

Telecommunications Deregulation and Competition:

A Unique Case Study

Much has been written lately concerning the United States Federal Communications Commission's ("FCC") third attempt to craft telecommunications network unbundling rules that will survive judicial scrutiny. As has been widely reported, the United States Court of Appeals for the District of Columbia Circuit vacated that third set of rules and once again remanded the issue of unbundled network elements to the FCC. On December 15, 2004, the FCC announced the adoption of new unbundling rules designed to satisfy the Court's concerns and on February 4, 2005 those rules were finally released. Michael Powell, FCC Chairman and strong proponent of elimination of many of the UNE access requirements, has announced his resignation effective "sometime in March [2005]." All of these factors leave many speculating as to the future of telecommunications competition and the states' role in adopting, enforcing and interpreting various access requirements.

Throughout the history of United States telecommunications deregulation there has been substantial conflict between the policies and pro-competitive goals of the FCC and various state commissions. The FCC has sought to preempt state commission rulings and establish a more national competitive policy framework. While to many this may make sense for an industry that crosses state and national boundaries, in some instances it is the states that are best positioned to ensure the pro-competitive goals of telecommunications deregulation are realized.

In Connecticut, one case promises to have significant impact on the availability of competitive communications alternatives for residents and small businesses. The case pits a start-up competitor with a unique vision of competitive service against one of the largest incumbent local exchange carriers in the country. The legal issues implicate states' rights to unbundle and will likely affect future infrastructure investment.

I. History of the I-SNET Network

On December 29, 1994, the Southern New England Telephone Company ("SNET"), the oldest local exchange company in the nation, filed its I-SNET

Technology Plan with the Connecticut Department of Public Utility Control (“DPUC”). SNET touted I-SNET as a full service network that could provide a full suite of voice, data and video services. I-SNET was intended to transform Connecticut’s existing twisted copper pair telecommunications infrastructure into a robust, multifunctional hybrid-fiber copper network (“HFC”) capable of supporting a variety of broadband information, communications and entertainment applications.

As part of I-SNET, SNET intended to deploy over 200,000 plant miles of HFC cable. Statewide deployment of Synchronous Optical Network (SONET) interoffice transport systems, digital switching, Signaling System Number 7 (SS7), Advanced Intelligent Network (AIN) and Integrated Services Digital Network (ISDN) capabilities were also to occur by 1999 that would complement SNET’s HFC installation. The entire infrastructure deployment was supposed to be completed by 2009 and was to result in the retirement of: 1) the embedded base of analog switches and asynchronous interoffice transmission systems; 2) significant portions of the embedded base of the digital switching system; 3) asynchronous loop transmission systems; 4) copper loop plant; and 5) an associated variety of common and complementary systems and subsystems.

Part of the I-SNET plan included the provision of competitive cable television services. SNET testified to the DPUC that it anticipated significant opportunities for efficiencies in terms of operation, maintenance and ability to quickly provide telecommunications services to customers through the deployment of I-SNET. SNET also testified that I-SNET was “proved-in” based on telephony cost savings alone and that potential video revenues were incremental revenues to the cost savings that SNET expected to realize. According to SNET, when conversion to the HFC network was complete, the Company expected that network operating costs would be significantly less per access line than with the twisted copper pair.¹

Based on SNET’s representations, and in order to provide business and residential customers the benefits of new telecommunications technologies, the DPUC

¹ Decision, Docket No. 99-04-02, Application of SNET Personal Vision, Inc. to Modify its Franchise Agreement, August 25, 1999 at 4.

afforded SNET very favorable regulatory treatment for the deployment costs of the I-SNET network. The DPUC permitted SNET to include for purposes of depreciation an allowance for the twisted copper plant that would be retired due to the I-SNET deployment. This depreciation allowance would subsequently be recovered from SNET's customers.

II. The Legal Landscape in 1996

Just prior to SNET's introduction of its I-SNET plan, on July 1, 1994, Connecticut's Public Act 94-83, "An Act Implementing the Recommendations of the Telecommunications Task Force" became Connecticut law. The goals of the General Assembly in passing P.A. 94-83 are contained in the Connecticut Act itself. They include the "efficient development and deployment of an advanced telecommunications infrastructure, including open networks with maximum interoperability and interconnectivity" and the "shared use of existing facilities and cooperative development of new facilities where legally possible, and technically and economically feasible."²

From the very outset of the introduction of telecommunications competition in Connecticut, the DPUC recognized that "the telecommunications infrastructure will play a dominant role in the success or failure of the development of effective competition in Connecticut's telecommunications marketplace and will thus greatly determine the public benefit to be derived from Public Act 94-83."³ The DPUC immediately initiated a series of dockets to unbundle SBC's network and functions, beginning with Docket Nos. 94-07-01, The Vision for Connecticut's Telecommunications Infrastructure and 94-10-04, DPUC Investigation Into Participative Architecture Issues. These unbundling initiatives continued throughout the DPUC's review of the I-SNET technology proposal.

On February 8, 1996, more than a year and a half after Connecticut opened its telecommunications markets to competition, and almost one year into SNET's deployment of the I-SNET network, the United States Congress passed the federal

² P.A. 94-83, codified at Conn. Gen. Stat. § 16-247a(a).

³ Decision, Docket No. 94-07-01, The Vision for Connecticut's Telecommunications Infrastructure, Nov. 1, 1994 at 33.

Telecommunications Act (the “Federal Act”)⁴ to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage rapid deployment of new telecommunications technologies.”⁵ In order to facilitate delivery of the benefits of competition to all American telecommunications consumers without delay, Congress required the FCC to implement the local competition provisions of the Federal Act within six months of the passage of the Federal Act.⁶ Nine years after passage of the Federal Act, the FCC’s rules implementing the Federal Act are still in a state of continual flux and unending challenge.

III. The Death of SPV

Also in 1996, many large telecommunications companies began to retreat from HFC. Many of the companies that had begun to deploy the HFC technology started to report that provision of telephone service over an HFC network was not technologically and economically viable. These reports came despite the entrée of incumbent cable television companies into the retail telephony market through the utilization of incumbent cable HFC networks. Beginning in 1997, telecommunications companies such as Pacific Bell (now a part of SBC Communications Corporation, Inc. (“SBC”)), NYNEX, Bell Atlantic, (currently a part of the Verizon Corporation) and Time Warner began to retreat from, and subsequently reject, HFC as a full service network solution. During this time, SNET undertook its own HFC review and ultimately decided to continue to deploy the HFC technology, reaffirming its commitment to HFC technology. SNET applied for and received an unprecedented statewide cable television franchise and began providing competitive cable television services over the HFC portions of the I-SNET network as the network was constructed and activated.

In 1998, SBC acquired SNET. In approving the acquisition of SNET by SBC, the DPUC required SBC to continue SNET’s cable television venture, thus continuing

⁴ The Connecticut Act and the Federal Act are collectively referred to as the “Acts.”

⁵ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), preamble.

⁶ 47 U.S.C. § 251(d) (“within 6 months after [the date of enactment of the Act] the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section”).

the build-out of the HFC portion of the network for a minimum of two years.⁷ Only seven months later, on April 1, 1999, SBC filed a petition with the DPUC requesting that it be permitted to cease its HFC buildout. The request was granted.⁸ Then, less than one year after the DPUC granted SBC's request, SBC filed another petition with the DPUC seeking permission to abandon its cable television franchise and the more than 3,000 miles of HFC plant constructed. The DPUC reluctantly granted SBC's request.⁹

IV. Potential Rebirth of the HFC Network

The HFC portions of SNET's former cable television franchise network currently lay abandoned since 2001, in many cases occupying the last usable space on the telephone poles. The HFC network is unused and not being repaired or maintained. In June of 2002, Gemini Networks CT, Inc. ("Gemini"), a start-up broadband service provider founded by the Chase family, pioneers in the communications industry, requested interconnection negotiations pursuant to Section 252 of the Federal Act for unbundled access to the abandoned HFC network. SBC refused to negotiate with Gemini, claiming that the abandoned HFC plant was not part of SNET's network, was never used for the provision of telecommunications services¹⁰ and not subject to Section 252 unbundling requirements. On January 2, 2003, Gemini filed a petition for declaratory ruling with the DPUC requesting that the DPUC find that the abandoned HFC plant is part of SBC's network and is subject to unbundling.

Before the DPUC, Gemini argued that, notwithstanding the ongoing Triennial Review process at the FCC, the DPUC has independent authority under 47 U.S.C. § 251(d)(3),¹¹ 47 C.F.R. § 51.317¹² and Connecticut General Statutes § 16-247a, et seq.

⁷ Decision, Docket No. 98-02-20, Joint Application of SBC Communications Inc. and Southern New England Telecommunications Corporation for a Change of Control, September 2, 1998.

⁸ Decision, Docket No. 99-04-02, Application of SNET Personal Vision, Inc. to Modify its Franchise Agreement, August 25, 1999.

⁹ Decision, Docket No. 00-08-14, Application of Southern New Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity, March 14, 2001.

¹⁰ SPV provided cable television services utilizing the HFC network. SBC undertook a trial of voice services in a portion of Stamford, Connecticut. Despite the success of that test, SBC never provided commercial telephony services over the HFC network.

¹¹ 47 U.S.C. § 251(d)(3) provides:
Preservation of State access regulations

to order the unbundling of the HFC network. Gemini argued that the HFC network was constructed, owned and operated by the ILEC, SNET, and intended to be a total replacement for the traditional copper network facilities. Gemini relied heavily on case law suggesting that the critical issue was not SNET's actual use of the network, but the capability of use of that network that was central to the DPUC's determination.

Up to the time of the filing of Gemini's petition, the independent authority of individual states to order unbundling beyond the national list of elements determined by the FCC had been confirmed by the courts. In holding that Section 251(d)(3) preserves state authority, the Eighth Circuit Court of Appeals, for example, contrasted that section with Section 252(c) of the Federal Act. The latter requires other state rules to conform to FCC regulations.¹³ Because Section 251(d)(3) does not require state unbundling rules to conform to FCC rules, the Eighth Circuit struck down the FCC's conclusion "that merely an inconsistency between a state rule and a Commission regulation under section 251 is sufficient to preempt the state rule."¹⁴ The Eighth Circuit similarly rejected the FCC's claim that any state unbundling requirement that varies from unbundling requirements established by the FCC necessarily conflicts with the Federal Act or undermines the achievement of its purposes. The Eighth Circuit

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

¹²

51.317(b)(4) provides:

If an incumbent LEC is required to provide nondiscriminatory access to a network element in accordance with Sec. 51.311 and section 251(c)(3) of the Act under Sec. 51.319 of this section or any applicable Commission Order, no state commission shall have authority to determine that such access is not required. A state commission must comply with the standards set forth in this Sec. 51.317 when considering whether to require the unbundling of additional network elements. With respect to any network element which a state commission has required to be unbundled under this Sec. 51.317, the state commission retains the authority to subsequently determine, in accordance with the requirements of this rule, that such network element need no longer be unbundled.

¹³

Iowa Utils. Bd. v. FCC, 120 F.3d 753, 807 (8th Cir. 1997).

¹⁴

Id.

specifically held that Section 251(d)(3) was meant “to shield state access and interconnection orders from FCC preemption.”¹⁵ The Eighth Circuit stated:

The FCC’s conflation of the requirements of section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and to be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251.¹⁶

The United States Supreme Court subsequently granted certiorari and overturned portions of the Eighth Circuit’s decision, but not the parts that addressed states’ rights to unbundle.¹⁷ Instead, the Supreme Court noted that “[i]f a requesting carrier wants access to additional elements, it may petition the state commission, which can make other elements available on a case-by-case basis.”¹⁸ The Court also went on to state that it “can only enforce the clear limits that the 1996 Act contains, which in the present cases invalidate only Rule 319”¹⁹ and not Rule 317. Section 251(d)(3) would serve no purpose and be merely superfluous if it did not preserve the right of states to establish unbundling obligations in addition to those established by the FCC.

Subsequent to the Supreme Court’s decision in AT&T Corporation v. Iowa Utilities Board, the Ninth Circuit joined the Eighth Circuit and the Supreme Court when it stated:

The [FCC] is charged with the responsibility of promulgating regulations necessary to implement the Act itself, but the Act reserves to states the ability to impose additional requirements so long as the requirements are consistent with the Act and “further competition.”²⁰

¹⁵ Iowa Utils. Bd. v. FCC, 120 F.3d at 807, reversed and remanded in part by AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

¹⁶ Id.

¹⁷ See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

¹⁸ 525 U.S. 366, 388 (1999). While the Supreme Court remanded 47 C.F.R. § 51.319 (the necessary and impair standard) back to the FCC for further justification, it did not remand or note with any disfavor 47 C.F.R. § 51.317.

¹⁹ Id. at 397 (emphasis added).

²⁰ MCI Telecomms. Corp. v. US West Communications, 204 F.3d 1262, 1265 (9th Cir. 2000), cert. denied, Qwest v. MCI Worldcom Network Servs., 531 U.S. 1001 (2000) (citing 47 U.S.C. § 251(d)); see also 47 C.F.R. § 51.317.

The DPUC had also previously recognized its own independent state unbundling authority under the Federal Act. As early as 1996, the DPUC had found that “Congress acknowledged in the Act that a State commission retains the power to establish access and interconnection obligations for local service providers if such obligations are consistent with the Federal Act’s interconnection provisions and do not substantially prevent implementation of the Federal Act’s interconnection requirements and the purposes thereof.”²¹ In DPUC Investigation Into Rebundling of Telephone Company Network Elements, the DPUC recognized its own independent state authority to rebundle network elements even after the Eighth Circuit removed all requirements under the Federal Act for an ILEC to offer such rebundled elements under federal law.²² In acknowledging these independent state law rights to unbundle, the DPUC refused to dismiss Gemini’s petition and agreed to hear the matter.

V. Enter the TRO

After close of the record concerning Gemini’s petition, but prior to issuance of any decision by the DPUC, the FCC released its long-awaited Triennial Review Order (“TRO”).²³ The DPUC reopened the record to consider the impact of the TRO on its authority to order the unbundling of the HFC network. Such a review proved to be complicated, in that the TRO did not address the specific type of network at issue in Connecticut inasmuch as no other incumbent local exchange carrier still possessed HFC architecture. In fact, at the time it was likely that the FCC was completely unaware of the ongoing dispute in Connecticut.

The TRO explicitly confirmed the DPUC’s right to unbundle the HFC network pursuant to state law. In the TRO, the FCC reaffirmed its interpretation of 47 U.S.C. § 251(d)(3)²⁴ as preserving state authority to unbundle, so long as the exercise of that authority did not conflict with the Act, as interpreted by the FCC, or substantially

²¹ Decision, Docket No. 94-10-04, DPUC Investigation into Participative Architecture Issues, Aug. 7, 1996 at 57.

²² Decision, Docket No. 98-02-01, DPUC Investigation Into Rebundling of Telephone Company Network Elements, July 8, 1998 at 31.

²³ cite

²⁴ See n.11, supra.

prevent the FCC's implementation of the Act.²⁵ The FCC rejected the arguments of incumbent LECs, including SBC, that states are preempted as a matter of law from making unbundling determinations.

We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.²⁶

Second, the FCC settled once and for all, or so some thought, the issue surrounding the definition of network element and whether such elements must be “used,” as argued by SBC, or merely “capable of being used,” as argued by Gemini. The FCC clearly agreed with Gemini:

We find that, taken together, the relevant statutory provisions and the purposes of the 1996 Act support requiring incumbent LECs to provide access to network elements to the extent that those elements are capable of being used by the requesting carrier in the provision of a telecommunications service. We note that, by using the terms “features, functions and capabilities,” the definition itself uses broad and expansive terminology in defining its scope. For example, the term “capability” is defined in Webster's New College Dictionary as “potential ability.” Limiting a requesting carrier's ability to obtain access only to facilities or equipment (and associated features, functions and capabilities) actually used in the provision of a telecommunications service would require a reading in tension with this definition.²⁷

With regard to the purposes of the Act, as mentioned above, Section 251(d)(2) requires the Commission to consider whether the failure to provide access to a particular network element would impair the ability of a requesting telecommunications carrier “to provide the services that **it** seeks to offer.” To interpret the definition of “network element” so narrowly as to mean only facilities and equipment actually used by the incumbent LEC in the provision of a telecommunications service also would be at odds with the statutory language in section 251(d)(2) and the pro-competitive goals of the 1996 Act. Such a finding would deny competitive LECs any certainty about the availability of a network element in a given market unless and until a determination was made

²⁵ Triennial Review at ¶¶ 180, 191. In discussing the Supreme Court's ruling in AT&T Corp. v. Iowa Utilities Board, the FCC noted that “[n]o party challenged the Commission's conclusion that it could authorize the states to apply those standards to require unbundling of additional network elements under federal law.” Triennial Review at n.586.

²⁶ Triennial Review at ¶ 192.

²⁷ Triennial Review at ¶ 59 (internal citations omitted).

about whether the incumbent LEC is actually using that network element in its provision of a telecommunications service in that market.

Providing requesting carriers with access only to those facilities and equipment actually used by the incumbent LEC would also lead to such unreasonable results as preventing a spare loop that is capable of providing second-line service from being considered a “network element” if the customer were not purchasing service over that line from the incumbent LEC. Finally, **an alternative reading of the statute would allow incumbent LECs to prevent competitors from making new and innovative uses of network elements simply because the incumbent LEC has not yet offered a given service to consumers. Such a result would stifle a competitor’s ability to innovate and could hinder deployment of advanced telecommunications services.**²⁸

Third, in the TRO, the FCC reaffirmed that a carrier is impaired when lack of access to an incumbent LEC’s network elements poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic.²⁹ The TRO established the barriers to entry to be considered in any impairment analysis: scale economies, sunk costs, first-mover advantages, absolute cost advantages, and barriers within the control of the incumbent LEC. The FCC charged the states, and thus the DPUC, with determining impairment. In applying the impairment test, the DPUC needed to determine whether the sum of the barriers was likely to make Gemini’s market entry uneconomic, taking into account any countervailing advantages that Gemini might have.³⁰

An in-depth review of the factors articulated by the FCC demonstrated that Gemini is impaired by denial of access to SNET’s abandoned HFC network. Moreover, the TRO required the Department to take into consideration the fact that Gemini is seeking access to SBC’s HFC loop facilities to provide basic voice-grade telephony services to mass market customers. The FCC concluded in the TRO that facilities capable of providing such mass market voice-grade services are to be afforded the maximum unbundling, because the mass market is the most competitively underserved, especially for basic voice-grade telephony services, mainly as a result of

²⁸ Id. at ¶ 60 (1st emphasis in original, 2nd emphasis added).

²⁹ Triennial Review at p.9, ¶ 85.

³⁰ The FCC refused to consider the availability of non-UNE alternatives, such as tariffed services or resold retail services, as having any bearing on the impairment analysis. Id. at ¶ 94.

the impairment associated with the necessity of duplicating mass market loop facilities.³¹

The greatest impairment factor associated with serving the mass market is the necessary duplication of mass market loop facilities absent any guaranteed return on the investment. At the time that most mass market loops were constructed by the ILECs, the ILECs enjoyed mandated monopolies and captive customers providing regulated rates of return for capital construction. SNET had its own mass market captive customer base and regulated rates to fund the costs of construction of the HFC network.

The FCC recognized the fixed and sunk costs associated with local loops serving mass market customers. Specifically:

The costs of local loops serving the mass market are largely fixed and sunk. By fixed we mean that these costs are largely insensitive to the number of customers being served. Much of the cost applies whether a carrier serves a single residential customer or ten thousand residential customers: that carrier must secure rights-of-way, dig trenches or place poles, and run wire underground or along poles. Such deployment costs are also sunk. That is, local loop facilities are not fungible because they cannot be used for any other purpose if the investment fails. If a new entrant overbuilds to serve a mass market customer and loses that customer to another carrier, the new entrant cannot economically redeploy that loop to another location. Its investment might be lost unless it could find a particular purchaser for its redundant loops. This is true regardless of whether the new entrant was providing narrowband or broadband service, or both. A carrier will not deploy mass market loops unless it knows in advance that it will have customers that will generate sufficient revenues to allow it to recover its sunk loop investment. This certainly could most easily be achieved through long-term service contracts and a large, guaranteed customer base. In contrast to the enterprise market, however, long-term contracts are not commonplace in the mass market for either the narrow band or the broadband services and we have no information in our record to indicate that consumers ordinarily would accept such terms. As new entrants, competitive LECs do not enjoy a large guaranteed subscriber base that would provide a predictable source of funding to offset their local loop deployment costs. For these reasons, we find that the costs of self-provisioning mass market loop facilities are demonstrably greater than those faced universally by new entrants in other industries.³²

³¹ Id. at 205; n.711.

³² Id. at ¶ 237 (internal citations omitted).

The adverse effect of sunk costs is exacerbated by the barriers to entry in the sole control of SBC. One of the results of Connecticut's telephony work being the oldest local exchange in the country is that Connecticut has some of the oldest and shortest telephone poles in the nation. Thus, securing pole attachment licenses and pole space is tremendously time consuming and expensive, a fact aggravated by the fact that premium usable space is being occupied by the abandoned HFC network. Therefore, in order to self-provision, Gemini must either pay to remove the abandoned HFC network facilities (if SBC decides it will allow the existing HFC network to be removed upon Gemini's request) or replace the entire pole and pay the associated make-ready costs for all existing parties on the pole to shift their facilities. In either event, the associated costs make market entry uneconomic, if not impossible.

Most importantly, the TRO focused on the incentive to invest in next-generation architecture to deliver advanced telecommunications capability and the upgrading of existing loop plant. Although these "other considerations" typically weigh in favor of the ILEC, in this case they actually weigh in favor of Gemini and of the unbundling of the unique HFC network.

The case for not unbundling local loop facilities rests on the resulting incentive for the ILEC to continue deployment of advanced facilities. That incentive does not exist in this instance as SBC has already abandoned the HFC network. The only investment to come with respect to the HFC network will come from Gemini or some other company that desires to provide local loop services to Connecticut consumers via the HFC network.

Gemini argued that a review of the FCC's stated policy considerations required the unbundling of the abandoned HFC network. The purpose of the FCC's retreat from the unbundling rules crafted by the Reed Hundt regime, aside from the numerous court reversals and remands, is to incent incumbents to invest in their network architecture. The Republican-dominated Commission believes that by stripping away access to advanced technology and fiber-based networks, ILECs such as SBC will have the

incentive to invest in upgrading their networks, deploying more fiber and advanced services.

Gemini seized on this rationale in making its arguments to the DPUC. SBC, Gemini argued, has no incentive to invest in the HFC network. SBC has, in fact, abandoned and partially cannibalized the HFC network. Gemini, on the other hand, publicly committed to investing in the remaining portions of the HFC network, repairing and upgrading it for the provision of advanced broadband services to consumers. Thus, reading the TRO not in a vacuum, but in the context of the circumstances presented to the DPUC, the DPUC agreed that the policy considerations and unique nature of the HFC network favored unbundling.

VI. The DPUC Decision and Appeals, Appeals, Appeals

After reviewing the TRO and all of the arguments on both sides, the DPUC finally issued its decision on December 17, 2003. In its decision, the DPUC ordered SBC to unbundle the abandoned HFC network and make it available to Gemini for competitive access. SBC, of course, appealed the DPUC's decision to the Connecticut Superior Court. The Connecticut Superior Court sided with the DPUC and Gemini, finding that the DPUC's unbundling order is consistent with federal law. However, the Superior Court remanded the case for a more definitive finding from the DPUC on the technical feasibility of unbundling the abandoned network. After another proceeding, hearings and briefs, the DPUC found unbundling of the HFC network to be technically feasible.

Still not ready to give up, SBC filed a petition with the FCC seeking preemption of the DPUC's ruling based on a claim that unbundling of the HFC network is not consistent with the federal regime, including the TRO. At the same time, SBC, along with several other Bell companies and some CLECs, appealed various portions of the TRO. The appeals were consolidated in the D.C. Circuit.

The D.C. Circuit ultimately dealt a blow to states' rights to make unbundling determinations. The court removed from state commissions the authority to determine impairment and access to legacy UNEs that had been conferred by the TRO, stating that the Federal Act required the FCC to make such determinations. However,

notwithstanding the court's ruling, Section 251(d)(3) of the Federal Act remains, providing states with authority to add to the national list of UNEs to be determined by the FCC. As a statutory right of the states, Section 251(d)(3) is not subject to administrative or judicial compromise. Thus, under USTA II, Gemini survives in its unbundling quest, as long as the FCC does not make a specific finding with respect to unbundling of HFC.

Once again unsuccessful in its search for a ruling to preempt the DPUC's order unbundling the HFC network, SBC sued the DPUC in the United States District Court for the District of Connecticut arguing for preemption. Both the FCC request for preemption and the district court case are still pending.

VII. New rules

Further complicating the issues raised in this case, on February 4, 2005 the FCC issued its new unbundling rules. Again, the statutory ability of a state to add the federal list of unbundled network elements was left intact, as it must be. Some argue that the new unbundling rules actually increase state participation in the unbundling process. For example, with respect to dedicated transport and high capacity loops, CLECs are required to diligently evaluate the market and self-certify that, to the best of the CLEC's knowledge, the CLEC is entitled to the unbundled loops and transport it is seeking. Upon receiving such a request, the ILEC must process the request and, if it desires to challenge the request, must invoke appropriate dispute resolution procedures. Ironically, most of the dispute resolution procedures contained in relevant interconnection agreements require the parties to negotiate and, if such negotiations are unsuccessful, proceed to arbitration before the appropriate state public utility commission. Thus, under the new rules, state commissions may ultimately determine whether or not certain elements are eligible to be unbundled.

However, disputes have already arisen over whether the state commissions should arbitrate these issues or whether the FCC should resolve these matters. Additional litigation on this, among other issues, is likely. However, Congress has declared an intent to revisit the Act in its entirety and craft new legislation to address

these and many other issues. The real question may be who speaks first – Congress or the courts.

VIII. Conclusion.

Notwithstanding the continual flux of the competitive telecommunications rules in the United states, the Gemini case highlights one important fact: states must continue to be involved in the deregulatory process to ensure a fair and level playing field and the survival of competition. Absent the involvement of the Connecticut DPUC, SBC would have the ability to consume the last usable space on the utility pole with an abandoned, non-functional facility. Additionally, the SBC's captive ratepayers who were forced to fund the construction of I-SNET, including the HFC network, would be forever prevented from using the network or receiving any services over it. Only state commissions have the necessary vision and experience to deal with matters of such purely local concern, as highlighted by the fact that the FCC has not addressed this issue in any of its numerous rulings on unbundling. Just as Connecticut has its own unique and state-specific competitive issue, other states are likely to have similar issues in the sense that they are of purely local concern and irrelevant to the national market.

Some state regulation is essential to protect local interests. Without the Connecticut DPUC and its extensive and historical knowledge of SNET's failed experiment with HFC, it is unlikely that competitive use of the HFC facilities, or any use for that matter, would ever be achieved. The future of a pro-competitive telecommunications market, especially in light of the consolidation and convergence in the industry, is dependent on an active state role. And most importantly, the future of facilities-based competition in Connecticut is largely dependent on one upstart communications company with the will to see this issue through.