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

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: December 12, 2001 **Released: December 20, 2001**

Comment Date: 60 days after Federal Register publication of this Notice
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By the Commission: Chairman Powell, Commissioners Copps and Martin issuing separate statements.

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I. INTRODUCTION

1. Today we initiate our first triennial review of the Commission's policies on unbundled network elements (UNEs).[1] This proceeding will consider the circumstances under which incumbent local exchange carriers (LECs) must make parts of their networks available to requesting carriers on an unbundled basis pursuant to sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 (1996 Act).[2] Recognizing that incumbent LECs control some bottleneck facilities, Congress adopted section 251 of the 1996 Act in order to permit competitors to overcome the obstacles posed by that control. In 1996, the Commission first applied the statute and determined which network elements need to be unbundled to permit requesting carriers to compete.[3] Then, in 1999, the Commission revisited its unbundling analysis, on remand from the Supreme Court.[4] Recognizing that market conditions would change and create a need for commensurate changes to the unbundling rules, the Commission determined to revisit its unbundling rules in three years -- a schedule we adhere to by adopting this Notice of Proposed Rulemaking (NPRM) today. In this review, we undertake a comprehensive evaluation of our unbundling rules. We seek to ensure that our regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the

[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3766, para. 151 & n.269 (1999) (*UNE Remand Order*) ("We expect to reexamine our national list of network elements that are subject to the unbundling obligations of the Act every three years. . . . The review may begin after approximately only two years of experience so that it can be completed in three-year intervals.").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 251 *et seq*; s*ee* 47 U.S.C. § 251(c)(3), (d)(2). We refer to the Communications Act of 1934, as amended, as the Act.

[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*), *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) (*Iowa Utils. Bd.*), *aff'd in part and remanded*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand*, *Iowa Utils Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *petitions for writ of certiorari granted*, *Verizon Communications Inc. v. FCC*, 121 S. Ct. 877, 878 (2001); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further recons. pending.

[4] *See Iowa Utils. Bd.*, 525 U.S. at 366; *UNE Remand Order*, 15 FCC Rcd at 3696.

1996 Act in light of our experience over the last two years, advances in technology, and other developments in the markets for telecommunications services.

2. Over the last several years, a number of incumbent and competitive carriers have asked us to reconsider, modify, expand, or eliminate various unbundling obligations. While parties have raised these issues in discrete proceedings, resolving any of these issues would essentially require the Commission to reevaluate, on some level, our framework for unbundling. Rather than decide these issues piecemeal, we initiate this triennial review in order to comprehensively consider the appropriate changes, if any, to our unbundling approach. Moreover, we now have the benefit of over five years of experience since the 1996 Act was passed. Throughout this review, we expressly invite comment on the lessons learned from this experience, and further seek to explore what significant changes have taken place in the market since 1996. For example, we seek to fashion a more targeted approach to unbundling that identifies more precisely the impairment facing requesting carriers.

3. In particular, we expressly focus on the facilities used to provide broadband services and explore the role that wireless and cable companies have begun to play and will continue to play both in the market for broadband services and the market for telephony services generally. At the same time, we recognize that the statute contemplates three modes of entry -- through resale of tariffed incumbent LEC services, use of UNEs, and construction of new facilities.[5] We are, therefore, statutorily bound to require incumbents to permit both facilities-based and non-facilities-based entry. With respect to facilities-based entry, we seek to promote entry not only by fully facilities-based carriers but also by those facilities-based carriers that purchase actual UNEs, such as the loop.[6]

4. This proceeding is one of several in which we are initiating a broad review of our competition policies in light of our experience since first implementing the market-opening provisions of the 1996 Act, and the developments in the marketplace such as the birth of broadband. In particular, through the *UNE Measurements and Standards Notice,* we seek comment on a discrete set of national performance measures and standards that could improve enforcement of incumbents' wholesale obligations under section 251.[7] We are also considering how to regulate broadband services provisioned by LECs that the Commission has traditionally treated as dominant in the provision of telephone services.[8] Thus, at the same time as we consider which facilities need to be unbundled in this proceeding, we are also considering the appropriate regulatory treatment for incumbent LECs' provision of broadband services over

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5 *See UNE Remand Order*, 15 FCC Rcd at 3700, para. 5.

6 We examine in greater detail below how to define the concept of "facilities-based competition" with regard to the Act and the instant proceeding. *See infra* Section III.B.1.

7 *See Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, FCC No. 01-331, Notice of Proposed Rulemaking (rel. Nov. 19, 2001) (*UNE Measurements and Standards Notice*). We also adopted a similar notice regarding incumbent LECs' provisioning of special access services, which also serve as inputs for carriers seeking to provide competitive telephony services. *See Performance Measurements and Standards for Interstate Special Access Services, et al.*, Notice of Proposed Rulemaking, CC Docket No. 01-321, FCC No. 01-339 (rel. Nov. 19, 2001) (*Special Access Measurements and Standards Notice*).

8 *Development of a Regulatory Framework for Incumbent LEC Broadband Services, Notice of Proposed Rulemaking,* CC Docket No. 01-337, FCC No. 01-360 (adopted Dec. 12, 2001) (*Incumbent LEC Broadband Services*).

those facilities. In addition, we will also initiate in the near future a proceeding to examine how to classify under the Act a wireline carrier's offering of a broadband telecommunications service bundled with an information service.[9] The areas of regulation we consider in each of these notices are different, but our ultimate goal is the same: to implement the provisions of the 1996 Act in order to achieve its goals of bringing the benefits of competition and expanding broadband availability to consumers.

II. BACKGROUND

5. Under section 251(d)(2) of the Act:

> In determining what network elements should be made available for purposes of subsection [251](c)(3), the Commission shall consider, at a minimum, whether --
>
> (A) access to such network elements as are proprietary in nature is necessary; and
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> (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.[10]

In 1996, the Commission adopted the *Local Competition First Report and Order*, which implemented the local competition provisions of the 1996 Act.[11] In that order, the Commission interpreted the terms "necessary" and "impair" in section 251(d)(2), which contains standards that must be considered in determining the network elements that must be made available. For network elements that are "proprietary in nature," the Commission must consider whether access to them is "necessary" to competitors.[12] For network elements that are not proprietary, the Commission must consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[13] In the *Local Competition First Report and Order*, the Commission interpreted these terms as standards by which it could limit the general obligation in section 251(c)(3) to provide access to all UNEs where technically feasible.[14]

6. On appeal of the *Local Competition First Report and Order*, the United States Supreme Court affirmed in part, reversed in part, and remanded to the Commission.[15] In

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[9] The question of how to classify "cable modem service" (referring to "high-speed access to the Internet provided to subscribers over cable infrastructure") is the subject of a separate proceeding currently pending. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, 15 FCC Rcd 19287, 19287 & n.1 (2000).

[10] 47 U.S.C. § 251(d)(2).

[11] *Local Competition First Report and Order*, 11 FCC Rcd 15499.

[12] 47 U.S.C. § 251(d)(2)(A).

[13] *Id.* § 251(d)(2)(B).

[14] *See Local Competition First Report and Order*, 11 FCC Rcd at 15640-44, paras. 277-88.

[15] *Iowa Utils. Bd.*, 525 U.S. 366.

particular, the Supreme Court required the Commission to reexamine the "necessary" and "impair" standards of section 251(d)(2) -- the same standards that we review and apply in this proceeding. The Court directed the Commission to give substance to the "necessary" and "impair" standards, and to develop a limiting standard for imposing unbundling obligations that is "rationally related to the goals of the Act."[16] The Court vacated the Commission's list of elements to be unbundled and remanded for consideration of a new interpretation and application of section 251(d)(2) that takes into consideration the availability of elements outside the incumbent's network and does not assume that any increase in cost or decrease in quality imposed by denial of a network element causes the failure to provide that element to impair the entrant's ability to furnish its desired services.[17] In addition, the Court upheld the Commission's determination that competitors do not need to deploy their own facilities to be eligible to purchase UNEs.[18]

7. To respond to the Supreme Court's directives, the Commission adopted the *UNE Remand Order*.[19] In that order, the Commission revised its interpretation of the "necessary" and "impair" standards of section 251(d)(2) in order to identify specifically where requesting carriers are impaired without access to the incumbent's network, rather than making UNEs available wherever it is technically feasible to do so, as the Commission had done in the *Local Competition First Report and Order*.[20] Specifically, the Commission held with regard to proprietary network elements that:

> [A] proprietary network element is "necessary" within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.[21]

Second, the Commission held with regard to non-proprietary network elements that:

> [T]he failure to provide access to a network element would "impair" the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer.[22]

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16 *Id.* at 388.

17 *Id.* at 389-91.

18 *Id.* at 392-93 (citing *Local Competition First Report and Order*, 11 FCC Rcd at 15666-71, paras. 328-40).

19 *UNE Remand Order*, 15 FCC Rcd 3696.

20 *See Local Competition First Report and Order*, 11 FCC Rcd at 15640-44, paras. 277-88.

21 *UNE Remand Order*, 15 FCC Rcd at 3721, para. 44 (emphasis in original).

22 *Id.* at 3725, para. 51 (emphasis added).

8. The Commission considered several factors in deciding whether a requesting carrier's ability to provide services would be "materially diminished" if it were not able to use the incumbent's network. Specifically, the Commission considered: (1) the costs incurred using alternatives to the incumbent's network;[23] (2) delays caused by use of alternative facilities;[24] (3) material degradation in service quality;[25] (4) the ability of a requesting carrier to serve customers ubiquitously using its own facilities or those acquired from third-party suppliers;[26] and (5) the impact that self-provisioning a network element or obtaining it from a third-party supplier may have on network operations.[27]

9. Section 251(d)(2) requires the Commission to consider the "necessary" and "impair" standards "at a minimum."[28] Recognizing that it can and should consider other factors that promote the goals of the Act in its unbundling analysis, the Commission also considered (1) whether an unbundling obligation is likely to promote the rapid introduction of competition in all markets; (2) whether the obligation will promote facilities-based competition, investment, and innovation; (3) the extent to which the Commission can reduce regulatory obligations as alternatives to the incumbent's network become available; (4) whether the unbundling requirements will provide uniformity and predictability to new entrants and market certainty in general; and (5) whether the unbundling obligations are administratively practical.[29] In addition, the Commission emphasized that "unbundling rules that are based on a preference for development of facilities-based competition in the long run will provide incentives for both incumbents and competitors to invest and innovate, and should allow the Commission to reduce regulation once true facilities-based competition develops."[30]

10. Applying this section 251(d)(2) analysis to incumbents' networks, the Commission identified seven network elements without which requesting carriers were impaired: (1) loops, including high-capacity lines, dark fiber, line conditioning, and some inside wire; (2) subloops; (3) network interface devices; (4) local circuit switching (but not most packet switching); (5) interoffice transmission facilities, including dedicated transport from DS1 to OC96 capacity levels and such higher capacities as evolve over time, dark fiber, and shared transport; (6) signaling networks and call-related databases; and (7) operations support systems (OSS).[31] In a separate order released shortly after the *UNE Remand Order*, the Commission

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[23] The Commission especially considered "the difference between the cost to the requesting carrier of obtaining the unbundled element from the incumbent LEC at forward-looking costs and the cost of an alternative element." *Id.* at 3734-40, paras. 72-88. The Commission was careful to analyze the costs -- not the profitability -- of using alternatives, because profitability depends on the individual circumstances of both requesting carriers and incumbents. *Id.* at 3734, para. 73.

[24] *Id.* at 3740-43, paras. 89-95.

[25] *Id.* at 3743, para. 96.

[26] *Id.* at 3744-45, paras. 97-98.

[27] *Id.* at 3744, para. 99.

[28] *Id.* at 3745, para. 101 (quoting 47 U.S.C. § 251(d)(2)).

[29] *Id.* at 3747-50, paras. 107-16.

[30] *Id.* at 3704, para. 14.

[31] *Id.* at 3771-3890, paras. 162-437.

added the high frequency portion of the loop to the list of elements that must be unbundled on a national basis.[32]

11. We intend in this proceeding to draw on our experience with both the 1996 Act and the rules adopted in the *UNE Remand Order* in order to inform our unbundling analysis. Since the *UNE Remand Order* was adopted, many interrelated issues have surfaced through petitions, requests for waivers, and *ex parte* communications. We describe below the relationship between these proceedings and this NPRM, and we hereby incorporate the comments and *ex parte* presentations of these proceedings into this docket. In particular, and as described below, we incorporate the records of pending proceedings as they apply to: (1) availability of loops, transport, and combinations thereof (also known as enhanced extended links, or EELs);[33] (2) high-capacity loops and dedicated transport;[34] (3) local switching;[35] and (4) next-generation networks.[36] Commenters need not resubmit material previously filed in these proceedings.

12. We first incorporate the record amassed when the Commission, on several occasions, sought comment on the availability of UNE loops, transport, or combinations thereof. In the *Shared Transport Order*, the Commission sought comment on whether requesting carriers may use unbundled dedicated transport or shared transport to carry interstate toll traffic for end users to whom the requesting carrier does not provide local exchange service.[37] In the *Fourth Further Notice of Proposed Rulemaking*, the Commission asked whether the Act or the Commission's rules would support making entrance facilities (a form of transport) unavailable on an unbundled basis, or whether these facilities could be available only for use in providing local exchange service.[38] In the *Supplemental Order*, the Commission expanded this inquiry to ask about support in the Act for limiting the availability of EELs to local exchange service, and

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[32] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*). The Commission addressed line sharing issues in a separate proceeding so that it could more fully develop a record on specific technical and operational issues relating to such unbundling. *See UNE Remand Order*, 15 FCC Rcd at 3787, para. 201.

[33] *See, e.g.*, Public Notice, *Comments Sought on the Use of Unbundled Network Elements To Provide Exchange Access Service*, CC Docket No. 96-98, DA 01-169 (rel. Jan. 24, 2001) (*January 24, 2001 Public Notice*).

[34] *See, e.g.*, Public Notice, *Pleading Cycle Established for Comments on Joint Petition of BellSouth, SBC and Verizon*, CC Docket No. 96-98, DA 01-911 (rel. Apr. 10, 2001) (*Joint Petition Public Notice*).

[35] *See, e.g.*, Petition for Partial Reconsideration of Birch Telecom, Inc., in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Feb. 17, 2000).

[36] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 16 FCC Rcd 2101 (2001) (*Third Further Notice of Proposed Rulemaking and Sixth Further Notice of Proposed Rulemaking*).

[37] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12494-96, paras. 60-61 (1997) (*Shared Transport Order*).

[38] *See UNE Remand Order*, 15 FCC Rcd at 3914-15, paras. 492-96.

to ask about the policy ramifications of permitting the use of EELs for solely exchange access service.[39] In regard to the various temporary restrictions on EELs, the Commission had sought comment on petitions for waiver of the co-mingling prohibition that WorldCom and ITC^DeltaCom filed.[40] Most recently, two commercial mobile radio service (CMRS) carriers filed a petition for declaratory ruling asking the Commission to confirm that CMRS carriers may purchase dedicated transport on an unbundled basis.[41] The issues raised therein are suitable for resolution in this proceeding. We also incorporate the Joint Petition of SBC, BellSouth, and Verizon asking the Commission to find that requesting carriers are no longer impaired without access to high-capacity loops and dedicated transport,[42] and the comments and *ex parte* communications filed in response.

13. We also incorporate the record generated by the petitions for reconsideration of the *UNE Remand Order*. Among other challenges to that decision, parties have questioned how the Commission determined where and under what circumstances local switching need not be unbundled (the "switching carve-out").[43] We incorporate those petitions and all related *ex parte* communications for both the information they contain about switching and other issues, and for what they can teach us about ways to refine the impairment analysis.[44] Further, we incorporate the petition recently filed by competitors seeking to establish certain procedures and standards for this triennial review.[45]

14. Finally, we incorporate the record on several issues relating to next-generation network architectures. In the *Fifth Further Notice of Proposed Rulemaking*, the Commission sought comment generally on whether the deployment of next-generation network architectures requires any change to the Commission's unbundling rules.[46] More recently, in the *Third*

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[39] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd 1760 (1999) (*Supplemental Order*). The Commission asked even more detailed questions about EEL availability in the *January 24, 2001 Public Notice*.

[40] *See* Public Notice, Comments Requested on WorldCom Petition for Waiver of the Supplemental Order Clarification Regarding UNE Combinations, CC Docket No. 96-98, DA 00-2131 (rel. Sept. 18, 2000); Public Notice, *Common Carrier Bureau Seeks Comment on Petition of ITC^DeltaCom Communications, Inc. for Waiver of Supplemental Order Clarification*, CC Docket No. 96-98, DA 01-2030 (rel. Aug. 28, 2001).

[41] Petition for Declaratory Ruling of AT&T and VoiceStream, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Nov. 19, 2001) (ATTWS & VoiceStream Petition for Declaratory Ruling).

[42] *See Joint Petition Public Notice*.

[43] *See, e.g.*, Petition for Reconsideration and Clarification of Sprint Corporation, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 at 7-14 (filed Feb. 17, 2000).

[44] The switching carve-out is the subject of litigation pending at the D.C. Circuit as part of the appeal of the *UNE Remand Order*. *See United States Telecom Ass'n, et al. v. FCC*, D.C. Circuit Nos. 00-1015 *et al.* (filed Jan. 19, 2000).

[45] *See* Petition of the Competitive Telecommunications Association, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Nov. 26, 2001) (CompTel Joint Conference Petition). We address certain issues raised in this pleading, including a request for Federal-State Joint Conference on UNEs, in Section III.E, *infra*.

[46] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 15 FCC Rcd 17806 (2000) (*Fifth Further Notice of Proposed Rulemaking*). We will (continued....)

Further Notice of Proposed Rulemaking and Sixth Further Notice of Proposed Rulemaking, the Commission specifically sought comment on the impact of the deployment of next-generation network architectures on the Commission's line sharing rules.[47]

III. FRAMEWORK FOR UNBUNDLING

15. The *UNE Remand Order* set forth definitions of "necessary" and "impair," and also clarified the application of the "at a minimum" language of section 251(d)(2). That decision, and the many subsequent filings from different parties addressing related issues, serve as the building blocks of this proceeding. As we move past that initial phase of our implementation of the statute, we look to those records and seek comment on establishing a framework to reflect comprehensively the technological advances and marketplace changes that have taken place during the interim.

16. We seek comment generally on how to apply the section 251(d)(2) analysis in a manner that is faithful to the Act and promotes its goals, as further discussed below. First, in Section III.A, we ask about the weight we should assign the factors in our "impair" standard, and whether we should first identify network elements or impairments.[48] In Section III.B, we seek comment on weighing the many important goals of the Act as we consider whether and how to refine our unbundling analysis in interpreting, among other things, the "at a minimum" language of the statute. Then, in Section III.C, we ask whether both the "necessary" and "impair" standards as well as other statutory language support an unbundling analysis that is more targeted, and seek comment on various approaches to unbundling that take into consideration specific services, facilities, and customer and business considerations. In Section III.D, we seek comment on applying the unbundling analysis to define the network elements and to resolve specific implementation issues. We request comment on the appropriate role of state commissions in Section III.E, and ask in Section III.F whether we should retain or modify a periodic review cycle for UNE reevaluation.

17. In responding to this NPRM, parties are strongly encouraged to submit evidence regarding actual marketplace conditions, which will inform our understanding of how the Commission's unbundling rules have shaped the market to date. In particular, we encourage parties to submit evidence detailing what alternatives to the incumbents' networks are available, and where they are available. Based on our experience from prior proceedings, we anticipate that we will find evidence of actual marketplace conditions to be more probative than other kinds of evidence, such as cost studies or hypothetical modeling. We invite parties to suggest what

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address in a separate proceeding the remaining collocation issues, including remote terminal issues, that were the subject of the companion Further Notice of Proposed Rulemaking.

[47] *See Third Further Notice of Proposed Rulemaking and Sixth Further Notice of Proposed Rulemaking*, 16 FCC Rcd at 2101.

[48] Several parties have appealed the *UNE Remand Order* to the D.C. Circuit in litigation that is not yet resolved. Among other issues, the parties have asked the court to find that the Commission's interpretation of "impair" does not "impose[] a meaningful limiting standard on the availability of unbundled elements," as the Supreme Court directed. Brief of Petitioners and Supporting Intervenors at 19, in *United States Telecom Ass'n v. FCC*, Nos. 00-1015 & 00-1025 (D.C. Cir. filed June 1, 2001). In raising issues of statutory interpretation, we emphasize that we are not suggesting that any of the analysis in our prior decisions is incorrect. Rather, the purpose of asking these questions is to seek comment on how to read the Act on a prospective basis only.

data would be useful to our consideration in this proceeding,[49] including how any of the information the Commission routinely collects could be of use.[50]

A. Threshold Statutory Analysis

18. Throughout this NPRM, we ask specific questions about the manner in which we should apply the section 251(d)(2) "necessary"[51] and "impair" standards. Section 251(d)(2)(A) states that "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether . . . access to such network elements as are proprietary in nature is necessary."[52] In the *UNE Remand Order*, the Commission adopted a limited definition of "proprietary in nature,"[53] and interpreted the "necessary" standard to mean "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer."[54]

19. For elements that are not proprietary, the Act provides that the Commission "shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[55] As explained above, the Commission interpreted this standard in the *UNE Remand Order* as requiring the Commission to consider whether, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier,

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[49] To assess impairment of loops and transport, one party has proposed that the Commission acquire specific data by location regarding customer demand concentration for different circuit capacities, and the extent to which competing carriers can and do self-provision different circuit types. *See* Letter from Henry G. Hultquist, Associate Counsel, WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Joint Petition of BellSouth, SBC, and Verizon*, CC Docket No. 96-98 (filed Nov. 9, 2001) (WorldCom November 9, 2001 *Ex Parte*).

[50] *See, e.g.*, Local Telephone Competition: Status as of December 31, 2000, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission at 1-3 (May 2001).

[51] The Commission recently interpreted the term "necessary" as it appears in section 251(c)(6) very similarly to the way the Commission interpreted the term as it appears in section 251(d)(2)(A). *Compare Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435, 15446-47, at paras. 19-21 (2001) (*Collocation Order*) *with UNE Remand Order*, 15 FCC Rcd at 3720-23, paras. 41-47. The Commission found in the *Collocation Order* that the statutory contexts in which the term arises justify largely similar (but slightly differing) interpretations. Commenters are free, however, to suggest that the Commission's interpretation in section 251(d)(2)(A) should now be altered. We note that several parties have appealed the *Collocation Order* to the D.C. Circuit, and litigation of those appeals is not yet resolved. *See* Petition for Review, *Verizon California, Inc. v. FCC*, No. 01-1371 (D.C. Cir. filed August 23, 2001).

[52] 47 U.S.C. § 251(d)(2)(A).

[53] "We find that if an incumbent LEC can demonstrate that it has invested resources (time, material, or personnel) to develop proprietary information or network elements that are protected by patent, copyright, or trade secret law, the product of such an investment is 'proprietary in nature' within the meaning of section 251(d)(2)(A)." *UNE Remand Order*, 15 FCC Rcd at 3717, para. 35.

[54] *Id.* at 3721, para. 44 (emphasis in original).

[55] 47 U.S.C. § 251(d)(2).

lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer."[56] The Commission considered the factors of cost, timeliness, quality, ubiquity, and operational issues in making this "materially diminish" determination.[57] We seek comment on whether we should assign more or less weight to any of the factors of the standard. For example, should cost be afforded less weight than other factors?[58]

20. In prior orders, the Commission has generally set forth network element definitions and then made a determination as to whether requesting carriers were impaired without access to those elements. We seek comment on whether we should continue this approach, or whether we should first identify impairments to requesting carriers' ability to provide service, and then define network elements that specifically address such impairments.

B. "At a Minimum" Statutory Analysis

21. In the *UNE Remand Order*, the Commission determined that section 251(d)(2) contemplates that factors advancing the goals of the Act are relevant to an unbundling analysis. That is, an initial finding that a network element satisfies the "necessary" or "impair" standard does not automatically lead to the designation of a UNE, because "[i]n determining what network elements should be made available for purposes of subsection [251](c)(3), the Commission shall consider, *at a minimum*," the "necessary" and "impair" standards.[59] Applying this interpretation in the *UNE Remand Order*, the Commission identified five factors that further the goals of the Act for consideration in its unbundling determination: the rapid introduction of competition in all markets; promotion of facilities-based competition, investment, and innovation; reduced regulation; market certainty; and administrative practicality.[60] We seek comment on the considerations that should come into play in our unbundling analysis. As we review our experience with the factors identified in the *UNE Remand Order* and application of them, we seek comment on whether the list is complete, and on the relative weight to assign different factors. In particular, and as discussed below, we seek input on whether and how to carry out the advanced services mandate contained in section 706 of the 1996 Act as an explicit factor in our unbundling analysis, as some parties have suggested.[61] We also ask whether our section 251(d)(2) determination should explicitly take into account other goals of the Act.

1. Encouraging Facilities Investment and Broadband Deployment

22. We seek comment on whether and to what extent our unbundling analysis should expressly consider the Act's goal of encouraging the deployment of advanced telecommunications capability. More specifically, Congress declared that encouraging the

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56 *UNE Remand Order*, 15 FCC Rcd at 3725, para. 51; *see supra* para. 7.

57 *See supra* para. 8.

58 *Iowa Utils. Bd.*, 525 U.S. at 389-90.

59 47 U.S.C. § 251(d)(2) (emphasis added).

60 *UNE Remand Order*, 15 FCC Rcd at 3747-50, paras. 107-16.

61 *See, e.g.*, Comments of Intel Corporation at 15, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 98-146 (filed Sept. 24, 2001).

provision of new services and technologies to the public is a policy of the United States,[62] and in section 706 of the 1996 Act provided specific direction to the Commission to:

> encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[63]

"Advanced telecommunications capability" is defined "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[64] Although "broadband" is not defined by statute, the Commission has used this term to mean sufficient capacity to transport large amounts of information, and recognized that under its evolving nature the Commission "may consider today's 'broadband' services to be 'narrowband' services when tomorrow's technologies appear."[65]

23. We seek comment on whether we can balance the goals of sections 251 and 706 by encouraging broadband deployment through the promotion of local competition and investment in infrastructure. Some parties have argued that imposing unbundling requirements on incumbent LECs, particularly with respect to innovative, new facilities, may deter investment by both incumbent LECs and others.[66] That is, requiring incumbents to unbundle new or upgraded facilities may discourage them from investing in those facilities in the first place.[67] Moreover, the availability of incumbent facilities at cost-based rates may discourage competitive carriers and others from investing in or using alternatives to the incumbent's network. In its past unbundling orders, the Commission noted these policy concerns and formulated rules that limited incumbents' obligation to unbundle transport to existing facilities.[68] Others have argued, alternatively, that facilities investment can be made possible only through first establishing a

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62 47 U.S.C. § 157(a).

63 Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157 (47 U.S.C. § 157 nt).

64 *Id.* § 157 nt (c).

65 *Line Sharing Order*, 14 FCC Rcd at 20914, para. 1, n.2.

66 *E.g.*, Comments of SBC and Verizon at 25-28, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001).

67 Letter from Thomas J. Tauke, Senior Vice President, Verizon Communications, to Michael Powell, Chairman, Federal Communications Commission, at 4 (filed Nov. 6, 2001) (Verizon November 6, 2001 *Ex Parte*).

68 In the *Local Competition First Report and Order*, the Commission considered the economic impact of its transport rules on small incumbent LECs, and expressly limited the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities. *Local Competition First Report and Order*, 11 FCC Rcd at 15722, para. 451 (emphasis in original). While the *UNE Remand Order* concluded that an incumbent LEC must unbundle its "ubiquitous transport network, including ring transport architectures," it did not require construction of new transport facilities that the incumbent LEC has not deployed for its own use. *UNE Remand Order*, 15 FCC Rcd at 3843, para. 324.

competitive presence in a market, through the purchase of UNEs. Thus, they argue, unbundling obligations are necessary for sustainable competition.[69]

24. We seek comment on whether we should modify or limit incumbents' unbundling obligations going forward so as to encourage incumbents and others to invest in new construction.[70] For example, should we exempt from an unbundling obligation any facilities that an incumbent LEC constructs after a set point in time? If so, should those facilities be exempt in perpetuity or for a limited duration in time? Commenting parties should also address whether we should exempt from unbundling obligations only certain types of new facilities, such as those intended to provide advanced telecommunications capabilities. In particular, should fiber loops be categorically de-listed, while copper loops remain UNEs? Or, as one party has suggested, should we exempt from unbundling all fiber-based broadband facilities deployed by incumbents "in new build and total rehab situations?"[71] Would such policies bias investment and maintenance decisions? Are there other proposals that more effectively advance the goals of the Act? In seeking comment on how newly-installed facilities should be treated, we ask whether new facilities should automatically trigger new unbundling obligations, and how we should consider overlays of existing facilities with upgraded new facilities in defining unbundling obligations. In addition, we ask how, if at all, we should distinguish between overlay construction and new facilities in new residential developments. Commenters should explain the statutory support for any such distinction, and the appropriate legal framework for the balance of the statutory goals.[72] In particular, we seek comment on whether the "at a minimum" language in section 251(d)(2) can support a distinction between unbundling facilities used for analog voice telephony, and those used for advanced technologies. Additionally, we seek comment on whether, in lieu of limiting incumbents' unbundling obligations to encourage investment in new facilities, we might clarify or modify our pricing rules to allow incumbent LECs to recover for any unique costs and risks associated with such investment. Would such an approach adequately encourage new construction?

25. Moreover, to gauge the means of achieving meaningful, innovative competition in the future, we ask commenters to discuss the role that investment in new facilities has played over the last half decade. As we move into the second phase of statutory implementation and seek lasting competition, we ask for comment on the benefits of facilities-based competition compared to those of other forms. Does actual marketplace experience demonstrate that decreased dependence on the incumbents' networks correlates to more sustainable competition? Over the last five years, where and how has investment by carriers – including incumbents – led to technological and service innovations that ultimately benefited consumers? What are the

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[69] *See, e.g.*, Comments of WorldCom at 30, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001). In the *UNE Remand Order*, the Commission agreed with competitive LECs that access to UNEs would lead to initial acceleration of alternative facilities build-out because acquisition of sufficient customers and necessary market information would justify new construction. *UNE Remand Order*, at 3749, para. 112.

[70] We ask similar questions in more detail in paragraphs 50 and 73, *infra*.

[71] Letter from Wendell P. Weeks, President, Corning Communications, to Michael Powell, Chairman, Federal Communications Commission, CC Docket Nos. 96-98, 98-147 (filed Dec. 3, 2001).

[72] Commenters should be aware that the Commission has already sought comment on certain aspects of overlay construction, spare copper, and other related issues. *See Fifth Further Notice of Proposed Rulemaking*, 15 FCC Rcd at 17856-62, paras. 118-31.

primary causes of the observed behavior? Is a five-year period sufficient to draw any relevant definitive conclusions? In addition, we seek comment on experience relating increased investment in the nation's telecommunications infrastructure with increased redundancy and reliability necessary to ensure the continuous delivery of all services to the public.

26. While we examine more broadly whether and how to draw lines on the basis of service-specific or facilities considerations in Section III.C below, interpreting section 251(d)(2) to take into account the broadband goals embodied in section 706 raises some threshold questions about the meaning of "advanced telecommunications capability." For example, in order to ensure that our unbundling analysis adequately considers the goal of encouraging deployment of advanced telecommunications capability, do we need to consider whether this capability corresponds to a facility, a service, a market, or something different? We also ask for comment on whether drawing lines to account for this capability is only necessary with respect to loops and other "last-mile" facilities, or whether it also has implications for other network elements. For example, could alternative unbundling rules for switching or transport encourage deployment by incumbent LECs of this capability?

27. The task set out by the statute -- to implement a competition policy that provides incentives for the "deployment" of advanced telecommunications capability without regard to transmission technology -- requires a special focus on questions of intermodal and intramodal competition as they relate to broadband technology.[73] First, we seek data both on how widely intermodal alternatives are deployed, and for what purposes they can be used. For example, how widely is upgraded cable plant deployed, and how much of it can support telephony, broadband, or both applications? Can satellites, fixed wireless, or mobile telephones provide an alternative to incumbent facilities, and if so, where? To what extent do intermodal competitors share common ownership with incumbent LECs, and how should we address this in our analysis? Should we consider only the actual capabilities of deployed platforms, or weigh their potential as well? If we are to weigh their potential, precisely how should we do so? Is this deployment significant for our impairment analysis, regardless of whether there is currently a wholesale market?

28. We next ask parties to comment on whether we should consider these intermodal providers as competitive alternatives to the incumbent's network. Although section 251(d)(2)(B) does not require technological neutrality explicitly, it contains no reference to the types of technology that the Commission must consider in unbundling the network. In the *UNE Remand Order*, the Commission did consider alternative technologies as part of the ubiquity and quality factors in its impairment analysis, but found that mobile telephones and fixed wireless were "not yet viable alternatives to the incumbent's wireline loop facilities."[74] The Commission made a similar finding with regard to cable television plant as an alternative to the incumbent's loop.[75] We seek comment on whether these conclusions are still valid in light of deployment over the last two years. We also seek comment on how should we weigh the competing interests in

[73] In this context, we refer to "intramodal competition" as the competing provision of services over platforms using the same or similar technology. In addition, we refer to "intermodal competition" as the competing provision of services over alternative technological platforms.

[74] *UNE Remand Order*, 15 FCC Rcd at 3782, para. 188.

[75] *Id.* at 3782, para. 189.

having broadband-capable facilities deployed in the first place, and encouraging competition and consumer choice in the broadband services market. That is, deployment of telephone facilities, wireless technologies, and cable plant that are all capable of carrying broadband services may provide a choice of service provider to end users served by more than one provider. But if none of these service providers has unbundling obligations, consumer choice may be limited to those two or three enterprises. We seek comment on how to balance the interests in broadband deployment and competition in our unbundling analysis.

29. We seek comment on what the Commission should consider to be "facilities-based" competition for the purposes of the Act and this proceeding.[76] Should we encourage investment in particular kinds of facilities in order to promote the goals of innovation, competition, and reliability that we describe above? For example, is it equally beneficial to encourage investment in transmission facilities as in switching facilities?

30. We also recognize that reduced dependence on incumbent facilities does not necessarily mean that competitors must own all of their own facilities. For example, they could obtain the use of non-incumbent facilities from third parties on a wholesale basis. We seek comment on whether unbundling obligations should operate as a competitive stimulus and encourage the development of a wholesale market in some kinds of facilities. Would it be more practical and economical for a single "wholesaler" to construct new facilities within an area and lease them to other carriers, rather than having multiple entities obtaining rights of way and permits and engaging in disruptive and duplicative construction? Would this "wholesaling" be more effective for some kinds of facilities, such as those that are more fungible from carrier to carrier like transmission, than for switching or other "intelligent" components? In particular, we also seek comment on the viability of an intermodal and third-party intramodal wholesale facilities market, particularly for high-capacity loops. For instance, could an unbundling policy be revised to encourage fixed wireless providers to build out to office buildings or multi-dwelling units, and then sell loop facilities or services to other carriers? Is the development of such a wholesale market for different technologies feasible? What barriers currently exist to the

[76] For example, in the SBC/Ameritech merger the Commission defined an out-of-region "facilities-based service" to mean a service provided by SBC/Ameritech "utilizing its own switch or utilizing switching capability from a party other than the incumbent LEC" or affiliate. *Applications of Ameritech Corp., Transferor, and SBC Communication Inc., Transferee*, 14 FCC Rcd 14712, 15027, at Appendix C, para. XXI.c(3) (1999). In contrast, for the purpose of permitting Bell operating company (BOC) entry into interLATA services, section 271 of the Act defines "facilities-based competitors" as those that offer telephone exchange service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." 47 U.S.C. § 271(c)(1)(A). More broadly, in other areas the Commission has looked to indicia such as ownership in transmission facilities, the property interest in bare capacity or the existence of two wireline service providers. *See, e.g., Independent Data Communications Mfrs. Ass'n, Inc., Petition for Declaratory Ruling and American Tel. & Tel. Co., Petition for Declaratory Ruling*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13718 (Comm. Carr. Bur. 1995) (defining common carriers owning transmission facilities as facilities-based carriers for the purposes of requiring them to unbundle their basic frame relay services from their enhanced service offerings); 47 C.F.R. § 63.18 n.2 (defining an international facilities-based carrier as the holder of "an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity in an international facility"); *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Second Report and Order, CS Docket No. 96-46, 11 FCC Rcd 18223, 18258, para. 52, n.143 (defining "facilities-based competition" for video programming as competition "between at least two wireline service providers").

development of a third-party wholesale market, and what steps should we take to reduce such barriers?

2. Other Statutory Considerations

31. In the *UNE Remand Order*, we also listed several factors for consideration in our unbundling analysis that advance statutory goals.[77] We seek comment on whether there are other goals that the Commission should take into account in its unbundling analysis. For example, as the Commission has recognized, unfettered availability of UNEs can implicate universal service funding and damage the system of access charges.[78] In response to this concern, the Commission imposed restrictions on the use of certain UNEs and initiated ongoing proceedings in response to these issues. More specifically, shortly after issuing the *UNE Remand Order*, in order to preserve the status quo with regard to incumbent LEC special access revenues pending a resolution of the issues contained in the *Fourth Further Notice of Proposed Rulemaking*, the Commission determined that competitive LECs must provide a "significant amount of local exchange service" to a particular customer in order to obtain UNE pricing for the EEL used to serve that customer.[79] In the subsequent *Supplemental Order Clarification*, the Commission reasoned on the record before it that the related co-mingling restrictions in the safe harbors ensured that interexchange carriers did not use UNEs solely or primarily to bypass special access services.[80]

32. We seek comment on whether and to what extent universal service and access charge issues should be considered in the unbundling analysis. Some carriers assert that the *CALLS Order* removed all implicit subsidies from interstate access charges, and therefore universal service considerations should not implicate unbundling policy.[81] Others have argued

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[77] *UNE Remand Order*, 15 FCC Rcd at 3747-50, paras. 107-16.

[78] The *UNE Remand Order* barred the conversion of the entrance facility portion of special access service to UNE pricing to address the bypass of access charges and undermining of universal service. *Id.* at 3912, para. 485 (citing Letter from William B. Barfield, Associate General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98, at 1 (filed Aug. 9, 1999) (BellSouth August 9, 1999 *Ex Parte*). This prohibition on conversion remains in effect, even though the entrance facility is available for ordering as a new UNE. *Id.* at 3852, 3913, paras. 348, 488.

[79] *Supplemental Order*, 15 FCC Rcd at 1762, para. 5 (1999). The Commission intended for this temporary usage constraint to address concerns that universal service could be harmed if interexchange carriers were permitted to use the incumbent LECs' networks solely to originate and terminate long distance calls without paying their assigned share of the incumbents' costs recovered normally through access charges.

[80] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, 15 FCC Rcd 9587, 9598-600, 9602, paras. 22, 28 (2000) (*Supplemental Order Clarification*). The three safe harbors for providing a "significant amount of local exchange service" to a particular customer are met if the requesting carrier certifies that it is the exclusive provider of local exchange service, or if it certifies that it meets certain traffic thresholds and other conditions.

[81] *E.g.*, Comments of AT&T Corp. at 4, 14, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001) (citing Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, Low-Volume Long-Distance Users, CC Docket No. 99-249, Report and Order, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962 (*CALLS Order*)), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Util. Counsel, et al. v. FCC*, 265 F.3d 313 (5th Cir. 2001).

that the threat to the entire interstate access regime is massive,[82] that universal service issues arising from intrastate access charges still remain,[83] and that section 251(g) protects incumbent LECs' receipt of compensation and the entire access charge regime until the Commission modifies it.[84] We seek comment on how, if at all, to factor universal service considerations into our unbundling analysis. Interested parties in particular should comment on whether the court decision in the *CALLS Order*[85] and, more recently, our issuance of the *MAG Order*,[86] or any other development since we issued the *January 24, 2001 Public Notice* should inform our analysis. Is there still a risk to universal service if interexchange carriers migrate from switched access to UNEs?

33. More broadly, we also ask commenters to identify any additional factors not raised previously for consideration in our unbundling analysis that would further statutory goals. For example, should issues of public safety, national security, or network integrity be explicitly considered in our implementation of section 251?

C. More Granular Statutory Analysis

34. In contrast to the *Local Competition First Report and Order* where the Commission required very broad unbundling when "technically feasible," the Commission sought to tailor the unbundling rules to address actual impairment in the *UNE Remand Order*. For example, the Commission declined to require unbundling of the operator services/directory assistance element after finding that alternatives to the incumbent are available to competitors.[87] The Commission also constructed switching rules that did not require unbundling in dense urban areas,[88] and the Commission declined to require the unbundling of packet switching, in most circumstances.[89] Since the *UNE Remand Order*, parties have suggested other ways to apply the unbundling analysis in a more granular way.[90] As discussed more fully below, in this proceeding

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82 *E.g.*, Joint Comments of the National Exchange Carrier Ass'n, Inc., *et al.* at 4, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001).

83 *E.g.*, Comments of BellSouth at 32, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001).

84 *E.g.*, Comments of SBC and Verizon at 24, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001).

85 *See* Public Notice, *Common Carrier Bureau Seeks Comment on Remand of $650 Million Support Amount Under Interstate Access Support Mechanism for Price Cap Carriers*, CC Docket Nos. 96-262, 94-1, 99-249, and 95-45 (rel. Dec. 4, 2001).

86 *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 00-256, *Federal-State Joint Board on Universal Service*, Fifteenth Report and Order in CC Docket No. 96-45, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Report and Order in CC Docket Nos. 98-177 and 98-166 (rel. Nov. 8, 2001).

87 *See UNE Remand Order*, 15 FCC Rcd at 3891-92, paras. 441-42.

88 *See id.* at 3822-32, paras. 276-99.

89 *See id.* at 3835-40, paras. 306-17.

90 *See, e.g.*, WorldCom November 9, 2001 *Ex Parte*.

we probe whether and to what extent we should adopt a more sophisticated, refined unbundling analysis.

35. Specifically, we first seek comment on applying the unbundling analysis to specific services and specific geographic locations. Second, we seek comment on applying the unbundling analysis to differing facilities, in order to take into account competitors' abilities to self-provision different kinds of facilities, and also specifically to encourage the deployment of facilities with broadband capabilities. Third, we seek comment on crafting unbundling rules that take into account customer and business considerations. That is, should unbundling rules differ based on the type of customer the carrier seeks to serve, or what kind of carrier the requesting carrier is? Finally, we seek comment on different mechanisms for transitioning to a more competitive marketplace.

1. Service- and Location-Specific Considerations

36. We seek comment on applying the unbundling analysis to specific services, and in a manner that takes into account geographic variations in the availability of alternatives to the incumbent's network. In the *Supplemental Order Clarification*, the Commission noted section 251(d)(2)'s "services" language as it limited the conversion of special access circuits to combinations of loop and transport UNEs:

> [Section 251(d)(2)] asks whether denial of access to network elements "would impair the ability of the telecommunications carrier seeking access to provide *the services that it seeks to offer*." Although ambiguous, that language is reasonably construed to mean that we may consider the markets in which a competitor "seeks to offer" services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services.[91]

In a Public Notice following the *Supplemental Order Clarification*, the Commission solicited comment on whether it should undertake to conduct its impairment analysis on a service-by-service or market-by-market basis, and if so, how.[92] Here, we seek to refine this line of inquiry

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[91] *Supplemental Order Clarification*, 15 FCC Rcd at 9595, para. 15 (footnotes omitted) (emphasis in original). Several parties have petitioned the D.C. Circuit to review the *Supplemental Order Clarification*. *See* Statement of Issues of Petitioner, in *Competitive Telecommunications Ass'n v. FCC*, Case No. 00-1272 (D.C. Cir. filed Jul. 31, 2001).

[92] The record of that inquiry is incorporated herein as explained *supra* Section II. Some carriers have argued that the Commission *must* take into account individual services when it makes its determination whether to unbundle a network element. They argue that the reference in section 251(d)(2)(B) to "the *services*" the requesting carrier seeks to offer means that the Commission *must* conduct an impairment analysis for each separate service that requesting carriers might offer. *See, e.g.*, Reply Comments of SBC and Verizon at 9, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 30, 2001). On the other hand, others argue that the Commission has no authority to conduct an impairment analysis that is specific to individual services. They focus on the language of section 251(d)(2)(B) that explains that the Commission applies its impairment analysis in order to determine "what network elements should be made available." And because a "network element," they argue, is a "facility or equipment," the impairment analysis results in unbundled facilities over which any number of services may be provided. *See, e.g.*, Comments of CompTel at 23, in *Implementation of*

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in two ways. First, we seek comment on applying the service-specific approach beyond just impairment to all aspects of the section 251(d)(2) analysis. Second, we seek to broaden the inquiry to include a geographic component.

37. We seek comment on whether section 251(d)(2) requires us to take into account the particular "service" the requesting carrier seeks to offer. Alternatively, does section 251(c)(3) suggest the opposite, and limit in part or in whole our ability to define "network elements" in terms of "services"? Interested parties should expressly comment on whether and how to take services into account in our unbundling analysis. If we take a service-specific approach, should our identification of services for this purpose be governed by the Act's categories and definitions of services (*e.g.*, telephone exchange service, exchange access, CMRS), or is there some other principle we can use to categorize services at a level of generality that makes analysis practical? Is it useful to conduct unbundling analyses for individual services? Or would such an analysis stifle innovation and creativity as carriers decline to expand the services they offer for fear of losing access to UNEs?

38. In addition, how should we consider the level of competition for a particular service? For example, should the particular characteristics of the CMRS market affect the availability of UNEs to CMRS carriers?[93] What effect, if any, would CMRS carrier access to UNEs have on the goal of encouraging the development of intermodal alternatives to the incumbents' networks? If an element is unbundled for one service, should we limit its availability to that service, or should we permit it to be used for any service? We note that the competitive checklist of section 271(c)(2)(B) requires BOCs to "provide[] or generally offer[]" local loops, local transport, and local switching.[94] What, if anything, should we infer for purposes of the unbundling analysis from Congress' descriptions of these items as "local" in the section 271 competitive checklist? Does the fact that the Act described these items as "local" have any bearing on our unbundling analysis under section 251?

39. We also seek comment on whether and how to take geography into account in the unbundling analysis. In the *UNE Remand Order*, the Commission took geographic considerations into account in formulating rules for determining under what circumstances

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the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 (filed Apr. 5, 2001); Comments of AT&T at 9, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98 (filed Apr. 5, 2001). They also argue that any service-specific "elements" would be contrary to the requirements of section 251(c)(3) that elements be made available on a "nondiscriminatory basis." *See* Comments of WorldCom at 8-9, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001); Comments of AT&T at 12, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001).

93 *See, e.g.*, Letter from W. Scott Randolph, Director -- Regulatory Affairs, Verizon Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 2, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Aug. 22, 2001). Some parties have suggested that CMRS providers should not have access to UNEs. *Compare* Letter from John W. Kure, Executive Director -- Federal Law and Policy, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Sept. 26, 2001) *with* ATTWS & VoiceStream Petition for Declaratory Ruling.

94 47 U.S.C. § 271(c)(2)(B).

incumbent LECs did not have to unbundle switching.[95] Here, we seek comment on targeting the unbundling analysis by expanding the geographic-specific approach to all elements. What precisely are the considerations that could justify unbundling rules that vary from location to location? Is geographic location a better indicator of impairment for some elements, like loops, than for others, like switching and OSS? What kinds of geographic delineations would be useful to our unbundling analysis: political boundaries, metropolitan statistical areas (MSAs), density zones, or other delineations? We also ask parties to comment on how or whether a service- or location-specific unbundling analysis intersects with any "market-specific" dominance analysis we undertake in the *Incumbent LEC Broadband Services* proceeding.

40. We ask parties to comment on the competing interests involved in conducting a service- or location-specific unbundling analysis. On the one hand, such an analysis may more accurately pinpoint the circumstances under which unbundling is necessary to promote the goals we have identified. On the other hand, a service- or location-specific analysis will be administratively more difficult, because it will involve more data and more review, and appropriate classifications may vary over time. In addition, the resulting rules could be more administratively burdensome on carriers because it would be more difficult to keep track of where and under what circumstances certain elements must be unbundled.[96] How should the Commission weigh the benefits of more refined unbundling rules against the administrative burden of conducting the more detailed analysis and applying more complicated rules?

2. Facility and Capacity Considerations

41. We also seek comment on whether UNEs should be differentiated by facility type in order to account for differing availability of alternatives outside the incumbents' network. More specifically, in the past, the Commission has required incumbents to unbundle facilities largely without regard to those facilities' capacities or capabilities. For example, the Commission required the unbundling of "all technically feasible capacity-related services such as DS1-DS3 and OC3-OC96 dedicated transport services."[97] We seek comment on whether our unbundling analysis should take facilities' characteristics into account. Specifically, should UNEs be defined by capacity level of transmission facilities? Generally, higher-capacity transmission facilities have the potential to generate more revenue for the carrier than lower-capacity transmission facilities, and therefore could be more economical to self-provision.

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[95] The Commission recognized that competitive carriers had more opportunities to deploy their own switches or use the switches of non-incumbents in density zone 1 of the top 50 metropolitan statistical areas (MSAs). *UNE Remand Order*, 15 FCC Rcd at 3823, para. 278. Evidence in the *UNE Remand* proceeding demonstrated that approximately 61% of the 700 switches deployed by competitors had been deployed in the top 50 MSAs, and that in 48 of those MSAs there were four or more competitive switches. *See id.* at 3824, para. 280. Looking even more granularly, the Commission found that most of these competitive switches had been deployed in density zone 1 of each of the top 50 MSAs. The Commission thus determined that requesting carriers were impaired only outside of density zone 1 of the top 50 MSAs, and it limited the incumbents' unbundling obligation to that geographic area. *See id.* at 3826, para. 285. The Commission only permitted the incumbents not to unbundle local circuit switching in this geographic area if the incumbent provided EELs within that area. The Commission also maintained the unbundling obligation in this same geographic area for end users with three or fewer lines. *See id.* at 3828-31, paras. 288-98.

[96] Parties addressing this concern of geographic differentiation should also take into account the role of the states, as discussed in Section III.D, *infra*.

[97] *UNE Remand Order*, 15 FCC Rcd at 3842, para. 322.

Is there any reason to consider whether a facility is freestanding or whether it is merely part of a larger facility? For example, should the unbundling rules be different for a freestanding DS1 as opposed to a DS1 channel that rides on a larger facility, such as a DS3? Should we distinguish between facilities that are used exclusively for "local" services and those that are used exclusively to provide toll services, such as intercity transmission?[98] For transmission or switching facilities, can we or should we distinguish between facilities using circuit-switched versus packet-switched technologies? Are there other distinctions we can or should make regarding transmission or switching facilities?

3. Customer and Business Considerations

42. In the *UNE Remand Order*, the Commission found that "the type of customers that a competitive LEC seeks to serve is relevant to our analysis of whether the cost of self-provisioning or acquiring an element from a third-party supplier impairs the ability of a requesting carrier to provide the services it seeks to offer."[99] The Commission applied this approach as it analyzed whether requesting carriers are impaired without access to local circuit switching.[100]

43. We ask parties to comment on whether we should consider the type of customer that a requesting carrier seeks to serve as we implement the unbundling provisions of the Act. The Commission cannot, as a practical matter, consider the characteristics of each customer individually. Are there categories of customers contemplated by the Act? For example, should the availability of UNEs differ depending on whether the requesting carrier is using them to serve residential customers as opposed to business customers? Should the number of lines a customer takes, or other customer-specific characteristics, be considered in the analysis? Some parties may assert that alternate facilities are more widely available for larger business customers as a group. Should our unbundling rules differ for facilities serving larger business customers, or should those facilities be distinguished geographically or otherwise? We ask commenters to address the interplay of customer and business considerations with section 251(c)(3)'s requirement that elements be made available on a nondiscriminatory basis.

44. We also ask for commenters' input on whether the Commission should consider any characteristics of the requesting carrier in the unbundling analysis. For example, some incumbents have argued that it is unreasonable to require them to provide unbundled elements to wireless carriers, because those carriers have already assembled their networks using incumbents' tariffed special access services.[101] Should access to UNEs differ depending on whether a particular requesting carrier is impaired without them, as opposed to whether

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[98] *See* 47 U.S.C. § 271(c)(2)(B) (requiring BOCs to demonstrate that they make available "local" loops, transport, and switching in order to obtain section 271 authority).

[99] *UNE Remand Order*, 15 FCC Rcd at 3737, para. 81.

[100] *Id.* at 3829, paras. 291-94.

[101] *See, e.g.*, Letter from John W. Kure, Executive Director - Federal Policy and Law, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission, attach. at 2, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Sept. 26, 2001); Letter from W. Scott Randolph, Director - Regulatory Affairs, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 3-4, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Aug. 22, 2001).

requesting carriers as a whole are impaired? Should the availability of tariffed offerings play a role in the Commission's unbundling analysis?

4. Triggers for Changes in UNE Availability

45. We recognize that, as alternative facilities become more available and the market for telecommunications in general grows more competitive, our unbundling rules will need to change in order to maintain the proper balance between requiring incumbent LECs to unbundle their facilities and encouraging other carriers to invest in alternatives. Some parties have suggested that the UNEs, particularly switching, could be phased out over time. Specifically, one party has suggested that, if certain conditions are met, competitive LECs could commit to serving no more than 75 percent of their customers' access lines using UNE-P[102] after 12 months of adopting such a rule, with a goal of serving no more than 50 percent of their customers' access lines with UNE-P.[103] We seek comment on whether, consistent with the statute, we can or should impose absolute temporal boundaries on UNE availability, including approaches in which the requirements that incumbents unbundle specific network elements would sunset as of a date certain. We also seek comment on whether any of the metrics we adopt pursuant to the *UNE Measurements and Standards Notice* or the *Special Access Measurements and Standards Notice* could be used as triggers for phasing out certain UNEs.[104]

46. More broadly, we seek comment on other, non-temporal triggers that might signal that requesting carriers no longer need access to particular UNEs. For example, one carrier has suggested that requesting carriers may not be impaired in their ability to serve business customers without access to unbundled switching if four or more competitive LECs have deployed switches in an MSA where the incumbent makes EELs available.[105] As another example, could a competitive LEC purchasing the UNE-P be required to migrate customers to its own facilities once it begins providing service to a sufficient number of customers served by a single central office? To what extent is the availability of collocation a relevant factor for a requesting carrier's access to UNEs? Alternatively, are there triggers that could result from the incumbent's own improvements? For example, could we limit the availability of the UNE-P to circumstances where an incumbent continues to use manual cutovers to provision unbundled loops, as opposed to those circumstances where the incumbent has automated the cutover process, such as by deploying digital cross-connects? We encourage parties to suggest other triggers that might signal when requesting carriers no longer need access to a particular element.

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[102] We refer to the combination of unbundled loops, switches, and transport elements as "UNE-P" or "UNE-platform."

[103] Conditions for such a transition would include incumbents' making unbundled loops available consistent with their provisioning requirements. *See* Letter from Steven C. Andreassi, Managing Director - Regulatory Affairs, Broadview Networks, Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Jul. 5, 2001).

[104] *See UNE Measurements and Standards Notice; Special Access Measurements and Standards Notice*.

[105] *See* Letter from Thomas Jones, Counsel for Allegiance Telecom, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Jan. 30, 2001).

D. Specific Network Elements

47. In the prior parts of this NPRM, we requested comment on the most appropriate way to interpret sections 251(d)(2) and 251(c)(3) in accordance with the intent of the Act. In this section, we seek to apply these sections and develop specific requirements concerning incumbent LECs' obligations to unbundle and provide access to network elements. We intend to build on the experience of all participants in the telecommunications industry with our existing rules. Accordingly, we seek comment on our existing unbundling rules and how we should apply the more granular analytical approach to the statute discussed above in deciding whether to retain, modify or eliminate these rules. We also seek comment on a number of outstanding issues regarding incumbent LEC obligations to provide access to network elements under these existing rules. In addition to the specific issues we identify below, we encourage commenters to address any other areas of uncertainty stemming from our existing network element rules.

1. Loop, Subloop and Network Interface Devices

48. In the *UNE Remand Order*, we required incumbent LECs to provide access to loops, subloops, and network interface devices (NIDs) in order for requesting carriers to provide telecommunications services.[106] We defined the loop (and subloop) as "a transmission facility" and all of its features, functions and capabilities.[107] We found that requesting carriers were impaired without access to all available loop capacities (*e.g.*, DS1, DS3, OC3) and dark fiber.[108] We defined the NID as "any means of interconnection of end-user customer premises wiring to the incumbent LEC's distribution plant."[109] We seek comment on whether, in light of changed circumstances, we should retain these unbundling requirements and if so, whether we should modify these requirements or the existing definitions for these network elements.[110] We also seek comment on the benefits and burdens resulting from continuing these unbundling requirements and whether there are alternative, less burdensome options available to achieve the goals of the Act.

49. The loop, subloop and NID as currently defined enable requesting carriers to connect end user customers to the carriers' equipment.[111] We seek comment as to whether these network elements essentially provide similar functionality differing primarily only in the point of

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[106] *UNE Remand Order*, 15 FCC Rcd at 3772, 3789, 3801, paras. 165, 205, 232; *see* 47 C.F.R. §§ 51.319(a)-(b).

[107] 47 C.F.R. § 51.319(a)(1). The subloop is defined as "any portion of the loop that is technically feasible to access at terminals in the incumbent LEC's outside plant." 47 C.F.R. § 51.319(a)(2).

[108] *UNE Remand Order*, 15 FCC Rcd at 3776-77, paras. 174, 176.

[109] 47 C.F.R. § 51.319(b).

[110] To the extent necessary, we seek comment on whether we need to clarify under our existing rules whether the NID is part of the unbundled loop when a competitor requests access to the loop or subloop. In the *UNE Remand Order* we stated that the loop network element may terminate at the NID, before the NID or beyond the NID. *Id.* at 3801, para. 233 n.457. We also stated, however, that we declined to adopt parties' proposals to include the NID in the definition of the loop. *Id.* at 3802, para. 235; *see also Line Sharing Order*, 14 FCC Rcd at 20923, para. 17 n.29 ("In the [*UNE Remand Order*], however we identify subloops and [NIDs] as separate network elements, even though the loop network element includes subloops and NIDs, because a competitor's subloop or NID access is not contingent upon its access of the entire loop.").

[111] In addition, network element combinations including the loop, such as the UNE-platform and the EEL, enable carriers to connect end user customers to the carriers' equipment.

access they provide to the incumbent LEC's network. If so, should we consider the replacement of these existing network elements with a single "unified" loop network element? Would doing so require that we explicitly incorporate the functionality of additional equipment, such as packet switching, splitters or other passive devices into the definition of the loop?[112] Alternatively, should we define such a "unified" loop as a particular level of bandwidth between a point in the incumbent LEC's network and a specific end user? Should our loop definition take into consideration and distinguish between various levels of bandwidth and quality of service (*e.g.*, constant bit rate, variable bit rate[113])? How would any such changes to the loop definition impact the Act's goal of ensuring the deployment of broadband capabilities and encouraging investment in facilities?

50. As discussed above, we also seek comment on how we should treat deployment of new facilities by incumbent LECs for the purposes of our loop unbundling requirements.[114] Should we apply the same requirements to all transmission facilities or should we distinguish between copper, fiber and wireless facilities? Should we adopt unbundling requirements specific to the unique characteristics of the underlying facilities? For example, the transmission capacity of fiber optic facilities is significantly larger than a standard copper loop. Should our rules treat different local exchange network architectures differently? For example, should we distinguish between the deployment of fiber optic facilities directly to the home (*i.e.*, "fiber to the curb") and fiber optic facilities only to remote terminals? Should we treat all loop facilities the same or should we distinguish between existing facilities and new construction? Should we adopt different rules for new "overlay" facilities that duplicate existing facilities than for new deployment that completely replaces old facilities? In other words, should we consider whether the incumbent LEC has multiple alternative facilities in place to serve a specific customer in determining what, if any, facilities the incumbent must provide on an unbundled basis? To what extent can requesting carriers use older facilities, such as spare copper plant, after an incumbent LEC has deployed "overlay" network facilities? What operational issues are created by such overlapping facilities? For example, are there additional spectrum management or interference problems (*i.e.*, "cross-talk") associated with the simultaneous deployment of packet-switched services over older copper facilities and new fiber optic facilities?

51. We also seek comment generally on how we should apply the more granular unbundling analysis we seek to develop in this proceeding. Should we, as described above, apply service, geographic, capacity or other distinctions to the unbundled loop? If we were to limit access to unbundled loops to specific geographic areas what type of data should we review to make such a determination? Should we distinguish unbundling obligations by the services

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[112] The Commission has previously requested comment on whether attached electronics used for both voice and data services, such as the splitter, should be included in the definition of the loop. *Fifth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. at 17858, para. 122. The Commission has also indicated that the splitter might be considered part of the packet switching network element discussed below. *See Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Servs., Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18517, para. 328 (2000).

[113] Constant Bit Rate (CBR) refers to a service where information (*i.e.*, data) is conveyed regularly in time and at a constant rate. Variable Bit Rate (VBR) refers a service in which information is allowed to vary within defined limits. Harry Newton, Newton's Telecom Dictionary 210, 918 (16th ed. 2000).

[114] *See supra* para. 24.

(*e.g.*, circuit-switched analog voice, packet-switched digital data) that the requesting carrier seeks to provide with access to the loop? Can we, and if so, should we make meaningful distinctions between those loops capable of providing basic services versus those capable of advanced or broadband services?

52. In the *UNE Remand Order*, we found that requesting carriers were impaired without access to all high-capacity loops and dark fiber loops.[115] Some commenters have suggested that loops of DS1 or greater capacity should not be unbundled because requesting carriers can self-provision or obtain such capacity from third parties.[116] Others have suggested that marketplace conditions still pose an impairment, even for high-capacity loops.[117] We seek comment on whether application of a more refined impairment analysis would result in a continued requirement of access to all capacity levels for unbundled loops. To the extent that we continue to require unbundling of high-capacity loops (DS1s and above), do we have the authority to require incumbent LECs to engage in the activities necessary to activate such loops that are not currently activated in the network, such as attaching any necessary electronics to the loop facility? If we do have this authority, should we impose such a requirement? From both a legal and policy perspective, what should be the limits of any such requirement?[118] For example, although it may be unreasonable to expect an incumbent to engage in construction of new outside plant as part of an unbundling obligation, it may not be unreasonable to make use of spare port capacity on an existing multiplexer. Taking account of the goals of the Act to encourage broadband deployment and facilities investment, we ask parties to specify the appropriate contours of the incumbent LECs' unbundling obligations in this context.

2. High Frequency Portion of the Loop

53. In the *Line Sharing Order*, we required incumbent LECs to provide access to the high frequency portion of the loop necessary for the provisioning of line sharing arrangements between incumbent LECs and competitive LECs.[119] More specifically, access to this network element allows competitive LECs to provide an advanced service, such as assymetric digital subscriber line (ADSL), over the same loop facility that the incumbent LEC uses to provide the customer with voice service. We have also found that competitors are impaired without access to line splitting arrangements supported by incumbent LECs that allow for competitive LECs voluntarily to cooperate in the provision of advanced and basic services to a single customer over a single unbundled loop.[120] We seek comment on whether, in light of changed circumstances, we

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[115] *UNE Remand Order*, 15 FCC Rcd at 3776-77, paras. 174-77.

[116] *See, e.g.*, Comments of United States Telecom Ass'n, at 9-11, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed June 11, 2001).

[117] *See, e.g.*, Comments of Cbeyond *et al.*, at 21, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed June 11, 2001).

[118] By asking these questions, we are not seeking comment on the legality of unbundling dark fiber. Rather, we are seeking comment on whether, and to what extent, incumbents should be obligated to complete orders for high-capacity loops when spare facilities and/or capacity on those facilities is unavailable. *See, e.g.*, *Application of Verizon Pennsylvania Inc., et al., To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17468-69, paras. 91-92 (2001) (*Pennsylvania Section 271 Order*).

[119] *Line Sharing Order*, 14 FCC Rcd at 20926, para. 25.

[120] *Deployment of Wireline Services Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in

(continued....)

should retain this unbundling requirement and if so, whether we should modify this requirement or the existing definition for this network element. We also seek comment on the benefits and burdens resulting from continuing these unbundling requirements and whether there are alternative, less burdensome options available to achieve the goals of the Act.

54. At least one party has urged us to require incumbent LECs to provide access to a low-frequency network element in order to facilitate the provisioning of basic services, with or without the provisioning by another party of an advanced service on the same facility.[121] We seek comment generally on parties' experience with our current rules concerning access to the high frequency portion of the loop and the proposals for further sub-frequency unbundling put forth and incorporated by reference in this proceeding.

3. Switching

55. In the *UNE Remand Order*, the Commission required incumbent LECs, with some restrictions, to provide access to "local switching capability" and "tandem switching capability" for the provision of a telecommunications service.[122] The Commission defined "local circuit switching capability" to include "line-side facilities," "trunk-side facilities," and all the features, functions and capabilities of the switch.[123] We seek comment on whether, in light of changed circumstances, we should retain these unbundling requirements and if so, whether we should modify these requirements or the existing definitions for these network elements. We also seek comment on the benefits and burdens resulting from continuing these unbundling requirements and whether there are alternative, less burdensome options available to achieve the goals of the Act.

56. In the *UNE Remand Order*, the Commission recognized that under certain circumstances, lack of access to unbundled local circuit switching would not impair requesting carriers and that our unbundling rules should take such circumstances into account.[124] Specifically, in density zone one of the top fifty MSAs, incumbent LECs that make the EEL combination available are not obligated to provide unbundled circuit switching to requesting

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CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, 16 FCC Rcd 2101 (2001) (*Line Sharing Recon. Order*). We note that under our current rules, incumbent LECs do not have any obligation to provide the splitter as part of line splitting and that at least one party has requested the Commission to impose such a requirement on incumbents. *See, e.g.*, Letter from Frank S. Simone, Government Affairs Director, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 2, in *Deployment of Wireline Services Offering Telecommunications Capability*, CC Docket No. 98-147, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Jan. 16, 2001).

[121] *See* Petition for Reconsideration and Clarification of the Competitive Telecommunications Association, *Deployment of Wireline Services Offering Telecommunications Capability*, CC Docket No. 98-147, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Mar. 8, 2001) (CompTel Recon. Petition) (seeking reconsideration of the *Line Sharing Recon. Order*). We note that the specific issues raised by CompTel in its petition are pending and our request for comment does not prejudice our decision in that proceeding.

[122] *UNE Remand Order*, 15 FCC Rcd at 3808-09, 3822, paras. 253, 275; *see* 47 C.F.R. § 51.319(c).

[123] 47 C.F.R. § 51.319(c)(1). "Local tandem switching capability" is defined as "trunk-connect facilities" and other functions centralized in tandem switches. 47 C.F.R. § 51.319(c)(3).

[124] 47 C.F.R. § 51.319(c)(2).

carriers for serving customers with four or more lines.[125] We seek comment on the how well this "carve-out" to unbundled switching has worked in practice; whether the elements of the carve-out should be altered or refined; or whether, based on the experience of the past three years, a substantially revised approach is called for.[126]

57. First, we seek comment on the geographic component of the switch carve-out. In the *UNE Remand Order*, the Commission selected the top fifty MSAs because switch deployment appeared to be concentrated in these MSAs, and in all but two of the top fifty MSAs, competitors had deployed at least three switches.[127] Parties seeking reconsideration of the *UNE Remand Order* question whether switch deployment as recorded in the Local Exchange Routing Guide (LERG) is a reliable indication of whether competitors can serve the mass market using their own switches. These parties suggest that competing carriers may have deployed switches primarily to serve business customers using digital lines, and not to serve residences and smaller businesses using voice grade analog lines, and therefore, overall switch deployment is a poor proxy for gauging competition in the mass market.[128] On the other hand, incumbent LECs generally support use of switch deployment as a proxy for impairment, but argue that the number of switches deployed warrants a substantially larger geographic switch carve-out than created by our current rules.[129] We seek comment, in light of our experience since the *UNE Remand Order*, on whether a geographic limit is most appropriate for a switch carve-out, or whether other factors such as customer size or the capacity level of the transmission facilities may be better suited to matching availability of the incumbent carrier's switch to impairment of the requesting carrier. We also solicit information regarding the precise nature of the LERG data. In particular, we ask commenters to discuss whether some facilities designated by the LERG as switches may not be suitable for providing local exchange service to mass market customers, and whether the methodology used by the LERG could lead to over- or under-counting of switches.

58. Second, we seek comment on the customer-size component of the switch carve-out. In the *UNE Remand Order*, the Commission determined that, without access to unbundled

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[125] *UNE Remand Order*, 15 FCC Rcd at 3822-31, paras. 276-298; 47 C.F.R. § 69.123 (defining the parameters for the establishment of density pricing zones with density zone one as the geographic area with the highest access line density and amount of traffic volume).

[126] For example, AT&T has proposed an approach wherein the Commission would set forth "basic considerations" for state commissions to apply in making specific determinations as to whether or not unbundled switching must be made available. Letter from Robert W. Quinn, Jr., Vice President Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 2, 2001) (AT&T April 2, 2001 *Ex Parte*).

[127] *UNE Remand Order*, 15 FCC Rcd at 3824, para. 280 & n.555.

[128] *See, e.g.*, Petition of AT&T Corp. for Reconsideration and Clarification of the Third Report and Order at 16, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Feb. 17, 2000); Petition of MCI WorldCom Inc. for Reconsideration at 22, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Feb. 17, 2000); Letter from Genevieve Morelli, Counsel for the PACE Coalition, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 at 2 (filed May 19, 2000).

[129] *See, e.g.*, Letter from Gary L. Phillips, General Attorney, SBC Telecommunications, Inc., to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 at 1 (filed June 13, 2000) (stating that competitive LECs have obtained collocation and deployed switches not only throughout the 100 largest MSAs, but even in some MSAs that are smaller than the largest 150).

local switching, requesting carriers were impaired in their ability to serve the mass market.[130] Noting that commenters had not identified the characteristics that distinguish the mass market from medium and large business customers, the Commission found that a significant portion of the mass market could be captured by a four-line limit because that limit would include nearly all residential users and those business users that, because they took fewer than four access lines, were more akin to residential users than they were to large businesses.[131] We seek comment on how best to determine the mass market. For example, commenters might discuss whether the mass market is best understood as those customers that are courted by mass media and marketing campaigns, or as those customers obtaining service by means of a certain technology, a specific capacity level of the transmission facilities (*e.g.*, analog loop market), or that are served by no more than a certain number of lines.

59. We also seek comment whether, for purposes of the switch carve-out, a more suitable division might lie between residences and businesses.[132] If we again adopt a line-count limit to target the mass market, we ask commenters to discuss how such an approach should treat specific end users, such as a growing or seasonal businesses, that originally qualify under the limit, but later exceed it on a temporary or permanent basis. We also ask commenters to consider whether, for serving the mass market, requesting carriers may view the incumbent's switch less as an independent network element than as a dependable method of obtaining access to the incumbents' loops.[133] If so, we seek comment whether incumbents that adopt a mechanized method of transferring loops to a competitive carrier's switch should be excused from the obligation to provide unbundled switching to mass market customers. In particular, we seek comment regarding possible gating factors such as cost, reliability, and scalability that would determine the feasibility of transferring loops on a mechanized basis. Finally, we ask commenters to discuss any other technological developments that we should consider in determining the extent and duration of the switch carve-out.

60. Third, in the *UNE Remand Order*, the Commission required incumbent LECs to make the EEL combination available as a precondition to taking advantage of the switch carve-out. We now ask commenters to discuss whether that precondition is appropriate and whether the availability of the EEL combination serves to address impairment that would otherwise exist in the absence of unbundled switching in these geographic areas.

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130 *UNE Remand Order*, 15 FCC Rcd at 3829, para. 291.

131 *Id*. at 3829, para. 293.

132 Letter from Thomas J. Tauke, Senior Vice President Public Policy & External Affairs, and Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon Communications, to Michael Powell, Chairman, Federal Communications Commission, CC Docket No. 96-98 (filed Oct. 19, 2001).

133 Letter from Robert A. Curtis, Senior Vice President, Strategic Planning and Thomas M. Koutsky, Vice President, Law and Public Policy, Z-Tel, to Chairman Michael K. Powell, Federal Communications Commission, at 4-5, CC Docket No. 96-98 (filed Dec. 5, 2001); AT&T April 2, 2001 *Ex Parte* at 2 ("The manual nature of the 'hot cut' processes required to access the incumbent's loop infrastructure has resulted in unacceptably poor service quality during the provisioning process, including significant service outages, which cause higher costs, gated volumes, and customer dissatisfaction. In an effort to combat (or at least more effectively control) these service quality and economic impairments, AT&T has implemented processes designed to acquire business customers via UNE-P and then subsequently convert large volumes of those customers in a single central office from a UNE-P product to a UNE-loop product on a project basis.").

61. Finally, in the *UNE Remand Order*, the Commission defined "packet switching capability" as "routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units" as well as the functions performed by Digital Subscriber Line Access Multiplexers (DSLAMs).[134] The Commission required incumbent LECs, in limited circumstances, to provide access to "packet switching capability."[135] We seek comment on whether, in light of changed circumstances, we should retain this unbundling requirement and, if so, whether we should modify this requirement or the existing definition for this network element. Specifically, some parties have asserted that the term "forwarding" in our current definition sweeps in fiber optic facilities in the loop used in the transmission (*i.e.*, "forwarding") of packets. We seek comment on whether our current definition is correct as a technical matter. Should we alter our definition of packet switching to explicitly include or exclude the fiber optic facilities used in the transmission of packets to a central office termination point?

62. Similarly, we also seek comment on whether we should retain or modify our current definition of DSLAM functionality. Specifically, as a technical matter, should our definition include the "ability to forward voice channels, if present, to a circuit switch?"[136] Does this forwarding of voice channels encompass the fiber optic facilities in the loop used in such transmission? We seek comment on the benefits and burdens resulting from the packet switching unbundling requirement and seek comment on whether there are alternative, less burdensome options available to achieve the goals of the Act. In particular, we seek comment on whether we should alter the Commission's standard for those circumstances in which incumbent LECs must unbundle packet switching. Is this standard still tailored to the actual impairment facing competitors seeking to access next-generation architecture? We seek comment on the level of competitive LEC demand for and use of unbundled packet switching under our existing standard and the impact of that standard on incumbent LEC investment in packet switching capability at remote terminal facilities.

4. Interoffice Transmission Facilities

61. In the *UNE Remand Order*, the Commission found that requesting carriers are impaired without access to entrance facilities and interoffice facilities on a shared or dedicated basis.[137] We defined dedicated transport as "incumbent LEC transmission facilities . . . dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers."[138] The Commission defined shared transport as "transmission facilities shared by more than one carrier, including the incumbent

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134 *UNE Remand Order*, 15 FCC Rcd at 3833-34, paras. 302-04; *see* 47 C.F.R. § 51.319(c)(4).

135 47 C.F.R. § 51.319(c)(5). An incumbent LEC must provide access to unbundled packet switching only where the incumbent LEC has deployed digital loop carrier systems or otherwise deployed fiber optic facilities in the distribution part of the loop; has no spare copper loops capable of providing the xDSL service the requesting carrier seeks to offer; has not permitted the requesting carrier to collocate its own DSLAM at an appropriate subloop point; and has deployed packet switching for its own use. *See id.*

136 47 C.F.R. § 51.319(c)(4)(iii).

137 *UNE Remand Order*, 15 FCC Rcd at 3842, para. 321; *see* 47 C.F.R. § 51.319.

138 47 C.F.R. § 51.319(d)(1)(i).

LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network."[139] The Commission also found that requesting carriers were impaired without access to all available transport capacities (*e.g.*, DS1, DS3, OC3) and dark fiber. We seek comment on whether, in light of changed circumstances, we should retain these unbundling requirements and if so, whether we should modify these requirements or the existing definitions for these network elements. For example, some CMRS carriers assert that incumbent LECs have refused to provide unbundled transport on the basis that a CMRS cell site (*i.e.*, base station) is not a switch or wire center and therefore, transport to such location does not meet the definition for unbundled transport.[140] We seek comment on whether the facilities requested by CMRS carriers fit within our current definition for unbundled transport and if not, whether we should modify our definition of transport to include the unbundling of these facilities.[141] We also seek comment on the benefits and burdens resulting from continuing these unbundling requirements and whether there are alternative, less burdensome options available to achieve the goals of the Act.

62. We seek comment on whether we should apply to transport the more granular unbundling analysis we seek to develop in this proceeding. For example, given the prevalence of competitive transport providers, should we apply service, geographic, capacity or other distinctions to the availability of unbundled transport? Given the point-to-point nature of most transport facilities, how would we apply geographic disaggregation to this network element? Could we consider all potential routes originating and terminating in a specific geographic area, such as a MSA? For example, should we limit access to unbundled transport in geographic areas where sufficient levels of alternative transport facilities exist? Should we limit the availability of transport to certain capacity levels? Some parties assert that dedicated transport of a DS1 or greater capacity can be self-provisioned or acquired from third parties.[142] Others state that marketplace conditions still pose an impairment to requesting carriers.[143] In the *UNE Remand Order*, we required incumbent LECs to provide access to all technically feasible capacity levels of unbundled transport (*i.e.*, DS1, DS3, OC3). We seek comment on whether application of a more refined impairment analysis would lead to different requirements for different levels of capacity. Should we distinguish by the services that the requesting carrier seeks to provide with access to unbundled transport? Are there distinctions we can and should make between classes of requesting carriers? For example, are there fewer transport alternatives available to CMRS

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[139] 47 C.F.R. § 51.319(d)(1)(iii).

[140] *See* ATTWS & VoiceStream Petition for Declaratory Ruling.

[141] At least one incumbent LEC argues that section 51.319(d)(1)(i) of the Commission's rules only requires incumbent LECs to provide unbundled transport if both the mobile switching center (MSC) and the cell site are switches or wire centers owned by the requesting CMRS carriers, which Verizon asserts they are not. *See* Letter from W. Scott Randolph, Director – Regulatory Affairs, Verizon Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98, at 1-2 (filed Aug. 22, 2001). CMRS carriers, however, argue that channel terminations to base stations qualify as dedicated transport because base stations are switches and are the functional equivalent of a wire center. These issues, among others, are addressed in AT&T Wireless, Inc.'s and VoiceStream's petition for a declaratory ruling. *See* ATTWS & VoiceStream Petition for Declaratory Ruling at 23-24.

[142] *See, e.g.*, Comments of United States Telecom Ass'n, at 12, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed June 11, 2001).

[143] *See, e.g.*, Joint Comments of Cbeyond, *et al.*, at 30, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed June 11, 2001).

carriers than to other types of requesting carriers?[144] Some CMRS carriers assert that they obtain almost all of their high-capacity special access circuits from incumbent LEC tariffs.[145] What other alternatives are available to a CMRS carrier seeking to transport traffic between its MSC and base stations, and between base stations?

63. We also seek comment on the extent to which incumbent LECs have an obligation to modify their existing networks in order to provide access to network elements as required under rules prescribed by the Commission. The Commission previously concluded that because the incumbent LECs' networks were not initially constructed in a manner that provides for access to network elements, incumbent LECs have an obligation to modify those networks in order to comply with their unbundling requirements under the Act.[146] The Commission has also recognized that in at least some circumstances, incumbent LECs are not required to build new facilities in order to fulfill competitors' requests for network elements. For example, our current rules exempt incumbent LECs from any obligation "to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use."[147] In the *UNE Remand Order*, the Commission also prohibited the conversion of the entrance facility portion of a tariffed special access service to network element pricing to limit the ability of carriers to bypass access charges.[148] Should these policies be limited to interoffice transmission facilities, or are they equally applicable to loops and other network elements? Do special construction provisions of special access tariffs, such as non-recurring charges and term guarantees with termination liabilities, protect the incumbent LECs from uncompensated UNE conversions?[149] We seek comment on the extent of incumbent LECs' obligations to take reasonable steps to comply with their unbundling obligations and invite proposals for guidelines or bright line rules that would provide sufficient guidance all parties involved to minimize disputes arising from implementation of unbundling requirements adopted in this proceeding.[150]

63. In the *UNE Remand Order*, the Commission concluded that ring architecture transport was included within the definition of unbundled transport and that incumbent LECs

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144 *See* ATTWS & VoiceStream Petition for Declaratory Ruling at 30.

145 *See id.* at 10.

146 *Local Competition First Report and Order*, 11 FCC Rcd at 15602-03, 15605, paras. 198, 202. The Commission has given further shape to this obligation in certain circumstances by more clearly delineating the activities necessary to fulfill this obligation. *See, e.g., UNE Remand Order*, 15 FCC Rcd at 3775, paras. 172-73.

147 *UNE Remand Order*, 15 FCC Rcd at 3843, para. 324.

148 *Id.* at 3912, para. 485 (citing BellSouth August 9, 1999 *Ex Parte* at 1).

149 For example, incumbent LECs state that when requesting carriers order a special access circuit, the incumbent will build high-capacity circuits at the request of competitive carriers. *See, e.g.*, Letter from John W. Kure, Executive Director -- Federal Policy and Law, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Sept. 26, 2001).

150 *See* Letter from W. Scott Randolph, Director -- Regulatory Affairs, Verizon Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 01-138 (Aug. 21, 2001) (stating that where Verizon does not presently have facilities, but identifies new construction that would lead to its being able to fulfill a request, Verizon will provide the requested network element upon completion of that new construction).

must provide it on an unbundled basis.[151] The Commission also noted that incumbent LECs did not have to provide SONET capabilities to requesting carriers where the incumbent LEC did not already have SONET capabilities in place.[152] Some parties have interpreted language in the *UNE Remand Order* to mean that incumbent LECs have no obligation to provide SONET capabilities to requesting carriers, regardless of whether or not the facilities existed at the time of the request. We seek comment on the extent to which incumbent LECs should not have to provide ring architecture transport, particularly those facilities supporting SONET capabilities. Are there specific considerations about SONET technology or ring architectures that warrant exemption from unbundling?

5. Other Network Elements

64. In the *UNE Remand Order*, the Commission found requesting carriers were impaired without access to incumbent LECs' OSS functions, signaling networks and call-related databases.[153] The Commission defined OSS functions as consisting of "pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information.[154] The Commission defined signaling networks to include "signaling links and signaling transfer points"[155] and call-related databases as "databases, other than operations support systems, that are used in signaling networks for billing and collection, or the transmission, routing, or other provision of a telecommunications service."[156] We seek comment on whether, in light of changed circumstances, we should retain these unbundling requirements and if so, whether we should modify these requirements or the existing definitions for these network elements. We also seek comment on the benefits and burdens resulting from continuing these unbundling requirements and whether there are alternative, less burdensome options available to achieve the goals of the Act.

65. In the *UNE Remand Order*, the Commission noted that there were signaling alternatives available, but found that they were not sufficient to address the impairment to requesting carriers created by lack of access to the incumbent LEC's signaling system.[157] In particular, we seek comment on the deployment of signaling services that provide competitors with an alternative to the incumbent LEC's signaling system whether those services are obtained on a wholesale basis or as the result of self-deployment of facilities. What type of data should we consider to determine whether requesting carriers continue to be impaired without access to incumbent LECs' signaling systems?

66. In the *UNE Remand Order*, the Commission found that requesting carriers were impaired without access to incumbent LECs' call-related databases, "including, but not limited

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151 *UNE Remand Order*, 15 FCC Rcd at 3843, para. 324.

152 *Id.* ("Notwithstanding the fact that we require incumbents to unbundle high-capacity transmission facilities, we reject Sprint's proposal to require incumbent LECs to provide unbundled access to SONET rings.").

153 *Id.* at 3867, 3875, 3887, paras. 383, 402, 433; s*ee* 47 C.F.R. §§ 51.319(e), (g).

154 47 C.F.R. § 51.319(g).

155 *Id.* § 51.319(e)(1).

156 *Id.* § 51.319(e)(2).

157 *UNE Remand Order*, 15 FCC Rcd at 3869-70, paras. 389-90.

to, the Calling Name Database, 911 Database, E911 Database, Line Information Database, Toll Free Calling Database, Advanced Intelligent Network Databases, and downstream number portability databases."[158] We seek comment on whether we need to apply our unbundling analysis more specifically to each call-related database. For example, should we apply service or customer distinctions to our existing requirements for call-related databases?

67. The Commission has found that requesting carriers are impaired without nondiscriminatory access to incumbent LECs' OSS functions, including the pre-ordering function. The Commission has more specifically required incumbent LECs, as part of the pre-ordering function for loops supporting advanced services, to provide requesting carriers with access to line information necessary to determine whether advanced services can be provisioned to specific customers.[159] In contrast, we have set forth no such specific guidelines for the pre-ordering function for other loop types and our understanding is that no incumbent LEC provides similar information concerning facilities characteristics for other loop types during the pre-ordering function. Our experience in recent applications for section 271 authority indicates that at least two incumbent LECs do not provide information concerning facilities characteristics for high-capacity loops to competitors until after the OSS ordering function has been completed.[160] We request comment, therefore, on whether incumbent LECs, as part of the pre-ordering function for high-capacity loops, should provide requesting carriers with access to information concerning network infrastructure such that the requesting carrier can adequately determine whether to order the specific requested loop from the incumbent and when that order will be completed. Commenters should address whether, in light of changed circumstances, declining to provide such access impairs competitive LECs within the meaning of section 251(d)(2). We also seek comment on whether there are other aspects of access to OSS functions that might require further guidance or clarification from the Commission. Finally, we seek comment on whether any of our existing OSS requirements can be streamlined or modified to eliminate unnecessary regulatory burdens.

6. General Unbundling Issues

68. The Commission has previously concluded that Congress intended for the term "nondiscriminatory" in section 251 to impose a more stringent standard for prohibiting discrimination than the "unjust and unreasonable discrimination" standard in section 202 of the Act.[161] The Commission also interpreted the terms "just" and "reasonable" in section 251 to require incumbent LECs to provide competitors with access to network elements that provides "a meaningful opportunity to compete."[162] In prior orders, the Commission has required incumbent

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158 *Id.* at 3875, 3878, paras. 402, 410; *see* 47 C.F.R. § 51.319(e)(2)(i).

159 *UNE Remand Order*, 15 FCC Rcd at 3884-87, paras. 426-31.

160 *See, e.g., Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20772-73 para. 107 (2001); *Pennsylvania Section 271 Order*, 16 FCC Rcd at 17468-69, para. 90.

161 *Local Competition First Report and Order*, 11 FCC Rcd at 15612, paras. 217-18 ("We believe the term 'nondiscriminatory' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself.").

162 *Id.* at 15660, para. 315.

LECs to provide all technically feasible methods of access to network elements. As an alternative, we seek comment on whether we should identify and require only those methods of access that fulfill the "just, reasonable and nondiscriminatory" standard of section 251(c)(3).

69. We also seek comment on the relationship between "services," including both retail services and wholesale services (governed by sections 251(c)(4) and 251(b)(1)), and "network elements" (governed by sections 251(d)(2) and 251(c)(3)).[163] For example, several parties have requested that we require incumbent LECs to provide a requesting carrier with both network elements and wholesale services in order to serve a single customer.[164] In particular, competitive LECs propose to request access to a combination of network elements including the loop (*i.e.*, UNE-platform), in order to provide voice service to a customer while providing advanced telecommunications services, such as xDSL-based services, to the same customer via the resale of the incumbent LEC's retail telecommunications offering. We seek comment on whether the Act *requires* incumbent LECs to provide such a combination of network elements and services and the underlying statutory analysis that supports such a requirement. Several parties have asserted that we should expressly allow co-mingling of network elements with access services.[165] Should we continue to impose limits on the ability of requesting carriers to combine certain network elements and services in order to serve a specific customer or class of customers?[166] We seek comment generally on the rights and obligations of all carriers in regards to the use and provision of services and network elements, particularly when combined over the same facilities or when used in combination to serve a specific customer or class of customers.

70. We also seek comment specifically on the co-mingling restrictions currently in place. In the safe harbor provisions of the *Supplemental Order Clarification*, the Commission articulated two specific prohibitions on the co-mingling of services and network elements: (1) requesting carriers may not "connect" loop-transport combinations to the incumbent LEC's tariffed services, and (2) requesting carriers may not "combine" loop network elements or loop-transport combinations with tariffed special access services.[167] Since that time, some commenters have suggested that we should impose a general prohibition on "connecting" or "combining" any network elements or combinations with any access services. Incumbent LECs in particular, argue that their billing systems are not designed to treat a single circuit as part network element and part tariffed service, and that they have separate personnel to handle provisioning, repair, maintenance, billing and other functions for network elements as opposed to tariffed access services that would make it difficult to manage circuits that co-mingled network elements and tariffed services.[168] In contrast, competitive LECs state that the current co-mingling

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[163] In the *Local Competition First Report and Order*, the Commission explicitly left this question unresolved. *Id.* at 15671, para. 341.

[164] *Pennsylvania Section 271 Order*, 16 FCC Rcd at 17472, para. 97.

[165] *See, e.g.*, Comments of Focal Communications Corporation, at 10-12, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001) (Focal April 5, 2001 Comments).

[166] *See Supplemental Order Clarification*, 15 FCC Rcd at 9602, para. 28.

[167] *Id*. at 9598-99, 9602, paras. 22, 28.

[168] *See, e.g.*, Opposition of SBC Communications, Inc. to ITC^DeltaCom Petition for Waiver, at 6, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (continued....)

restrictions force them to build and operate two duplicate, inefficient networks (*i.e.*, one for network elements and one for tariffed services), thereby adding excessive cost and delay to their provision of competitive services.[169] We seek comment from all parties on these assertions and whether there are practical difficulties in co-mingling network elements with tariffed services. We also seek comment on methods to overcome such difficulties. Finally, are there any other legal or policy reasons for permitting or prohibiting co-mingling restrictions?

71. In addition, we note that the safe harbor provisions limit requesting carriers' access to EEL combinations in order to preserve the status quo with regard to the Commission's current access charge regime.[170] We seek comment on whether the Commission's safe harbor provisions, in practice, are effectively tailoring access to EEL combinations to those requesting carriers seeking to provide "significant local usage" to their end users. Based on practical experience, how many circuits eligible for conversion under the safe harbors have actually been converted? More broadly, do our safe harbors appropriately target competitive LEC impairment to local exchange service?

72. We seek comment on the relationship between section 271(c)(2)(B) and sections 251(d)(2) and 251(c)(3). The Act requires BOCs, as part of the application for authority to provide interLATA services, to demonstrate that they provide or generally offer local loop transmission, local transport, local switching, databases and signaling.[171] The Commission has previously considered these requirements to be informative in determining which network elements must be unbundled pursuant to section 251.[172] With respect to the potential limitation or removal of unbundling obligations that overlap the requirements of section 271(c)(2)(B), should we treat those network elements differently from other elements and, if so, how? In the *UNE Remand Order*, the Commission found that where there is no longer a requirement to unbundle a network element comparable to a section 271 checklist item, the market price for that checklist item should prevail.[173] We seek comment on how to evaluate a checklist item where there is no unbundling requirement for the network element that corresponds to that checklist item, and on the appropriateness of evaluating a tariffed service that corresponds to that network element.[174]

(...continued from previous page)
(filed Sept. 18, 2001); Opposition of the Verizon Telephone Companies, at 9-10, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Sept. 19, 2001).

169 *See, e.g.*, Comments of Cbeyond, *et al.*, at 14-16, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001).

170 *Supplemental Order Clarification*, 15 FCC Rcd at 9591-92, paras. 7-8.

171 47 U.S.C. § 271(c)(2)(B).

172 "Although we do not conclude that the checklist determines definitively that all incumbent LECs are required, pursuant to section 251, to unbundle the items enumerated in section 271, we find that section 271 sheds some light on what elements Congress believed should be unbundled in order to open local markets to competition." *UNE Remand Order*, 15 FCC Rcd at 3748, para. 109.

173 *Id.* at 3906, para. 473.

174 *See also Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4126-27, para. 340 (1999).

73. Similarly, we seek comment on how, in the absence of a section 251 unbundling obligation for a network element, sections 201 and 202 of the Act may be applied to encourage broadband deployment and investment in facilities by both incumbents and competitors. For example, one incumbent LEC has asserted that mandatory unbundling of its broadband network is not necessary to incent facilities investment and ensure customer access, where other carriers can purchase a wholesale service at its central offices to reach their customers at a "commercially reasonable rate."[175] We ask interested parties to comment on how commercially reasonable prices should be determined. Should they be established solely through private negotiation or is some regulation appropriate? At what level should prices be set to maximize investment in advanced telecommunications infrastructure, while still affording competitive access? Those parties advocating regulations should specify the method and degree of regulation, and how sections 201 and 202 of the Act or other statutory provisions provide authority for such regulation.

74. We seek comment on whether any specific quality or variation of a "network element" provided by an incumbent LEC to itself, to its customers or other carriers should be considered "superior" under the now invalidated Rule 51.311(c). There is very little evidence in CC Docket No. 96-98 concerning specific examples of "superior" network elements or "superior" access to network elements, and the Eighth Circuit opinion invalidating the rule also does not refer to specific examples.[176] We seek comment on whether the quality of a network element could be found to be something other than "superior" if it allows the provision of services that could not be provisioned using network elements of another quality. To the extent that a network element encompasses functionality, features and capabilities of an existing or prior offering of a service, or other arrangement of an incumbent LEC, we seek comment as to whether this is presumptive evidence that the quality of or access to a network element is not "superior."

E. The Role of the States

75. We seek comment on the proper roles of state commissions in the implementation of unbundling requirements for incumbent LECs. Section 251(d)(3) of the Act permits state commissions to establish access obligations that are consistent with Commission unbundling rules.[177] In the *UNE Remand Order*, we interpreted section 251(d)(3) to grant authority to state commissions to impose additional obligations upon incumbent LECs so long as they met the requirements of section 251 and national policy framework of that order.[178] However, the Commission found that "state-by-state removal of elements from the national list would substantially prevent implementation of the requirements and purposes of this section and the Act,"[179] particularly with regard to uncertainty and frustration of business plans.[180] As a result of our attempt to apply the Act's unbundling requirements more precisely here, it is not

[175] Verizon November 6, 2001 *Ex Parte* at 3.

[176] *Iowa Utils. Bd.*, 120 F.3d at 812-13.

[177] 47 U.S.C. § 251(d)(3); *UNE Remand Order*, 15 FCC Rcd at 3767, para. 154.

[178] 15 FCC Rcd at 3767, para. 154.

[179] *Id.*

[180] *Id.* at 3768-70, paras. 155-61

unreasonable to expect the administrative burden on the Commission to increase. We also recognize that state commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdictions, and that entry strategies may be more sophisticated in recognizing regional differences. We seek comment, therefore, on the extent to which state commissions can act in creating, removing, and implementing unbundling requirements and the statutory provisions that would provide authority for states to act, consistent with applicable limitations on delegations of authority to the states.

76. Specifically, should the Commission establish national standards that the states will apply to their incumbents' networks, much like the Commission has done with regard to setting network element pricing? For example, if the Commission determined that accessing end users (*i.e.*, "last mile") presented an impairment to requesting carriers, could each state commission adopt a definition of that element that specifically dealt with the unique architecture of its incumbent LECs and the impairment factors we have identified above? Or, more broadly, are states better situated to tailor unbundling rules that more precisely fit their markets? Do state commissions have the resources to conduct such an investigation? Should the development of federal unbundling standards rely on any of the federal performance standards that may be established in the *UNE Measurements and Standards Notice* and *Special Access Measurements and Standards Notice*? For example, where an incumbent is meeting the standard set forth for a particular UNE on a consistent basis, should the Commission rely on this performance as a factor in de-listing that element for that state?[181] We encourage state commissions in particular to comment on these issues. We also seek comment on a proposal to convene a Federal-State Joint Conference on UNEs pursuant to section 410(b) of the Act[182] to inform and coordinate our three-year review.[183]

F. Implementation Issues

77. We undertake this review of UNEs consistent with the Commission's pronouncement in the *UNE Remand Order* that it needed to reevaluate its national rules periodically to determine whether unbundling the incumbent's network meets the requirements of section 251 and the goals of the Act.[184] The Commission established a quiet period for the filing of petitions to remove elements prior to these reviews in order to provide a measure of certainty for competitors to design networks, attract investment capital, and carry out their business plans, as well as to prevent the administrative impracticality of entertaining numerous *ad hoc* petitions.[185] As for the length of the review cycle, the Commission chose a triennial review period for three reasons: (1) parties were expected to implement the new rules as they

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[181] One party has already proposed a framework where states would recommend to the Commission that unbundled switching obligations be relaxed, subject to incumbent LEC demonstration of the sufficiency of certain operational processes and other conditions. *See* AT&T April 2, 2001 *Ex Parte*.

[182] 47 U.S.C. § 410(b).

[183] CompTel Joint Conference Petition at 6-7; *see also* Letter from Joan Smith, Chair, NARUC Communications Committee, *et al.*, to Michael Powell, Chairman, Federal Communications Commission, CC Docket No. 96-98 (filed Dec. 5, 2001) (NARUC December 5, 2001 *Ex Parte*) (supporting CompTel's proposal for the Commission to convene a Federal-State Joint conference on UNEs pursuant to section 410(b) of the Communications Act).

[184] *UNE Remand Order*, 15 FCC Rcd at 3765, paras. 148-49.

[185] *Id.* at 3765-66, para. 150.

negotiated new interconnection agreements, which typically have three-year terms; (2) three years is generally sufficient time for competitors to implement their plans; and (3) the Modified Final Judgment used a triennial review process.[186] We request comment on the burden of proof that a party seeking to modify current rules and policies should bear.[187] In declining to adopt a sunset period for removing unbundling obligations, the Commission noted that the record before it did not provide a basis for making predictive judgments about when an unbundling standard will no longer be met.[188] We seek comment on this conclusion specifically. We invite interested parties to comment on whether we should continue with a fixed period review process that bars the filing of petitions to remove unbundling obligations between cycles, and on whether we should adopt a sunset period for removing unbundling obligations. We seek comment in particular on whether a sunset period for remaining unbundling obligations could create incentives for facilities deployment and investment. If not, the details of alternative plans should be provided. Commenters are also invited to provide guiding principles that should be employed to determine whether and how existing unbundling rules should be modified on an ongoing basis.

78. Further, to the extent we retain a periodic review cycle, we request comment on whether three years is the appropriate length for the review cycle in light of competitors' experiences with network design, ability to attract investment, and execution of their business strategies. We also note that the Joint Petitioners questioned the consistency of a triennial UNE review with the requirement of section 11 of the Act to review in even-numbered years whether regulations in effect continue to serve the public interest.[189] Although our completion of the instant review in 2002 satisfies both review cycles, we seek comment on whether the Commission could wait until 2005 for a subsequent UNE review, or whether section 11 requires a UNE review in 2004.

79. We also seek comment on whether and to what extent we should specifically address the financial impact created by changes to UNE availability to all affected carriers and access providers. Such an examination is consistent with our prior actions in recognizing new unbundling obligations as well as introducing other regulations. For example, in the *UNE Remand Order*, the Commission acknowledged that making entrance facilities available on an unbundled basis could have a large impact on incumbent LECs, and sought comment on the extent any such impact should be taken into account.[190] In the *Supplemental Order Clarification*, the Commission identified a reason for a temporary constraint on the EEL independent from the

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[186] *Id.* at 3766, para. 151 & n.269.

[187] CompTel Joint Conference Petition at 13 (asking the Commission to make clear that parties seeking to modify existing rules and policies must show by a preponderance of the record evidence that the requested relief is justified); *see also* NARUC December 5, 2001 *Ex Parte* at 1-2 (supporting CompTel's proposal on the burden of proof for requested relief).

[188] *UNE Remand Order*, 15 FCC Rcd at 3766, para. 152.

[189] Opposition of Joint Petitioners at 2; *see also* Separate Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 16 FCC Rcd 1727, 1731 (1999) (stating that the three-year review period is illegal, because section 11 of the 1996 Act, 47 U.S.C. § 161, would require a biennial review in 2000).

[190] *UNE Remand Order*, 15 FCC Rcd at 3915, para. 496.

protection of universal service or access charges: "An immediate transition to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers."[191] More recently, in correcting market distortions of the intercarrier compensation regimes for ISP-bound traffic, the Commission adopted a transitional interim regime to avoid a "flash cut" that would upset the "legitimate business expectations of carriers and their customers."[192] Commenters should discuss whether the Commission should address the financial impact of changes to UNE availability in a similar manner for all affected carriers, or whether the Commission can and should target its concerns to facilities-based providers or other classes of carriers.

80. In addition, we note that the Commission has previously tied the offset of BOC loss of revenues from switching unbundling with increased revenues from section 271 approval,[193] and we encourage parties to identify cut-off dates and triggers that relate to the goals of the Act. Additionally, while the Commission has previously disallowed relief for competitors from termination liabilities for UNE conversions of special access circuits,[194] we seek comment on what bases competitors should be able to obtain a "fresh look" for long term commitments.[195]

IV. PROCEDURAL MATTERS

A. Ex Parte Presentations

81. These matters shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[196] 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 in generally required.[197] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

B. Comment Filing Procedures

82. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[198] interested parties may file comments within 60 days after publication of this NPRM in the Federal Register

[191] *Supplemental Order Clarification*, 15 FCC Rcd at 9597, para. 18.

[192] *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 96-98, CC Docket No. 99-68, FCC 01-132 at para. 77 (rel. Apr. 27, 2001).

[193] "BOCs shall not be permitted to recover these revenues once they are authorized to offer in-region interLATA service, because at that time the potential loss of access charge revenues faced by a BOC most likely will be able to be offset by new revenues from interLATA services." *Local Competition First Report and Order*, 11 FCC Rcd at 15866, para. 724. We note that the Commission instituted a section 271 approval trigger date in conjunction with a temporal phase-in, and that the purpose of protecting revenues was to protect universal service and an unreformed access charge regime rather than the market position or business expectations of the BOCs. *Id.* at 15866, para. 725.

[194] *UNE Remand Order*, 15 FCC Rcd at 3912, para. 486 n.985.

[195] Focal April 5, 2001 Comments at 12-14.

[196] 47 C.F.R. §§ 1.1200-1.1216.

[197] *See* 47 C.F.R. § 1.1206(b)(2).

[198] 47 C.F.R. §§ 1.415, 1.419.

and may file reply comments within 105 days after publication of this NPRM in the Federal Register. All filings should refer to CC Docket No. 01-338. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[199] Comments filed through ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket numbers, which in this instance are CC Docket No. 01-338, CC Docket No. 96-98, and CC Docket No. 98-147. 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.

83. Parties that choose to file by paper must file an original and four copies of each, and are hereby notified that effective December 18, 2001, the Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at a new location in downtown Washington, DC. The address is 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location will be 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

84. This facility is the only location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. Accordingly, the Commission will no longer accept these filings at 9300 East Hampton Drive, Capitol Heights, MD 20743. In addition, this is a reminder that, effective October 18, 2001, the Commission discontinued receiving hand-delivered or messenger-delivered filings for the Secretary at its headquarters location at 445 12th Street, SW, Washington, DC 20554.

85. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail and Priority Mail), must be addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743. This location will be open 8:00 a.m. to 5:30 p.m. The USPS first-class mail, Express Mail, and Priority Mail should continue to be addressed to the Commission's headquarters at 445 12th Street, SW, Washington, DC 20554. The USPS mail addressed to the Commission's headquarters actually goes to our Capitol Heights facility for screening prior to delivery at the Commission.

If you are sending this type of document or using this delivery method . . .	It should be addressed for delivery to . . .
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002 (8:00 to 7:00 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m. to 5:30 p.m.)

[199] *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

Service Express Mail and Priority Mail)	
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12th Street, SW Washington, DC 20554

Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to Janice Myles, Policy & Program Planning Division, Common Carrier Bureau, Federal Communications Commission, at the filing window at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket numbers, in this case, CC Docket No. 01-338, CC Docket No. 96-98, and CC Docket No. 98-147), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy -- Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554.

86. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at qualexint@aol.com.

87. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission's rules.[200] We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in the NPRM in order to facilitate our internal review process.

C. Initial Regulatory Flexibility Analysis

88. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[201] the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided above in Section IV.B. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business

[200] *See* 47 C.F.R. § 1.48.

[201] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

Administration.[202] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[203]

1. Need for, and Objectives of, the Proposed Rules

89. We initiate this proceeding to begin a comprehensive examination of the Commission's approach to UNEs, and the circumstances under which incumbent LECs must make UNEs available to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2) of the 1996 Act. The Commission last reviewed its unbundling rules comprehensively in 1999 in the *UNE Remand Order*. Recognizing that market conditions would change and create a need for commensurate changes to the unbundling rules, the Commission determined to revisit its unbundling rules again in three years -- a schedule observed by issuing this NPRM. The NPRM also incorporates the records of several ongoing proceedings involving various UNE rules.

90. The NPRM seeks comment on all aspects of the Commission's unbundling framework. In particular, the NPRM seeks comment on the goals of the Act that should play a role in shaping unbundling policy, such as broadband deployment, investment in facilities, and others. The NPRM seeks comment on how the Commission could apply its unbundling analysis in a more sophisticated manner, by considering whether the unbundling rules should vary by type of service, facility, geography, or other factors. The NPRM then seeks comment on applying the unbundling approach to specific elements and resolving certain existing disputes or ambiguities in the unbundling rules. The NPRM also seeks comment on the proper role of the states, and how best to implement any new rules.

2. Legal Basis

91. The legal basis for any action that may be taken pursuant to the NPRM is contained in sections 1-4, 157, 201-05, 251, 252, 254, 256, 271, 303(r), and 332 of the Communications Act, as amended, 47 U.S.C. §§ 151-54, 157, 201-05, 251, 252, 254, 256, 271, 303(r), and 332.

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

92. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[204] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[205] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[206] A small business concern is one which: (1) is independently owned and

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202 *See* 5 U.S.C. § 603(a).

203 *See id.*

204 5 U.S.C. §§ 603(b)(3), 604(a)(3).

205 *Id.* § 601(6).

206 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an (continued....)

operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[207]

93. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted pursuant to this NPRM. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.[208] In a news release, the Commission indicated that there are 4,822 interstate carriers.[209] These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone service, providers of telephone exchange service, and resellers.

94. The SBA has defined establishments engaged in providing "Radiotelephone Communications" and "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.[210] Below, we discuss the total estimated number of telephone companies falling within the two categories, and the number of small businesses in each. We then attempt to further refine those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

95. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[211] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[212] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

(...continued from previous page)
agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

207 15 U.S.C. § 632.

208 Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 16.3 (Dec. 2000) (*Trends in Telephone Service*).

209 *Id.*

210 *See* 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) codes 4812 and 4813, now NAICS codes 51331-34; *see also* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

211 5 U.S.C. § 601(3).

212 Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

96. *Total Number of Telephone Companies Affected*. The U.S. Bureau of the Census ("Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[213] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, covered specialized mobile radio providers, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities because they are not "independently owned and operated."[214] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms that may be affected by the new rules.

97. *Wireline Carriers and Service Providers*. The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (*i.e.*, wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[215] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[216] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate 2,295 or fewer small telephone communications companies other than radiotelephone companies are small entities that may be affected by rules adopted pursuant to this *NPRM*.

98. *Local Exchange Carriers*. Neither the Commission nor the SBA has developed a definition for small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (*i.e.*, wireless) companies.[217] According to the most recent *Telecommunications Industry Revenue* data, 1,335 incumbent carriers reported that they were engaged in the provision of local exchange services.[218] We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition.

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213 U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (*1992 Census*).

214 *See generally* 15 U.S.C. § 632(a)(1).

215 *1992 Census* at Firm Size 1-123.

216 13 C.F.R. § 121.201, NAICS code 513310.

217 *Id*.

218 *Trends in Telephone Service* at Table 16.3.

Consequently, we estimate that 1,335 or fewer providers of local exchange service are small entities or small incumbent LECs that may be affected by the new rules.

99. *Interexchange Carriers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (*i.e.*, wireless) companies.[219] According to the most recent *Trends in Telephone Service* data, 204 carriers reported that they were engaged in the provision of interexchange services.[220] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 204 or fewer small-entity IXCs that may be affected by rules adopted pursuant to this *NPRM*.

100. *Competitive Access Providers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (*i.e.*, wireless) companies.[221] According to the most recent *Trends in Telephone Service* data, 349 CAP/CLEC carriers and 60 other LECs reported that they were engaged in the provision of competitive local exchange services.[222] We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 349 or fewer small-entity CAPs and 60 or fewer other LECs that may be affected by rules adopted pursuant to this *NPRM*.

101. *Operator Service Providers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (*i.e.*, wireless) companies.[223] According to the most recent *Trends in Telephone Service* data, 21 carriers reported that they were engaged in the provision of operator services.[224] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 21 or fewer small-entity operator service providers that may be affected by rules adopted pursuant to this *NPRM*.

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[219] 13 C.F.R. § 121.201, NAICS code 513310.

[220] *Trends in Telephone Service* at Table 16.3.

[221] 13 C.F.R. § 121.201, NAICS code 513310.

[222] *Trends in Telephone Service* at Table 16.3.

[223] 13 C.F.R. § 121.201, NAICS code 513310.

[224] *Trends in Telephone Service* at Table 16.3.

102. *Pay Telephone Operators*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (*i.e.*, wireless) companies.[225] According to the most recent *Trends in Telephone Service* data, 758 carriers reported that they were engaged in the provision of pay telephone services.[226] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 758 or fewer small-entity pay telephone operators that may be affected by rules adopted pursuant to this *NPRM*.

103. *Resellers* (*including debit card providers*). Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (*i.e.*, wireless) companies.[227] According to the most recent *Trends in Telephone Service* data, 454 toll and 87 local entities reported that they were engaged in the resale of telephone service.[228] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 454 or fewer small-toll-entity resellers and 87 or fewer small-local-entity resellers that may be affected by rules adopted pursuant to this *NPRM*.

104. *Toll-Free 800 and 800-Like Service Subscribers*.[229] Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to 800 and 800-like service ("toll free") subscribers. The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, and 877 numbers in use.[230] According to our most recent data, at the end of January 1999, the number of 800 numbers assigned was 7,692,955; the number of 888 numbers that had been assigned was 7,706,393; and the number of 877 numbers assigned was 1,946,538. We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 7,692,955 or fewer small-entity 800 subscribers, 7,706,393 or fewer small-entity 888 subscribers, and 1,946,538 or fewer small-entity 877 subscribers that may be affected by rules adopted pursuant to this *NPRM*.

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225 13 C.F.R. § 121.201, NAICS code 513310.

226 *Trends in Telephone Service* at Table 16.3.

227 13 C.F.R. § 121.201, NAICS code 513330.

228 *Trends in Telephone Service* at Table 16.3.

229 We include all toll-free number subscribers in this category, including 888 number subscribers.

230 *Trends in Telephone Service* at Table 19.2.

105. *Cellular Licensees.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (*i.e.*, wireless) companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[231] According to the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.[232] Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, we do not know the number of cellular licensees, since a cellular licensee may own several licenses. The most reliable source of information regarding the number of cellular service providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS). The report places cellular licensees and Personal Communications Service (PCS) licensees in one group. According to recent data, 808 carriers reported that they were engaged in the provision of either cellular or PCS services.[233] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are no more than 808 small cellular service carriers.

106. *220 MHz Radio Service—Phase I Licensees*. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and 4 nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to radiotelephone communications companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[234] According to a 1995 estimate by the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.[235] Therefore, assuming that this general ratio has not changed significantly in recent years in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

107. *220 MHz Radio Service—Phase II Licensees*. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted criteria for defining small businesses and very small businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment

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231 13 C.F.R. § 121.201, NAICS code 513322.

232 *1992 Census* at Firm Size 1-123.

233 Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (Mar. 2000).

234 13 C.F.R. § 121.201, NAICS code 513322.

235 *1992 Census* at Firm Size 1-123.

payments.[236] We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[237] The SBA has approved these definitions.[238] An auction of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[239] Nine hundred and eight (908) licenses were auctioned in three different-sized geographic areas: 3 nationwide licenses, 30 Regional Economic Area Group (REAG) licenses, and 875 Economic Area (EA) licenses. Of the 908 licenses auctioned, 693 were sold. Companies claiming small business status won: 1 of the Nationwide licenses, 67% of the Regional licenses, 47% of the REAG licenses and 54% of the EA licenses. As of January 22, 1999, the Commission announced that it was prepared to grant 654 of the Phase II licenses won at auction.[240] A second 220 MHz Radio Service auction began on June 8, 1999 and closed on June 30, 1999. This auction offered 225 licenses in 87 EAs and 4 REAGs. (A total of 9 REAG licenses and 216 EA licenses. No nationwide licenses were available in this auction.) Of the 215 EA licenses won, 153 EA licenses (71%) were won by bidders claiming small business status. Of the 7 REAG licenses won, 5 REAG licenses (71%) were won by bidders claiming small business status.

108. *Private and Common Carrier Paging*. The Commission has adopted a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. A small business will be defined as either: (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[241] At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to recent data, 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services, which are placed together in the data.[242] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's

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[236] *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order, 12 FCC Rcd. 10943, 11068-70 paras. 291-95 (1997).

[237] *Id.* at 11068-69 para. 291.

[238] *See* Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (filed Jan. 6, 1998).

[239] *See generally* Phase II 220 MHz Service Auction Closes, Auction No. 18, *Public Notice*, 14 FCC Rcd. 605 (1998).

[240] Public Notice, *FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Auction No. 18, 14 FCC Rcd 1085 (1999).

[241] 13 C.F.R. § 121.201, NAICS code 513321.

[242] Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (Feb. 19, 1999).

definition. Consequently, we estimate that there are no more than 172 small paging carriers. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

109. *Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. As noted above in the section concerning paging service carriers, the closest applicable definition under the SBA rules is that for radiotelephone (*i.e.*, wireless) companies,[243] and recent data show that 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services.[244] Consequently, we estimate that there are no more than 172 small mobile service carriers.

110. *Broadband Personal Communications Service* (*PCS*). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[245] For block F, an additional classification for "very small business" was added and is defined as an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[246] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[247] No small businesses within the SBA-approved definition bid successfully for licenses in blocks A and B. There were 90 winning bidders that qualified as small entities in the C block auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for blocks D, E and F.[248] On March 23, 1999, the Commission held another auction (Auction No. 22) of C, D, E and F block licenses for PCS spectrum returned to the Commission by previous license holders. In that auction, 48 bidders claiming small business, very small business or entrepreneurial status won 272 of the 341 licenses (80%) offered. Based on this information, we conclude that the number of small broadband PCS licensees includes the 90 winning C block bidders, the 93 qualifying bidders in the D, E and F blocks, and the 48 winning bidders from Auction No. 22, for a total of 231 small-entity PCS providers as defined by the SBA and the Commission's auction rules.

111. *Narrowband PCS.* The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone

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[243] 13 C.F.R. § 121.201, NAICS code 513321.

[244] *Trends in Telephone Service* at Table 19.3.

[245] *See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd. 7824, 7850-53, paras. 57-60 (1996) (*CMRS Spectrum Cap Order*); 61 FR 33859 (Jul. 1, 1996); *see also* 47 C.F.R. § 24.720(b).

[246] *CMRS Spectrum Cap Order*, 11 FCC Rcd at 7852, para. 60.

[247] *See, e.g., In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd. 5532, 5581-84 (1994).

[248] FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997).

companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions, however, have not yet been scheduled. Given that nearly all radiotelephone companies have no more than 1,500 employees, and no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for our purposes here, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

112. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[249] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[250] We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[251] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

113. *Air-Ground Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.[252] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[253] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

114. *Specialized Mobile Radio* (*SMR*). The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to two tiers of firms: (1) "small entities," those with revenues of no more than $15 million in each of the three previous calendar years; and (2) "very small entities," those with revenues of no more than $3 million in each of the three previous calendar years. The regulations defining "small entity" and "very small entity" in the context of 800 MHz SMR (upper 10 MHz and lower 230 channels) and 900 MHz SMR have been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for our purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz (upper 10 MHz) and 900 MHz SMR bands. There were 60 winning bidders that qualified as small and very small entities in the 900 MHz auction. Of the 1,020 licenses won in the 900 MHz auction, 263 licenses were won by bidders qualifying as small and very small entities. In the 800 MHz SMR auction, 38 of the 524 licenses won were won by small and very small entities.

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249 The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

250 BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

251 13 C.F.R. § 121.201, NAICS code 513322.

252 The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

253 13 C.F.R. § 121.201, NAICS code 513322.

115. *Marine Coast Service*. Between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of this auction, and for future public coast auctions, the Commission defines a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. A "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[254] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the Commission's definition, which has been approved by the SBA.

116. *Fixed Microwave Services*. Microwave services include common carrier,[255] private-operational fixed,[256] and broadcast auxiliary radio services.[257] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For our purposes here, we will utilize the SBA's definition applicable to radiotelephone companies—*i.e.*, an entity with no more than 1,500 persons.[258] Under this definition, we estimate that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities.

117. *Local Multipoint Distribution Service*. The Commission held two auctions for licenses in the Local Multipoint Distribution Services (LMDS) (Auction No. 17 and Auction No. 23). For both of these auctions, the Commission defined a small business as an entity, together with its affiliates and controlling principals, having average gross revenues for the three preceding years of not more than $40 million. A very small business was defined as an entity, together with affiliates and controlling principals, having average gross revenues for the three preceding years of not more than $15 million. Of the 144 winning bidders in Auction Nos. 17 and 23, 125 bidders (87%) were small or very small businesses.

118. *24 GHz—Incumbent 24 GHz Licensees*. The rules that we may later adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission has not developed a definition of small entities applicable to licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for the

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254 *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

255 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

256 Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial or safety operations.

257 Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. § 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

258 13 C.F.R. § 121.201, NAICS code 513322.

radiotelephone industry, providing that a small entity is a radiotelephone company employing fewer than 1,500 persons.[259] The 1992 Census of Transportation, Communications and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.[260] This information notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc.[261] Both Teligent and TRW, Inc. appear to have more than 1,500 employees. Therefore, it appears that no incumbent licensee in the 24 GHz band is a small business entity.

119. *Future 24 GHz Licensees*. The rules that we may later adopt could also affect potential new licensees on the 24 GHz band. Pursuant to 47 C.F.R. § 24.720(b), the Commission has defined "small business" for Blocks C and F broadband PCS licensees as firms that had average gross revenues of less than $40 million in the three previous calendar years. This regulation defining "small business" in the context of broadband PCS auctions has been approved by the SBA.[262] With respect to new applicants in the 24 GHz band, we shall use this definition of "small business" and apply it to the 24 GHz band under the name "entrepreneur." With regard to "small business," we shall adopt the definition of "very small business" used for 39 GHz licenses and PCS C and F block licenses: businesses with average annual gross revenues for the three preceding years not in excess of $15 million. Finally, "very small business" in the 24 GHz band shall be defined as an entity with average gross revenues not to exceed $3 million for the preceding three years. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held. Even after that, the Commission will not know how many licensees will partition their license areas or disaggregate their spectrum blocks, if partitioning and disaggregation are allowed.

120. *39 GHz*. The Commission held an auction (Auction No. 30) for fixed point-to-point microwave licenses in the 38.6 to 40.0 GHz band (39 GHz Band).[263] For this auction, the Commission defined a small business as an entity, together with affiliates and controlling interests, having average gross revenues for the three preceding years of not more than $40 million. A very small business was defined as an entity, together with affiliates and controlling principals, having average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these definitions.[264] Of the 29 winning bidders in Auction No. 30, 18 bidders (62%) were small business participants.

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[259] *See* 13 C.F.R. § 121.201, NAICS code 513322.

[260] *1992 Census* at *Firm Size* 1-123.

[261] Teligent has acquired the DEMS licenses of FirstMark, the only other licensee in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

[262] *See Section 309(j) of the Communications Act—Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd. 5532, 5581-82 para. 115 (1994).

[263] *See* Public Notice, *39 GHz Band Auction Closes; Winning Bidders of 2,173 Licenses Announced*, DA 00-1035 (rel. May 10, 2000).

[264] *See* Letter from Aida Alvarez, Administrator, Small Business Administration, to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (filed Feb. 4, 1998).

121. *Multipoint Distribution Service* (*MDS*). This service involves a variety of transmitters, which are used to relay data and programming to the home or office, similar to that provided by cable television systems.[265] In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues for the three preceding years not in excess of $40 million.[266] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[267] These stations were licensed prior to implementation of Section 309(j) of the Communications Act of 1934, as amended.[268] Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.[269] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 meet the definition of a small business.

122. MDS is also heavily encumbered with licensees of stations authorized prior to the MDS auction. SBA has developed a definition of small entities for pay television services, which includes all such companies generating $11 million or less in annual receipts.[270] This definition includes MDS systems, and thus applies to incumbent MDS licensees and wireless cable operators which may not have participated or been successful in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of $11 million annually. Therefore, for purposes of this analysis, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules.

123. *Offshore Radiotelephone Service*. This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.[271] At present, there are approximately 55 licensees in this service. We are unable at this time to estimate the number of licensees that would qualify as small under the SBA's definition for radiotelephone communications.

124. *Wireless Communications Services* (*WCS*). This service can be used for fixed, mobile, radio-location and digital audio broadcasting satellite uses. The Commission defined "small business" for the WCS auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders

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265 For purposes of this item, MDS includes both the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

266 47 C.F.R. § 1.2110 (a)(1).

267 *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service; Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd. 9589 (1995), 60 FR 36524 (Jul. 17, 1995).

268 47 U.S.C. § 309(j).

269 *Id*. A Basic Trading Area (BTA) is the geographic area by which the Multipoint Distribution Service is licensed. *See* Rand McNally, 1992 Commercial Atlas and Marketing Guide 36-39 (123rd ed. 1992).

270 13 C.F.R. §121.201.

271 This service is governed by subpart I of Part 22 of the Commission's Rules. *See* 47 C.F.R. §§ 22.1001-22.1037.

that qualified as very small business entities, and one winning bidder that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

125. *General Wireless Communication Service* (*GWCS*). This service was created by the Commission on July 31, 1995[272] by transferring 25 MHz of spectrum in the 4660-4685 MHz band from the federal government to private sector use. The Commission sought and obtained SBA approval of a refined definition of "small business" for GWCS in this band.[273] According to this definition, a small business is any entity, together with its affiliates and entities holding controlling interests in the entity, that has average annual gross revenues over the three preceding years that are not more than $40 million.[274] By letter dated March 30, 1999, NTIA reclaimed the spectrum allocated to GWCS and identified alternative spectrum at 4940-4990 MHz. On February 23, 2000, the Commission released its *Notice of Proposed Rulemaking* in WT Docket No. 00-32 proposing to allocate and establish licensing and service rules for the 4.9 GHz band.[275]

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

126. In this NPRM, we seek comment on crafting unbundling rules that promote the goals of the Act and on a more granular approach to unbundling.[276] In addition, we ask for comment on how to involve the experience and expertise of state commissions.[277] As a result, our unbundling regulations may require incumbent LECs to unbundle their networks by facility, service, or geography, rather than on a national basis for an entire element as they currently do. However, to identify which factors advancing the goals of the Act are relevant to an unbundling analysis, we ask about the weight to assign to reducing regulatory obligations as alternatives to the incumbent's network becomes available, and whether the unbundling obligations are administratively practical.[278]

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

127. The RFA requires an agency to describe any significant small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting

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[272] *See Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd. 624 (1995).

[273] *See* Letter from Aida Alvarez, Administrator, Small Business Administration, to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (filed May 19, 1998).

[274] *See* 47 C.F.R. § 26.4.

[275] *See The 4.9 GHz Band Transferred From Federal Government Use*, WT Docket No. 00-32, Notice of Proposed Rulemaking, 15 FCC Rcd. 4778 (2000).

[276] *See supra, e.g.*, Section III.C.

[277] *See supra* Section III.E.

[278] *See supra* Section III.B.

requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[279]

128. In this NPRM, we seek comment on refining our unbundling rules by examining whether we should consider the type of customer that a requesting carrier seeks to serve.[280] In particular, we ask whether the availability of UNEs should differ on the basis of whether the requesting carrier serves business or residential customers, and whether to have different rules for facilities serving larger business customers.[281] We ask questions in considerable depth with regard to the carve-out for the residential market for local switching, and seek comment on the practical experience of the carve-out has worked in practice and whether a substantially revised approach is warranted.[282] The size of the entity as a subscriber to telecommunications services is therefore an important component of our unbundling analysis.

129. In addition to examining the economic impact on customers, we also examine the economic impact on carriers. We especially seek comment from small entities on these issues. As we consider undertaking a more granular approach, we recognize that the resulting rules could be more administratively burdensome on carriers because it would be more difficult to keep track of where and under what circumstances certain elements must be unbundled. Accordingly, we ask for comment about balancing any administrative burden against the benefits of a refined approach to unbundling.[283] Particularly with regard to definitions of different network elements, we ask whether there are less burdensome alternatives available to achieve the goals of the Act.[284]

6. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

130. None.

V. ORDERING CLAUSES

131. Accordingly, IT IS ORDERED that pursuant to sections 1-4, 157, 201-05, 251, 252, 254, 256, 271, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 157, 201-05, 251, 252, 254, 256, 271, 303(r), and 332, this NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

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279 5 U.S.C. § 603(c).

280 *See supra* Section III.C.2.

281 *See supra* Section III.C.3.

282 *See supra* Section III.D.3.

283 *See supra* Section III.C.1.

284 *See supra* Section III.D.

132. IT IS FURTHER ORDERED that the Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this NOTICE OF PROPOSED RULEMAKING, including the INITIAL REGULATORY FLEXIBILITY ANALYSIS, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services et al., CC Docket No. 01-337 et al.

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al., CC Docket Nos. 01-338 et al.

In this combined statement, I write separately to underscore my support for these two *Notices of Proposed Rulemaking*, which comprise the second and third in a series of notices the Commission recently announced that will begin Phase II of our local competition implementation and enforcement efforts under the 1996 Act.[1]

Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services

I vigorously support the *Notice* we hereby adopt that initiates a review of the regulatory requirements applicable to incumbent LEC provision of high-speed telecommunications services. In this proceeding, the Commission will ask whether potentially robust competition among multiple types of broadband service providers suggests that we should avoid subjecting incumbents to the same regulatory burdens that we impose on these carriers with respect to their provision of local telephone service. That is, we ask whether incumbent LECs, which are so clearly dominant in the provision of local phone service, must also be treated as dominant as they use DSL and other technologies to provide high-speed telecommunications services in competition with cable modem service providers and other types of platforms. I would point out that this item focuses on traditional Title II common carrier regulation, historically arising out of the section 201 and 202 of the Communications Act of 1934, as applied to incumbent LEC provision of high-speed *telecommunications services.* In contrast, the aforementioned proceeding regarding regulation of incumbent LEC broadband information services will address the question whether Title I should apply when incumbent LECs provide a bundled high-speed *information service* offering.

I would emphasize that our initiation of this proceeding should not suggest a grand departure from our ongoing efforts to implement unbundling, collocation and other market-opening requirements with respect to incumbent LECs pursuant to section 251(c)(3) of the Act. These other requirements are intended to allow competing carriers, particularly facilities-based

[1] The first of these items was the *Notice of Proposed Rulemaking* regarding performance requirements for UNE provisioning that we adopted at the November agenda meeting. *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, Notice of Proposed Rulemaking, FCC 01-331 (rel. Nov. 19, 2001). In addition to that *Notice* and the two items captioned above, we will in the coming weeks seek comment on the appropriate regulatory framework for incumbent LEC provision of broadband information services.

carriers, to provide new and innovative telecommunications services. By the express terms of the statute, the Commission is duty-bound to continue our implementation and enforcement of these provisions, and we will.

Rather, this *Notice of Proposed Rulemaking* is intended to develop further one more avenue of thinking about how regulation can serve to help (or hinder) broadband deployment. It is, in that sense, not a signpost heralding a new direction but an attempt to add yet another arrow to the regulatory quiver we will use to attack and, in conjunction with other forces outside our purview, eventually subdue the broadband beast.

Notwithstanding my enthusiasm for our decision to initiate this inquiry, I for one have an open mind as to how these questions should be answered. For example, it may prove too unwieldy for both carriers and the Commission to treat incumbents as dominant for their provision of traditional local service but non-dominant for their provision of high-speed telecommunications services. I also acknowledge that declaring incumbent LEC provision of broadband telecommunications services non-dominant could have consequences in other areas of regulation that the Commission has not yet fully anticipated. Yet the importance of broadband deployment to the public interest and welfare is too great to disregard any potential method of facilitating that deployment. In sum, we must ensure that we leave no stone unturned in our pursuit of this important goal.

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

I similarly and wholeheartedly support the *Notice* we adopt here that initiates our scheduled triennial review of UNE obligations imposed on incumbent LECs pursuant to sections 251(c)(3) and 251(d)(2). Taking our cues from the Supreme Court in its opinion remanding to the Commission the task of giving meaningful effect to these provisions, my former colleagues and I determined that the agency would, in three years, revisit its decisions regarding the availability of UNEs.[2] The purpose of this triennial review would be to keep those decisions current with ongoing market and regulatory developments. That was in 1999, and now the year 2002 fast approaches.

Not surprisingly, however, I support this item for reasons other than the fact that it will put the Commission in a position to deliver on the commitment it made in 1999. First, it underscores the Commission's ongoing commitment to the promotion of facilities-based competition, which was pronounced most clearly by my former colleagues and I in the 1999 *UNE Remand Order*.[3] I believe this commitment should focus, in particular, on both so-called "full facilities-based" competition and competition from newer entrants who supplement their own facilities with network elements leased from the incumbent. As I have demonstrated in my

[2] *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*"), ¶ 151.

[3] *UNE Remand Order*, ¶ 14.

decisions and public statements over my four years at the Commission, I fully support the use of facilities and individual UNEs as means to promote local competition while simultaneously furthering the related goals of encouraging deregulation and innovation. The 1996 Act and our experience since its passage demand no less.

Second, I support this item because it emphasizes further an area of inquiry begun in the *UNE Remand Order*. Specifically, in that *Order*, we considered how the Act's goals of encouraging broadband deployment and investment in competing facilities should shape unbundling policy.[4] I support our decision here to continue and to expand this area of inquiry.

Third, I support the Commission's decision, in seeking comment here on whether to unbundle aspects of the incumbent's network, to ask whether and the extent to which we should take note of the availability of technologies other than circuit-switched telephony provided by traditional common carriers. In particular, this *Notice* expressly focuses on the roles that cable and wireless companies have begun and will continue to play in the market for telephony and broadband telecommunications services. This emphasis may also be viewed as expansion of an avenue of inquiry begun by the previous Commission. Specifically, in the *UNE Remand Order*, my former colleagues and I appropriately followed the Supreme Court's demand that we not blind ourselves to the availability of self-provisioned or other alternative facilities in determining whether to unbundle elements of the incumbent LEC's network.[5]

To my mind, it seems premature to suggest that the availability of such technologies should be fully dispositive of the question whether to require the availability of specific UNEs. Yet it does stand to reason that such availability may give us some indication of the alternative tools newer entrants could use to serve customers if the Commission were to decline to unbundle any particular element of the network. I encourage parties to provide detailed and well-supported comments in order to help us determine whether this line of reasoning is, in fact, sound.

As this *Notice* itself reminds us, the Commission now has the benefit of two years of experience with the current unbundling rules and almost six years of experience with promoting competition since the 1996 Act was passed. These are no doubt merely the opening chapters of a regulatory epic that will take many years to rewrite a near century-long history of legally sanctioned monopoly in the telephone market. But I believe it is critical that we take stock of the lessons we have learned so far and make any changes that may be necessary to ensure that our rules remain faithful to the statute and its goals of promoting competition, deregulation and innovation in telecommunications markets.

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4 *UNE Remand Order*, ¶¶ 107-113.

5 *UNE Remand Order*, ¶ 8.

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I thank the Common Carrier Bureau staff and my colleagues for their enormous work on these *Notices* and look forward to working with them, as well as my state commission colleagues, in carrying out both of these important "Phase II" proceedings.

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking; and Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking.

I will vote to approve these Notices of Proposed Rulemaking because I think they have been significantly improved, and given more balance, during the discussions preceding today's meeting. These Notices recognize the importance of competition and, importantly, do not reach tentative conclusions. Nevertheless, I do not vote for these Notices without some concern for the competition framework laid out by Congress in the 1996 Act.

I understand the need to ask questions. In particular, the Commission indicated in 1999 that it would reexamine every three years the list of network elements that need to be unbundled pursuant to section 251(c)(3). I generally do not mind asking questions, but we must be sensitive to the larger context.

This is a time of great uncertainty in the economy, for the telecommunications industry, and for competition for both telecommunications and Internet services. The years since passage of the Act have seen high-flying expectations, and lately, descent into worry and trepidation. I hear from competitors and incumbents alike the desire for certainty and stability in the regulatory environment. I fear that these broad Notices may not be meeting this need.

Some parties may read these Notices and conclude that the Commission has a predetermined agenda to remake the competition framework. Whether accurate or not, this perception, coupled with the uncertainty created by these broad Notices, can damage competition as surely as any final rules adopted by this Commission.

We must recognize that setting competition policy is the exclusive jurisdiction of Congress. I approach these proceedings optimistic that the Commission will show proper restraint and will not presume to question the statutory competitive framework. Instead, the Commission should use these proceedings to understand the marketplace better in our role as policy implementers and not policy makers. And we should not create concern, even unwittingly, that our zeal to deregulate before meaningful competition develops might cripple the very competition that Congress sought to engender.

Let the record show, however, that if our proceedings should ever turn into an attempt to undermine the competitive framework that Congress adopted in the 1996 Act, I will – without hesitation – oppose such overreaching.

SEPARATE STATEMENT OF
COMMISSIONER KEVIN J . MARTIN

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking

I am pleased to join in approving this item, which initiates our first triennial review of the Commission's policies on unbundled network elements (UNEs). In this proceeding, we will revisit the circumstances under which incumbent local exchange carriers must make parts of their networks available to requesting carriers.

This proceeding goes hand-in-hand with our inquiries on national performance measures in terms of promoting facilities-based competition. *See* Separate Statement of Commissioner Kevin J. Martin, *Performance Measurements and Standards for Unbundled Network Elements And Interconnection*, Notice of Proposed Rulemaking, FCC 01-331, 2001 WL 1461061 (rel. Nov. 19, 2001). As I have stated, the promotion of facilities-based competition should be a fundamental priority of this Commission. The goal of the Telecommunications Act of 1996 was to establish an environment that promotes meaningful competition and allows for deregulation. To get to true deregulation, we need facilities-based competition. Without such competition, we will always need a regulatory body to set wholesale and retail prices.

This proceeding presents an important opportunity for the Commission to consider carefully how our rules affect facilities deployment. In particular, we inquire how the necessary and impair standard, which is used to determine what elements must be unbundled, should apply to elements that are readily available and to new facilities and infrastructure being built by the ILECs. Any changes we make to our rules – if, indeed, any are necessary – should ensure there are adequate incentives for both ILECs and CLECs to invest in new equipment.

At the same time, I reiterate my commitment to making sure that CLECs are able to obtain, in a reasonable and timely manner, those facilities of the ILECs that are truly essential. No one expects CLECs to build entire networks from scratch overnight. Enabling CLECs to gain meaningful access to essential facilities controlled by ILECs thus remains crucial to promoting facilities-based competition. Accordingly, I view our inquiries on establishing national performance measures for UNEs and special access as equally important to the proceeding we initiate today. In all of these proceedings, I look forward to furthering our goal of making meaningful facilities-based competition a reality.