with a regatta or marine parade are excluded under that authority.

List of Subjects in 33 CFR Part 100

Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

Temporary Regulations

For the reasons set out in the preamble, the Coast Guard proposes to amend 33 CFR Part 100 as follows:

PART 100—[AMENDED]

1. The authority citation for Part 100 continues to read as follows:

Authority: 33 U.S.C. 1233 through 1236; 49 CFR 1.46 and 33 CFR 100.35.

2. A temporary section, 100.35–T05–020 is added to read as follows:

§ 100.35–T05–020 Special Olympics 1999 Summer Sailing Regatta, St. Mary's River, St. Mary's City, Maryland.

(a) *Definitions:*

(1) *Regulated Area.* The waters of St. Mary's River from shoreline to shoreline, bounded on the north by a line drawn along latitude 38°12′00.0″ N and bounded on the south by a line drawn along latitude 38°09′00.0″ N. All coordinates reference Datum NAD 1983.

(2) *Coast Guard Patrol Commander.* The Coast Guard Patrol Commander is a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Activities Baltimore.

(b) *Special Local Regulations:*

(1) All persons and vessels not authorized as participants or official patrol vessels are considered spectators. The ''official patrol'' consists of Coast Guard, public, state, or local law enforcement vessels assigned or approved by Commander, Coast Guard Activities Baltimore.

(2) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(3) The operator of any vessel in this area shall:

(i) Stop the vessel immediately when directed to do so by any official patrol, including any commissioned, warrant, or petty officer on board a vessel displaying a Coast Guard ensign.

(ii) Proceed as directed by any official patrol, including any commissioned, warrant, or petty officer on board a vessel displaying a Coast Guard ensign.

(4) Spectator vessels may enter and anchor in areas outside the regulated area without the permission of the Patrol Commander. They shall use caution not to enter the regulated area. No vessel shall anchor within a tunnel, cable or pipeline area shown on a Government chart.

(5) The Coast Guard Patrol Commander will announce the specific time periods during which the regulations will be enforced, by Broadcast Notice to Mariners on channel 22 VHF–FM marine band radio.

(c) *Effective Dates.* The regulated area is effective from 6 a.m. EDT (Eastern Daylight Time) to 5 p.m. EDT, daily from June 27 to July 2, 1999.

Dated: April 6, 1999.

Roger T. Rufe, Jr.,

Vice Admiral, U.S. Coast Guard Commander, Fifth Coast Guard District.

[FR Doc. 99–10428 Filed 4–23–99; 8:45 am]

BILLING CODE 4910–15–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[CC Docket No. 96–98, FCC 99–70]

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In response to the Supreme Court's January 25, 1999 decision, the Second Further Notice of Proposed Rulemaking (Second FNPRM) seeks public comment on issues related to how the Commission should identify the network elements incumbent local exchange carriers must make available to requesting carriers, pursuant to sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996. The ability of requesting carriers to use unbundled network elements is integral to achieving Congress' objective of promoting rapid competition in the local telecommunications marketplace. In this proceeding, we seek to move forward to resolve this issue in a timely manner, in order to further reduce uncertainties in the marketplace and to promote robust competition in local telecommunications markets.

DATES: Comments are due on or before May 26, 1999 and reply comments are due on or before June 10, 1999.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, S.W., Room TW–A325, Washington, D.C. 20554, with a copy to Janice Myles of the Common Carrier Bureau, 445 12th Street, S.W., Room 5–C327, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20 St., N.W., Washington, D.C. 20036.

FOR FURTHER INFORMATION CONTACT: Jake Jennings or Claudia Fox, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580. Further information may also be obtained by calling the common Carrier Bureau's TTY number: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Further Notice of Proposed Rulemaking adopted April 8, 1999, and released April 14, 1999 (FCC 99–70). The full text of this Second FNPRM is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, S.W., Room CY–A257, Washington, D.C 20554. The complete text also may be obtained through the World Wide Web, at http://www.fcc.gov/Bureaus/Common Carrier/Orders/fcc99070.wp, or may be purchased from the Commission's copy contractor, International Transcription Service, In., (202) 857–3800, 1231 20th St., N.W., Washington, D.C. 20036.

I. Synopsis of Second Further Notice of Proposed Rulemaking

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

the Commission should require incumbent LECs to unbundle under section 251(c)(3).

2. The ability of requesting carriers to use unbundled network elements, including combinations of unbundled network elements, is integral to achieving Congress' objective of promoting rapid competition in the local telecommunications market. Our identification of the network elements that must be unbundled pursuant to section 251 is therefore a critical tool for promoting the goals of the 1996 Act. In this proceeding, we seek to move forward quickly to resolve the issue of which network elements incumbent LECs must make available on an unbundled basis, in order to reduce uncertainties in the marketplace and to allow carriers to make informed and rational business decisions in order to provide service on a competitive basis to consumers.

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

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

II. Background

5. On August 8, 1996, the Commission adopted the *Local Competition First Report and Order,* implementing the local competition provisions of the 1996 Act. In that order, the Commission established rules governing the obligations and responsibilities of incumbent LECs to open their local networks to competition pursuant to the requirements of section 251 of the 1996 Act. Among other things, the order adopted rules implementing the network unbundling requirements of sections 251(c)(3) and 251(d)(2) of the 1996 Act. Section 251(c)(3) imposes a duty on all incumbent LECs to provide to competitors access to network elements on an unbundled basis. Section 251(d)(2) provides that, in determining which network elements should be unbundled under section 251(c)(3), the Commission shall consider, ''at a minimum, whether—(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network element would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.''

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

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

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

9. In its January 25, 1999 opinion, the Supreme Court reversed the Eighth Circuit's decision on this issue, stated that section 51.319 should be vacated, and remanded the matter for further proceedings. The Court concluded that the Commission had not adequately considered the ''necessary'' and ''impair'' standards of section 251(d)(2). The Court found, among other things, that the Commission, in deciding which elements must be unbundled, did not adequately take into consideration the ''availability of elements outside the incumbent's network.'' The Court also faulted the Commission's ''assumption that *any* increase in cost (or decrease in quality) imposed by a denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services.'' In addition, the Court criticized the Commission's interpretation of section 251(d)(2) because it ''allows entrants, rather than the Commission, to determine'' whether the requirements of that section are satisfied.

III. Request for Further Comments

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

11. We seek comment on a number of issues related to the interpretation of section 251(d)(2), including identification of unbundled network elements on a nationwide basis, the

interpretation of the ''necessary'' and ''impair'' standards of section 251(d)(2), and the criteria the Commission and states should consider in determining whether a network element is subject to the unbundling obligations of section 251(c)(3) of the 1996 Act. In determining which network elements are subject to the unbundling obligations of section 251(c)(3), we seek comment on an approach that would allow sunset or modification of the unbundling obligations as technology and market conditions evolve over time. Such an approach would allow the Commission and the states to identify particular network elements that should be sunsetted or removed from, or added to, the initial list of elements subject to the unbundling obligations of the Act, as warranted.

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

A. Identification of Unbundled Network Elements on a Nationwide Basis

13. In the *Local Competition First Report and Order,* the Commission concluded that, by identifying a specific list of network elements that must be unbundled, applicable uniformly in all states and territories, we would best further the ''national policy framework'' established by Congress to promote competition. The Commission adopted a minimum list of network elements that must be unbundled on a national basis, and permitted states to impose additional unbundling requirements.

14. We find nothing in the Supreme Court's decision that calls into question our decision to establish minimum national unbundling requirements. We therefore tentatively conclude that the Commission should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis. We seek comment on this tentative conclusion. We also seek comment on whether the existence of geographic variations in the availability of elements outside the incumbent LEC's network is relevant to a decision to impose minimum national unbundling requirements. We also seek comment on the relevance, if any, to the interpretation of the ''necessary'' and ''impair'' standard that we are reexamining these issues today, more than three years after passage of the Act. We note that, under our rules, the states have authority to impose additional unbundling requirements, pursuant to our interpretation of section 251(d)(2). We do not propose to eliminate the states' authority to impose additional unbundling requirements, pursuant to the standards and criteria we adopt in this proceeding. In addition, we seek comment on whether states may, consistent with the Supreme Court's decision, apply our interpretation of section 251(d)(2) to determine in the first instance that a network element need not be unbundled in light of the availability of that element outside the incumbent's network in that state. If so, under what circumstances, if any, should the Commission review state decisions?

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

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

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

16. In the *Local Competition First Report and Order,* the Commission defined a ''necessary'' network element as one that is a ''prerequisite'' to competition. We seek comment on the definition of ''necessary'' for the purpose of determining proprietary network elements that must be unbundled pursuant to the requirements of section 251(d)(2)(A) and on the Commission's application of this term in the *Local Competition First Report and Order.*

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

17. Section 251(d)(2)(B) requires us to consider whether the failure to provide access to an element would ''impair'' the ability of a new entrant to provide a service it seeks to offer. In the *Local Competition First Report and Order,* the Commission adopted a dictionary definition of the term ''impair'' that means ''to make or cause to become worse; diminish in value.'' The Commission stated that ''generally * * * an entrant's ability to offer a telecommunications service is 'diminished in value' if the quality of the service the entrant can offer, absent access to the requested element,

declines and/or the cost of providing the service rises.'' We seek comment on the meaning of the term ''impair.'' Should the Commission adopt a standard by which we examine whether the new entrant's ability to offer a telecommunications service in a competitive manner is materially diminished in value? Would a new entrant be ''impaired'' from providing service in a certain area if there is no additional collocation space available in the incumbent LECs' central office?

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

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

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

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

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

21. Although the Supreme Court acknowledged incumbent LEC arguments that section 251(d)(2) codifies ''something akin'' to the essential facilities doctrine, the Court did not find that section 251(d)(2) mandates that standard. We nevertheless seek comment on the significance of the essential facilities standard under section 251(d)(2). Next, the Supreme Court concluded that we must take into account the availability of substitutes for incumbent LEC network elements outside of the incumbent's network. We thus seek comment on when we should deem a substitute sufficiently available so as to render access to the incumbent's network element unnecessary. Finally, the Court found that the Commission erred in concluding that ''any'' increase in cost or decrease in quality resulting from the failure to gain access to a network element satisfied the necessary and impair standard. We therefore seek comment on whether and the extent to which an increase in cost or decrease in quality caused by the inability of obtaining access to an incumbent's network element meets the ''necessary'' or ''impairment'' standard. In addressing these factors, commenters should distinguish between the ''necessary'' and ''impair'' standards if appropriate to do so in light of the factor being discussed.

1. Essential Facilities Doctrine

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

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

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

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

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

this work in practice? Should the threshold vary by the network element?

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

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

28. In addition to cost, we seek comment on other factors that the Commission should consider in evaluating the availability of network elements from alternative sources. For example, how should the Commission assess factors such as the difference in the length of time it takes to obtain a network element from an incumbent LEC versus obtaining it from an alternative source. We seek comment, in particular, on whether and the extent to which the language of the statute and the Supreme Court's opinion constrain the factors that we can or should consider in evaluating the availability of elements outside the incumbent's network. We also seek comment on whether differences in quality that result from acquiring a network element from the incumbent LEC compared to an alternative source are relevant to our analysis of the ''necessary'' and ''impair'' standards of section 251(d)(2). Parties advocating the application of such factors for analyzing unbundling requirements under the ''necessary'' and ''impair'' standards of section 251(d)(2) should discuss specific methods for measuring and applying those differences to specific network elements.

G. Weight To Be Given to Various Factors

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

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

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

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

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

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

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

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

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

I. Modifications to Unbundling Requirements

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

37. Parties advocating that we adopt a mechanism for removing particular elements from the unbundling requirements should provide specific details and explain the legal basis under section 251(d)(2) for doing so. Parties should discuss what factors the Commission should consider in determining whether to remove an element from the unbundling obligations of section 251(c)(3), how the Commission should apply those factors to the particular element, and what conditions would trigger removal from the unbundling requirements. If the Commission adopts a mechanism for removing the unbundling obligation for specified network elements, to what extent should the Commission consider whether to phase out the use of such unbundled network elements in a manner that avoids market disruptions? Should the incumbent LEC bear the burden of demonstrating to the Commission that a particular network element no longer need be unbundled, and what showing should be necessary to overcome any presumption in favor of continuing the unbundling requirement? Alternatively, should competing LECs bear the burden of demonstrating that unbundling is still required pursuant to section 251(d)(2)? Should we restrict incumbents from seeking removal of certain network elements from the unbundling requirements for a specific period of time following implementation of our new unbundling rules (*e.g.*, two years), or in the case of regional Bell Operating Companies (BOCs), until after section 271 authority is obtained?

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

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

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

J. Additional Questions

41. We seek comment on what effect, if any, the fact that Congress required BOCs seeking in-region interLATA authority to unbundle certain network elements should have on our interpretation of section 251(d)(2). For example, should there be a presumption that the network elements set forth in the competitive checklist of section 271(c)(2)(B) are subject to the unbundling obligation contained in section 251(c)(3)? Conversely, what would be the effect on future 271 applications of concluding that a network element identified in section 271(c)(2)(B) is not subject to the 251(c)(3) unbundling obligations? For example, if after considering the ''necessary'' and ''impair'' standards of section 251(d)(2) we determine that a network element need not be unbundled pursuant to section 251(c)(3), what terms and conditions would still apply to that element if it must be provided as part of the competitive checklist of

section 271? Commenters should address what pricing standard, if any, would apply in such a situation, and what pricing rule would govern in arbitrations where the parties had been unable to negotiate a price.

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

43. In the *Local Competition First Report and Order*, the Commission explicitly rejected the argument that would allow incumbent LECs to deny access to unbundled elements if the element is equivalent to a service available at resale. The Commission stated that such a conclusion would lead to impractical results, because incumbents could completely avoid section 251(c)(3) unbundling obligations by offering unbundled elements to end users as retail services. In light of the Supreme Court decision, we seek comment on the extent to which, if any, the availability of resold services obtained from the incumbent LEC should be considered in determining whether a particular network element should be unbundled. More specifically, we ask parties to apply their interpretations of the ''necessary'' and ''impair'' standards in light of the availability of incumbent LEC resold services. Is there a legal or policy basis for concluding that the inability to obtain access to combinations of network elements could impair a requesting carrier's ability to provide service to residential customers, but not business customers?

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

IV. Procedural Issues

A. Ex Parte Presentations

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

B. Supplemental Initial Regulatory Flexibility Analysis

46. In the *Local Competition First Report and Order*, the Commission prepared a Final Regulatory Flexibility Analysis (FRFA) addressing the impact of the local competition rules on small businesses, including section 51.319. In *AT&T* v. *Iowa Utils. Bd.* the Supreme Court vacated section 51.319 because it found that the Commission had not properly considered and applied the ''necessary'' and ''impair'' standards of section 251(d)(2) when it identified network elements that must be unbundled pursuant to section 251(c)(3) of the Act. This proceeding will further consider, in light of the Supreme Court's decision in *AT&T* v. *Iowa Utils. Bd.*, how the Commission should interpret the standards set forth in section 251(d)(2), and which network elements should be unbundled under section 251(c)(3). This may require modification of the portion of the *Local Competition First Report and Order* FRFA addressing former section 51.319. Therefore, we have prepared this Supplemental Initial Regulatory Flexibility Analysis (SIRFA) to address any possible significant economic impact on small entities that may result from our further consideration. Written public comments are requested on this SIRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of the Second Further NPRM, but they must have a separate and distinct heading, designating the comments as responses to the SIRFA. The Commission will send a copy of the Second Further NPRM, including this SIRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Second Further NPRM and SIRFA (or summaries thereof) will be published in the **Federal Register**.

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

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

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

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

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

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

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

C. Comment Filing Procedures

54. Interested parties may file any comments in response to this Second Further NPRM no later than May 26, 1999, with the Secretary, FCC, at 445 12th Street, S.W., Washington, D.C. 20554. Reply comments may be filed with the Secretary, FCC, no later than June 10, 1999. All pleadings are to reference CC Docket No. 96–98. Interested parties should file an original and 12 copies of all pleadings. An

additional copy of all pleadings must also be sent to Janice M. Myles, Common Carrier Bureau, FCC, 445 12th Street, S.W., Room 5–C327, Washington, D.C. 20554, and to the Commission's contractor for public service records duplication, ITS, 1231 20th Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for inspection and copying during normal business hours in the FCC's Reference Center, 445 12th Street, S.W., Washington, D.C. 20554. Copies also can be obtained from ITS at 1231 20th Street, N.W., Washington, D.C. 20036, or by calling ITS at (202) 857–3800 or faxing ITS at (202) 857–3805.

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

56. We will treat this proceeding as permit-but-disclose for purposes of the Commission's *ex parte* rules. *See generally* 47 CFR 1.1200–1.1216. Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b)(2), as revised. Other rules pertaining to oral and written presentations are set forth in section 1.1206(b) as well. Interested parties are to file with the Secretary, FCC, and serve Janice Myles and ITS, with copies of any written *ex parte* presentations or summaries of oral *ex parte* presentations in these proceedings in the manner specified.

V. Ordering Clauses

57. Accordingly, *it is ordered* that pursuant to Sections 1, 3, 4, 201–205, 251, 252, 254, 256, and 271 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 251, 252, 256, and 271, the second further notice of proposed rulemaking is hereby *adopted*.

58. *It is further ordered* that, the Office of Public Affairs, Reference Operations Division shall send a copy of this second further notice of proposed rulemaking, including the SIRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (1981).

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 99–10307 Filed 4–23–99; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket NHTSA 99–5546]

RIN 2127–AH30

Federal Motor Vehicle Safety Standards: Light Vehicle Brake Systems

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Withdrawal of rulemaking.

SUMMARY: This action withdraws a rulemaking action initiated with the issuance of a proposal in 1996. In that proposal, NHTSA proposed to extend the requirements of the passenger car brake system standard to trucks, buses, and multipurpose passenger vehicles with a gross vehicle weight rating (GVWR) of 4,536 kilograms (10,000 pounds) or less. In a 1997 final rule, NHTSA extended the passenger car brake requirements to trucks, buses, and multipurpose passenger vehicles with GVWRs of 3,500 kilograms (7,716 pounds) or less. At that time, the agency deferred its decision on the issue of whether to include vehicles with GVWRs between 3,501 kilograms and 4,536 kilograms.

NHTSA believes that the limited safety benefit that could be derived from requiring these vehicles to comply with Standard No. 135 would not be justified by the considerable costs and burden of redesigning their brake systems. In response to comments by the vehicle manufacturers about the proposal, NHTSA conducted the passenger car brake sequence tests on four late-model vehicles with GVWRs between 3,501 kilograms and 4,536 kilograms. All vehicles were tested to the hydraulic brake standard, which specifies performance standards for hydraulic braking systems on hydraulically-braked vehicles with a GVWR greater than 3,500 kilograms (7,716 pounds). All of the tested vehicles failed some aspect(s) of the test sequence, tending to confirm manufacturers' assertions that redesign of the braking systems of vehicles in this category may be necessary to meet the passenger car brake standard. Accordingly, NHTSA is withdrawing the rulemaking action initiated in 1996.

FOR FURTHER INFORMATION CONTACT: For technical issues: Mr. Samuel Daniel, Jr., Safety Standards Engineer, Office of Crash Avoidance Standards, Vehicle Dynamics Division, 400 Seventh Street, SW, room 5307, Washington, DC 20590; telephone (202) 366–2720; fax (202) 493–2739.

For legal issues: Mr. Walter Myers, Attorney-Advisor, Office of the Chief Counsel, National Highway Traffic Safety Administration, 400 Seventh Street, SW, room 5219, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

A. Background

(1) Rulemaking History

In order to harmonize U.S. brake standards with international brake standards, NHTSA published a final rule on February 2, 1995, establishing a new Federal Motor Vehicle Safety Standard (Standard) No. 135, *Passenger car brake systems* (60 FR 6411).[1] This new standard replaced Standard No. 105, *Hydraulic brake systems,* insofar as Standard No. 105 applied to passenger cars.

On May 2, 1996, NHTSA published a Notice of Proposed Rulemaking (NPRM) proposing to extend the applicability of Standard No. 135 to all multipurpose passenger vehicles, trucks, and buses with GVWRs of 4,536 kilograms (kg) (10,000 pounds (lbs)) or less (61 FR 19602) (hereinafter referred to as ''LTVs,'' meaning light trucks and vans). The agency stated in the NPRM that the extension of the provisions of Standard No. 135 to LTVs would be consistent with the agency's policy of achieving international harmonization wherever possible and consistent with the agency's statutory mandate to increase motor vehicle safety in the U.S.

NHTSA received 8 comments in response to the NPRM, 5 from vehicle manufacturers, 2 from vehicle trade

[1] This standard was subsequently renamed Light Vehicle Brake Systems.