

## § 51.317

unbundled network element or combination of unbundled network elements.

[68 FR 52294, Sept. 2, 2003]

EFFECTIVE DATE NOTE: At 68 FR 52294, Sept. 2, 2003, § 51.316 was added, effective Oct. 2, 2003.

### § 51.317 Standards for requiring the unbundling of network elements.

(a) *Proprietary network elements.* A network element shall be considered to be proprietary if an incumbent LEC can demonstrate that it has invested resources to develop proprietary information or functionalities that are protected by patent, copyright or trade secret law. The Commission shall undertake the following analysis to determine whether a proprietary network element should be made available for purposes of section 251(c)(3) of the Act:

(1) Determine whether access to the proprietary network element is "necessary." A network element is "necessary" if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to the network element precludes a requesting telecommunications carrier from providing the services that it seeks to offer. If access is "necessary," then, subject to any consideration of the factors set forth under paragraph (c) of this section, the Commission may require the unbundling of such proprietary network element.

(2) In the event that such access is not "necessary," the Commission may require unbundling subject to any consideration of the factors set forth under paragraph (c) of this section if it is determined that:

(i) The incumbent LEC has implemented only a minor modification to the network element in order to qualify for proprietary treatment;

(ii) The information or functionality that is proprietary in nature does not differentiate the incumbent LEC's services from the requesting carrier's services; or

(iii) Lack of access to such element would jeopardize the goals of the 1996 Act.

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(b) *Non-proprietary network elements.* The Commission shall undertake the following analysis to determine whether a non-proprietary network element should be made available for purposes of section 251(c)(3) of the Act:

(1) Determine whether lack of access to a non-proprietary network element "impairs" a carrier's ability to provide the service it seeks to offer. A requesting carrier's ability to provide service is "impaired" if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer. The Commission will consider the totality of the circumstances to determine whether an alternative to the incumbent LEC's network element is available in such a manner that a requesting carrier can provide service using the alternative. If the Commission determines that lack of access to an element "impairs" a requesting carrier's ability to provide service, it may require the unbundling of that element, subject to any consideration of the factors set forth under section 51.317(c).

(2) In considering whether lack of access to a network element materially diminishes a requesting carrier's ability to provide service, the Commission shall consider the extent to which alternatives in the market are available as a practical, economic, and operational matter. The Commission will rely upon the following factors to determine whether alternative network elements are available as a practical, economic, and operational matter:

(i) Cost, including all costs that requesting carriers may incur when using the alternative element to provide the services it seeks to offer;

(ii) Timeliness, including the time associated with entering a market as well as the time to expand service to more customers;

(iii) Quality;

(iv) Ubiquity, including whether the alternatives are available ubiquitously;

(v) Impact on network operations.

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(3) In determining whether to require the unbundling of any network element under this rule, the Commission may also consider the following additional factors:

(i) Whether unbundling of a network element promotes the rapid introduction of competition;

(ii) Whether unbundling of a network element promotes facilities-based competition, investment, and innovation;

(iii) Whether unbundling of a network element promotes reduced regulation;

(iv) Whether unbundling of a network element provides certainty to requesting carriers regarding the availability of the element;

(v) Whether unbundling of a network element is administratively practical to apply.

(4) If an incumbent LEC is required to provide nondiscriminatory access to a network element in accordance with § 51.311 and section 251(c)(3) of the Act under § 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 § 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 § 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.

[65 FR 2551, Jan. 18, 2000]

EFFECTIVE DATE NOTE: At 68 FR 52295, Sept. 2, 2003, § 51.317 was revised, effective Oct. 2, 2003. For the convenience of the user, the revised text is set forth as follows:

### **§ 51.317 Standards for requiring the unbundling of network elements.**

*Proprietary network elements.* A network element shall be considered to be proprietary if an incumbent LEC can demonstrate that it has invested resources to develop proprietary information or functionalities that are protected by patent, copyright or trade secret law. The Commission shall undertake the following analysis to determine whether a proprietary network element should be made

available for purposes of section 251(c)(3) of the Act:

(a) Determine whether access to the proprietary network element is "necessary." A network element is "necessary" if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting telecommunications carrier or acquiring an alternative from a third-party supplier, lack of access to the network element precludes a requesting telecommunications carrier from providing the services that it seeks to offer. If access is "necessary," the Commission may require the unbundling of such proprietary network element.

(b) In the event that such access is not "necessary," the Commission may require unbundling if it is determined that:

(1) The incumbent LEC has implemented only a minor modification to the network element in order to qualify for proprietary treatment;

(2) The information or functionality that is proprietary in nature does not differentiate the incumbent LEC's services from the requesting telecommunications carrier's services; or

(3) Lack of access to such element would jeopardize the goals of the Act.

### **§ 51.318 Eligibility criteria for access to certain unbundled network elements.**

(a) Except as provided in paragraph (b) of this section, an incumbent LEC shall provide access to unbundled network elements and combinations of unbundled network elements without regard to whether the requesting telecommunications carrier seeks access to the elements to establish a new circuit or to convert an existing circuit from a service to unbundled network elements.

(b) An incumbent LEC need not provide access to an unbundled DS1 loop in combination, or commingled, with a dedicated DS1 transport or dedicated DS3 transport facility or service, or to an unbundled DS3 loop in combination, or commingled, with a dedicated DS3 transport facility or service, unless the requesting telecommunications carrier certifies that all of the following conditions are met:

(1) The requesting telecommunications carrier has received state certification to provide local voice service in the area being served or, in the absence of a state certification requirement, has complied with registration,