary significantly among different markets, states and regions.[69]

Regardless of the Merits of National Rules, Such Rules Must Account for Potentially Widespread Variation in the Availability of Elements.

Accordingly, as the Commission attempts to apply the limiting standard it will develop pursuant to section 251(d)(2) and the Court's remand, one important question we will have to address is whether the Commission can defensibly require the unbundling of specific elements on a categorical, nationwide basis. I am somewhat skeptical that the Commission can give meaningful effect to the requirement that we assess the availability of non-incumbent elements and related geographic variation for all areas and markets in the nation. Although I think the Commission could potentially *conduct* such a sweeping assessment, at least in theory, that project would likely necessitate an exhaustive, fact-intensive inquiry to which I fear the Commission would devote inadequate time and resources. This raises such questions as: (1) whether regional, state or market-specific approaches to designating elements for unbundling are necessary to meaningfully assess the availability of non-incumbent network elements; and (2) whether regulators with closer proximity and more intimate knowledge of the availability of non-incumbent elements (*e.g.*, state commissions) should take a leading role in that analysis.

The substance and spirit of the Court's command that we assess the availability of non-incumbent elements and the strong likelihood that such availability will vary with geography convince me that any interpretations of the "necessary" and "impair" standards we adopt must somehow address (or, at the very least, methodically discount) these geographic variations. The tentative conclusion in favor of unbundling the same elements nationwide does neither. Indeed,

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[68] Common Carrier Bureau Industry Analysis Division, Federal Communications Commission, Local Competition 2 (1998) ("Facilities-based [new entrants] appear to have concentrated in more urbanized areas. For example, the Atlanta, Dallas, Los Angeles, and New York City LATAs each have more than 20 [entrants] . . ., while 30 of the nation's more rural LATAs have no such [entrants].").

[69] It also seems likely that an assessment of whether an element is necessary to provide service or whether failing to mandate access to that element would impair a new entrant's ability to provide service will vary considerably among firms, as each firm brings to market a unique complement of assets and capabilities. I do not, however, address this issue further here.

the *Notice* seeks comment on the issue of geographic variation in availability almost as afterthought, with no clear explanation or suggestion of how unbundling the same elements nationwide could possibly address such obvious variation. At best, the *Notice* itself requests information that the commission might use to address geographic variation in availability, and obviously we have not yet received that information.

Given that we currently lack information by which we could measure or discount geographic variations in element availability, as well as the fact we have not yet developed a record for proposes of helping us to develop the "necessary" and "impair" standards of section 251(d)(2), I do not yet share the majority's confidence that unbundling the same elements nationwide will adequately fulfill the Court's mandate. As I have said in another context,[70] I feel we should make tentative conclusions only when we are more sure than not that those tentative conclusions should be the ultimate outcome. I fully recognize the many potential benefits of unbundling the same elements nationwide. In light of the substantial likelihood of geographic variation in the availability of non-incumbent elements, however, I feel it is incumbent on me to reserve judgment entirely until we develop a record that will enable us thoughtfully to address this issue.[71]

Conclusion

In closing, I wish to reiterate that my opposition to making a tentative conclusion in favor of unbundling the same elements nationwide in no way indicates that I could not be persuaded that a final ruling along these lines is appropriate in light of the record we will develop and the requirements of the statute as interpreted by the Court. I believe, however, that the majority's tentative conclusions here are premature. Our task in responding to the Court's remand must be to interpret and apply section 251(d)(2) anew, giving full effect to the Court's guidance and building an unbundling regime from the ground up, not the top down. If we fail in this task, we will, at the very least, incur substantial litigation risk on judicial review of this action and possibly subject the industry to yet another court battle, ending in a further shift in our implementation of the Act. At worst, we will fail to give real effect to the specific regulatory framework erected by Congress and possibly delay the myriad consumer benefits of *meaningful* competition that I believe the Act and section 251(d)(2) can make possible if faithfully executed.

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[70] *See, e.g.*, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. No. 98-147, FCC 99-48 (rel. Mar. 31, 1999) (statement of Commissioner Michael K. Powell, concurring in part).

[71] I reject, furthermore, any suggestion that such a record cannot be built on the excellent questions and observations made in this *Notice* unless we also make tentative conclusions. This notion is a red herring and, in any event, is unsupported. Although tentative conclusions may allow regulators to "send signals" as to how they will ultimately decide an issue, they add nothing from an evidentiary standpoint to a *Notice* of this caliber, in which the specificity of the proposals and discussion themselves is likely to lead to an adequately focused record.

It is because I find the tentative conclusion in favor of unbundling the same elements nationwide fundamentally inconsistent with building a rational unbundling regime from the bottom up that I cannot fully support today's action. I wish to commend the Common Carrier Bureau and my colleagues, however, on their excellent contributions to this *Notice*.