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October 4, 2004

Via the Electronic Comments Filing System

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, ROOM TWB-204
Washington, DC 20554

Re: Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Local Exchange Carriers
WC Dkt. No. 04-313, CC Dkt. No. 01-338

Dear Ms. Dortch:

Enclosed, please find Initial Comments being filed on behalf of the New Jersey Division of the Ratepayer Advocate in response to the above-captioned Federal Communications Commission's Notice of Proposed Rulemaking.

The attached affidavit and attachments are redacted. The proprietary versions will be filed through hard copy to the Commission.

Very truly yours,

SEEMA M. SINGH, Esq.
RATEPAYER ADVOCATE

By: Christopher J. White
Christopher J. White, Esq.
Deputy Ratepayer Advocate

Cc: Janice M. Myles (via electronic mail)
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
	)	
Review of the Section 251 Unbundling	)	WC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	

COMMENTS OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

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COMMENTS OF THE
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

I. INTRODUCTION.

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") submits these comments in response to the *Order and Notice of Proposed Rulemaking* ("*NPRM*") issued by the Federal Communication Commission ("FCC" or "Commission") on August 20, 2004, in the above-captioned proceeding.

A. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING.

1. The Ratepayer Advocate has a Distinct Interest in this Proceeding.

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to the Ratepayer Advocate=s continued participation and interest in implementation of the Telecommunications Act of 1996.[1] The New Jersey Legislature has declared that it is the

[1]/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (A1996 Act@). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as Athe 1996 Act,@ or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will Apromote efficiency, reduce regulatory delay, and foster productivity and innovation@ and Aproduce a wider selection of services at competitive market-based prices.@[2] The Ratepayer Advocate supports the customer benefits that will be realized through the introduction and expansion of competition in New Jersey and the Nation=s telecommunications markets. Competition should result in lower prices, greater consumer choices, and more rapid technological innovation and deployment.

The Ratepayer Advocate has participated in all major NJ-BPU proceedings concerning UNEs and UNE pricing, and through this involvement has acquired and developed an in-depth familiarity with the status of local competition in New Jersey, and the impact of Federal and state regulatory developments on residential and small-business consumers. The Ratepayer Advocate's interest in fostering pro-competition policies extends to its participation in proceedings that contemplate inter-modal competition. For example, the Ratepayer Advocate submitted initial and reply comments in the FCC's Voice over Internet Protocol ("VoIP") proceeding (WC Docket 04-36), and, is familiar with the possibilities and limitations of VoIP as an alternative to basic telecommunications services.

The Ratepayer Advocate has a critical interest in this proceeding because the issues to be decided herein will affect all ratepayers, regardless of the carrier from which they take service. Rates for unbundled network elements ("UNEs") and the ability of competitive local exchange carriers ("CLECs") to offer UNE-based services will necessarily affect competition, the market, and successful implementation of the 1996 Act. Competitive carriers must be able to acquire UNE at rates that permit profitable sales for both the CLECs and the ILEC. Competition will emerge when carriers operate on a level playing field, and a reasonably

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[2]/ *N.J.S.A.* 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

comparable cost-basis for all carriers, both new and incumbent, is the first step to ensuring that a lively and viable market can form. As a representative of consumer interests, the Ratepayer Advocate has in-depth familiarity with critically important granular market data in New Jersey, with particular knowledge of mass market switching conditions and data.

The input of the Ratepayer Advocate, as well as other consumer advocate agencies and organizations, is vital to a reasoned decision of the Commission in the instant proceeding. Indeed, the court in *United States Telecom Ass'n v. FCC* ("*USTA II*")[3] explained that, "a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself."[4] The Ratepayer Advocate submits herewith the Affidavit of Susan M. Baldwin ("Baldwin Affidavit") in support of the instant comments, and incorporates the data provided therein by reference in these comments. Generally, and as described in the Baldwin Affidavit, the Ratepayer Advocate urges the Commission to consider specifically the impact of the final rules on consumers' ability to migrate among competitively priced local telecommunications providers without disruption, and the prospects for meaningful local competition; the Ratepayer Advocate offered consistent recommendations in the New Jersey Board of Public Utilities ("NJ-BPU") "Impairment Proceeding."[5]

2. *USTA II* Provides for States' Advisory Role in this Proceeding.

In responding to the issues about which the FCC seeks comment in the *NPRM*, the Ratepayer Advocate relies upon and refers to the granular market data that the industry submitted in New Jersey Board of Public Utilities Docket No. TO03090705. The Ratepayer Advocate submits that state commissions continue to have a role in establishing UNE

3/ *United States Telecom Ass'n v. FCC* 359 F.3d 544 (D.C. Cir. 2004).

4/ *Id*. at 17.

5/ *See I/M/O Implementation of the Federal Communications Commission Triennial Review Order: Direct Testimony of Susan M. Baldwin on Behalf of the New Jersey Division of the Ratepayer Advocate*, New Jersey Board of Public Utilities Docket No. TO03040705 (Feb. 2, 2004).

regulations and cannot be eliminated from the process. The Commission itself supports this position, as evidenced by its brief in *USTA II*:

> The Act also authorizes state commissions to make pricing decisions for UNEs pursuant to guidelines set by the FCC. *See* 47 U.S.C. §252(c)(2); *see also AT&T*, 525 U.S. at 384 ('It is the States that will apply those [FCC] standards and implement that methodology, determining the concrete result in particular circumstances.'). And the Act explicitly permits states to adopt unbundling rules of their own that are consistent with section 251 and do not substantially prevent implementation of that provision's requirements. 47 U.S.C. §251(d)(3). The Act thus plainly contemplates a meaningful role for the states in the unbundling process.[6]

Further, as noted above, the *USTA II* decision clearly recognizes states' advisory role. States possess first-hand experience with UNEs, which makes them uniquely qualified to shape the Commission's determinations. In the attached Baldwin Affidavit, the Ratepayer Advocate addresses the changes to the Commission's unbundling framework that are necessary, given the guidance of the *USTA II* court.

B. SCOPE OF THE *NPRM*

The *NPRM* seeks comment on how the Commission should craft new rules in response to *USTA II* in order to establish sustainable new unbundling rules under Sections 251(c) and 251(d)(2) of the Act.[7] Specifically, the FCC seeks for comment on:

- how various incumbent LEC service offerings and obligations, such as tariffed offerings and Regional Bell Operating Company ("RBOC") section 271 access obligations, fit into the Commission's unbundling framework.[8]

6/ *USTA II*, *supra*. fn. 3, Brief of the United States Department of Justice and Federal Communications Commission, at 23 (Dec. 21, 2003).

7 / See *NPRM* at para. 9.

8 / *Id*. at fn. 34.

- how best to define relevant markets (*e.g.*, product markets, geographic markets, customer classes) to develop rules that account for market variability and to conduct the service-specific inquiries to which *USTA II* refers.[9]

- how to respond to the D.C. Circuit's guidance on other threshold factors, including the relationship between universal service support and UNEs.

- how to apply the Commission's unbundling framework to make determinations on access to individual network elements.

- which specific network elements the FCC should require incumbent LECs to make available as UNEs in which specific markets, consistent with *USTA II*, and how the Commission should make these determinations, including submission of evidence at a granular level to support such requests.

- any other issues the FCC should address in light of *USTA II*.

II. SUMMARY OF THE RATEPAYER ADVOCATE'S RECOMMENDATIONS.

A. FINAL RULES MUST PROMOTE COMPETITION AND SUPPORT AND PRESERVE THE INTENT OF THE 1996 ACT.

The Ratepayer Advocate submits that the Commission's final rules should be compatible with other telecommunications laws and rules, *i.e.*, Section 271 requirements and state purview over intrastate rates. The Ratepayer Advocate's recommendations, set forth in these comments and supported by the Baldwin Affidavit, attached hereto, are consistent with the directives set forth in *USTA II* and are intended to address the specific failings that the Court identified with the Commission's August 2003 *Triennial Review Order.*[10] Further, the Commission should establish UNE rules that encourage the economically efficient deployment of facilities by incumbent and new carriers. The Ratepayer Advocate does not believe that state or Federal regulators should "pre-select" any particular mode of entry (Congress did not favor

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9 / *Id*. at fn. 35.

10/ *I/M/O Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability: Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (Aug. 21, 2003) ("*Triennial Review Order*"). The proceeding surrounding this Order is known colloquially as the "TRO proceeding."

any particular mode). However, *arguendo,* the Commission nonetheless chooses to promote facilities-based competition (*see* Baldwin Affidavit at para. 2), UNE-P is entirely compatible with such a goal. The Ratepayer Advocate submitted comments setting forth this position in greater detail in a prior Commission proceeding.[11] The Ratepayer Advocate also notes that a policy paper issued in September 2004 by the Phoenix Center for Advanced Legal & Economic Public Policy Studies shows that positive effects of unbundling as it relates to broadband deployment.[12] This policy paper is fully consistent with the Ratepayer Advocate's position that competition, regardless of the form, promotes the goals of the Act. As a result, there has been an undue, improper, and short sighted emphasis on promoting facilities-based competition as a driving force for elimination of the UNE-P.

The proprietary data that the industry submitted in NJ-BPU Docket No. TO03090705 are current as of June 2003. The Ratepayer Advocate does not have access to more recent, proprietary data, but, given industry trends, the limited consumer options that exist for mass market are likely to be diminishing because carriers have been withdrawing from the residential market. For example, AT&T recently announced plans to stop marketing its residential telephone service. This decision "was clinched by a recent regulatory setback that will make it more expensive for AT&T and others to rent the Bells' lines to sell similar packages. MCI Inc. and Sprint Corp. also have throttled back on advertising and marketing." ("AT&T Posts 80% Drop in Net, Confirms Consumer Retreat," *The Wall Street Journal*, July 23, 2004, page A11). Press reports indicate that both AT&T and MCI are for sale given the right deal. ("Bride or Bridesmaid? AT&T and MCI May Compete for Suitors," *The Wall Street Journal*, August 2,

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11/ *See I/M/O Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and Resale of Service by Incumbent Local Exchange Carriers: Comments of the New Jersey Division of the Ratepayer Advocate*, CC Dkt. No. 03-173 (2004); *see also* Affidavit of Eugene Floyd, PhD.

12/ See *Phoenix Center Policy Paper Number 19: The Positive Effects of Unbundling on Broadband Deployment* George S. Ford, PhD and Lawrence J. Spiwak, Esq., Phoenix Center for Advanced Legal & Economic Public Policy Studies, Washington, DC (Sep. 2004).

2004, page C1). As evidenced from the Commission's own Daily Digest, many smaller competitors frequently file for authorization to cease provision of service.

The Ratepayer Advocate submits that, ultimately, the litmus test of whether the final rules are sound is whether they further the goals that Congress set forth in the 1996 Act. The Ratepayer Advocate urges the Commission to issue rules that further Congressional goals and the Commission's objectives, as informed by the states. Since the Commission is now issuing new rules, in those instances where it may disagree with the substantive arguments in the *USTA II* decision (as opposed to the issue regarding the unlawful delegation of authority to states), the Commission can establish rules that incorporate the agency's administrative expertise even if those rules do not conform precisely to the policy issues as the Court framed them.

As described in greater detail in the Baldwin Affidavit, the Ratepayer Advocate concurs with the Commission (*see, e.g.*, paras. 1, 10, 20) that avoidance of unnecessary instability and consumer disruption is critical to successful implementation of new rules. Absent compelling reasons to the contrary, the rules that the Commission adopts in this proceeding should endeavor to promote investor confidence in CLECs' operations and consumer confidence in the viability and longevity of competitive choice in the local telecommunications market. Indeed, rules that provide stability for CLECs and serve to promote competition will foster investor and consumer confidence.

B. THE COMMISSION SHOULD RELY UPON CONSISTENT AND COMPARABLE DATA.

1. The Ratepayer Advocate has Updated Data to the Extent Possible.

In the instant comments, the Ratepayer Advocate has updated public data when feasible. Incumbents have unique access to geographically disaggregated and carrier-specific market share data as a result of supplying UNE loops, UNE platform and collocation to their competitors. If, in this proceeding, the incumbent carriers rely on updated granular data in

either their initial or reply filings (*i.e.*, data that is of a more recent vintage than the data that carriers submitted in the state *TRO* proceedings), then parties should have an opportunity for discovery. Alternatively, the Commission should limit the analysis of proprietary data to the data submitted in states' *TRO* proceedings, and updated as necessary. As described in the attached Baldwin Affidavit, the Ratepayer Advocate submits that the FCC should require ILEC to submit GIS data layers that include either municipal and/or wire center boundaries super-imposed over their proposed markets in order to permit informed analyses of the ILEC proposed boundaries.

2. The Commission Should Complete the "Nine Month" Proceeding Based Upon State-Specific Data.

The Ratepayer Advocate recommends that the FCC complete the "nine month" proceeding initially begun by the New Jersey Board of Public Utilities in New Jersey. This will require updating the record and finishing the contested proceeding with the filing of additional testimony, hearings, and submissions of briefs by the participating parties. For example, based upon the record that existed when the proceeding was suspended in March, the Ratepayer Advocate submits that Verizon New Jersey ("Verizon NJ") failed to demonstrate that the self-provisioning trigger was met here in New Jersey. As a result, the FCC should still require Verizon NJ to provide UNE-P in New Jersey. As discussed in more detail below, the Ratepayer Advocate has substantive recommendations to guide the FCC in conducting the completion of the trigger analysis for New Jersey and suggestions for modifications to the "trigger" rules set forth in Section 51.319(d) of the FCC's regulations.

3. Current Data Does Not Support Elimination of UNE-P.

Further, as described in the attached Baldwin Affidavit, Verizon NJ's filing in New Jersey failed to demonstrate that it considered the variation in key drivers to the cost of supplying the local telecommunications market. Moreover, the UNE loop deployment data

suggests that Verizon NJ's proposal masks important market structure differences among wire centers. This pattern is simply insufficient to support elimination of UNE-P in New Jersey, and may serve as a comparative model for analysis of data supplied in other states. Indeed, based upon the Verizon NJ data that the Ratepayer Advocate reviewed in New Jersey, and as described in the Baldwin Affidavit, the FCC should conclude that Verizon NJ has failed to demonstrate that CLECs serve the entire business market, let along the entire mass market in the proposed relief area.

The Ratepayer Advocate suggests that the FCC continue to require the RBOCs to continue to provide UNE-P in all states where they declined to file a petition in order to show that elimination of the UNE-P would be appropriate under the applicable triggers. For example, Verison did not file a trigger case in West Virginia or in Vermont. This approach should make the process more manageable since there are significant number of states where no petitions were filed.

The Ratepayer Advocate further recommends that the FCC undertake in each state where a trigger case has been filed a cost of service proceeding. Without a complete and comprehensive cost of service proceeding, the FCC will not be able support its claim that cross subsidies exist which subsidize residential and rural customers. As noted by the *USTA II* decision, the FCC attempted to show that such below cost retail rates are a factor in assessing impairment. The D.C. Circuit essentially criticized the FCC for making no attempt to connect this barrier to entry either with structural features that would make competitive supply wasteful or with any other purpose of the Act. A cost of service study would demonstrate whether the TELRIC rates are in fact too low in comparison to the actual cost of local service. If TELRIC

rates are in fact close to retail rates, then the "*piñata*" effect[13] is not present and the goals of the Act are furthered and enhanced.

Additionally, the Ratepayer Advocate submits that certain modifications to the unbundling framework are appropriate at this time. If UNE-L is an appropriate substitute for UNE-P, then one would expect an inversely proportional demand throughout the market for the two products. As described in the Baldwin Affidavit, ILEC should be required to provide empirical evidence to support the notion that UNE-P may be replaced by other means of market entry. Further, any triggers that utilize such data should be based upon FCC-established criteria that define both their application and target markets appropriately. As the Commission itself has stated,

> state commissions are well suited to monitoring the operational aspects of this migration . . . State commissions have strong incentives both to encourage competition (as a means of providing citizens of their states with a choice of service providers) as well to foster new investment (as a means of promoting economic growth in their states.[14]

As set forth in the Baldwin Affidavit, impairment continues to exist in New Jersey for mass market unbundled local switching in all relevant markets. *See* Baldwin Affidavit at paras. 24, 125-128.

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[13]/ *See USTA II*, 359 F.3d at 573 ("In competitive markets, an ILEC can't be used as a *pinata*").

[14]/ *Triennial Review Order* at para. 531.

C. SECTION 271 OBLIGATIONS ARE STILL BINDING AND APPROPRIATE.

In the context of establishing new unbundling rules under sections 251(c) and 251 (d)(2) of the Act, the Commission seeks comment on how RBOC section 271 access obligations fit into the current unbundling framework.[15] Under Section 271(c)(2)(B) the RBOCs must satisfy a fourteen point "competitive checklist" of access and interconnection requirements before they are allowed to offer in-region long distance services. Of the fourteen checklist items, four have been deemed to be UNEs under the standards of section 251(c)(3) and are therefore subject to the unbundling requirements set forth in sections 251(c)(3) and 251 (d)(2). Specifically, items 4 through 6 and 10 require the unbundling of local loops, local transport, local switching, and databases and associated signaling necessary for call routing and completion.[16]

In its UNE Remand Order, the Commission concluded that RBOCs must continue to provide access to checklist items 4-6, and 10 , even if such access is no longer required under section 251.[17] The Commission also concluded that under such circumstances, the RBOC could price these elements based on the market instead of at forward-looking TELRIC prices.[18] The Commission reaffirmed its conclusions in its *Triennial Review Order* by finding that section 271 access obligations for network elements apply even where an element has been removed from the section 251(c)(3) unbundling list.[19] Furthermore, the Commission determined that the

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15/ *NPRM* at para. 9.

16/ 47 U.S.C. § 271(c)(2)(B)(iv-vi, x).

17/ UNE Remand Order, 15 FCC Rcd at 3906, para. 473.

18/ Id.

19/ The Commission stated that "BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis."

terms and conditions of such access would be subject to sections 201 and 202 of the Act, requiring that they be just, reasonable and non-discriminatory.[20]

The Ratepayer Advocate fully supports the Commission's conclusion that section 271 requires RBOCs to provide unbundled access to network elements not required to be unbundled under section 251 at prices that are just and reasonable in conformance with sections 201 and 202. States along with the Federal government have the authority to ensure RBOC compliance with the competitive checklist by ensuring that RBOCs continue to provide access to checklist items at rates, terms, and conditions that comply with the Act. As to rates, the state commission in each section 271 proceeding evaluated RBOC rates for checklist items, pursuant to methodology established by the Commission. The Supreme Court in *Iowa Utilities Board* confirmed the dual role of the Commission and state commissions in pricing network elements by stating that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions . . . The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the states that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[21]

The Ratepayer Advocate submits that the historical jurisdictional distinctions governing intrastate and interstate applies fully to pricing of elements under Section 271 of the Act. For example, the Commission has eliminated operator services and directory assistance as network elements that must be unbundled under section 251 of the Act. However, the Commission still regulates interstate operator services and directory assistance and states continue to regulate these elements as well because they are also identified in Section 271.

20/ Triennial Review Order, para 656.

21/ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999).

Furthermore, the Commission in establishing that the just, reasonable and nondiscriminatory pricing standard would apply to all network elements made available under section 271 did not specifically preclude state commissions from establishing rates for these network elements nor did the Commission modify the division of pricing responsibility set forth in the Act whereby the Commission regulates interstate services, and the states regulate intrastate services. Therefore absent Congressional intent to vest sole rate-making authority with the Commission, it remains the responsibility of the states to establish the actual rates of Section 271 elements in accordance with the pricing standards established by the each state.

The Court in *USTA II* endorsed the Commission's conclusion that RBOCs must continue to comply with the unbundling obligations under section 271 even in the absence of an impairment finding under section 251 and also agreed with the Commission's determination that the TELRIC pricing standard would not apply to Section 271 network elements.[22] The Court, however did not make a ruling on the role of either the Commission or the states in evaluating rates. Therefore the task of determining whether prices for network elements made available pursuant to Section 271 remain with the states.

The Ratepayer Advocate also recommends that the FCC declare that RBOCs' obligations under Section 271 cannot be eliminated under the forbearance authority of Section 10 of the Act. Specifically, Section 271(d)(4) precludes the FCC from limiting or extending the requirements of the competitive checklist contained in Section 271(c)(2)(B) of the Act. As a result, the UNE-P and all other network elements identified in this part must still be made available to all competitors. In addition, the Ratepayer Advocate recommends that the FCC declare that state commissions have the right under Section 2(b) of the Act to establish the rates

22/ USTA II , 359 F.3d at 589.

for intrastate local switching, i.e., UNE-P provided under Section 271 of the Act and may set rates based upon any reasonable methodology.[23]

Furthermore, the Ratepayer Advocate submits that ample evidence shows that the existence and offering of special access services provides no basis for the elimination of the UNE-P. Empirical evidence has been supplied to show that special access rates charged by the RBOCs have lead to excessive returns.[24] Special access rates are interstate rates which have not been reviewed by state commissions as to whether such rates would be fair, just and reasonable for use as transport which is an intrastate service.

D. A RATIONAL TRANSITION PERIOD SHOULD BE CREATED.

The Ratepayer Advocate submits that the Commission should maintain transition mechanisms in order to preclude service disruptions to customers. As described in the Baldwin Affidavit, even if the Commission supports a finding of non-impairment in selected markets, the harm caused by a premature discontinuance of UNE-P would be of greater detriment than the alleged harm caused to the ILEC that may be required to provide it. Further, a transition period is necessary in order to allow CLECs to develop new UNE-L provisioning systems. As set forth in the Baldwin Affidavit, a transition period would contemplate a series of measures intended to prevent customer disruption.[25]

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[23]/ The Ratepayer Advocate notes that state commission could price network elements provided under Section 271 of the Act using the "new services test" as defined in Sections 61.49(g)(2) and 61.49(h) of the FCC regulations (see 47 C.F.R. §§ 61.49(g)(2) and (h)). State commissions could also factor in whether the cost allocation of joint and common costs should be adjusted to reflect RBOCs' entry into long distance and the FCC's decision to decline unbundling for fiber to the premises. It is anticipated that reductions in the allocation of joint and common costs resulting from industry changes would be result in lower retail and wholesale rates for users of plain old telephone service ("POTs"). The Ratepayer Advocate recommendations in no way affects the rights of state commissions under Section 261(c) of the Act and state law to order an RBOC to provide UNE-P under state law even if the FCC decides to eliminate UNE-P as an network element.

23/ *Competition in Access Markets: Reality or Illusion, A Proposal for Regulating Uncertain Markets*, Ad Hoc Telecommunications Users Committee, filed in FCC WC Docket No. 01-338.

24/ *See* Baldwin Affidavit at paras. 116, 120-125.

The Ratepayer Advocate opposes the FCC's decision to permit rate increases during the second six month period, that is identified as the "transition period." The Ratepayer Advocate submits that only state commissions have the right to adjust UNE rates under the Act. The FCC may set the methodology but the actual setting of rates is the province of the individual state commissions.[26] As a result, the portion of the FCC's order is *ultra vires* and not otherwise enforceable.

More importantly, the Ratepayer Advocate suggests that the FCC exercise the forbearance authority under Section 10 of the Act to forbear from the application of the necessary and impair standards of the Act as it relates to UNE-P. The Ratepayer Advocate submits that the only real prospect for mass market residential and small business customers having meaningful choice of service providers envisioned by the Act is through maintaining of UNE-P under Section 251 and Section 252 of the Act. At this time, it is not reasonable to expect that facilities-based competition can and should develop as the primary source of competition under the Act. The myriad problems associated with hot cuts including technical and cost issues do not provide assurances that UNE-L would offer CLECs the ability to serve on a competitive basis mass market customers.[27]

25/ *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Verizon Communications v. FCC*, 535 U.S. 467 (2002).

27/ The Ratepayer Advocate notes that there is an open issue regarding whether the delegation to state commissions to conduct batch hot cut proceedings survived the *USTA II* decision finding delegation of impairment to the states as misplaced. The Ratepayer Advocate asks that the Commission clarify this issue since it impacts whether the Commission will need to assume the batch hot proceedings currently underway in various states.

E. NEW JERSEY GRANULAR DATA SHOWS THAT THE CLECS ARE IMPAIRED WITHOUT UNE-P.

The New Jersey granular data clearly and convincingly demonstrates that the CLECs' competitive position in the local market is tenuous and the volatility within the local exchange market that is exacerbated by the churn in customers.[28] Furthermore, in the intervening period of the last eight months, the prospects of competitive choice among suppliers of basic local telecommunications services for the mass market has suffered serious and substantial set backs.

AT&T Communications has announced that it will no longer pursue residential customers. MCI is downsizing, laying off employees and possibly putting itself up for sale.[29] The initial conclusions identified in the testimony offered by the Ratepayer Advocate in the New Jersey 9 month proceeding are not undercut by the period of time between filing of such testimony and the filing of comments herein.[30] Verizon NJ has not shown that there are any areas in New Jersey where the elimination of unbundled mass market switching would not impair CLECs.

A critical examination of the evidence offered by Verizon NJ in support of its proposed relevant market of various Metropolitan Statistical Areas ("MSAs") also reveals that Verizon NJ has not shown that there are any areas in New Jersey where the elimination of unbundled mass market switching would not impair CLECs.[31]

Essentially, the granular data shows that Verizon NJ's assertion that CLECs are serving a particular MSA is flawed. Generally, the CLECs identified by Verizon NJ are serving only "a segment within the market." CLECs that serve a few isolated and *de minimus* segments of

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28/ See Baldwin Affidavit at para. 17.

29/ *Id*. at paras. 19-23.

30/ *Id*. at para. 20.

31/ *Id*. at para. 78.

an entire MSA should be irrelevant to an impairment analysis.[32] In fact, the detailed evidence show that the CLECs identified by Verizon NJ do not serve residential and small business customers throughout Verizon NJ's proposed relevant markets.[33] If CLECs are not actually serving residential customers throughout a market, they cannot and should not be counted toward compliance with the self-provisioning trigger. The granular data also demonstrated that the Verizon NJ's alleged candidates for satisfaction of the self-provisioning trigger do not serve the entire business market, let alone the entire mass market in its proposed relevant market.[34]

The Ratepayer Advocate further submits that SBC be excluded from the Commission's determination as to whether the self-provisioning trigger is met in New Jersey markets; the Baldwin Affidavit sets forth the proprietary data upon which this recommendation is made (*see* Baldwin Affidavit at para. 84). If SBC is included in the trigger framework in New Jersey, then the number of self-provisioning CLECs should be increased from three to four. The Ratepayer Advocate also submits that the Commission's "potential deployment" analysis should be eliminated from the final rules, since the mechanism invites widely disparate views regarding the potential profitability of a CLEC's entry into a particular market. *See* Baldwin Affidavit at paras. 151-154.

32/ *Id*. at para. 77.

33/ *Id*. at para. 101.

34/ *Id*. at para. 104.

Accordingly, the Ratepayer Advocate submits that the UNE-P must remain available in New Jersey for the reasons set forth in the Baldwin Affidavit wherein the Ratepayer Advocate's witness concludes:

> Based on my analysis of the evidence submitted in New Jersey BPU Docket No. TO03090705, I conclude that Verizon NJ has not demonstrated that the self-provisioning trigger necessary to make a finding of non-impairment has been met. Although, as I demonstrate in Section III, geographic markets that correspond with wire centers are more appropriate than the ones that Verizon NJ proposes, *regardless* of the whether the Commission adopts Verizon NJ's proposed market definitions or mine, Verizon NJ has failed to demonstrate that the self-provisioning trigger is met.[35]

If the FCC wants to update the data to assess its impact on the application of the self-provisioning trigger, the Ratepayer Advocate recommends that the FCC require Verizon NJ to:

> submit a new impairment filing, based on recent data, and with information disaggregated to the wire center level. Within each wire center, Verizon NJ should provide information separately (in spreadsheet and printed format) as to its quantities of (a) residential customers; (b) residential lines; (c) businesses with one line; (d) businesses with two lines; (e) businesses with three lines; etc. The FCC should direct CLECs to provide comparable information. All carriers should be required to provide statewide totals for each of these categories.[36]

Lastly, as described in the Baldwin Affidavit, the Ratepayer Advocate submits that the instant proceeding be conducted on the basis that traditional POTS service market is the relevant market for extraction of data: specifically, VoIP and/or cable-based telephony is not relevant to the instant investigation and promulgation of rules related to UNE-P.[37]

35/ Baldwin Affidavit at para. 110.

36/ Baldwin Affidavit at para. 75.

37/ While the Ratepayer Advocate supports (and has previously supported) the notion of inter-modal competition, *see, e.g.,* fn. 7 and accompanying text, *supra.,* the Ratepayer Advocate draws a distinction between cable telephony and VoIP and other models of intermodal competition: in order for a customer to take cable telephone or VoIP, the customer must purchase a broadband width line, the cost of which often exceeds a standard "POTS" land-line. Therefore, they are not substitutes for UNE-P-based offerings for purposes of the application of the self-provisioning trigger.

F. THE FCC SHOULD EXERCISE THE FORBEARANCE AUTHORITY UNDER THE ACT TO ELIMINATE THE NECESSARY AND IMPAIR STANDARD IN THOSE RELEVANT MARKETS WHERE THE SELF-PROVISIONING TRIGGER IS NOT MET.

The Ratepayer Advocate submits that the FCC should exercise the forbearance authority set forth in Section 10 of the Act to eliminate the necessary and impair standard of Section 252(d)(2) of the Act.[38] Section 10 of the Act permits the FCC to decline to apply any regulation or provision of the Act to in all or some part of any geographic markets as applied to a carrier or a particular telecommunications service. The FCC need only make three determinations in order to exercise the authority granted under Section 10 of the Act. The three determinations are:

- enforcement is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or service are just and reasonable and are not unjustly or unreasonably discriminatory;
- enforcement of such regulation or provision is not necessary for the protection of consumers; and
- forbearance from applying such provision or regulation is consistent with the public interest.

The record established in the 9 month proceeding clearly shows that residential and small business customers have no real choice of service provider without continuation of the UNE-P. The exhaustive New Jersey proceeding amply demonstrates that Verizon NJ failed to show the self-provisioning trigger was met for any geographic area let alone for the relevant market defined by Verizon NJ. Trigger proceedings involve tremendous resources from all interested parties and to avoid similar onerous requirements in the future, the FCC should use the record it has to forbear from applying the necessary and impair standard to New Jersey. As mentioned previously, in those states where the RBOC declined to even file a mass market

38/ *See* 47 U.S.C. § 160 and 47 U.S.C. § 251.

switching trigger case, the FCC should likewise find that forbearance is appropriate and decline to apply the necessary and impair standard in those states as well.

As the Ratepayer Advocate noted, the key driver to innovation and technological advancement is not the form of competition, but the existence of competition. The UNE-P promotes competition which, in turn, is good for consumers and serves the public interest. Verizon NJ's main argument and opposition to the continuation of UNE-P relates to the fact that TELRIC rates are set too low in comparison to retail rates that are subsidized. Verizon NJ can no longer make that argument with respect to TELRIC rates in New Jersey. The NJ-BPU revised UNE rates, including the 2-wire loop rate and switching rate, upwards to a statewide average of $10.32.[39] Verizon NJ's retail business lines rates in New Jersey for a 2-Wire loop range from a low $10.65 to a high of $12.96 that reflect four rate groups.[40] Verizon NJ has never contended that business line rates in New Jersey are below cost and subsidized. The Ratepayer Advocate recommends that the Commission conduct a cost of service proceeding to actually determine whether any retail rates are in fact subsidized. Even if it could be shown that some subsidy existed, the Ratepayer Advocate submits that the FCC could properly address that issue by merely changing its treatment of the subscriber line charge ("SLC"). Currently, the CLEC who purchases the UNE-P is entitled to receive the entire SLC. The Ratepayer Advocate has recommended in the FCC's TELRIC proceeding that the FCC consider apportioning the SLC based upon whether the UNE-P rate is at the high or low end of the permissible range of

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39/ *See I/M/O The Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc.: Decision and Order*, New Jersey Board of Public Utilities Docket No. TO00060356 (May 7, 2004).

40/ *See Bell Atlantic New Jersey, Inc., Tariff B.P.U. N.J. No. 2 Exchange and Network Services, 5.2.1.C Monthly Rates.* Rate Group A is $10.65 for first line, Group B is $11.76, Group C is $12.77 and Group D is $12.96 and second lines called auxiliary lines are $6.56, $7.78, $8.60, and $8.82. The Ratepayer Advocate also notes that all revenues and all expenses should be considered in whether in whether TELRIC rates are too low. Verizon NJ receives revenues from interstate and intrastate access, collocation revenue, and other areas which supplement the loop rate charge.

TELRIC rates.[41] Accordingly, adoption of such an approach, would effectively eliminate any question whether the forbearance from application of the necessary and impair standard with respect to UNE-P would satisfy the first condition for application of Section 10 of the Act.

G. THE WIRE CENTER IS THE APPROPRIATE RELEVANT MARKET AND CLECS MUST SERVE BOTH RESIDENTIAL AND BUSINESS CUSTOMERS IN THE RELEVANT MARKET.

The Commission seeks comment on how best to define relevant markets in order to develop rules that account for market variability and to conduct the service-specific inquiries referred to in *USTA II*. [42] The *Triennial Review NPRM*, incorporated by the Commission into the instant *NPRM*, also seeks comment on how best to define markets.[43]

The Ratepayer Advocate submits that the proper definition of relevant markets is imperative for the purpose of assessing whether impairment exists. As set forth in the Baldwin Affidavit, relevant markets include product markets (*i.e.*, mass market vs. enterprise market), geographic market (*i.e.*, the physical boundaries), and customer class (*i.e.*, residential vs. business).[44] The Ratepayer Advocate submits that the Commission cannot undertake an analysis of impairment in the telecommunications market until and unless these markets have been properly defined.

41/ *See I/M/O Review of Commission's Rules Regarding Pricing of Unbundled Network Elements and Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173 and Ratepayer Advocate's comment and reply comments filed therein.

42/ NPRM, para. 9.

43/ NPRM, para. 11, fn. 39; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) ("Triennial Review NPRM"), paras. 39, 43, 57-58.

44/ See Baldwin Affidavit, para. 25.

The Ratepayer Advocate recommends that the Commission differentiate between the mass market[45] and the enterprise market[46] by simply classifying the lines provisioned at a DS0 level as mass market lines, and classifying the lines provisioned at DS1 and above as enterprise market lines.[47] Regarding mass market customers, the Ratepayer Advocate further recommends that the Commission determine whether CLECs are serving the entire business market, or only a portion of the market. For example, if CLECs are only serving customers with four or more lines, they should not be considered a direct competitor to the ILEC.[48]

45/ The Commission has stated:

> Mass market customers consist of residential customers and very small business customers. Mass market customers typically purchase ordinary switched voice service (Plain Old Telephone Service or POTS) and a few vertical features. Some customers also purchase additional lines and/or high speed data services. Although the cost of serving each customer is low relative to the other customer classes, the low levels of revenue that customers tend to generate create tight profit margins in serving them. The tight profit margins, and the price sensitivity of these customers, force service providers to keep per customer costs at a minimum. Profits in serving these customers are very sensitive to administrative, marketing, advertising, and customer care costs. These customers usually resist signing term contracts. *Triennial Review Order* at para. 127 (internal citations omitted).

46/ The Commission has stated:

> Small and medium enterprises are willing to pay higher prices for telecommunications services than the mass market. Indeed, they are often required to do so under business tariffs. Because their ability to do business may depend on their telecommunications networks, they are typically very sensitive to reliability and quality of service issues. These customers buy larger packages of services than do mass market customers, and are willing to sign term contracts. These packages may include POTS, data, call routing, and customized billing, among other services. Although serving these customers is more costly than mass market customers, the facts that enterprise customers generate higher revenues, and are more sensitive to the quality of service, generally allow for higher profit margins. The higher profit margins and greater emphasis on quality of service can provide a greater incentive to competing carriers to provision their own facilities, and the higher revenues make it easier to cover the fixed costs of installing such facilities. *Triennial Review Order* at para. 128.

47/ *See* Baldwin Affidavit at para.27.

48/ On May 18, 2004, Verizon NJ provided New Jersey CLECs with notice that after August 23, 2004, it would no longer provide them with unbundled switching to serve enterprise customers subject to the Commission's four-line carve-out rule. The New Jersey Board of Public Utilities ultimately issued a "stand still" Order direction Verizon NJ to continue provision of the elements. Verizon NJ appealed this decision to the United States District Court, District of New Jersey on September 14, 2004 (Civ. Action No. 04-4438-WHW).

The *Triennial Review NPRM* sought comment on how to take geography into account in the Commission's unbundling analysis and what kinds of "geographic delineations would be useful" to such an analysis.[49] The Ratepayer Advocate contends that the unbundling framework should be applied at the wire center level, which is the appropriate geographic market to use in assessing impairment. The wire center is the logical choice because it reveals where customers are actually being served. The wire center also corresponds with the economics of supply and demand for retail and wholesale services, is administratively feasible, and recognizes disparate customer densities.[50] Verizon NJ, however, advocated the use of MSAs to define the relevant markets for the purposes of impairment. Verizon NJ initially described the purported benefits of using MSAs, and then stated that the Board could choose to use density zones within the MSAs.[51] The Newark and Camden MSAs include wire centers with density zone classifications of 1, 2, or 3.[52] Under the "alternative" proposal, Verizon NJ seeks a finding of non-impairment only for those wire centers classified in density zones 1 and 2.[53] Verizon NJ, however, fails to address or to provide any compelling evidence as to why it excludes zone 3 territory and why it contends there is no impairment in zones 1 and 2. The Ratepayer Advocate submits that Verizon NJ's proposed use of MSAs to define geographic markets for the purpose of the Commission's impairment analysis is vague and unsupported by witnesses in the state proceedings.[54]

49/ Triennial Review NPRM, para. 39.

50/ See Baldwin Affidavit at paras. 29-30.

51/ Id. at 11-14.

52/ Three density zones exist for pricing UNE loops in New Jersey. *Wholesale Loop Costs*, Summary Order of Approval, New Jersey Board of Public Utilities Docket No. TO00060356, December 17, 2001, Attachment A.

53/ *I/M/O Implementation of the Federal Communications Commission Triennial Review Order:* New Jersey Board of Public Utilities Docket No. TO03040705, Verizon NJ response to RPA-TRO-93.

54/ For instance, the New Jersey Ratepayer Advocate propounded several discovery requests seeking the basis on which one of Verizon NJ's witnesses concluded that CLECs will seek to serve customers *throughout* an MSA. The responses indicated that his conclusion was based on general economic theory and that, in fact, CLECs may not seek to serve all portions of the market (*i.e.*, MSA). *See I/M/O Implementation of the Federal Communications Commission Triennial Review Order:* New Jersey Board of Public Utilities Docket No. TO03040705, Verizon NJ's responses to RPA-TRO-132 through RPA-TRO-137.

The Ratepayer Advocate further contends that CLECs are impaired in a given geographic market unless and until CLECs serve both residential and business customers. CLECs must serve both residential and business customers to be considered serving the entire mass market. The Commission should continue to be guided by its analysis in the *Triennial Review Order* regarding the distinctions in customer class within the mass market in which it stated that, "[i]n circumstances where switch providers (or the resellers that rely on them) are identified as currently serving, or capable of serving, only part of the market, the state commission may choose to consider defining that portion of the market as a separate market for purposes of its analysis."[55] Furthermore, the residential and small business market differ for several reasons, which means that, for the purpose of analysis, the Commission should consider separately whether the relevant markets are actually served. As illustrated in the attached Affidavit, the residential market is a distinct customer class within the mass market and the fact that Verizon NJ charges different rates for residential and business local exchange is evidence of separate markets.[56] It is therefore essential to examine whether mass market customers are being served in both the residential and business sub-markets. Moreover, the Commission should examine the degree to which CLECs serve the entire mass market.[57]

55/ *TRO*, fn. 1552. The *Triennial Review Order Errata* does not change the wording of this fn., although it does change the sentence to which this footnote refers, *i.e.*, the sixth sentence.

56/ Attachment SMB-3 of the Baldwin Affidavit also demonstrates that price discrimination differentiates areas within Verizon NJ's proposed geographic markets. This geographically-based price discrimination undermines the validity of Verizon NJ's proposed, excessively broad geographic areas.

57/ *See* Baldwin Affidavit at para. 103.

H. THE ELIMINATION OF LINE-SHARING REQUIREMENTS WARRANTS RECONSIDERATION.

The Ratepayer Advocate also urges the FCC to revisit its decision eliminating line sharing as part of its *Triennial Review Order*. Line sharing promotes increased competition and fulfillment of the goals of the Act. Although the FCC did not request comment and input on this issue as part of the subject NPRM, the Ratepayer Advocate submits the FCC should revisit its handling of line sharing as part of this proceeding.

III. CONCLUSION.

WHEREFORE the reasons set forth above and in the Affidavit, the Ratepayer Advocate submits the following recommendations to the Commission:

- final rules should promote competition and preserve the intent of the 1996 Act;
- the Commission should rely upon consistent and comparable data;
- Section 271 obligations are still binding and appropriate, and state commissions have authority to set intrastate rates;
- a rational transition period should be created;
- New Jersey granular data evidences that CLECs are impaired without access to UNE-P;
- the FCC should exercise forbearance authority and eliminate the necessary and impair standard in those relevant markets where the self-provisioning trigger is not met;
- the wire center is the appropriate relevant market and CLECs must serve both residential and business customers in the relevant market, and
- the elimination of line-sharing requirements warrants reconsideration.

Respectfully submitted,

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