a. The CLECs' Proposal to Require Ameritech Illinois to Establish New Project Pronto UNEs And Allow Collocation Of CLEC Line Cards Conflicts With The Act And The FCC's National Policy Framework And Therefore Is Preempted By Federal Law.

The CLECs in this proceeding presumably will assert that their proposal that the Commission require Ameritech Illinois to establish new Project Pronto UNEs and allow CLEC collocation of line cards, while not mandated by the *Line Sharing Order* or any other FCC order, is nevertheless permissible because it comport[s] with the competitive national framework for advanced services. In fact, however, the CLECs' proposed Project Pronto unbundling/line card collocation requirement is directly inconsistent with the FCC's policy framework for promoting advanced services deployment and competition, as well as with the Act itself, and therefore is preempted.

(i) The *Project Pronto Order* Provides The Current National Framework For Promoting Advanced Services Deployment And Competition.

The FCC has now determined that allowing the SBC ILECs to own and control line cards used with Project Pronto NGDLCs is in the public interest and is the best means for promoting advanced services deployment and competition, provided that the SBC ILECs offer CLECs end-to-end wholesale Broadband Services over the Project Pronto facilities and satisfy other pro-competitive commitments. *Project Pronto Order*, paras. 1-2. Indeed, the FCC emphasized that the SBC ILECs' commitments, made in exchange for being allowed to own such line cards, would (1) "speed the deployment of ADSL service availability to 77 million customers" and (2) give CLECs an "immediate opportunity to compete against SBC in the mass market" and "enable [CLECs] to compete more effectively against SBC by differentiating their product offerings." *Project Pronto Order*, para. 23.

The CLECs' proposal takes an approach to advanced services competition that is directly at odds with the approach in the FCC's rulings. Some background helps illustrate the significance of the FCC's *Project Pronto Order* and why the CLECs' Project Pronto UNE/line card collocation proposal conflicts with it. SBC originally considered allowing both its ILECs' Advanced Services Affiliates and unaffiliated CLECs to own and control their own line cards in the Project Pronto NGDLCs.[5] After discussing this proposal with CLECs, however, SBC concluded that the administrative and operational expense and technical issues involved with such a scenario would create inefficiency and add unreasonable costs and delays to its plans to deploy advanced services. *SBC Waiver Request* at 2-3; *Project Pronto Order*, para. 22 n.59.[6] SBC therefore proposed to have its ILECs own the NGDLC line cards and, to ensure that CLECs remained fully able to compete, to provide all carriers, including the SBC ILECs' Advanced Services Affiliate, access to wholesale Broadband Service offerings over the Project Pronto network for both data services only and for combined voice and data services. *SBC Waiver Request* at 5-6. SBC also made additional commitments to facilitate collocation in its ILECs' RTs, to preserve copper transmission facilities, and to host industry collaboratives to address competitive access to remote terminals, all of which were praised by the FCC as likely to promote advanced services competition. *Project Pronto Order*, paras. 2, 34-40.

After spending several months soliciting CLEC input and developing an exhaustive record on the issues, the FCC approved SBC's proposal as serving the public interest. The FCC reached this conclusion even though it knew that, if it denied SBC's request, CLECs would be

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[5] *See* Letter from Paul K. Mancini, Vice President and Assistant General Counsel, SBC Communications Inc., to Lawrence E. Strickling, Chief, Common Carrier Bureau (FCC filed Feb. 15, 2000) ("*SBC Waiver Request*") at 3.

[6] As explained more fully in Section II.B.2.d, *infra*, there are severe technical, operational, and practical problems that would arise from allowing CLECs to own or control line cards.

able to own and collocate line cards to the extent that SBC's Advanced Services Affiliates did so, and even though CLECs, including Rhythms, had clamored to be allowed to own and collocate such line cards.[7] The FCC concluded that any competitive risk from allowing the SBC ILECs to own and control the line cards was more than offset by the pro-consumer and pro-competitive benefits of SBC's Broadband Service offerings and other commitments. *Project Pronto Order*, paras. 1, 23. As the FCC stated, "we expect consumers will benefit not only from a more rapid deployment of advanced services, but from the increased choices that stem from the competitive safeguards contained in SBC's proposal." *Id.*, para. 2. Further, the FCC found that "[t]he immediate deployment of advanced services to consumers in SBC's regions that will occur as a result of SBC's proposal provides a significant benefit that we believe must be considered in our public interest analysis. In particular, we find that SBC's proposal should affirmatively and identifiably promote the rapid deployment of advanced services in a pro-competitive manner, thereby serving the goals of section 706." *Id.*, para. 23 (emphasis added).

The FCC also recognized the benefits to CLECs of SBC's commitments:

> Our approval of SBC's request subject to its pro-competitive commitments . . . paves the way for Rhythms and other carriers to compete for those customers [who would not be able to receive DSL service without Project Pronto]. SBC's commitments will facilitate Rhythms' access to remote terminals and enable Rhythms and others to differentiate their product offerings from those of SBC's Advanced Services Affiliate.

Id., para. 28. The FCC emphasized that the SBC ILECs' commitments will "help ensure that consumers will have a wide array of choice[s]" because SBC will "mak[e] available all features, functions, and capabilities of the equipment installed in remote terminals at just, reasonable, and nondiscriminatory rates, terms, and conditions." *Id.*, para. 42. "By unleashing the full potential

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[7] *Project Pronto Order*, para. 22 n.59; Comments of the DSL Access Telecommunications Alliance ("DATA"), CC Docket 98-141 (FCC filed Mar. 3, 2000) at 15.

of the [Project Pronto] equipment," the FCC found, "SBC's commitment will help competitive LECs provide innovative, exciting new services" and enable CLECs to "compete more effectively against SBC by differentiating their product offerings." *Id.*, para. 45.

As they did in front of the FCC, the CLECs predictably will criticize in this case the SBC ILECs' commitments that the FCC held to be so overwhelmingly pro-competitive and pro-consumer. But the CLECs' position directly conflicts with the FCC's finding that the SBC ILECs' commitments "must be considered in [an agency's] public interest analysis" and that those commitments "serv[e] the goals of Section 706" by "promoting the rapid deployment of advanced services in a pro-competitive manner." *Project Pronto Order*, para. 23 (emphasis added). The CLECs' likely assertion that the SBC ILECs' commitments – which are now enforceable conditions of an FCC Order – are somehow "illusory" or insufficient also conflicts with the FCC's policy decision to grant SBC's waiver request. The FCC went out of its way to grant a waiver from its merger conditions and allow the SBC ILECs to own line cards and other equipment solely because of the public interest benefits of SBC's commitments. The CLECs' position ignores that fact. In short, the CLECs fail to account for SBC's commitments, the FCC's weighing of policy factors, and the FCC's conclusion as to the best way to promote advanced services deployment. As a result, the CLECs' Project Pronto UNE/line card collocation proposal is not consistent with the "national policy framework" on which it presumably will seek to rely.

(ii) The CLECs' Project Pronto UNE/Line Card Collocation Proposal Is Inconsistent With The Act And Impedes Achievement Of the Act's Goals, And Therefore Is Preempted.

Under well established principles of law, state regulation is preempted where it "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress' — whether

that 'obstacle' goes by the name of 'conflicting; contrary to;...repugnance; difference; irreconcilability; inconsistency; violation; curtailment;...interference,' or the like." *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1921 (2000) (ellipses in original) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). As the FCC recently noted, "[a]mong the fundamental goals of the Telecommunications Act of 1996 . . . is the promotion of innovation, investment and competition among all participants and for all services in the telecommunications marketplace, including advanced services."[8]

As noted above, the FCC expressly found in its *Project Pronto Order* that "allowing SBC's incumbent LECs to own, install, and operate" the line cards used with Project Pronto NGDLCs, subject to the terms and conditions set forth in the Order, will promote the pro-investment and pro-competitive objectives of the Act set forth above. *Project Pronto Order*, paras. 1-2, 10. In particular, the FCC concluded that ILEC ownership and control over line cards would "speed the deployment of ADSL service availability to 77 million customers" across the country, while at the same time giving CLECs an "immediate opportunity to compete against SBC in the mass market," including by "differentiating their product offerings." *Id.*, para. 23. The FCC further added that the "immediate deployment of advanced services to consumers in SBC's regions . . . provides a significant benefit that we believe must be considered in our public interest analysis." *Id.* And the FCC also expressly found that allowing SBC ILECs to own and control line cards "should affirmatively and identifiably promote the rapid deployment of advanced services in a pro-competitive manner, thereby serving the goals of section 706." *Id.* As the FCC explained, its line card ruling "paves the way for Rhythms and other carriers to

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[8] *In the Matter of Deployment of Wireless Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, FCC 99-413 (rel. December 23, 1999) (citing Joint Statement of Managers, S. Conf. Rep. 104-230, 104th Cong. 2d Sess 1 (1996)).

compete" for the estimated 20 million potential customers who would not be able to receive DSL service but for SBC's voluntary – and discretionary – decision to roll out Project Pronto at this time. *Id.*, para. 28. Finally, the FCC emphasized the "wide array of choice" that will be available to consumers "[b]y unleashing the full potential of the [Project Pronto] equipment" and the "innovative, exciting new services" that SBC and competing LECs will provide in the years to come. *Id.*, paras. 42, 45.

The FCC's *Project Pronto Order* establishes as a matter of federal law that ILEC ownership and control of line cards, when coupled with the speedy deployment of Project Pronto and the pro-competitive commitments made by the SBC ILECs in connection with such ownership, affirmatively promotes the achievement of Congress' purposes and objectives under the Act. Indeed, if the FCC thought otherwise – *i.e.*, if the FCC thought that ILEC ownership of line cards were neutral or negative with respect to the accomplishment of Congress' goals – the FCC would not have found that waiver of the Merger Order conditions to permit ILEC ownership of line cards serves the public interest and promotes innovation and competition. The CLEC's proposal clashes head on with the FCC's controlling decision that, on the whole, the Act's purposes are best served if the SBC ILECs are allowed to own those line cards. Adoption of the CLECs' proposal would therefore stand "as an obstacle to the accomplishment off the purposes and objectives of Congress" and is preempted under established Supreme Court doctrine.

The Act's savings clauses do not change this result. Those savings clauses mandate that any state regulation of line cards must be "consistent" with – or, put another way, "not

inconsistent" with – the Act. 47 U.S.C. 251(d)(3), 261(c).[9] The Supreme Court recently admonished courts not to "give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law" and further emphasized that savings clauses do not "bar the ordinary working of conflict preemption principles." *Geier*, 120 S. Ct. at 1919; *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) (Posner, C.J.) ("interpretations [of savings clauses] that would empower state courts to gut the federal regulatory scheme . . . are therefore rejected"). Strict adherence to that principle is especially appropriate where, as here, the text of the savings clauses expressly limits the states to regulatory measures that are consistent with the federal Act. Because the FCC has expressly ruled that allowing ILECs to own line cards is in the public interest and best serves the goal of promoting advanced services competition, the Commission had no authority to impose a new unbundling obligation that undermines the FCC's ruling under the guise of implementing FCC policy.[10]

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[9] *See* 47 U.S.C. § 251(d)(3) (the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that "is ***consistent*** with the requirements of this section"); 47 U.S.C. § 251(e)(3) ("nothing in this section shall prohibit a State commission from establishing or enforcing ***other*** requirements of State law in its review of an agreement"); 47 U.S.C. § 261(b) (nothing in this part shall prohibit state regulations which "are not ***inconsistent*** with the provisions of this part"); 47 U.S.C. § 261(c) ("Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are ***not inconsistent*** with this part or the Commission's regulations to implement this part") (emphasis added).

[10] The Supreme Court has endorsed the view that the Act and its implementing regulations preempt inconsistent state laws and regulations. In *AT&T Corp.*, the Court held that "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.*, 119 S. Ct. at 730 n.6. In a similar vein, the Court stressed that under the 1996 Act, state commissions must regulate "in accordance with federal policy" and that the FCC has authority to "draw the lines to which [state commissions] must hew." *Id.* At the same time, the Court observed that the alternative scheme — *i.e.*, one in which the 50 state commissions were free to ignore the "affirmative finding[s]" of the FCC — would be "surpassing strange." *Id.* The same analysis holds true for the FCC's resolution of the line card ownership issue in the *Project Pronto Order*.

(iii) Adoption Of The CLECs' Project Pronto UNE/Line Card Collocation Proposal Would Violate Section 261(c) Of The Act.

Even if the FCC's *Project Pronto Order* did not preempt this Commission from adopting the CLECs' Project Pronto UNE/line card collocation proposal, the Commission could not adopt that proposal because the record evidence is insufficient for the Commission to find, as it must under Section 261(c) of the Act, that such a state-imposed requirement is "necessary" to "further competition in the provision of telephone exchange service or exchange access." The CLECs' failure to provide such evidence is not an excusable defect. The requirements of Section 261(c) are mandatory, and are incremental to the requirements of Sections 251(d)(2) and 251(c)(6), which are discussed below. The courts have consistently treated the term "necessary" in the 1996 Act as having real meaning requiring real analysis, and not as allowing regulators to do as they please while paying mere lip service to the Act. *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 736 (1999) (FCC must "giv[e] some substance" to the "necessary" requirement of Section 251(d)(2) and cannot regard any "increased cost or decreased service quality" as creating a "necessity"); *GTE Service Corp. v. FCC*, 205 F.3d 416, 422-23 (D.C. Cir. 2000) (reversing FCC collocation order for failing to give substance to "necessary" requirement of Section 251(c)(6)). The CLECs have failed to provide any specific evidence that their Project Pronto UNE/line card collocation proposal is "necessary to further competition" within the meaning of Section 261(c). Nor could they, in view of the commitments, including the Broadband Service commitments, made by SBC and incorporated as conditions in the *Project Pronto Order*. A failure by this Commission to apply the governing federal law requirements established in section 261(c), which by definition makes up part of the "national policy" that confines the scope of the Commission's authority, would be reversible error. *AT&T Corp.*, 119 S. Ct. at 736; *GTE*, 205 F.3d at 422-23; 220 ILCS 5/10-201(e)(iv)(B).

In this case, the CLECs have not met the heavy burden of demonstrating that unbundling of Project Pronto facilities is indispensable to the furtherance of competition. The Project Pronto architecture does not have to be unbundled for CLECs to be able to provide DSL services to their end users. In the *UNE Remand Order*, the FCC stated "the record in this proceeding, and our findings in the 706 Report, establish that advanced services providers are actively deploying facilities to offer advanced services such as xDSL across the country. ... [C]arriers have been able to secure the necessary inputs to provide advanced services to end users in accordance with their business plans. This evidence indicates that carriers are deploying advanced services to the business market initially as well as the residential and small business markets."[11]

Significantly, Ameritech Illinois' Broadband Service offerings provide CLECs with new methods to offer DSL services, in addition to the methods already available to CLECs today. Indeed, CLECs have several options for offering DSL services, including the following:

- The CLECs may utilize Ameritech Illinois' Broadband Service offerings. In doing so, CLECs will be able to utilize to the DSLAM functionality of the Project Pronto NGDLC equipment to provide DSL services without having to collocate their own stand-alone DSLAMs at RT sites.

- CLECs may also continue to utilize all-copper loops to provide DSL services. Because Project Pronto is an overlay network design, Ameritech Illinois' existing copper facilities will still be available to CLECs. Also, because the Project Pronto architecture will allow an end user's POTS and ADSL service to be provided over that architecture, use of the Broadband Service offerings by other CLECs will free additional existing copper facilities that were previously used only for POTS.

- CLECs may choose to collocate their own stand-alone DSLAM equipment in Ameritech Illinois' RT sites, where space is available and other technical requirements (e.g., heat dissipation, power, etc.) are met.

- CLECs may build their own facilities to provide DSL services to end users.

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11 *UNE Remand Order*, para. 307.

Ameritech Illinois Ex. 6.1 (Lube) at 13-14. Given these options, unbundling of Project Pronto clearly does not meet the "necessary" standard of Section 261(c).

In short, Section 261(c) limits a state's authority to impose requirements on telecommunications carriers to instances where that requirement (1) is necessary to further competition and (2) is not inconsistent with the Act and applicable FCC rules. A state law requirement to unbundle Project Pronto does not meet either standard and, therefore, cannot be imposed by this Commission.

While ignoring altogether the requirements of Section 261(c) in the evidentiary phase of this proceeding, the CLECs likely will attempt to justify their Project Pronto UNE/line card collocation proposal on the ground that Ameritech Illinois otherwise "would maintain monopoly control over a bottleneck facility." There is absolutely nothing in the record to support such an assertion. To the contrary, after conducting a fact-intensive investigation, the FCC explicitly held that ILECs "do not retain a monopoly position in the advanced services market," which is the only pertinent market here. *UNE Remand Order*, para. 308 (emphasis added). Likewise, the mere fact that an ILEC owns a facility – especially a facility that in many cases has not yet been deployed – does not automatically make that facility a "bottleneck." Indeed, the FCC certainly would not have allowed the SBC ILECs to own line cards in the *Project Pronto Order* if it viewed them as a true "bottleneck" facility. As the FCC stated, "[m]erely owning and operating equipment used to provide advanced services does not, by itself, evidence a violation of the Act or our rules." *Project Pronto Order*, para. 7. Congress and the Supreme Court also have recognized that, rather than assuming all ILEC facilities are bottlenecks, regulators must apply strict prerequisites before they can force the unbundling or sharing of any part of an ILEC's network. *See* 47 U.S.C. § 251(d)(2); *AT&T Corp.*, 119 S. Ct. at 734-36; *see also GTE*, 205 F.3d

at 422-23. For all of these reasons, the Act does not permit state commissions to make blind assumptions that incumbents are "monopolists" controlling "bottleneck" facilities.[12]

Drawing such blind assumptions in connection with the CLECs' Project Pronto UNE/line card collocation proposal is particularly unwarranted and contrary to the FCC's national policy in light of the FCC's express finding that the advanced services market is nascent and emerging for all service providers. *See UNE Remand Order*, paras. 314-17; see also *Project Pronto Order*, paras. 23-24. Indeed, the FCC has specifically adopted a policy of "regulatory restraint" in trying to ensure that regulatory action does not "alter the successful deployment of advanced services." *UNE Remand Order*, para. 316. As the FCC explained, "regulatory restraint . . . may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation." *Id.*

In his opinion concurring in part and dissenting in part in *AT&T Corp.*, Justice Breyer echoed the FCC's call for "regulatory restraint" in reconciling the Act's sometimes competing goals of competition and innovation. As Justice Breyer observed, "[i]ncreased sharing by itself does not automatically mean increased competition." 119 S. Ct. at 753 (Breyer, J., concurring on this issue). To the contrary, sharing, unbundling, and combination requirements "require balance," for "[i]t is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge." *Id.* "Regulatory rules that go too far, expanding the

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[12] The CLECs presumably will assert that, absent adoption of their Project Pronto UNE/line card collocation proposal, Project Pronto will be used as a roadblock to competition for advanced services in Illinois. This too is baseless. As Mr. Lube explained, Project Pronto is an *overlay* network that will not alter Ameritech Illinois' existing copper network or the required methods of line sharing in that network and thus will have absolutely no impact on a CLEC's ability to line share a copper loop or copper subloop under the *Line Sharing Order*. Further, as Mr. Lube also explained, the SBC commitments, which are now enforceable conditions of the *Project Pronto Order*, actually will create an array of new competitive options for CLECs. Ameritech Illinois Ex. 6.0 (Lube) at 5-6; Ex. 6.1 (Lube) at 13-14. The FCC found that these new options will make advanced services available to millions of customers more rapidly than would otherwise occur and will promote competition for those customers, not impede it. *Project Pronto Order*, paras. 23, 41-43, 46.

definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may not make the game worth the candle." *Id.*

In the *Project Pronto Order*, the FCC considered the Act's aims of increasing competition and innovation, and concluded that both goals would best be satisfied if SBC's ILECs own, install, and operate the line cards used to implement Project Pronto. By contrast, the CLECs want this Commission to baldly assume, without any evidentiary support, that permitting ILECs to control the Project Pronto NGDLC line cards will somehow stifle competition, and further want this Commission to completely ignore the potential risk that state-imposed sharing requirements may diminish SBC's incentive to deploy Project Pronto in Illinois. *See AT&T Corp.*, 119 S. Ct. at 753 (Breyer, J., concurring on this issue). The Commission may not ignore the FCC's controlling determination in the *Project Pronto Order*. Because the CLECs' Project Pronto UNE/line card collocation proposal directly clashes with the FCC's *Project Pronto Order*, the Commission cannot adopt that proposal.

b. The Commission Cannot Impose Unbundling Obligations On Ameritech Illinois That Require It To Build New Facilities Or Provide Superior Quality Service To CLECs.

It is unclear whether the CLECs are requesting access to something more than what Ameritech Illinois plans to deploy with Project Pronto. On the one hand, Rhythms has acknowledged that, in other proceedings, it has represented that it is not requesting that the Commission require Ameritech Illinois to deploy any other kind of equipment than what Ameritech Illinois is already planning to deploy. Tr. at 1134-1135. Rhythms also claims that this continues to be the case today. Yet at the same time, in a textbook example of "doublespeak", Rhythms' witness Mr. Riolo suggested during cross-examination that Ameritech Illinois should be required to deploy equipment that will perform wave division multiplexing.

Tr. at 1142. The LiteSpan 2000 equipment that Ameritech Illinois principally plans to deploy with Project Pronto, however, does not perform wave division multiplexing. Rather, Ameritech Illinois would have to purchase and install additional equipment in order to provide such functionality. If Rhythms is seeking to have Ameritech Illinois deploy a certain type of equipment associated with Project Pronto which is different from what Ameritech Illinois plans to deploy, or to have Ameritech Illinois add additional equipment to the Project Pronto architecture that it is not planning to add, the Eighth Circuit's decisions in *IUB I*[13] and *IUB III*[14] dictate that the Commission reject that request.

First, an incumbent LEC is required to provide unbundled access only to its existing network, not to construct new facilities simply to provide a UNE that a CLEC desires. *UNE Remand Order*, para. 324; see *IUB I*, 120 F.3d at 813. Requiring Ameritech Illinois to deploy, as part of Project Pronto, equipment that is different from what Ameritech Illinois plans to deploy and that is not part of Ameritech Illinois' existing network clearly violates this principle. *Second*, Rhythms' request that Ameritech Illinois deploy equipment associated with Project Pronto that will perform wave division multiplexing, when the equipment that Ameritech Illinois is currently deploying and plans to deploy does not perform it, is clearly a request for superior quality service, i.e., a higher level of quality than that which Ameritech Illinois plans to make available in its network. As the Eighth Circuit held in *IUB III*, 219 F.3d at 758, a requirement that an incumbent LEC provide a CLEC with superior quality network elements or interconnection to that which it provides itself "violate(s) the plain language of the Act." In

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[13] *Iowa Utils Bd. v. FCC*, 120 F. 3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) *("IUB I")*.

[14] *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) ("*IUB III*").

short, Rhythms' request that Ameritech Illinois be required to upgrade its network to make it more compatible with Rhythms' own business plans is contrary to federal law and must be rejected by the Commission.

c. Sound Policy Considerations Dictate Against Adoption Of The CLECs' Project Pronto UNE/Line Card Collocation Proposal.

Even if the FCC had not already established an applicable national framework, there would be strong policy reasons for this Commission not to rush into any decisions that would require the unbundling of the Project Pronto network and the forced collocation of line cards, as those issues fall within the scope of pending rulemakings at the FCC. Issues regarding the collocation of line cards in NGDLCs and the unbundling of associated network facilities are pending before the FCC in the *Collocation FNPRM* in CC Docket 98-147 (the *Advanced Services* docket),[15] the comment cycle of which concluded on November 14, 2000. In that case, the FCC has specifically asked parties to address Rhythms' proposal that CLECs be permitted to "collocate" line cards in Remote Terminals. See *Collocation FNPRM*, para.109; *Id.*, para. 82 (seeking comment on whether line cards are "equipment necessary for interconnection or access to unbundled network elements" as required by Section 251(c)(6)). The FCC has said it will consider all of the "difficult and complex" issues "involved with competitive access to remote terminals" in the context of that proceeding. *Project Pronto Order*, para. 49. And, of course, "SBC will be bound by any rules ultimately developed in that proceedings that affect the way in which SBC's incumbent LECs provide access to remote terminals." *Id.*, para. 9. If this Commission were to prejudge one of these "difficult and complex" issues, as the CLECs seek, it

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[15] *See* Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability* and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Dockets 98-147 and 96-98 (rel. Aug. 10, 2000).

would risk unnecessary conflict with the FCC's ultimate rulings.[16] Similarly, issues regarding CLEC access to Remote Terminals and NGDLCs are being addressed by the FCC in the ongoing case initiated by its August 10, 2000 Fifth Further Notice of Proposed Rulemaking in CC Docket 96-98 ("*NGDLC FNPRM*"). In that August 10 Notice, the FCC, citing SBC's October 1999 press release announcing Project Pronto, has sought comment on, among other things, "whether the deployment of new network architectures . . . necessitates any modification to or clarification of the [FCC's] local competition rules, particularly our rules relating to unbundled transport, loops, and subloops." Accordingly, the FCC will likely address in the *NGDLC FNPRM* as well as the *Collocation FNPRM* whether the unbundling of Project Pronto facilities is technically feasible and may be required consistent with the Act.

2. The Necessary and Impair Standards.

a. The CLECS' Project Pronto Unbundling/Line Card Collocation Proposal Attempts To Impermissibly Define A New UNE Without Applying Section 251(d)(2) And Rule 317.

As a necessary predicate for their proposal that the Commission require Ameritech Illinois to allow CLECs to collocate their own line cards in Project Pronto NGDLCs, the CLECs ask the Commission to create one or more new "Project Pronto UNEs" or UNE combinations. As both a physical and functional matter, these new UNE or UNE combinations would comprise the entire Project Pronto network, minus the line cards. They therefore would include, among other things, "the subloop element between the central office and the remote terminal" and a "port" on the Optical Concentration Device ("OCD") in the central office, which is an Asynchronous Transfer Mode packet switch that aggregates traffic from several remote

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[16] The *Project Pronto Order* notes that state commissions will "maintain their usual oversight of the offerings made available by SBC's incumbent LECs." *Project Pronto Order*, para. 25 n.75. Any such oversight, however, must be consistent with the 1996 Act and not impede achievement of its objectives, and the CLECs' proposal fails both tests.

terminals. See *Project Pronto Order*, paras. 4 and nn.11-12, 31; Ameritech Illinois Ex. 6.0 (Lube) at 4-5; Ex. 6.1 (Lube) at 10-16. Neither of these has ever been required as a UNE by the FCC, which means that the Commission could only define them as some kind of conglomerate UNE or UNE combination (including all the other packet switching functionality of the Project Pronto network) pursuant to the authority delegated by Congress and the FCC.

As explained in Section I above, however, that authority is limited. Before a state commission can require a new UNE, it must conduct a fact-intensive inquiry to determine whether the proposed UNE meets the governing legal standards, including the "necessary" and "impair" tests of Section 251(d)(2) of the 1996 Act and FCC Rule 317. 47 C.F.R. 51.317(b)(4) ("[A] state commission must comply with the standards set forth in this § 51.317 when considering whether to require the unbundling of additional network elements."). Section 251(d)(2) and Rule 317 require a "fact intensive" analysis that "consider[s] the totality of the circumstances," including market conditions and the availability of alternatives to the UNE, to determine whether, among other things, lack of access to the UNE will "materially" diminish CLECs' ability to provide the services they seek to offer. *UNE Remand Order*, paras. 62, 142. Contrary to federal law, however, the CLECs are attempting to have this Commission create new "Project Pronto UNEs" without subjecting them to the "necessary" test, the "impair" test, or any of the other tests of Rule 317.

Moreover, the Commission could not apply those tests based on the current record, which contains none of the types of information necessary to conduct the "fact intensive" review required by law. In fact, the only relevant evidence shows that Ameritech Illinois will offer meaningful alternatives to the "Project Pronto UNE" by, among other things, providing CLECs with wholesale Broadband Services for data service and for combined voice and data services,

both at UNE rates. See *Project Pronto Order*, App. A; Ameritech Illinois Ex. 6.0 (Lube) at 5, 8-9; Ex. 6.1 (Lube) at 6, 13-14. Those services will enable CLECS to make use of facilities and to access features and functions that are not required to be unbundled at all, and will make them available much more quickly than would otherwise be possible, thereby enhancing and accelerating CLECs' ability to provide competitive advanced services. See *Project Pronto Order*, paras. 2, 23, 41-43, 45-46; Ameritech Illinois Ex. 6.1 (Lube) at 13-17.

Unless and until a proposed new UNE passes the tests of Rule 317 based on a fully developed record and intensive factual analysis, a state commission has absolutely no power to require an incumbent LEC to provide it. 47 C.F.R. 51.317(b)(4). The CLECs have wholly failed to develop such a record that would enable this Commission to conduct such an analysis. Adoption of the CLECs' Project Pronto UNE/line card collocation proposal therefore would be unlawful.

b. By Treating The Bulk Of The Project Pronto Network As A UNE, The CLECs' Proposal Irreconcilably Conflicts With The *UNE Remand Order*.

The CLECs' proposal to unbundle the bulk of the Project Pronto network also directly conflicts with the *UNE Remand Order*. The CLECs' proposed new "Project Pronto UNE" or UNEs include, among other things, the functionality of the OCD, which is an ATM switch. *Project Pronto Order*, para. 18. ATM switches are packet switches. *Id.*; *see also UNE Remand Order*, para. 303. The FCC held in the *UNE Remand Order* that an ILEC is not required to provide packet switches as UNEs as long as the ILEC allows CLECs to collocate their DSLAMs in the ILEC's Remote Terminals (or meets other criteria), which Ameritech Illinois does. *UNE Remand Order*, para. 313; 47 C.F.R. 51.319(c)(4)-(5); Ameritech Illinois Ex. 6.1 (Lube) at 14-17. In other words, the FCC has now "made an affirmative finding as to whether or not the [packet switching network element] satisfies the unbundling standards of the Act as clarified by

the Supreme Court" (*UNE Remand Order*, para. 157) and held that in all but exceptional circumstances (that do not apply to Project Pronto), it does not.

Specifically, the FCC's rules provide that:

> (B) An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capability *only where each of the following conditions are satisfied*:
>
> > (i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to remote terminal, pedestal or environmentally controlled vault);
> >
> > (ii) There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;
> >
> > (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer at the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by § 51.319(b); and
> >
> > (iv) The incumbent LEC has deployed packet switching capability for its own use.[17]

The four conditions described in the FCC's rules will normally not exist in Ameritech Illinois' network, including any Project Pronto facilities that it deploys, for several reasons. *First*, copper loops will often be available to the CLECs. The deployment of Project Pronto does not displace any existing copper loops, and, in fact, will usually free up working copper loops for future CLEC use. *Second*, Ameritech Illinois' voluntary commitments, adopted as conditions in the FCC's *Project Pronto Order*,[18] enhance the CLECs' opportunity to collocate their own DSLAMs

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[17] 47 C.F.R. 51.319(c)(3)(B) (emphasis added).

[18] *Project Pronto Order*, paras. 34, 35, 61.

at or near the Ameritech Illinois' RT sites. Specifically, Ameritech Illinois will, upon a CLEC's request, either increase the size of future RT structures or provide the CLEC with an adjacent cabinet structure. *Third*, Ameritech Illinois is not deploying packet switching equipment for its own use. Instead, the Project Pronto NGDLC and OCD are being deployed by Ameritech Illinois for CLECs' use in provisioning their own retail DSL services to end users. Ameritech Illinois Ex. 6.1 (Lube) at 16-17.

This Commission cannot ignore or nullify the FCC's packet switching determination by ordering the unbundling of the Project Pronto network, including the OCD. See *AT&T Corp.*, 119 S. Ct. at 730 n.6 (under the 1996 Act, state commissions must regulate "in accordance with federal policy" and the FCC has authority to "draw the lines to which [state commissions] must hew"). The FCC drew the line on packet switching in the *UNE Remand Order*, and this Commission is not free to erase or ignore it. As the Supreme Court put it, any system that allowed state commissions to ignore the FCC's "affirmative finding as to whether or not the particular element now satisfies the unbundling standards of the Act" (*UNE Remand Order*, para. 157) would be "surpassing strange." See *AT&T Corp.*, 119 S. Ct. at 730 n.6. Adoption of the CLECs' Project Pronto UNE/line card collocation proposal therefore would be unlawful, because where the FCC has specifically determined that a network element does not meet the unbundling requirements of the Act and federal rules, its decision is the "national framework" that "draw[s] the lines to which [state commissions] must hew." *AT&T Corp.*, 119 S. Ct. at 730 n.6.

c. There Are Sound Technical And Policy Reasons Why The Commission Should Not Order Ameritech Illinois To Unbundle Equipment Or Facilities That Ameritech Illinois Deploys Pursuant To Project Pronto.

Putting aside momentarily the legal limitations on the Commission's authority to require Ameritech Illinois to unbundle Project Pronto, there are several technical and policy reasons why

the Commission should refrain from doing so. From a technical perspective, the evidence establishes that it is not technically feasible to unbundle this network architecture, because of the manner in which the components of the architecture interconnect and interwork with one another. As explained by Mr. Lube, a single end user's DSL service will not occupy a consistent end-to-end path through this architecture, or have a consistent interface at each end of the path. Consequently, the physical parts of this architecture used to provide DSL service to an end user will not bear a one-to-one correspondence to one another throughout the DSL service's path. When a CLEC provides DSL service to a single end user using the Broadband Service, the single end user's DSL service will be partially a physical path and partially a virtual path through these various network components. Therefore, the end user's DSL service can be physically accessed in some parts of the end-to-end path, but cannot be physically accessed in other parts. In particular, the end user's DSL service cannot be accessed as a specific, unique unbundled network element at the central office connection to the CLEC (*i.e.*, the OCD port). Ameritech Illinois ex. 6.1 (Lube) at 11. Because of this, Ameritech Illinois is making available to CLECs end-to-end wholesale Broadband Services, running from the end user's premises to Ameritech Illinois' central offices, for incorporation into the CLECs' own DSL services for their individual end users. Ameritech Illinois Ex. 6.1 (Lube) at 10. These Broadband Services provide CLECs with the full advanced services functionality of the equipment that Ameritech Illinois actually deploys under Project Pronto. *Id.*

From a policy perspective, the *UNE Remand Order* (at ¶¶ 101-115) sets forth several additional factors which should be considered when making an unbundling determination, incremental to the requirements of Section 251(d)(2) of the Act. These factors include whether the unbundling requirement would: (1) promote rapid introduction of competition in all markets;

(2) promote facilities-based competition, investment and innovation; (3) reduce regulation; and, (4) promote certainty in the market. Consideration of these policy factors only reconfirms that Ameritech Illinois should not be required to unbundle Project Pronto.

First, creation of yet another unbundled network element will not result in reduced regulation.

Second, additional regulation will impair the rapid introduction of competition in all markets. Ameritech Illinois' Broadband Services offering will drastically increase the potential markets for data CLECs. As a result of this Broadband Services offering, data CLECs will be able to reach millions of customers that they could not efficiently or economically reach before. The Broadband Services offering also reduces the amount of up-front capital required for a CLEC to begin providing data service to a new community, by minimizing the amount of collocation required and eliminating the need to purchase DSLAMs. Any additional regulatory burden placed upon Ameritech Illinois' deployment of Project Pronto has the potential to slow, or potentially stop, the roll-out of Project Pronto and the Broadband Services offering, which could limit competition. Ameritech Illinois Ex. 7.0 (Chapman) at 36-37.

Third, burdensome regulation of Ameritech Illinois' deployment of Project Pronto will discourage facilities-based competition, investment, and innovation. Ameritech Illinois' investment in Project Pronto is unprecedented. In providing a new Broadband Services offering that enables lower capital investment by CLECs seeking to provide data services, Ameritech Illinois is providing facilities-based data services providers with an *additional* option for providing DSL service and competing in the Advanced Services market, which would not otherwise exist. Not only does Ameritech Illinois' Broadband Services offering expand the potential market for all data CLECs, it also allows data CLECs to enter the market more quickly

by lowering the initial cost of entry. The Act seeks to promote exactly the type of innovative investment in network facilities that Ameritech Illinois is undertaking through Project Pronto. Future innovations and investment decisions by Ameritech Illinois and by other ILECs around the country obviously will take into account how Ameritech Illinois' investment in Project Pronto is supported by regulators or made burdensome and unattractive. Ameritech Illinois Ex. 7.0 (Chapman) at 37-38. Regulators should encourage ILECs to go beyond the requirements of the Act to develop new, innovative products for wholesale customers, such as Ameritech Illinois' Broadband Services offering. As ILECs become free to work cooperatively with CLEC customers in the development of mutually beneficial product offerings, true competition will bloom and flourish. However, if voluntary offerings of ILECs become onerous regulatory obligations, competition will be stifled and innovation will be discouraged. Ameritech Illinois Ex. 7.0 (Chapman) at 38.

Fourth, creation of yet another set of unbundled network elements will not promote certainty in the market. One of the goals of the *UNE Remand Order* was to create stability in the market by letting ILECs and CLECs alike know what the ILECs' unbundling requirements are today and what they will be in the future. To this effect, the FCC stated in *UNE Remand Order*:

> The new standards and framework we adopt in the Order for determining which network elements incumbent LECs must make available on an unbundled basis will remove the uncertainties surrounding the incumbent's unbundling obligations since passage of the Act. More importantly, however, they will define the competitive landscape of telecommunications markets for the foreseeable future.

UNE Remand Order, ¶ 4. A stable set of unbundled elements is a fundamental requirement for incumbent LECs making network investment and product development decisions. This is particularly true in the case of the development of innovative new products designed to be marketed solely to CLECs, as opposed to end user customers. If ILECs have no assurance that their voluntary investment of funds and work efforts to market a new product or service to

CLECs will not turn into a new UNE obligation, those ILECs will be discouraged from pursuing similar investments and innovation in the future. Ameritech Illinois Ex. 7.0 (Chapman) at 39.

B. COLLOCATION OF CLEC LINE CARDS IN PROJECT PRONTO NGDLCS

1. Effect of FCC *Project Pronto Order*

The legal effect of the FCC's *Project Pronto Order*, and the reasons why that Order precludes the Commission from adopting the CLECs' Project Pronto UNE/line card collocation proposal, are explained in Section II.A.1 above.

2. Legal Standard For Line Card Collocation

a. Adoption Of The CLECs' Project Pronto/Line Card Collocation Proposal Would Violate Section 251(c)(6) Of The Act.

Even if the CLECs' Project Pronto UNE/line card collocation proposal did not unlawfully seek to create new "Project Pronto UNEs" (which it does), the CLECs' proposal nevertheless would violate the 1996 Act because it would require Ameritech Illinois to collocate CLEC-owned or CLEC-designated line cards in the NGDLCs being deployed as part of Project Pronto, without any evidence sufficient to satisfy the statutory test governing such collocation set forth in Section 251(c)(6) of the 1996 Act. A state commission can impose new collocation requirements, if at all, only if it first determines that such requirements satisfy the "necessary" test of Section 251(c)(6). Section 251(c)(6) allows collocation of only such equipment as is "necessary for interconnection or access to unbundled network elements." 47 U.S.C. 251(c)(6). The CLECs have not provided any evidence sufficient to apply the "necessary" test of Section 251(c)(6) to Project Pronto NGDLC line cards, let alone satisfy that test. This failure by itself precludes the Commission from adopting the CLECs' line card collocation proposal. *See GTE*, 205 F.3d at 422-23.

Nor would the CLECs' line card collocation proposal pass this test even if it could be applied here. Line cards in the context for which the CLECs are seeking new collocation rights would not be used, let alone be necessary, for the exchange of traffic with Ameritech Illinois' network, and thus would not be necessary for interconnection. See 47 C.F.R. 51.5; Ameritech Illinois Ex. 6.1 (Lube) at 23-24. Likewise, line cards in this context would not be used, let alone necessary, for access to a UNE. Ameritech Illinois Ex. 6.1 (Lube) at 23-24. Rather, CLECs would use such line cards to access the packet switching functionality of Project Pronto NGDLCs. As noted above, the FCC has declined to classify such facilities or functionality as a UNE, and until it applies the mandatory "necessary" and "impair" tests, neither could this Commission reclassify such facilities as UNEs (even assuming it had such power in light of the *UNE Remand Order* and in light of the Act's structural limitations on state tariff proceedings). Moreover, the line card is merely a sub-component of an NGDLC, with no stand-alone functionality until it is integrated with the rest of the software and hardware in the NGDLC system. Ameritech Illinois Ex. 6.1 (Lube) at 18-23. The FCC has never required collocation of such sub-components of equipment. *Id.* Thus, Project Pronto NGDLC line cards simply cannot qualify as equipment that is used for interconnection or access to UNEs, much less equipment that is "necessary" for such interconnection or UNE access as required by Section 251(c)(6) of the Act. *Id.*

b. The Line Card Is Not A Piece Of Equipment Appropriate For Collocation.

The FCC's rules require the collocation of only complete items of equipment. In its *Advanced Services Order*, the FCC described the equipment eligible for collocation as including

DSLAMS, routers, ATM multiplexers, and remote switching modules.[19] In addition, section 51.323(b) of the FCC's rules, which address collocation, describes the equipment that can be used for interconnection and access to unbundled network elements as follows:

> (1) Transmission equipment including, but not limited to, optical terminating equipment and multiplexers, and
>
> (2) Equipment being collocated to terminate basic transmission facilities pursuant to §§ 66.1401 and 64.1402 of this chapter as of August 1, 1996.
>
> (3) Digital subscriber line access multiplexers, routers, asynchronous transfer mode multiplexers, and remote switching modules.[20]

In every case, the FCC cites complete items of network equipment, not piece-parts or sub-components that make up these complete items of network equipment. This demonstrates that the FCC does not consider such piece-parts or sub-components to be equipment eligible for collocation.[21] Ameritech Illinois Ex. 6.1 (Lube) at 19.

A line card is not a piece of equipment appropriate for collocation, because it is only a piece-part or sub-component of a complete item of equipment. Specifically, a line card is not a complete NGDLC. Rather, the line card is merely a sub-component of an NGDLC, with no stand-alone functionality until it is integrated with the rest of the software and hardware in the NGDLC system.[22] Ameritech Illinois Ex. 6.1 (Lube) at 21-22. Indeed, a line card is a "circuit

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[19] *Id.*, para. 28.

[20] 47 C.F.R.§ 51.323(b).

[21] The FCC also has addressed the characteristics of collocated equipment in other proceedings. The FCC has consistently excluded sub-components of equipment from its definition of collocation equipment. As far back as 1992, the FCC stated in its *Expanded Interconnection Order* that, under physical collocation, "the interconnecting party pays for LEC central office space in which to locate the equipment necessary to terminate its transmission links." Again, the NGDLC line card does not meet the FCC's definition of collocation equipment because it has no ability to terminate, by itself, any such transmission links. Ameritech Illinois Ex. 6.1 (Lube) at 20-21.

[22] It should be noted that the FCC specifically stated in its *Local Competition Order* (at para. 559) that ILECs must "offer physical collocation, with the interconnecting party paying the LEC for central office floor

pack" or "plug-in unit" that is only a piece-part or sub-component of the complete NGDLC RT equipment unit. The complete NGDLC physically consists of line cards; additional cards that provide common functions for multiple line cards; hardwired equipment such as the shelves, connectors, and wiring that house and interconnect all of the line cards and common cards; and the system software that makes all of the NGDLC RT sub-components operate as a complete equipment unit. More specifically, the type of Project Pronto NGDLC line card currently available from Alcatel, the manufacturer of most of the Project Pronto NGDLCs that Ameritech Illinois is deploying, is the ADSL Digital Line Unit ("ADLU") card. The ADLU card is inserted into a shelf within a complete NGDLC RT equipment unit. This ADLU card contains some of the electronic circuitry that enables the NGDLC to perform the various signal-conversion and multiplexing functions for an end user's ADSL signal. The ADLU card cannot perform any of these functions by itself, as it is only a piece-part or sub-component of the overall NGDLC RT equipment unit. Ameritech Illinois Ex. 6.1 (Lube) at 21-22.

The FCC's *Project Pronto Order* agrees with the characterization of an ADLU card as just a piece-part, stating that the

> "plug-in ADLU Card is only one component of an NGDLC system. An NGDLC system typically contains several 'channel bank assemblies,' which are multiplexers used to provide service to end users. In each channel bank assembly, a carrier 'plugs in' cards that are used to provide specific telecommunications services. ... The ADLU Card is a plug-in card used to provide ADSL service

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space." In other words, the FCC defined physical collocation space only as floor space, not as the shelf space required for a single piece-part of a complete equipment unit. Further, the FCC established in its *Advanced Services Order* (at para. 43) the minimum amount of collocation space to be provided by ILECs to CLECs in cageless collocation, stating that CLECs "can purchase space in increments small enough to collocate a single rack (*i.e.*, bay) of equipment." Consistent with this Commission's decisions, Ameritech Illinois provides collocation space in increments of a single rack in a CO, and as small as a two-inch rack space in an RT site, where physical space and other factors (e.g., heat dissipation and power consumption) allow. However, the collocation of just a sub-component within a shelf of Ameritech Illinois' equipment mounted in a rack is not consistent with either this Commission's collocation decisions or the FCC's definition of collocation space. Ameritech Illinois Ex. 6.1 (Lube) at 18-19.

> from an NGDLC system. The ADLU Card works in conjunction with other plug-in cards and software to provide such service. In addition to the channel bank assemblies and the associated plug-in cards, DLC systems (including NGDLC systems) also contain a common control assembly that contains multiplexing, power, and other capabilities."[23]

Although the FCC's *Project Pronto Order* stated that the ADLU card is the functional equivalent of a DSLAM,[24] the ADLU card is still not a complete item of equipment allowed for collocation.[25] Ameritech Illinois Ex. 6.1 (Lube) at 22-23.

c. Requiring Collocation of ADLU Cards Is Not Necessary For CLECs To Interconnect With Ameritech Illinois' Network Or Access UNEs.

Requiring collocation of ADLU cards is not necessary for the CLECs to interconnect with Ameritech Illinois' network or access UNEs. As a preliminary matter, the ADLU card is unable to access any of Ameritech Illinois' UNEs at an RT site, or provide interconnection between Ameritech Illinois' network and a CLEC's network for the mutual exchange of traffic.

There are only two Ameritech Illinois UNEs that *may* be accessible to a CLEC at an RT site. The first is unbundled dark fiber. Unbundled dark fiber is available at an RT site only if the RT is fed by fiber cable, and if any of the fiber strands are spare. The second is unbundled copper distribution subloops, including the full subloop or just the high frequency portion of the subloop. These unbundled subloops are available at an RT only if the CLEC's collocated equipment is cabled to the nearest cross-connect access point to those subloops (*e.g.*, the SAI

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[23] *Project Pronto Order*, footnote. 11.

[24] *Id.*, para. 14.

[25] A CLEC can collocate full items of equipment such as its own stand-alone DSLAM or its own complete NGDLC at an Ameritech Illinois RT site, where space and environment factors (heat dissipation and power) allow. The CLEC's ability to collocate such complete items of equipment at a Project Pronto RT site will be enhanced through Ameritech Illinois' voluntary commitments attached to and adopted by the FCC's *Project Pronto Order*, ¶¶ 34, 35, 61.

cabinet), or to the "engineering controlled splice" referred to in Ameritech Illinois' voluntary commitments adopted in the *Project Pronto Order*.[26] Ameritech Illinois Ex. 6.1 (Lube) at 23. A CLEC cannot obtain access to either of the UNEs by placing an ADLU card in Ameritech Illinois' NGDLC RT equipment. The ADLU card is simply not capable of providing access to any UNE. As previously explained, the ADLU card is only a sub-component of the complex system of hardware and software that collectively make up the complete functionality of a NGDLC. In fact, the ADLU card is merely one sub-component of one physical part (*i.e.*, the Project Pronto NGDLC) of the Project Pronto network. Further, there are no means to physically cross-connect the ADLU card to any UNE at the RT. Instead, the ADLU card can only be physically inserted into a slot within the NGDLC. In any event, even if it were able to access UNEs or interconnect two carriers' networks for the exchange of traffic, the ADLU card is not necessary for performing these tasks. In other words, access to the dark fiber and copper subloop UNEs at the RT site (or interconnection) neither involves nor requires the CLECs' use or ownership of the ADLU card. Ameritech Illinois Ex. 6.1 (Lube) at 24.

In sum, allowing CLECs to collocate ADLU line cards in Project Pronto NGDLCs is improper because the requirements of Section 251(c)(6) are not satisfied. The ADLU line card is not the type of equipment that can or should be collocated under the governing rules, nor is the line card "necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6).

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[26] *Id.*, para. 61.

d. The Commission Should Not Permit Competing CLECs To Collocate Their Own Line Cards In The NGDLCs That Ameritech Illinois Deploys As Part Of Project Pronto Because Of The Many Operational Problems That Would Result.

In additional to the legal limitations described above, there would be significant operational problems associated with allowing CLECs to own or control line cards for use with Ameritech Illinois' Project Pronto NGDLCs. One of the most serious operational problems is the premature exhaust of the NGDLC itself. Each type of NGDLC has a limited number of physical slots in which to place these line cards. Each NGDLC is planned and deployed with enough slot capacity to serve customers in a specific geographic area. In the Project Pronto NGDLCs used by Ameritech Illinois, the ADLU card has multiple ports for customer service (*i.e*, each port serves a separate end user). Each line card slot is wired to an SAI to accommodate the total number of ports (*i.e.*, end users) that will be served by that ADLU card and slot. When a carrier other than Ameritech Illinois owns or controls a line card for one end user, the entire port capacity of that card slot and the associated copper feeder pairs become unavailable for use by any other CLEC. The Alcatel NGDLCs that Ameritech Illinois is deploying in the Project Pronto architecture are designed and cabled to the SAI for four ports per ADLU card. Therefore, if a CLEC were allowed to own or control the ADLU card and used that card to serve one end-user customer, 75% of that slot capacity and associated cable pairs would become unavailable to other CLECs to serve other DSL end users. This condition would only be exacerbated if multiple CLECs were permitted to own and place their own line cards in the Project Pronto NGDLC. The capacity of the NGDLC equipment would exhaust much sooner compared to the existing arrangement established by the FCC's *Project Pronto Order*, under which Ameritech Illinois owns the line cards, which allows all of the NGDLC ports to be shared by all of the CLECs. Ameritech Illinois Ex. 6.1 (Lube) at 24-25.

Additionally, CLEC ownership of the ADLU cards would result in several significant complications to Ameritech Illinois' provisioning processes. *First*, Ameritech Illinois would have to maintain a record of which slots in which RTs in which wire centers were dedicated to which CLECs. The CLECs' provisioning systems would also have to inventory, assign, and track the use of individual slots on individual cards in individual RTs in individual wire centers. Exchanging and recording this CLEC slot/port assignment information between the two companies could complicate and very likely delay the provisioning intervals for new service orders. Ameritech Illinois Ex. 6.1 (Lube) at 25.

Second, when a new ADLU card was needed to work a new service order, the CLEC would have to physically ship a card to Ameritech Illinois so that Ameritech Illinois could place the card into the NGDLC. Having to properly identify these types of new service orders and having to physically obtain the cards from the CLECs would only complicate and very likely delay the service provisioning process. Ameritech Illinois Ex. 6.1 (Lube) at 25-26.

There would also be ongoing maintenance problems caused by CLEC ownership of the ADLU card. The CLECs would have to provide Ameritech Illinois with spare line cards so that defective line cards could be replaced promptly. In addition, CLECs would have to identify to Ameritech Illinois the locations of its ADLU cards whenever the manufacturer initiated product modifications or upgrades. Tracking these maintenance spares would place an undue burden on Ameritech Illinois. This would become particularly onerous if multiple CLECs owned multiple types of line cards. In other words, Ameritech Illinois' technicians would be required to identify the owner of a defective line card or a line card to be upgraded, determine whether the owner had provided a spare, locate that spare, or place a call or an order to the owner to provide a spare. This could increase the repair interval for the end user's POTS or data service, which would

mean longer out-of-service conditions, greater customer dissatisfaction, and even complaints to this Commission. Ameritech Illinois Ex. 6.1 (Lube) at 26.[27]

The problems described above would create substantially increased costs for both Ameritech Illinois and the CLECs that otherwise would be avoidable. More significantly, the increased costs and operational issues associated with the CLECs' ownership of these line cards would require SBC to re-evaluate and/or refocus its deployment plans for Project Pronto. The added cost to SBC and Ameritech Illinois resulting from CLEC ownership and collocation of these line cards would have to be factored into the overall economics of the Project Pronto architecture deployment, and could delay or eliminate the continued deployment of Project Pronto in Illinois. Ameritech Illinois Ex. 6.1 (Lube) at 27-28.

C. RIGHT OF CLECS TO PROVIDE VOICE AND DATA SERVICE OVER A SINGLE UNBUNDLED PROJECT PRONTO LOOP

Ameritech Illinois believes that this so-called issue is a non-issue, in that Ameritech Illinois has never proposed to limit a CLEC's access to unbundled loops. Unbundled loops are not even the subject of Ameritech Illinois' HFPL UNE tariff. Rather, they are the subject of a completely separate UNE tariff or of the CLECs' binding interconnection agreements with Ameritech Illinois, which are not at issue in this proceeding.

Moreover, neither the Act nor the FCC's rules provide a CLEC with a right to designate and obtain access to a specific copper wire or fiber strand pair in an incumbent LEC's network. Indeed, both the FCC and this Commission (in Docket No. 99-0511) have recognized that certain loop facilities served by integrated loop digital carrier ("IDLC") systems cannot physically be unbundled from those systems, but instead must be "virtually" unbundled through

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[27] Another problem with CLECs owning the line cards is that the Project Pronto NGDLCs are subject to numerous taxing entities' requirements. Ameritech Illinois Ex. 6.1 (Lube) at 26-27.

demultiplexing at the central office or the provision of a substitute loop. *See First Report and Order*, ¶ 383-384. For this reason, the FCC did not define the loop network element as a designated, specific copper wire or fiber strand pair, but instead defined it as "a *transmission facility* between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises." 47 C.F.R. § 51.319(a)(1). Ameritech Illinois' unbundled loop offerings fully comply with the FCC's definition and are already incorporated into the CLECs' interconnection agreements, which are "binding" on the parties under Section 252(a) of the Act.

Accordingly, a Commission ruling that Ameritech Illinois must provide CLECs with access to a specific copper wire or fiber strand pair designated by the CLEC would be both beyond the scope of this proceeding and contrary to federal law. To the extent that the CLECs are attempting to obtain something more from Ameritech Illinois with respect to their access to unbundled loops than is already provided for in those CLECs' interconnection agreements (or in Ameritech Illinois' UNE loop tariff), the Commission must reject that attempt.

III. LINE SPLITTING OVER UNE-P LOOPS

AT&T proposes that the Commission order Ameritech Illinois to revise its HFPL UNE tariff to require Ameritech Illinois to provide "line splitting," as defined by AT&T. AT&T's line splitting proposal involves the situation where a UNE-P[28] CLEC provides voice service and a data CLEC provides data service over the same loop. In other words, AT&T requests that Ameritech Illinois' tariff be modified to require Ameritech Illinois to provide splitters[29] to

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[28] A UNE Platform is a pre-existing combination of UNE switching, transport, and a UNE loop used to provide a circuit switched voice service.

[29] A "splitter" is a device that divides the data and voice signals that are transmitted concurrently over a single copper loop into separate voice and data components. Once separated, the data frequency is routed to a

AT&T when AT&T provides local voice service using UNE-P loops, and to combine that splitter with Ameritech Illinois' existing UNE-P arrangement. This proposal must be rejected for several reasons. *First*, under the Eighth Circuit's decisions in *IUB I* and *IUB III*, Ameritech Illinois cannot be required to provide new combinations of network elements. *Second*, under the *Line Sharing Order*, Ameritech Illinois cannot be required to provide access to the HFPL over the UNE-P when Ameritech Illinois is not the voice provider. *Third*, Ameritech Illinois is not required to provide splitters under any circumstances and, therefore, cannot be required to provide them to CLECs utilizing the UNE-P.

A. THIS COMMISSION CANNOT REQUIRE AMERITECH ILLINOIS TO COMBINE THE UNE-P AND SPLITTER FOR AT&T OR OTHER CLECS.

AT&T's line splitting proposal would improperly require Ameritech Illinois to separate currently combined UNEs and re-combine those UNEs with other facilities that are not UNEs, i.e., an Ameritech Illinois-owned splitter. The UNE-P as it exists in Ameritech Illinois' network is not pre-combined with a splitter. Consequently, in order to add data service to an existing line used to provide voice service, the loop must be separated from the switch, and the splitter installed. This is true regardless of whether the voice service is being provided by Ameritech Illinois or by AT&T using the UNE-P. In order for AT&T to provide both voice and data service over a single loop, the UNEs must be separated (*i.e.*, disconnected) and recombined with the splitter and any advanced services equipment needed to provided the "shared" use of the loop by both data and voice services.

Digital Subscriber Line Access Multiplexer ("DSLAM"), which may or may not be integrated with the splitter. The voice frequency, on the other hand, must be routed back to the switch.

It would violate the Act for this Commission to require Ameritech Illinois to combine for CLECs unbundled network elements that are not currently combined in Ameritech Illinois' network. The Eighth Circuit could not have stated more clearly, in vacating FCC Rules 315(c)-(f), that "Congress has directly spoken on the issue of who shall combine previously uncombined network elements" and required competing LECs to perform that task. *IUB III*, 219 F.3d at 759 (citing 47 U.S.C. § 251(c)(3)).

In *IUB I*, the Eighth Circuit held that section 251(c)(3) of the Act "unambiguously indicates that requesting carriers will combine the unbundled elements themselves" and that the language of that section "can[not] be read to levy a duty on the incumbent LECs to do the actual combining of elements." 120 F.3d at 813. As the court put it, "the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves." *Id.* The Eighth Circuit was equally emphatic in *IUB III*, finding that "Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall 'combine such elements.'" *IUB III*, 219 F.3d at 759. The court therefore held that the FCC's attempt to impose a new combinations requirement was impermissible because it "violate[d] the plain language of the statute." *Id.*

The Eighth Circuit has made clear that an incumbent LEC cannot be required to affirmatively combine UNEs. Simply put, because Congress has addressed in the Act the very combination issues that AT&T has raised in this proceeding, the Commission's ability to address those same issues and reach a different result from that dictated by Congress has been "taken...away" by the federal government. *IUB II*, 525 U.S. at 378 n.6. The Eighth Circuit's decisions are binding on every carrier and state commission nationwide by virtue of the Hobbs

Act.[30] Under the Hobbs Act (28 U.S.C. § 2342(1)), the Eighth Circuit had exclusive jurisdiction to determine the legality of the FCC's attempt to require incumbent LECs to provide new combinations. The Hobbs Act "avoids the possibility of conflicting litigation where two courts have concurrent jurisdiction to resolve the same issues" (*Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 907 (8th Cir. 1984), vacated on unrelated grounds, 476 U.S. 1167 (1986)), by consolidating all petitions for review of FCC orders interpreting and/or implementing the Act in a single court of appeals. As the Supreme Court has made clear, the Hobbs Act's jurisdictional preclusion is broad. It not only bars direct review of an agency's interpretation of the governing statute in courts other than the designated Hobbs Act court of appeals, but also forbids indirect review of such agency action. *See FCC v. ITT World Comm., Inc.*, 466 U.S. 463, 468 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399-400 (9th Cir. 1966); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Consistent with these rulings, the Ninth Circuit recently held that non-Hobbs Act courts may not collaterally attack FCC decisions that purport to interpret sections of the Act. *US West Communications, Inc. v. Hamilton*, 2000 WL 1335548, at *3-*5 (9th Cir. Sept. 13, 2000). Even if courts "doubt the soundness of the FCC's interpretation" of the Act, they "are not at liberty to review that interpretation." *Id.* at *17. Instead, they "are required by the Hobbs Act" to apply an FCC regulation "as it is written" until the Hobbs Act reviewing court says otherwise. *Id.*

In short, the Eighth Circuit has now twice held that a rule that requires incumbent LECs to combine UNEs for competing LECs violates the plain language of the Act. Given those

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[30] On October 11, 2000, the Eighth Circuit issued its mandate in *IUB III*, which makes unmistakably clear that its rulings on UNE combinations and superior quality – which reaffirmed the Eighth Circuit's prior holdings in *IUB I* that were left undisturbed by the Supreme Court in *IUB II* – must be followed as binding federal law.

decisions, no state law imposing the same requirement could ever be consistent with the Act. Indeed, it would make a mockery of the Eighth Circuit's role as the Hobbs Act reviewing court if, notwithstanding its unequivocal holding that a requirement to combine UNEs violates the plain language of the Act, a state commission were to impose the very same requirement, under the guise of "filling gaps" left by the FCC's rules. In this case, there is no gap. The FCC did adopt a requirement to combine UNEs, but the Eighth Circuit struck it down as patently violative of the Act. A state commission cannot do indirectly the very thing that the FCC cannot do directly. Indeed, if the express limits that the Act places on the FCC's rulemaking authority did not also apply to the states with equal vigor, the Act inevitably would become "a federal program administered by 50 independent state agencies," an outcome that the Supreme Court described as "surpassing strange." *IUB II*, 525 U.S. at 378 n.6.

For the same reasons set forth in Section II.A.1 above, the Act's savings clauses (including Sections 251(d)(3), 261(b) and 261(c)) do not change this result. Again, those savings clauses mandate that any state law requirements with respect to combinations must be "consistent" with the Act. 47 U.S.C. §§ 251(d)(3), 261(b), 261(c). Here, of course, the Eighth Circuit has held that a new combination requirement such as that requested by AT&T as part of its "line splitting" proposal would violate the Act. The Eighth Circuit has drawn the line "to which [state commissions] must hew." *IUB II* at 378 n.6. Any decision by a state Commission to the contrary would undermine federal policy objectives and is preempted under *Geier*. 120 S.Ct. at 1919-1920.