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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the matter of)
)
MFS COMMUNICATIONS COMPANY,)
INC.)
)
Petition for Arbitration Pursuant to)
47 U.S.C. § 252(b) of Interconnection Rates,)
Terms, and Conditions with)
)
SPRINT UNITED-CENDEL OF FLORIDA,)
INC. (also known as CENTRAL TELEPHONE)
COMPANY AND UNITED TELEPHONE)
COMPANY OF FLORIDA)

Docket No. 950838-TP

REBUTTAL TESTIMONY OF
DAVID N. PORTER
ON BEHALF OF
MFS COMMUNICATIONS COMPANY, INC.

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**REBUTTAL TESTIMONY OF
DAVID N. PORTER
ON BEHALF OF
MFS COMMUNICATIONS COMPANY, INC.**

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A. My name is David N. Porter. My business address is MFS
3 Communications Company, Inc. ("MFS"), 3000 K Street, N.W., Suite
4 300, Washington, D.C. 20007.

5
6 **Q. BY WHOM ARE YOU EMPLOYED AND WHAT ARE YOUR
7 RESPONSIBILITIES?**

8 A. I am the Vice President of Government Affairs for MFS. I work with
9 senior managers of MFS and its subsidiaries to develop positions in
10 public policy discussions before state, federal and international
11 regulatory and legislative bodies. I oversee MFS filings before the
12 Federal Communications Commission ("FCC"), coordinate MFS'
13 Congressional activities, advise on certain state proceedings and,
14 recently, have collaborated on our ongoing interconnection
15 negotiations driven by the Telecommunications Act of 1996 that was
16 signed by the President of the United States on February 8, 1996.

17

1 **Q. PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND**
2 **PROFESSIONAL EXPERIENCE.**

3 **A. I graduated from the University of Illinois in 1968 with a Bachelor of**
4 **Science degree in General Engineering and from Roosevelt**
5 **University, Chicago, and in 1974 with a Masters in Business**
6 **Administration. I am Registered as a Professional Engineer in Illinois,**
7 **New Jersey and New York.**

8 I began my telecommunications career in 1967 as an engineer
9 for Illinois Bell. After assignments in traffic, outside plant, local and
10 toll central office and toll facility engineering, I assumed duties as a
11 service cost engineer responsible for designing and completing cost
12 studies to support Illinois Bell rate filings and for establishing the price
13 of equipment, land and buildings to be sold to or purchased from
14 customers and other utilities. In 1976, I transferred to AT&T and was
15 responsible for supervising numerous studies being completed by
16 academicians and scientists intended to demonstrate the technical
17 and economic harms of interconnecting competing communications
18 networks and equipment. Later, I worked on the AT&T team that
19 negotiated and implemented the breakup of the Bell System. For two
20 years following AT&T's divestiture of BellSouth and the other Bell

1 Operating Companies in 1984, I managed the state and federal
2 regulatory activities for AT&T Information Systems including its
3 attempts to gain state approvals to offer shared tenant services. After
4 that assignment, I was responsible for creating certain AT&T
5 responses in the first triennial review of the Modification of Final
6 Judgment. In the late 1980's, I was responsible for developing policy
7 positions related to state regulatory issues and for managing AT&T's
8 intrastate financial results. For several years thereafter, I advocated
9 AT&T's interests at the FCC on matters concerning enhanced services
10 and wireless services including spectrum management issues. Prior
11 to assuming my current duties I was Director - Technology and
12 Infrastructure responsible for advocating AT&T's interests with
13 Members of Congress, the FCC and their staffs on technical matters
14 surrounding local exchange competition.

15 During the past several years, I traveled in eastern and central
16 Europe and South America with employees of the U.S. State
17 Department and the U.S. Department of Commerce as their industry
18 representative at bilateral and other meetings during which the U.S.
19 encouraged other governments to adopt laws and policies that would
20 foster telecommunications development and competition. I have

1 conducted multi-day training sessions for State Department embassy
2 trade personnel worldwide. I have spoken before many state
3 regulatory and legislative bodies and have attended and made
4 presentations to numerous industry meetings and training sessions.
5

6 **INTRODUCTION AND SUMMARY**

7 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

8 **A.** My testimony analyzes the unbundled loop cost studies presented by
9 Sprint United-Centel of Florida's ("Sprint") witness James Dunbar and
10 the costing testimony presented by Sprint's witness Randy Farrar and
11 generally presents MFS's position with regards to the costing evidence
12 presented by Sprint. In particular, my testimony summarizes and
13 compares the pricing and costing requirements for unbundled network
14 elements presented in the FCC's recently released Interconnection
15 Order^{1/} with the methodology Sprint uses in its cost studies. Because
16 of the immediate impact of FCC's Interconnection Order on the pricing
17 provisions of this agreement and the size and complexity of the FCC's

^{1/} Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket 96-98 (released August 8, 1996). Hereafter cited as "Interconnection Order" The rules implementing the FCC's decision are cited as "FCC Interconnection Rules §51.xxx."

1 Interconnection Order, I have included with my testimony a summary
2 of the FCC costing requirements, Exhibit ____ (DNP-1). The summary
3 reflects my understanding of the requirements of the FCC's
4 Interconnection Order with respect to pricing and costing of
5 interconnection and unbundled network elements. I have also
6 included a summary of the entire Interconnection Order as Exhibit ____
7 (DNP-2).

8
9 **Q. PLEASE SUMMARIZE YOUR CONCLUSIONS AND**
10 **RECOMMENDATIONS.**

11 **A.** The costing methodologies proposed by Sprint do not comply with the
12 requirements established by the FCC. Until Sprint develops (and the
13 Florida Commission approves) cost studies that do conform with the
14 FCC's costing requirements, the Florida Commission should apply the
15 default proxy cost ceilings established by the FCC for arbitrated
16 interconnection agreements. Specifically, the Florida Commission
17 should apply the proxy cost standard prescribed by the FCC for
18 Florida for unbundled loops. Applying data from Sprint's Benchmark
19 Cost Model to the FCC's proxy cost ceiling implies that Sprint's
20 average unbundled loop rate should be no higher than \$9.39 per

1 unbundled loop per month disaggregated into at least three
2 geographic zones. Because the cost studies described by Randy
3 Farrar do not comply with the requirements set out in the FCC's
4 Interconnection Order, the Florida Commission should also apply the
5 default proxy cost rates established by the FCC for tandem switching
6 and transport rather than the rates proposed by Sprint.

7
8 **I. COSTING REQUIREMENTS OF THE FCC'S INTERCONNECTION**
9 **ORDER**

10
11 **Q. PLEASE DESCRIBE THE COSTING STANDARD THE FCC SET**
12 **OUT IN ITS INTERCONNECTION ORDER.**

13 A. As I describe in Exhibit ___ (DNP-1), the FCC adopted a pricing
14 standard for interconnection and unbundled network elements that is
15 intended to emulate the cost-based pricing of a competitive market.^{2/}
16 When state commissions arbitrate interconnection agreements, the
17 FCC requires that they establish the incumbent's prices for
18 interconnection and access to unbundled network elements based on
19 "economic costs."

^{2/} Interconnection Order at ¶679.

1 Recognizing that it may not be possible for supporting cost
2 studies to be performed, analyzed and adopted by states within the
3 statutory time frames set out to resolve interconnection arbitrations,
4 the FCC adopted a variety of proxy cost price ceilings for unbundled
5 local loops and other unbundled network elements. States were
6 directed to use these proxy cost ceilings in the interim until estimates
7 of economic costs were developed and approved by states. States
8 are free to set interim rates below the proxy cost ceiling. States are
9 also directed to geographically deaverage unbundled loop prices by
10 establishing at least three cost-based zones so that the average over
11 all the zones is less than the proxy cost ceiling established by the FCC
12 for the state.

13
14 **Q. DO THE PROXY COST CEILINGS ESTABLISHED BY THE FCC**
15 **APPLY TO INDIVIDUAL COMPANIES?**

16 **A.** No. As described in Exhibit ____ (DNP-1), the FCC developed the
17 proxy cost ceilings based on state-wide data drawn from proxy cost
18 models and combined with statewide and national average data.
19 Plainly, the proxy cost ceilings developed by the FCC are not specific
20 to any single company, but represent state-wide averages.

1 Q. HOW DID THE FCC DEFINE "ECONOMIC COSTS"?

2 A. The FCC defines "economic costs" as the sum of Total Element Long
3 Run Incremental Costs (TELRIC) of providing each network element
4 plus a reasonable allocation of forward-looking common costs related
5 only to the provision of each network element.^{2/}
6

7 Q. HOW DID THE FCC DEFINE TELRIC?

8 A. TELRIC are the forward-looking costs over the long run of the facilities
9 and functions that are directly attributable to a particular element.
10 Generally speaking, TELRIC has three major components -- operating
11 expenses, depreciation cost and the appropriate risk-adjusted cost of
12 capital associated with the assets used to provide the unbundled
13 network element.^{3/} In addition, the FCC specified several aspects of
14 TELRIC, including:

15 > **Efficient Network Configuration.** TELRIC is properly
16 estimated assuming the most efficient telecommunications
17 technology available and the least-cost network configuration

^{2/} FCC Interconnection Rules §51.505(a).

^{3/} Interconnection Order at ¶ 703.

- 1 given the existing location of the incumbent provider's wire
2 centers.^{5/}
- 3 ▶ **Forward-looking Cost of Capital.** TELRIC is calculated using
4 a forward-looking cost of capital that presumably projects
5 market growth, increased competition and other factors that
6 affect risk and return. The cost of capital in TELRIC is what
7 investors must be paid to induce them to invest in the assets
8 used to provide the unbundled network element. In a sense, it
9 is the profit or return associated with the unbundled network
10 element.^{6/}
- 11 ▶ **Depreciation.** TELRIC is calculated using forward-looking
12 economic depreciation rates. Depreciation in a TELRIC study
13 is economic depreciation which measures the expected change
14 in the economic value of assets used to provide the unbundled
15 network element.^{7/}
- 16 ▶ **Directly Attributable Costs.** TELRIC includes all costs and
17 only those costs that are directly attributable to or caused by a

^{5/} Interconnection Order at ¶ 682.

^{6/} Interconnection Order at ¶¶ 699-700.

^{7/} Interconnection Order at ¶ 703.

1 particular unbundled network element. Retailing costs,
2 marketing expenses, billing and collection costs, and all other
3 costs associated with retail offerings cannot be included in the
4 directly attributable costs of an unbundled network element.
5 The FCC also requires that an incumbent carrier's cost study
6 must explain why or how a specific function included in a
7 TELRIC estimate is necessary to provide a particular element.^{8/}

8 ***No Embedded Costs, Universal Service Support or***
9 ***Opportunity Costs.*** The FCC expressly prohibits the use of
10 embedded costs or costs incurred by the incumbent carrier in
11 the past as the basis for TELRIC.^{9/} The FCC also prohibits the
12 inclusion of universal service subsidies or opportunity costs
13 (*i.e.*, the revenues the incumbent carrier expected to earn but
14 for offering a particular unbundled network element).^{10/}

15
16 **Q. HOW DOES THE FCC DEFINE A REASONABLE ALLOCATION OF**
17 **COMMON COSTS?**

^{8/} Interconnection Order at ¶¶ 682, 691 and FCC Interconnection Rules §51.505(d)

^{9/} Interconnection Order at ¶¶ 704-707.

^{10/} Interconnection Order at ¶¶ 708-711, 713.

1 A. The FCC indicated that a reasonable allocation of forward-looking
2 common costs would be determined by each carrier subject to
3 approval by state commissions. In general, it held that the common
4 costs to be allocated were the common costs of offering unbundled
5 network elements and not the common costs associated with retail
6 activities.^{11/} The FCC indicated that reasonable allocation
7 methodologies might include a fixed allocator (*i.e.*, a uniform
8 percentage markup applied over TELRIC for all unbundled network
9 elements) or an allocation of a small percentage of common costs to
10 critical unbundled network elements. The FCC indicated that a
11 Ramsey pricing method (*i.e.*, high allocations of common costs to
12 elements with low elasticities) is an unreasonable allocation
13 methodology.^{12/} Further, the FCC required that the sum of the TELRIC
14 and the reasonable allocation of common costs should not exceed the
15 stand-alone costs of the unbundled network element (*i.e.*, the costs
16 that an efficient firm would incur if it produced only the unbundled
17 element in question).^{13/} The FCC also required that the sum of the

^{11/} Interconnection Order at ¶694.

^{12/} Interconnection Order at ¶ 696.

^{13/} FCC Interconnection Rules § 51.505(c)(2)(A).

1 common costs associated with unbundled network elements (as
2 common costs are defined by the FCC) should not exceed the total
3 common costs associated with unbundled network elements.
4

5 **II. SPRINT'S COST STUDIES AND ANALYSES DO NOT CONFORM**
6 **WITH THE FCC'S COSTING REQUIREMENTS**
7

8 **A. Sprint's Cost Studies are Fatally Flawed**

9 **Q. DO SPRINT'S LOOP COST STUDIES FOR FLORIDA COMPLY**
10 **WITH THE FCC'S COST STANDARD FOR UNBUNDLED NETWORK**
11 **ELEMENTS?**

12 **A.** Absolutely not. There are a host of fatal problems associated with
13 using the Benchmark Cost Model (BCM) presented by Mr. Dunbar as
14 an estimate of economic costs:

15 **• *The BCM is not intended to estimate the costs of***
16 ***unbundled elements.*** As Mr. Dunbar indicates in his
17 testimony, the BCM estimates the cost of an entire service --
18 namely residential local service^{14/} -- and is not designed to
19 estimate the economic costs of various unbundled network

^{14/} Testimony of James Dunbar on Behalf of United Telephone Company,
pg. 7 (Aug. 12, 1996).

1 elements. The BCM was initially designed to identify high-cost
2 service areas in the context of defining appropriate universal
3 service support and was never intended to develop forward-
4 looking estimates of the costs of unbundled network elements.
5 However, to the extent that the BCM is an estimate of the
6 economic costs of an entire service, it obviously creates a cost
7 ceiling for the economic costs of an unbundled network
8 element. Said differently, the economic costs of unbundled
9 loops, a component of residential telephone service, cannot be
10 greater than the economic costs of residential service which
11 includes loops as a component.

12 ▶ ***The Florida Commission cannot be certain what the***
13 ***updated BCM presented by Sprint measures.*** The BCM
14 model is grossly complex, and it is nearly impossible to
15 determine and analyze all of the "simplifying" assumptions
16 embedded in the model. The BCM, for example, allows users
17 to specify 57 different numerical assumptions that affect the
18 results of the model and the data used as input for the BCM
19 model requires a CD-ROM for computer storage. The model
20 consists of about 360 variable inputs, more than 20 tables with

1 170 calculations and a spreadsheet with more than 160
2 calculations for each census block. As a practical matter, the
3 Florida Commission has no way to check the validity or
4 accuracy of the data employed or the calculations absent
5 simply trusting Mr. Dunbar. The BCM that Mr. Dunbar sponsors
6 in this proceeding is actually an update of an earlier version of
7 the same model. It is interesting to note that when Sprint first
8 released the BCM, it reported national average loop and
9 switching costs of \$23.04, but the BCM 2 that Mr. Dunbar
10 sponsors yields national average loop and switching costs of
11 \$29.98, an increase of about 30%. Such a large increase
12 hardly seems reasonable, and implies that the BCM results Mr.
13 Dunbar sponsors are unstable and unreliable.

14 ▶ ***The BCM does not develop an estimate of common costs***
15 ***(as defined by the FCC) or allocate those costs among all***
16 ***unbundled network elements.*** Certainly, the model employs
17 technologies that are common among various network
18 elements. For example, the feeder technologies are used by all
19 types of loops. However, it is unclear whether the model's
20 allocation of common costs complies with the FCC's

1 requirements. For example, the FCC requires that the TELRIC
2 and the allocation of stand-alone costs be less than stand-
3 alone costs. The BCM does not produce a stand-alone cost
4 estimate, so it is impossible to determine whether it complies
5 with this requirement. Also, the model does not develop an
6 estimate of total common costs, so it is impossible to determine
7 whether the allocation used in the model exceeds total common
8 costs, or whether the allocation is in any way consistent with the
9 pro-competition requirements of the Telecommunications Act.

10 ▶ ***The BCM does not develop an estimate of forward-looking***
11 ***costs since it is based on current equipment prices and***
12 ***currently deployed technologies rather than the***
13 ***technologies and prices might be anticipated.*** The BCM
14 uses depreciation levels and rates embedded in incumbent
15 carriers' practices and make no attempt to develop an estimate
16 of the change in the economic value of assets used to provide
17 unbundled local loops. Other than simply assuming the
18 depreciation rate embodied in ARMIS data, the BCM fails to
19 provide any analysis of the economic depreciation associated
20 with the assets used to provide unbundled network elements as

1 required by the FCC. Likewise, the BCM assumes a cost of
2 capital (11.25%), but does not provides an analysis or objective
3 estimate of the forward-looking, risk adjusted cost of capital as
4 required by the FCC.

5 ▶ ***The BCM fails to provide usable definitions of the***
6 ***geographic zones that might be used for a cost-based***
7 ***geographic deaveraging of prices.*** The FCC requires that
8 state commissions geographically deaverage prices for
9 interconnection and unbundled network elements by
10 establishing zones that reflect differences in economic costs.
11 While the BCM develops costs by the physical characteristics
12 of census blocks, it makes little sense to establish 226,000 cost
13 "zones" throughout the United States.

14 ▶ ***The BCM includes embedded costs when it develops its***
15 ***ARMIS-based factors used to annualize loop investments.***
16 The FCC specifically excludes the embedded costs of
17 incumbent providers from the development of TELRIC. Using
18 ARMIS-based factors to develop mark-ups uses the embedded
19 costs (revenue requirements) of incumbent providers as the

1 basis for annualizing loop investments rather than a forward-
2 looking, incremental methodology as required by the FCC.

3 *The BCM develops estimates of switching costs and*
4 *combines it with loop costs, but fails to develop a separate*
5 *estimate of the line-side and trunk-side port costs*

6 *associated with switching as required by the FCC.* It is not
7 clear, for example, whether the line side port costs (which the
8 FCC indicated should be recovered with a per line charge) are
9 bundled with the loop costs reported in the BCM or the
10 switching costs. Since the model was not designed to estimate
11 the incremental costs of unbundled network elements, such a
12 breakdown would have been unnecessary from Mr. Dunbar's
13 vantage and thus, excluded from the model.

14
15 **Q. DOES THE COST STUDY DESCRIBED BY MR. FARRAR COMPLY**
16 **WITH THE REQUIREMENTS ESTABLISHED BY THE FCC FOR**
17 **UNBUNDLED NETWORK ELEMENTS AND INTERCONNECTION?**

18 **A.** No. Again, Mr. Farrar's study appears to have been designed for
19 another purpose -- to estimate the Total Service Long Run Incremental
20 Cost -- rather than to develop estimates that conform with the FCC's

1 requirements. In particular, Mr. Farrar's study suffers from at least the
2 following major deficiencies:

3 ▶ **The allowance for joint and common costs (15%) is**
4 **completely arbitrary.** The FCC allows for a reasonable
5 allocation of common costs (as common costs are defined and
6 limited by the FCC), including a fixed allocator. However,
7 Sprint is not proposing to calculate its total joint and common
8 costs and allocate an equal proportion among its unbundled
9 network elements. It is simply adding 15% to its estimate of
10 incremental costs. Such a methodology virtually guarantees
11 the over-recovery of common costs that the FCC indicated was
12 not allowed in pricing unbundled network elements.

13 ▶ **The Florida Commission cannot determine how Mr. Farrar**
14 **develops his costs.** The cost study sponsored by Mr. Farrar
15 is presented in the highest level of generality that conceal
16 critical assumptions. For example, Mr. Farrar describes the
17 conversion process for translating busy-hour (peak load)
18 investments into monthly costs as follows:

19 There are two steps. First, each cost function
20 (traffic sensitive, processor set-up, and SS7 set-
21 up) is multiplied by an annual charge factor to
22 determine an annual revenue requirement.

1 Second, the annual amount is divided by 12 to
2 determine a monthly amount.^{15/}
3

4 Mr. Farrar fails to describe how that annual charge factor is
5 developed or what it includes. Similarly, he describes his
6 "analysis" of unbundled transport in conclusory terms that yield
7 absolutely no insight into how the figures were developed. For
8 example, he described the development of the costs of
9 transport capacity as "[t]he cost per DS1 is equal to the utilized
10 engineered, furnished and installed (EF&I) unit cost of each
11 component, divided by its DS1 capacity."^{16/} That "description" of
12 costs boils down to a tautology -- "the costs are the costs" --
13 rather than providing any insight into how Sprint developed its
14 transport costs. From reading Mr. Farrar's description of
15 Sprint's cost studies, the Florida Commission simply cannot tell
16 whether the costs he develops are the forward-looking costs of
17 an efficient competitor and an efficient network configuration as
18 required by the FCC or whether they are Sprint's costs.
19

^{15/} Testimony of Randy Farrar on Behalf of United Telephone Company of Florida at pg. 8 (August 12, 1996).

^{16/} Testimony of Randy Farrar on Behalf of United Telephone Company of Florida at pg. 9 (August 12, 1996).

1 **B. Applying the FCC's Proxy Cost Ceiling to Sprint**

2 **Q. WHAT CAN A STATE COMMISSION OR ARBITRATOR DO IF THE**
3 **INCUMBENT PROVIDER HAS NOT PERFORMED THE COST**
4 **STUDIES REQUIRED BY THE FCC?**

5 **A.** The FCC specified several proxy cost ceilings and ranges that state
6 regulators and arbitrators are directed to apply in the interim until the
7 incumbent performs the cost studies required by the FCC. In Florida,
8 the statewide proxy cost ceiling for unbundled local loops is \$13.68
9 per line per month. Since this is a price ceiling, incumbent carriers,
10 arbitrators and state commissions are free to establish rates based on
11 a lower average cost, but not higher. It is important to emphasize that
12 the FCC also ordered that the prices for unbundled network elements
13 be geographically deaveraged into at least three zones to reflect cost
14 differences between the zones.^{17/} The proxy cost is the weighted
15 average of these disaggregated costs, so the \$13.68 per line per
16 month proxy cost ceiling for Florida should be the average over at
17 least three geographic zones.^{18/}

18

^{17/} Interconnection Order at ¶¶ 764-765.

^{18/} Interconnection Order at ¶ 784.

1 **Q. ARE THERE ANY ADJUSTMENTS THE FLORIDA COMMISSION**
2 **SHOULD MAKE TO THIS AVERAGE LOOP COST?**

3 A. Yes. In his testimony, Mr. Dunbar indicates that based on his BCM
4 model, the average loop costs for the Maitland/Winter Park area is
5 \$20.01. The average cost for the entire state of Florida, according to
6 Mr. Dunbar's BCM model, is \$29.15,¹⁹ which implies that loop costs in
7 Sprint's service territory in Florida are 31% lower than the rest of the
8 state. Applying this proportion to the FCC's statewide average proxy
9 cost ceiling means that Sprint's average loop rates must be no higher
10 than \$9.39, averaged over all the geographic zones served by Sprint.

11
12 **III. RECOMMENDATIONS**

13 **Q. WHAT DOES MFS RECOMMEND?**

14 A. The Florida Commission should develop interim unbundled loop rates
15 using the proxy cost for unbundled local loops until Sprint and all other
16 incumbent local carriers in the state have developed cost studies that
17 comply with the FCC's requirements and this Commission has
18 reviewed and approved those cost studies. To comply with the

¹⁹ Benchmark Cost Model: A Joint Submission by Sprint Corporation and US West, Inc., at pg. 67 (July 3, 1996).

1 immediate need to meet the interim geographic deaveraging
2 requirement and recognizing that local carriers in many jurisdictions
3 have testified that loop length is the only significant variable in
4 determining loop costs, the Florida Commission should require each
5 incumbent local carrier to identify the average loop length for each of
6 its serving wire-centers and the number of working loops in each wire
7 center, which is readily available data. Armed with this data, the
8 Commission can quickly group wire-centers into zones by loop length;
9 compute the average length and total loops in each zone; and, using
10 this data, determine loop costs by zone surrounding the FCC proxy
11 cost ceiling. Having satisfied the immediate need, the Commission
12 should then order each incumbent LEC to develop its forward looking
13 loop costs. The Commission can then conduct the appropriate
14 investigations at its own schedule and modify the interim loop rates as
15 needed to comply with the then available forward-looking cost studies.
16 My recommendation regarding deaveraging loops by loop length is
17 shown in Exhibit __ (DNP-3).

18
19 **Q. HOW SHOULD THE GEOGRAPHIC ZONES BE DEFINED?**

1 A. As shown in Exhibit ____ (DNP-3), the zones should be defined by
2 clustering wire-centers based on the average loop length in each wire-
3 center, *e.g.*, all wire-centers having similar average loop lengths
4 should be grouped together. Although we each might suggest other
5 metrics such as average loop length by household or by census block
6 group, average loop length by wire-center is the correct metric for
7 several reasons. First, it matches the standard imposed by the FCC
8 for TELRIC studies based on forward looking technologies, but current
9 wire-centers. Second, it uses the same reference as is used for
10 current tariffs and billing systems. Most importantly, it is a concept
11 that consumers are most likely to understand because it also is co-
12 terminous with current telephone numbering systems. When the
13 Commission has gathered the loop length by wire-center data, it
14 should be able to cluster the wire-centers based on inspection or by
15 using statistical grouping techniques. In either event, the Commission
16 should strive to have zones each aggregating a similar number of
17 loops, for example, in a three zone system, no zone should consist of
18 less than 25% nor more than 50% of the total loops.

19

1 Q. DO YOU HAVE OTHER CONCERNS CONCERNING LOOP
2 PRICING?

3 A. Yes, I am concerned about the price of cross-connect facilities
4 between Sprint and MFS equipment and frames.
5

6 Q. PLEASE EXPLAIN.

7 A. The FCC defines the loop network element "as a transmission facility
8 between a distribution frame, or its equivalent, in an incumbent
9 carrier's central office, and the network interface device at the
10 customer premises."^{20/} This definition specifically does not include the
11 cross-connection necessary to deliver the loop from the distribution
12 frame to MFS' collocated equipment. Although the FCC requires the
13 incumbent carrier to provide the cross-connection and establishes the
14 costing standard^{21/}, it neither defined the cross-connection as a
15 network element nor established proxy rates for the cross-connection.
16 Since the loop is almost useless without the cross-connection, MFS
17 requests that this Commission declare the cross-connection to be a
18 network element and require Sprint to develop a TELRIC based rate

^{20/} Interconnection Order at ¶380.

^{21/} Interconnection Order at ¶386.

1 for this element. Until the required study is complete, MFS
2 recommends this Commission adopt a rate no higher than \$0.21 per
3 month per cross-connection as its interim rate. This is the tariffed rate
4 filed with the Illinois Commerce Commission for the same network
5 element based on a cost study submitted by Ameritech.^{22/}
6

7 **Q. HOW SHOULD UNBUNDLED TRANSPORT RATES BE**
8 **ESTABLISHED?**

9 **A.** Sprint's transport cost study provides absolutely no information that is
10 useful or relevant to determining the economic cost of transport. MFS
11 recommends that the Florida Commission implement the default
12 proxies for transport as described in Exhibit ____ (DNP-1).
13

14 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

15 **A.** Yes, it does.

167568.10

^{22/} Ameritech-Illinois Tariff, ILL. C. C. NO. 15, Original Page 876.20.5

Exhibit ____ (DNP-1)

SUMMARY OF THE COSTING REQUIREMENTS FROM THE FCC'S INTERCONNECTION ORDER

MFS Communications Company, Inc.

August 23, 1996

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SUMMARY OF THE COSTING REQUIREMENTS FROM THE FCC'S INTERCONNECTION ORDER

This document summarizes the costing requirements of the Federal Communications Commission's (FCC's) Interconnection Order.^{1/}

I. GENERAL REQUIREMENTS

The FCC's Interconnection Order develops a costing methodology for the price of interconnection, unbundled network elements, and physical collocation^{2/} that must be applied by state regulators who set such prices.^{3/} In fact, the FCC directed states to review and revise their costing standards to comply with the FCC's standard.

Those states that have already established methodologies for setting interconnection and unbundled rates must review those methodologies against the rules we are adopting in this Order. To the extent a state's methodology is consistent with the approach we set forth herein, the state may apply that methodology in any section 252 arbitration. However, if a state's methodology is not consistent with the rules we adopt today, the state must modify its approach. We invite any state uncertain about whether its approach complies with the Order to seek a declaratory ruling from the Commission.^{4/}

^{1/} Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, First Report and Order (released August 8, 1996). Hereafter cited as "Interconnection Order." The rules implementing the FCC's Interconnection Order are cited as "Interconnection Rules."

^{2/} Interconnection Order at ¶¶ 628-629.

^{3/} Interconnection Order at ¶¶ 619, 624. "While every state should, to the maximum extent feasible, immediately apply the pricing methodology for interconnection and unbundled elements that we set forth below, we recognize that not every state will have the resources to implement this pricing methodology immediately in the arbitrations that will need to be decided this fall. Therefore, so that competition is not impaired in the interim, we establish default proxies that a state commission shall use to resolve arbitrations in the period before it applies the pricing methodology. In most cases, these default proxies for unbundled elements and interconnection are ceilings, and states may select lower prices." (¶ 619)

^{4/} Interconnection Order at ¶ 624.

The FCC requires that prices for interconnection, unbundled network elements and collocation be set at forward-looking economic costs rather than embedded costs or historical costs. The FCC reasoned that setting prices equal to forward-looking economic costs best replicates the conditions of a competitive market.^{5/} Specifically, the FCC defined forward-looking economic costs as the sum of:

- (1) Total Element Long Run Incremental Costs (TELRIC), developed consistent with the FCC's rules; and
- (2) A reasonable allocation of forward-looking common costs, developed consistent with the FCC's rules.^{6/}

In addition, the FCC also required that state commissions establish geographically deaveraged prices for interconnection and unbundled network elements with at least three zones and where the zones reflect differences in costs.^{7/} It also required that prices for interconnection and unbundled elements reflect the manner in which costs are incurred.^{8/} Specifically, it required that the prices for dedicated facilities (including, unbundled loops, dedicated transport, interconnection and collocation) should be flat-rated and not usage sensitive.^{9/}

^{5/} Interconnection Order at ¶¶ 679.

^{6/} Interconnection Rules at § 51.505(a).

^{7/} Interconnection Order at ¶¶ 764-766. "We conclude that three zones are presumptively sufficient to reflect geographic cost differences in setting rates for interconnection and unbundled elements, and that states may, but need not, use these existing density-related rate zones [zones established in the Expanded Interconnection proceeding]. Where such systems are not in existence, states shall create a minimum of three cost-related rate zones to implement deaveraged rates for interconnection and unbundled elements. A state may establish more than three zones where cost differences in geographic regions are such that it finds that additional zones are needed to adequately reflect costs of interconnection and access to unbundled elements." (¶ 765)

^{8/} Interconnection Order at ¶ 743.

^{9/} Interconnection Order at ¶ 744 and Interconnection Rules at § 51.509.

The FCC prohibited states from allowing non-recurring charges for facilities with recurring costs except where the recurring costs are *de minimis*.^{10/} The FCC permitted states to allow for recovery of non-recurring costs with recurring (e.g., monthly) charges, but the FCC also required that states take steps to avoid double recovery of costs that may be shared among interconnectors.^{11/} For example, if a collocator improves a building, then that collocator may be entitled to a *pro rata* refund of charges for the building improvement if other interconnectors subsequently collocate in the building. The FCC also observed that interconnectors may be entitled to a refund of a portion of their costs if they cancel service. For example, if a collocator ends its collocation, it may be entitled to a refund of the economic value of the collocation cage it may have paid for.^{12/}

The FCC also held that incumbent local exchange carriers (LECs) have the burden of coming providing information to support the required cost studies.

We note that incumbent LECs have greater access to the cost information necessary to calculate the incremental cost of the unbundled network elements of the network. Given this asymmetric access to cost data, we find that incumbent LECs must prove to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover in the prices of interconnection and unbundled network elements.^{13/}

The FCC also prohibits all non-cost based price discrimination.^{14/} The FCC distinguished between two types of discrimination that are not allowed – charging different prices to different interconnectors where the costs are the same or similar, and charging the same price for different service or interconnections where the costs are different. The FCC also found that charging different (lower) prices to interconnectors or wireless carriers that do not compete with the incumbent LEC than charged to competing interconnectors is discriminatory and violates the Telecommunications Act.^{15/}

^{10/} Interconnection Order at ¶¶ 745-748.

^{11/} Interconnection Order at ¶ 749-751.

^{12/} Interconnection Order at ¶ 751.

^{13/} Interconnection Order at ¶ 680.

^{14/} Interconnection Order at ¶ 862.

^{15/} Interconnection Order at ¶¶ 860-861.

II. TELRIC COMPONENTS

TELRIC is a concept created by the FCC based on (but not the same as) Total Service Long Run Incremental Costs (TSLRIC). TELRIC is the forward-looking costs over the long run of all the facilities and functions that are directly attributable to or reasonably identifiable as incremental to an individual element taking the provision of all other elements as a given.^{16/} Broadly speaking, TELRIC consists of the sum of out-of-pocket operating costs, depreciation costs and an appropriate risk-adjusted cost of capital.^{17/} There are several components of a TELRIC estimate, including:

- **Incremental Costs.** TELRIC is an incremental cost estimate in that it measures the change in total costs associated with the provision of an entire element (*i.e.*, the increment is the entire element). For example, if the firm adds a particular network element, the incremental costs are the change in its total costs that are caused by the addition of that element given that all other elements are provided at their present levels. In a competitive market, prices will tend to equilibrate at incremental costs.^{18/}
- **Long Run Costs.** TELRIC is an estimate of long run costs, which is a period long enough that all of a firm's costs become variable or avoidable.

^{16/} Interconnection Rules § 51.505(b).

^{17/} Interconnection Order at ¶ 703. TELRIC is an economic cost in that it includes out-of-pocket expenses/costs and an estimate of the returns or profits (as measured by the cost of capital) the firm gives up by devoting resources to a particular activity.

^{18/} Interconnection Order at ¶¶ 675, 677. For example, if it costs \$5 per customer per month for a cable television provider to upgrade add telephone service to its existing video services, the cable television provider can profitably sell telephone service for anything greater than \$5 per month and the competitive market price will tend towards \$5 per month.

-
- ▶ **Elements Rather than Services.** TELRIC is an estimate of the costs of discrete network elements, like local loops or switching, rather than the costs of an telecommunication service, like local residential telephone service.^{19/}
 - ▶ **Forward-Looking Costs.** TELRIC is an estimate of the costs that a carrier would incur in the future to provide a particular element, and not necessarily the costs that the incumbent carrier realized given its network and configuration. Forward-looking costs are intended to present an estimate of the costs associated with providing an unbundled network element using the most efficient technology and the most efficient network deployment. It does not measure the losses or costs that the incumbent LEC expects to realize in a competitive market, nor does it measure the costs the incumbent actually incurs in providing various services or elements. The FCC required that forward-looking costs be based on an estimate that assumes that wire centers will be placed at the incumbent LEC's current wire centers, but that the reconstructed local network uses the most efficient technology for reasonably foreseeable capacity requirements.^{20/}
 - ▶ **Directly Attributable Costs.** A TELRIC estimate includes only costs that are directly attributable to or reasonably identifiable with the provision of a particular network element. For example, customer billing expenses, marketing expenses and other costs attributable to the provision of retail services (and not the network elements purchased by a carrier) are not directly attributable to a network element.^{21/}
 - ▶ **Capital Costs.** A TELRIC estimate includes an estimate of the forward-looking cost of capital, which is an estimate of the risk-adjusted cost of obtaining debt and equity financing for a particular element.^{22/}

^{19/} Interconnection Order at ¶ 678.

^{20/} Interconnection Order at ¶¶ 683-686 and Interconnection Rules § 51.505(b)(1).

^{21/} Interconnection Order at ¶¶ 682, 694.

^{22/} Interconnection Order at ¶ 702 and Interconnection Rules § 51.505(b)(2).

- **Depreciation.** A TELRIC estimate includes an estimate of the forward-looking depreciation cost, which measures the change in the economic value of assets used to provide a particular element.^{23/}

TELRIC is not the same as TSLRIC. A TSLRIC study develops the incremental costs of an entire service rather than a network element, which is the focus of TELRIC. The FCC distinguishes between services and elements by observing that elements are the components used to assemble and provide a service rather than a stand-alone service.^{24/} Thus, a TSLRIC will often include the costs of several elements, and can be viewed as a price ceiling for TELRIC. For example, residential telephone service includes a local loop, a port, and access to various databases and functionalities used by residential telephone consumers. Logically, the TELRIC for a residential loop cannot exceed the TSLRIC for residential telephone service which includes the loop as an element.

III. REASONABLE ALLOCATION OF FORWARD-LOOKING COMMON COSTS

In addition to TELRIC, an estimate of economic costs must include a reasonable allocation of forward-looking common costs. These are the costs that cannot be directly attributed to an individual element, but exclude the costs of providing services on a retail basis. The FCC required adoption of a reasonable allocation, but adopted only three requirements:

- **Stand-Alone Cost Cap.** The sum of the TELRIC and the allocation of common costs assigned to a particular element may not exceed the stand-alone costs associated with the element.^{25/}
- **Complete Allocation of Common Costs.** The sum of all allocated common costs, exclusive of retailing costs, shall be equal to the total forward-looking

^{23/} Interconnection Order at ¶ 703, fn. 1711 and Interconnection Rules § 51.505(b)(3).

^{24/} Interconnection Order at ¶ 262-264.

^{25/} Interconnection Rules § 51.505(c)(2)(A) and Interconnection Order at ¶ 698.

common costs for all elements and services offered by the incumbent LEC.^{26/} However, the FCC excludes from common costs any retail costs,^{27/} so the total common costs are some sum that is far less than the incumbent LEC's total common or overhead expenses. Said differently, the common costs are common only to the provision of interconnection and unbundled network elements, and there is a possibility that there are no common costs after TELRIC costs have been developed. Incumbent LECs have the burden to prove the specific nature and magnitude of these forward-looking common costs.^{28/}

- ***Consistent with the Pro-Competitive Goals of the Telecommunications Act.*** The allocation of common costs must not be inconsistent with the pro-competition goals of the Telecommunications Act by using a reasonable allocation methodology. The FCC did not specify any particular methodology, but identified two allocators it considered reasonable: (1) a fixed allocator (*i.e.*, the same percentage for all unbundled network elements); and, (2) allocate a small share of common costs to critical network elements that are the most difficult for new entrants to replicate promptly. The FCC concluded that multiple recovery of common costs (*i.e.*, recovering more than the total common costs) or an allocation methodology that recovers the greatest share of common costs from the least elastic elements were unreasonable allocation methodologies.^{29/}

IV. INTERIM STRUCTURE FOR ACCESS CHARGES

The FCC recognized that if unbundled network elements are priced at economic costs, to creates powerful economic incentives for long distance carriers to buy unbundled elements rather than access services, which are priced well above

^{26/} Interconnection Rules § 51.505(c)(2)(B).

^{27/} Interconnection Order at ¶ 694.

^{28/} Interconnection Order at ¶ 695. The FCC envisions that the allocation of common costs will be more of an issue for sub-elements (*e.g.*, identifying the costs of 2-wire loops, 4-wire loops, ISDN loops, etc. distinct from the costs of loops generally)

^{29/} Interconnection Order at ¶ 696.

economic costs. The FCC indicated that it intends to conclude a proceeding focused on access reform by May 1997, coincident with its universal service docket.^{30/}

The FCC required that for an interim period, incumbent LECs may charge a portion of existing carrier common line charges (CCLCs) and transport interconnection charges (TICs) to carriers that purchase unbundled local switching, and **use that element to originate and terminate interstate traffic or intrastate toll calls.**^{31/} Specifically, incumbent LECs may assess all of the interstate CCLC and 75% of the interstate TIC on interstate traffic, and they may assess 100% of intrastate CCLC and TICs plus any intrastate universal service additives for this interim period.^{32/} For interstate charges, the interim period is defined as the shorter of: (1) June 30, 1997, (2) the effective date of the FCC's orders in both of its universal service and access reform dockets, and (3) if the incumbent LEC is a Bell Operating Company, the date on which the LEC is authorized to provide in-region interLATA service.^{33/} For intrastate charges, the interim period is the shorter of: (1) June 30, 1997, (2) if the incumbent LEC is a Bell Operating Company, the date on which the LEC is authorized to provide in-region interLATA service, and (3) the date a state commission decides to eliminate any such state charges.^{34/}

For example, under today's access charge structure, a long distance carrier that originates or terminates interstate traffic at a LEC pays a local switching charge, a CCLC and a TIC, each about 1¢ per minute. Under the FCC's interim access structure, the long distance carrier that buys unbundled local switching would pay the unbundled rate (say 0.4¢), the CCLC and 75% of the interstate TIC during the interim period.

^{30/} Interconnection Order at ¶¶ 716.

^{31/} Interconnection Order at ¶¶ 721 (interstate traffic), 729 (intrastate toll calls). Note that a carrier that uses unbundled switching for local traffic would not be subject to the interim access charges.

^{32/} Interconnection Order at ¶¶ 720-731.

^{33/} Interconnection Order at ¶ 720.

^{34/} Interconnection Order at ¶¶ 731, 31.

V. ITEMS EXPRESSLY EXCLUDED FROM ECONOMIC COSTS BY THE FCC

Several items are explicitly excluded from the costs used to estimate economic costs.

- ▶ **Historical or Embedded Costs.** The incumbent provider's historical or embedded costs are excluded from estimates of the economic costs.^{25/}
- ▶ **Opportunity Costs or the Efficient Component Pricing Rule.** The FCC explicitly excluded opportunity costs (i.e., the profits that incumbent LECs lose as a result of providing an unbundled network element to competitors rather than maintain a monopoly) or the Efficient Component Pricing Rule from estimates of economic cost.^{26/}
- ▶ **Retail Costs.** The costs associated with providing a network element or interconnection include only "wholesale" costs and not the costs of providing retail services to end-users. Thus, billing and collection, marketing expenses and other "retail" costs are excluded from the costs of providing interconnection or unbundled network elements.^{27/}
- ▶ **Revenues to Subsidize Other Services and Universal Service Subsidies.** The price of interconnection or unbundled network elements may not be used to provide a subsidy for any other service and may not be used to provide universal service subsidies.^{28/} The FCC explicitly held that New York's "pay or play" system that funds universal service by imposing higher rates for interconnection, transport and termination, unbundled elements on carriers that focus on particular types of customers violates the Telecommunications Act.^{29/}

^{25/} Interconnection Order at ¶¶ 704-707 and Interconnection Rules § 51.505(d)(1).

^{26/} Interconnection Order at ¶¶ 708-711 and Interconnection Rule § 51.505(d)(3).

^{27/} Interconnection Rules § 51.505(d)(2).

^{28/} Interconnection Rules § 51.505(d)(4) and Interconnection Order at ¶¶ 712-715.

^{29/} Interconnection Order at ¶ 713.

VI. PROXY COST CEILINGS

The FCC established several proxy costs that state commissions may use as a price ceiling until they develop cost studies consistent with the FCC's requirements. Four important aspects of the proxy costs should be emphasized:

1. The proxies are often price ceilings, so that state commissions are free to set rates that are lower than the ceilings.^{40/}
2. The proxies for local loops are subject to the geographic deaveraging requirements, so that they are the average price for a particular element in a study area.^{41/} In developing the proxy costs in its Interconnection Order, the FCC used statewide averages.^{42/}
3. The FCC explicitly rejected the use as proxies of rates in interconnection agreements that predate the Telecommunications Act because such rates were not set in a competitive market environment.^{43/} However, it observed that "[p]rices in agreements reached since the 1996 Act are more likely than prior agreements to provide useful information about forward-looking costs, which together with other information may be useful in establishing proxies."^{44/}
4. The proxies established by the FCC are interim proxies that apply only until a state sets rates in an arbitration on the basis of economic costs or until the FCC promulgates new proxies based on economic cost models.^{45/}

^{40/} Interconnection Order at ¶¶ 784, 797.

^{41/} Interconnection Order at ¶ 784.

^{42/} Interconnection Order at ¶ 793.

^{43/} Interconnection Order at ¶ 785.

^{44/} Interconnection Order at ¶ 785.

^{45/} Interconnection Order at ¶ 787.

5. The proxies, like the pricing standards described by the FCC, are to be used by state commissions in resolving arbitration requests.^{46/} While the FCC does not address whether state commissions must apply the proxies or the costing standards to voluntarily negotiated prices, it appears that parties can agree to prices different than the proxies or based on something other than the FCC's estimate of economic costs. Since the FCC allows parties to take advantage of other interconnection agreements,^{47/} and prohibits incumbent carriers from discriminating against other carriers by charging different prices for services that cost the same,^{48/} prices set in interconnection agreements can be expected to quickly equilibrate at economic costs.

A. Loop Rates

The FCC used the Benchmark Cost Model (BCM)^{49/} and the Hatfield 2.2^{50/} model combined with loop rate data from Colorado, Connecticut, Florida, Illinois, Michigan and Oregon to set proxy cost ceilings for unbundled loops. Specifically, the FCC developed a scaling factor based on the simple average of these six state's average estimates of the statewide incremental cost of loops divided by the national average loop costs reported by the BCM and Hatfield 2.2. The FCC then used applied this scaling factor to the state-by-state loop costs reported by the BCM and Hatfield 2.2 to

^{46/} Interconnection Order at ¶¶ 618. ("If carriers can agree on such prices voluntarily without government intervention, these agreements will be submitted directly to states for approval under section 252. To the extent that the carriers, in voluntary negotiations, cannot determine the prices, state commissions will have to set those prices.")

^{47/} Interconnection Order at ¶¶ 1309-1323.

^{48/} Interconnection Order at ¶¶ 859-862. The FCC flatly prohibits non-cost based discriminatory treatment, so setting identical prices for services with different costs is also be prohibited.

^{49/} *Benchmark Cost Model: A Joint Submission by MCI Communications, Inc., NYNEX Corporation, Sprint Corporation, US West, Inc.* (Dec. 1995)

^{50/} *Hatfield Model, Version 2.2, Release 1* (Hatfield Associates, Inc. March 1996).

develop the proxy loop rates and increased the resulting product by 5% to reflect any common costs not included in the models.^{51/}

The proxy costs for unbundled loops are shown in Attachment 1.

The FCC requires that rates for unbundled loops be geographically deaveraged into at least three zones. It also requires "in all cases the weighted average of unbundled loop prices, with weights equal to the number of loops in each zone, should be less than the proxy ceiling set for statewide average loop cost."^{52/} Thus, a state cannot simply use a single proxy cost for all carriers in the state, but must deaverage into at least three zones it so that the weighted average (with the number of loops as the weights for each zone) is less than or equal to the statewide proxy provided by the FCC.

B. Local Switching

The FCC decided that a combination of a flat-rated charge for line ports and a usage sensitive (per minute) charge for switching and trunk ports best reflect the way costs are incurred for unbundled local switching.^{53/} The FCC established as a proxy a range between 0.2¢ and 0.4¢ per minute for unbundled local switching. It also grandfathered local switching rates as high as 0.5¢ per minute.^{54/} This per minute rate is a blended average of the flat-rated port charge and usage sensitive switching charges.^{55/}

The FCC uses the unbundled local switching rate as the basis for charges for both local and long distance call termination. However, as described above, toll call termination using unbundled local switching is subject to the interim access structure, whereas the rate for local call termination would consist of just the local switching

^{51/} Interconnection Order at ¶ 794.

^{52/} Interconnection Order at ¶ 797.

^{53/} Interconnection Order at ¶ 810. Line side ports refer to the connection to a switch on the customer side of the switch. Trunk side ports refer to the connection to a switch on the carrier's side of the switch.

^{54/} Interconnection Order at ¶¶ 811, 814.

^{55/} Interconnection Order at ¶ 815.

rate.^{56/} The FCC found that state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation for call termination. Traffic originating or terminating outside of a particular local area would be subject to interstate or intrastate access charges.^{57/} In interconnection agreements, carriers typically distinguish between local and toll traffic by segregating local and access traffic on to different trunks and/or reporting the percentage of local traffic similar to how long distance carriers report a Percentage Interstate Usage (PIU) to local exchange carriers.

C. Transport

The FCC required that dedicated transport facilities be priced on a flat rate basis, using the interstate direct-trunked transport rates as a proxy.^{58/} For transport using the tandem, the FCC established a default or proxy rate ceiling of 0.15¢ per minute.^{59/}

D. Databases and Signaling

Interstate rates for database services (*i.e.*, Line Information Database (LIDB) and 800 Database) and signaling (*i.e.*, charges for SS7 signaling) are the proxies for the unbundled provision of database lookups and signaling.^{60/} On average, a LIDB lookup is 3.34¢ per database query.

^{56/} Interconnection Order at ¶¶ 1060-62.

^{57/} Interconnection Order at ¶¶ 1033-38. Note however, that the FCC found that states *do not* have the authority to set local traffic areas with regard to traffic to or from a CMRS network.

^{58/} Interconnection Order at ¶¶ 820, 822.

^{59/} Interconnection Order at ¶ 824.

^{60/} Interconnection Order at ¶ 825.

E. Collocation

States are required to use the same rate structure rules established by the FCC for collocation elements in its Expanded Interconnection order.^{61/} The proxy cost ceiling is the rates that the incumbent LEC has in effect in its federal interconnection tariff, subject to revision by the FCC when it completes its review of such tariffs.^{62/}

F. Capital Costs

The FCC concluded that the currently authorized rate of return at either the federal (11.25%) or state level is a reasonable starting point for TELRIC calculations with respect to the capital costs included in TELRIC estimates.^{63/} The FCC allows states to adjust the cost of capital if an incumbent LEC demonstrates that either a higher or lower cost of capital is warranted.

^{61/} *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, 9 FCC Rcd 5154, 5186 (1994).

^{62/} Interconnection Order at ¶ 826.

^{63/} Interconnection Order at ¶ 702.

Attachment 1
PROXY LOOP PRICES

General Application: States may use proxy costs as a ceiling for the prices of unbundled network elements until they develop estimates of the economic cost (TELRIC plus a reasonable allocation of common costs). States are also directed to geographically deaverage rates into at least three cost-based zones, so that the proxy costs are the average of the zones.

STATE PROXY PRICE CEILINGS FOR THE LOCAL LOOP					
STATE	PROXY CEILING	STATE	PROXY CEILING	STATE	PROXY CEILING
Alabama	\$17.25	Louisiana	\$16.98	Ohio	\$15.73
Arizona	\$12.85	Maine	\$18.69	Oklahoma	\$17.63
Arkansas	\$21.18	Maryland	\$13.36	Oregon	\$15.44
California	\$11.10	Massachusetts	\$9.83	Pennsylvania	\$12.30
Colorado	\$14.97	Michigan	\$15.27	Puerto Rico	\$12.47
Connecticut	\$13.23	Minnesota	\$14.81	Rhode Island	\$11.48
Delaware	\$13.24	Mississippi	\$21.97	South Carolina	\$17.07
D.C.	\$10.81	Missouri	\$18.32	South Dakota	\$25.33
Florida	\$13.68	Montana	\$25.18	Tennessee	\$17.41
Georgia	\$16.09	Nebraska	\$18.05	Texas	\$15.49
Hawaii	\$15.27	Nevada	\$18.95	Utah	\$15.12
Idaho	\$20.16	New Hampshire	\$16.00	Vermont	\$20.13
Illinois	\$13.12	New Jersey	\$12.47	Virginia	\$14.13
Indiana	\$13.29	New Mexico	\$18.66	Washington	\$13.37
Iowa	\$15.94	New York	\$11.75	West Virginia	\$19.25
Kansas	\$19.85	North Carolina	\$16.71	Wisconsin	\$15.94
Kentucky	\$16.70	North Dakota	\$25.36	Wyoming	\$25.11

Swidler & Berlin's
Analysis and Summary of

**The FCC's First Report And Order
And
Second Report And Order
In**

**IMPLEMENTATION OF THE LOCAL COMPETITION
PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996**

(FCC) CC DOCKET 96-98

Orders Dated: August 8, 1996

Analysis Dated: August 9, 1996

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EXECUTIVE SUMMARY

The Federal Communications Commission (FCC) released both of its Interconnection Orders on August 8. The FCC divided its interconnection proceeding into two phases, one dealing with the majority of interconnection issues and the second phase dealing with number administration, dialing parity, and access to rights of way. In total, the two orders are about 1,000 pages long, the key provisions of which are summarized in this document. Highlights of the orders include:

- **Trilogy of Actions.** The FCC views interconnection as a part of a trilogy of regulatory actions necessary to promote competition. Other elements include reforming the subsidies that promote universal service and reforming access to eliminate competition distorting subsidies. The FCC announced that it will complete universal service reform and access charge reform by May 8, 1997.
- **Duty to Negotiate in Good Faith.** The FCC established national rules regarding the duty to negotiate in good faith and identified actions that are considered bad faith.
- **Interconnection Architecture.** The FCC identified a minimum of five "technically feasible" points of interconnection at which incumbents must allow interconnection: (1) line side of a local switch; (2) trunk side of a local switch; (3) trunk interconnection points for a tandem switch; (4) central office cross-connect points; and (5) out-of-band signaling transfer points at which call-related databases are accessed. In addition, the points of access to unbundled elements are considered technically feasible points of interconnection.
- **Access to Unbundled Elements.** The FCC identified a minimum (states may require more) set of network elements that incumbent carriers must provide by January 1, 1997 on an unbundled basis, including: local loops, local and tandem switches (including vertical features), interoffice transmission facilities, network interface devices, signaling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities. Incumbent carriers may not impose restrictions on the uses to which carriers put such network elements.
- **Methods of Obtaining Interconnection and Access to Unbundled Elements.** Incumbent carriers are required to provide any technically feasible method of interconnection, including physical collocation, virtual collocation and interconnection at meet points. The FCC adopted, with certain modifications, the physical and virtual collocation requirements it adopted in its earlier *Expanded Interconnection* docket.
- **Pricing Methodologies.** The FCC required that prices for interconnection and access to unbundled network elements should be based on Total Element Long Run Incremental Cost (TELRIC) plus a reasonable share of forward-looking joint and common costs. For states unable to conduct a cost study within the statutory time frame, the FCC established default price ceilings and ranges to apply to interconnection arrangements. The FCC also required states to geographically deaverage prices for

unbundled network elements by establishing at least three cost-based zones. The default prices are summarized in Attachment 1 to this Executive Summary (at page ix).

- **Access Charges for Unbundled Switching.** The FCC intends to restructure access charges, but recognized the potential for carriers avoiding access charges by buying unbundled network elements at cost-based rates. For an interim period, carriers that buy unbundled switching must pay the carrier common line charge plus 75% of the transport interconnection charge for all interstate minutes that use the switch and intrastate carrier common line charges, transport interconnection charges and any applicable universal service charges for intrastate minutes that use the switch. The interim period is the shorter of: (1) June 30, 1997; (2) the effective date of the FCC's universal service and access charge reform orders; (3) the effective date a state commission decision that an incumbent may not assess such charges; or (4) if the incumbent is a Bell operating company, the date on which the incumbent is authorized to provide in-region interLATA service.
- **Resale.** The FCC directed state commissions to identify marketing, billing, collection and other avoided or avoidable costs associated with the provision of wholesale services. The FCC also identified some avoided costs. States may also elect, on an interim basis, to apply the default discounts established by the FCC set between 17-25%.
- **Requesting Telecommunications Carriers.** Any telecommunications carrier can request interconnection (and must comply with the requirements of Section 251(a)). The FCC found that CMRS providers are telecommunications carriers, but private mobile radio service providers are not except to the extent that they use excess capacity to provide services to the public for a fee. If a company provides both telecommunications services and information services, it is classified as a telecommunications carrier.
- **Commercial Mobile Radio Service.** Incumbent carriers must provide interconnection to CMRS providers, but CMRS providers are not classified as local exchange carriers.
- **Transport and Termination.** Charges for transport and termination must be reciprocal (i.e., same rate for the incumbent or new entrant) and based on the TELRIC that applies to interconnection. The FCC established a default range of 0.2¢ to 0.4¢ per minute for termination at end offices, with significant support for the lower end of the range. For termination at a tandem switch, the default increases by 0.15¢ per minute.
- **Access to Rights of Way.** The FCC implemented the pole attachment provisions of the Telecommunications Act and established procedures to obtain access to poles, ducts, conduits and rights-of-way owned by utilities or incumbent carriers. The procedures include an expedited dispute resolution process when negotiations fail.
- **Obligations of Non-Incumbent Carriers and Exemptions for Rural Carriers.** The FCC established a process for treating non-incumbent carriers as incumbent local exchange carriers, and developed rules governing when a rural carrier may seek an

exemption from the interconnection requirement. The FCC held that carriers must have less than 2% of the nation's access lines at a holding company level to be eligible for the rural exemption.

- **FCC Arbitrations.** If a state fails to arbitrate an interconnection negotiation, the FCC must act in its place. The FCC established its procedures it would use if states fail to act. It will use a "final offer" arbitration where each party presents its best and final offer and the arbitrator chooses among the proposals. The arbitrator may select an entire agreement or choose and combine elements from either agreement.
- **Most Favored Nations.** The FCC concluded that carriers may obtain any individual interconnection, service, or network element under the same terms and conditions as contained in any publicly filed interconnection agreement without having to agree to the entire agreement. Carriers seeking individual elements may seek them through an expedited process rather than through a full interconnection request.
- **Dialing Parity.** The FCC required dialing parity for all telecommunications services and adopted a full 2-PIC presubscription methodology for intraLATA toll calls.
- **Nondiscriminatory Access to Operator Services and Directory Listings.** The FCC ordered nondiscriminatory access to operator services to include a requirement that LECs comply with reasonable requests to "brand" resold operator services.
- **Public Notice of Network Changes.** The FCC adopted guidelines governing the type of information that LECs must make available to provide notice of changes to their networks that affect interconnectors.
- **Numbering Administration.** The FCC reaffirmed its numbering guidelines set out in the *Ameritech* order that restrict area code overlays and generally prohibited service-specific or technology-specific area code overlay plans.

Attachment 1
KEY INTERCONNECTION PRICES

General Application: States may use proxy costs as a ceiling for the prices of unbundled network elements until they develop estimates of the economic cost (TELRIC plus a reasonable allocation of common costs). States are also directed to geographically deaverage rates into at least three cost-based zones, so that the proxy costs are the average of the zones.

STATE PROXY PRICE CEILINGS FOR THE LOCAL LOOP					
STATE	PROXY CEILING	STATE	PROXY CEILING	STATE	PROXY CEILING
Alabama	\$17.25	Louisiana	\$16.98	Ohio	\$15.73
Arizona	\$12.85	Maine	\$18.69	Oklahoma	\$17.63
Arkansas	\$21.18	Maryland	\$13.36	Oregon	\$15.44
California	\$11.10	Massachusetts	\$9.83	Pennsylvania	\$12.30
Colorado	\$14.97	Michigan	\$15.27	Puerto Rico	\$12.47
Connecticut	\$13.23	Minnesota	\$14.81	Rhode Island	\$11.48
Delaware	\$13.24	Mississippi	\$21.97	South Carolina	\$17.07
D.C.	\$10.81	Missouri	\$18.32	South Dakota	\$25.33
Florida	\$13.68	Montana	\$25.18	Tennessee	\$17.41
Georgia	\$16.09	Nebraska	\$18.05	Texas	\$15.49
Hawaii	\$15.27	Nevada	\$18.95	Utah	\$15.12
Idaho	\$20.16	New Hampshire	\$16.00	Vermont	\$20.13
Illinois	\$13.12	New Jersey	\$12.47	Virginia	\$14.13
Indiana	\$13.29	New Mexico	\$18.66	Washington	\$13.37
Iowa	\$15.94	New York	\$11.75	West Virginia	\$19.25
Kansas	\$19.85	North Carolina	\$16.71	Wisconsin	\$15.94
Kentucky	\$16.70	North Dakota	\$25.36	Wyoming	\$25.11

Local Switching -- between 0.2¢-0.4¢ per minute; 0.15¢ per minute additional for termination at tandem switch.

Wholesale discount -- between 17% and 25% below existing retail rates.

[Analysis of Full Text of First and Second Report And Orders
in CC Docket 96-98 Follow Immediately]

Summary Analysis of
IMPLEMENTATION OF THE LOCAL COMPETITION
PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996
CC DOCKET 96-98
FIRST REPORT AND ORDER
AND
SECOND REPORT AND ORDER

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Section headings and [¶ xx] numbers are from the FCC's Orders. Rules adopted by the FCC are cited as [Rules § 51.xxx]. BOC = Bell Operating Companies; ILEC = Incumbent Local Exchange Carrier; CLEC = Competitive Local Exchange Carrier; NPRM = Notice of Proposed Rulemaking

FIRST REPORT AND ORDER

II. SCOPE OF THE COMMISSION'S RULES [¶¶ 41 - 137]

A. The Commission Adopts National Rules Where Necessary

In implementing § 251 of the Act, the FCC concluded "some" national rules are necessary to promote Congress' goals for a national policy framework, and that states should have the major responsibility for prescribing the specific terms and conditions that will lead to competition in local exchange markets. [¶ 41] Addressing the scope of authority of the FCC and state commissions, the FCC stated that "the steps necessary to implement § 251 are not appropriately characterized as a choice between specific national rules on one hand and substantial state discretion on the other." Rather, the FCC explained, the agency adopts national rules where they:

facilitate administration of sections 251 and 252; expedite negotiations and arbitrations by narrowing [in appropriate cases] the potential range of dispute; offer uniform interpretations of the law that might not otherwise emerge until after years of litigation; remedy significant imbalances in bargaining power; and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish. [¶ 41]

The FCC stated that while some of the national rules adopted will be relatively self-executing, others will require the states to exercise significant discretion and make critical decisions through arbitrations and development of state-specific rules. *Id.*

B. Promulgation of National Rules Will Expedite Fair Negotiations

The FCC concluded that the states and the FCC can craft a working partnership that is built on mutual commitment to local telephone competition throughout the country. As envisioned by the FCC, under this partnership, the FCC establishes uniform national rules for some issues; the states (and in some instances the FCC) administer those rules; and the states adopt additional rules (which may take into account local concerns) that are critical to local telephone competition. [¶ 53]

The FCC emphasized that the Act permits parties to voluntarily negotiate agreements without regard to the rules established under §§ 251(b) and (c). Fair negotiations, however, will be expedited by the promulgation of national rules and state arbitration of interconnection agreements similarly will be expedited and simplified by promulgation of national rules, which will provide a baseline for terms and conditions for *all* arbitrated agreements, absent mutual consent to different terms. [¶¶ 56, 60] Furthermore, national standards will enable the FCC and states to carry out other responsibilities under the Act such as, for example, enabling the FCC to respond if it is obligated to assume § 252 responsibilities because a state commission has failed to act. [¶ 57] Additionally, in light of the short time frames for state review of agreements under § 252, establishing minimum requirements that arbitrated agreements must satisfy will assist states in arbitrating and reviewing such agreements. *Id.*

The FCC also concluded that to enable parties to take advantage of all applicable FCC and state rules as they evolve, arbitrated agreements must permit parties to incorporate changes to such rules without abrogating the entire contract. [¶ 58] Under § 51.301(c) of the new rules, a party's refusal to include a provision permitting such amendment violates the duty to negotiate in good faith.

C. The Commission Has the Legal Authority to Establish Rules Applicable to Intrastate Aspects of Interconnection, Resale Services and Unbundled Network Elements [¶¶ 69 - 103]

The FCC concluded that *§§ 251 and 252 address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled network elements.* Congress, in enacting §§ 251, 252 and 253, altered the Communication Act's dual regulatory framework, which gave jurisdiction over interstate matters to the FCC and gave intrastate matters to the states. Consequently, the 1996 Telecommunications Act extend national rules to historically intrastate issues, and state rules to traditionally interstate issues. [¶¶ 83-84]

Sections 251 and 253 create "parallel jurisdiction" for the FCC and the states. The FCC explained that these sections "require the FCC to establish implementing rules to govern interconnection, resale of services, [and] access to unbundled network elements . . . and direct the states to follow the Act and those rules for arbitrating and approving arbitrated agreements

under sections 251 and 252." Parallel jurisdiction over both interstate and intrastate matters is "the inevitable inference." [¶¶ 85, 92]

The FCC further concluded that its regulations under § 251 are binding on the states, even with respect to intrastate issues. The FCC noted that § 252 provides that the agreements state commissions arbitrate must comply with the FCC's regulations established pursuant to § 251. The FCC also noted that § 253 requires the FCC to preempt state or local regulations or requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [¶ 101]

D. National Pricing Rules Will Assist States to Review and Arbitrate Agreements

The FCC concluded, moreover, that national pricing rules are a "critical component" of the interconnection regime established in §§ 251 and 252, helping states review and arbitrate contested agreements on a timely basis. [¶ 113] In reaching this conclusion, the FCC rejected arguments that § 252(c) indicates Congress's intent for the FCC to have little or no authority with respect to pricing of interconnection, access to unbundled elements, and collocation. According to the FCC, states must comply with both the statutory standards under § 252(d) and the regulations prescribed by the FCC pursuant to § 251, when arbitrating rate disputes (or when reviewing BOC statements of generally available terms). "Section 252(c) enumerates three requirements that states must follow in arbitrating issues. These requirements are not set forth in the alternative; rather, states must comply with all three." [¶ 118]

E. The Commission Has Authority to Take Enforcement Action

Section 252(e) relates to review of state commission actions, providing that "in any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of § 251 and this section." The FCC concluded that parties have several options for seeking relief if they believe that a carrier has violated the standards under §§ 251 or 252, including bringing an action for federal district court review or filing with the FCC a § 208 complaint. Additionally, the aggrieved party may request a declaratory ruling from the FCC, or seek informal consultations with the FCC. [¶¶ 124-125, 127-128].

The FCC further concluded that § 252(e)(6) does not divest the FCC of jurisdiction over complaints that a carrier violated § 251 or 252 of the Act. The FCC noted that § 601(c)(1) of the Act provides that the Act shall not be construed to modify, impair or supersede existing federal law, which includes the § 208 complaint process (unless expressly so provided). Accordingly, the FCC concluded that §§ 251 and 252 do not divest the FCC of its § 208 complaint authority. [¶ 126]. The FCC emphasized, however, that in reviewing a § 208 complaint, the FCC would consider only whether the carrier's actions were in contravention of the Communications Act. "[The FCC] would not be directly reviewing the state commission's decision." [¶ 128]

III. DUTY TO NEGOTIATE IN GOOD FAITH [¶¶ 138 - 171]

Section 251(c)(1) of the Telecommunications Act requires incumbent local exchange carriers (ILECs) and interconnecting telecommunications carriers to negotiate in good faith the terms and conditions of agreements to fulfill the duties established by §§ 251(b) and (c) of the Act. Under § 252(b)(5), a party's refusal to participate further in the negotiations, to cooperate with the state commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence or with the aid of the state commission, if proved, constitutes a failure to negotiate in good faith.

A. The Commission Adopts National Standards Regarding Good Faith Duty to Negotiate

The FCC concluded that establishing "some" national standards regarding the duty to negotiate in good faith could help reduce areas of dispute and expedite negotiations. [¶ 141] Recognizing, however, that it would be futile to try to determine in advance every possible action that might be inconsistent with that duty [¶142], the FCC identified in its rules eight actions that, if proved, violate the duty to negotiate in good faith, [Rules § 51.301(c)] including:

- ▶ Demanding that another party sign a non-disclosure agreement that precludes providing information to regulators as part of the arbitration;
- ▶ Demanding that an interconnector attest that an agreement complies with all the provisions of the Telecommunications Act, federal regulations or state law;
- ▶ Refusing to include in an agreement a provision that allows the agreement to be amended to account for regulatory changes;
- ▶ Conditioning negotiations on a requirement that an interconnector first obtain a state certificate;
- ▶ Intentionally misleading or coercing another party into an agreement that it would not have otherwise made;
- ▶ Intentionally delaying or obstructing negotiations or dispute resolution;
- ▶ Refusing to designate a responsible negotiator with the authority to make binding representations; and,
- ▶ Refusing to provide information necessary to reach agreement, including refusal to furnish cost data and refusing to provide network information.

The FCC, moreover, expressed its belief that state commissions have authority, under § 252(b)(5), to consider allegations that a party has failed to negotiate in good faith. According to the FCC, specific determinations of whether a party has acted in good faith are to be decided by a state commission, court, or the FCC on a case-by-case basis. The Report and Order, however, does not indicate the basis for determining which of the three entities will review such

allegations. The FCC also stated that the FCC has authority to review complaints alleging bad faith pursuant to its traditional authority to address formal complaints. [¶143]

B. Section 252 Applies to Preexisting Agreements

The FCC also concluded that interconnection *agreements negotiated before the 1996 Act was enacted, including agreements between neighboring LECs, must be filed for review by the state commission pursuant to § 252(e)*. [¶165] [Rules § 51.303] The FCC, however, declined to require immediate filing of pre-existing agreements, directing the states to establish procedures and reasonable time frames for requiring such filings. [¶171]

IV. INTERCONNECTION ARCHITECTURE

Section 251(c)(2) imposes on an ILEC the duty to provide interconnection with its network for any requesting carrier. Such interconnection must be

- (1) provided by the ILEC at "any technically feasible point within [its] network;
- (2) "at least equal in quality to that provided by the local exchange carrier to itself or . . . [to] any other party to which the carrier provides interconnection; and
- (3) provided on rates, terms and conditions that are "just, reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements this section and section 252."

A. Relationship Between Interconnection and Transport and Termination [¶ 176]

The FCC defined the term "interconnection" under § 251(c)(2) as "the physical linking of two networks for the mutual exchange of traffic." The FCC purposely excluded the transport and termination of traffic from the scope of this term to avoid nullifying the duty of ILECs to establish "reciprocal compensation arrangements for the transport and termination of traffic" pursuant to § 251(b)(5) and to avoid setting a pricing standard for transport and termination of traffic apart from the pricing standard for facilities and equipment pursuant to § 252(d)(1).

B. National Interconnection Rules [¶¶ 179-180]

The FCC concluded that national interconnection rules pursuant to § 251(c)(2) are required to remove barriers of entry to the telephone exchange market. The FCC reasoned that uniform rules would not only allow carriers to plan regional or national networks, but also guarantee minimum nondiscrimination safeguards and consistent quality in each state. In an effort to avoid overly comprehensive rules and to avoid addressing issues for which there is inadequate information, the FCC's rules allow the states to impose procompetitive interconnection requirements that are consistent with the Act and its regulations.

C. Interconnection for the Transmission and Routing of Telephone Exchange Service and Exchange Access [¶¶ 184-185]

Section 251(c)(2) obligates ILECs to provide "interconnection with the [ILEC's] network . . . for the transmission and routing of telephone exchange service and exchange access." The FCC determined that this provision permitted a carrier to request interconnection for purposes of transmitting and routing (1) telephone exchange service, (2) exchange access or (3) both. The FCC reasoned that allowing a carrier to provide either service removes another barrier to entry and would facilitate the entry of new competitors into the local exchange markets.

D. Interexchange Service is Not Telephone Exchange Service or Exchange Access [¶¶ 190-191]

ILECs are obligated to provide interconnection and nondiscriminatory access to unbundled network elements to "any requesting telecommunications carrier" pursuant to §§ 251(c)(1) and (c)(3). The FCC determined that interexchange carriers (IXCs) are telecommunications carriers because they provide telecommunications services by originating and terminating interexchange traffic. Therefore, all carriers, including traditional IXCs, are entitled to interconnection to terminate calls originating from their customers residing within the same exchange. The FCC made the distinction, however, that IXCs seeking interconnection *solely* for the purpose of originating or terminating its *interexchange* traffic are not entitled to interconnection. [¶ 191] An IXC may only obtain interconnection for the purpose of providing telephone exchange service or exchange access on an ILEC's network.

E. Definition of "Technically Feasible" [¶¶ 198-206]

ILECs must provide interconnection within their networks at any "technically feasible point," and must provide access to unbundled elements at any "technically feasible point" pursuant to §§ 251(c)(2) and (c)(3). The FCC determined that "technically feasible" "refers to technical or operational concerns, rather than economic, space, or site considerations." [¶ 198]

The FCC provided additional insight into the definition of "feasible." An interconnection or access at a particular point may be feasible even if that point requires a novel use of, or some modification to the ILEC's network facilities to accommodate the interconnection or access. [¶ 202] Moreover, preexisting interconnection at a particular point and at a certain level of quality is evidence of technical feasibility for that point and for substantially similar points at that same level of quality.

The FCC determined that Congress deliberately distinguished economic issues from the determination of technical feasibility. Carriers requesting an expensive but technically feasible interconnection, however, must compensate the ILEC for the cost of that interconnection including a reasonable profit. Restricted space also is generally not an issue in the determination of technical feasibility. When physical collocation is not feasible because of limited space, ILECs must provide virtual collocation. Where expansion is possible, space restrictions are not an obstacle to technical feasibility, but the requesting party again would bear the expansion costs. Where expansion is not possible, however, interconnection or access at that site may not be technically feasible.

Network reliability and security concerns are relevant to the determination of technical feasibility. If an ILEC establishes by clear and convincing evidence that the interconnection or

access would have a "specific and significant adverse impact" on its network, it may successfully prove that the interconnection or access is not technically feasible. [¶] 203] ILECs bear the burden of proving to a state commission that interconnection or access at a particular point is not technically feasible. They also are obligated to make general information regarding the location and technical characteristics of ILEC network facilities available to requesting carriers.

F. Technically Feasible Points of Interconnection [¶¶] 209-212]

The FCC identified a minimum set of technically feasible points of interconnection. It includes:

- (1) the line-side of a local switch;
- (2) the trunk-side of a local switch;
- (3) the trunk interconnection points for a tandem switch;
- (4) central office cross-connect points;
- (5) out-of-band signaling transfer points; and
- (6) points of access to unbundled elements.

An ILEC bears the burden of proving to a state commission that such points are not technically feasible, otherwise it must provide interconnection at those points.

G. Just, Reasonable, and Nondiscriminatory Rates, Terms, and Conditions of Interconnection [¶¶] 216-220]

ILECs must provide interconnection "on rates, terms and conditions that are just, reasonable and nondiscriminatory," pursuant to § 251(c)(2)(D). The FCC emphasized that Congress intended that the term "nondiscriminatory" in the 1996 Act to be a more stringent standard than the phrase "unjust and unreasonable discrimination" in the 1934 Act. The FCC stated that *an ILEC violates the duty to be "just" and "reasonable" under the 1996 Act if it provides interconnection to a competitor in a manner less efficient than it provides to itself*. In addition, an ILEC may not discriminate against parties based upon the identity of the carrier (*i.e.*, whether the carrier is a CMRS provider, a Competitive Access Provider, or a competitive local exchange carrier (CLEC)). Moreover, an ILEC would not be just, reasonable and nondiscriminatory if it refused to accommodate two-way trunking upon request where technically feasible.

H. Interconnection that is Equal in Quality [¶¶] 224-225]

An ILEC must provide interconnection "at least equal in quality to that provided by the [ILEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection," pursuant to § 251(c)(2)(C). The FCC concluded that this "equal in quality" standard requires an ILEC to provide interconnection that "is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate or other party." [¶] 224] This standard is not limited to the quality perceived by end users.

The FCC also indicated that "at least" equal in quality is a minimum requirement. An ILEC must provide an interconnection at superior or lesser quality if requested and if the arrangement is technically feasible. The requesting carrier, however, must bear the cost burden of a superior quality interconnection arrangement.

V. ACCESS TO UNBUNDLED ELEMENTS

A. Commission's Authority and Scope of Nationwide Regulation

Under § 251(c)(3), ILECs must provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point pursuant to reasonable rates, terms and conditions. [¶ 226] The FCC concluded that its obligation to take all action necessary to implement this section requires it to identify network elements that the ILEC's must offer on an unbundled basis.

Rather than adopting an exhaustive list of elements, however, the FCC has chosen to adopt a minimum list which can be augmented by the states if they find that further unbundling is necessary to advance competition. [¶¶ 241-248] The FCC found that some absolute requirements were necessary because "historically, the ILECs have had strong incentives to resist, and have actively resisted, efforts to open their networks to users, competitors, or new technology-driven applications of network technology." [¶ 241] However, an exhaustive list might fail to accommodate changes in technology and the need of the states to address local conditions. [¶ 243]

B. Standards for Identifying Unbundled Network Elements [¶¶ 271 -288]

By statute, unbundling of a network element is required only where technically feasible. Furthermore, in deciding what should be unbundled the FCC is required to 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 elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." [¶ 271] The FCC concluded that the proprietary and impairment standards contained in § 251(d)(2) allow it to refrain from requiring the unbundling of elements even if it is technically feasible to do so where these considerations weigh against unbundling. [¶ 279]

C. Identification of Network Elements

Section 153(29) of the Communications Act defines "network element" as both "a facility or equipment used in the provision of a telecommunications service" and "features, functions, and capabilities that are provided by means of such facility or equipment." The FCC interprets this definition as allowing competitive carriers to purchase the right to obtain exclusive access to an entire element (such as the loop) or some feature, function or capability of the element (with respect to shared facilities such as common transport). [¶ 258] The FCC also interprets this definition broadly, to include "facilities or equipment used in the provision of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment including subscriber numbers, databases, signaling

systems and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." [¶ 262] Thus the definition includes software and elements sold directly to end users as retail services, such as call forwarding and caller ID.

D. Specific Unbundling Requirements

1. Local Loop [¶¶ 367-396]

The FCC agreed with most commenting parties that the local loop must be unbundled because it is technically feasible to do so and access to the loop is critical to the development of competition. The FCC defines the local loop element as "a transmission facility between a distribution frame, or its equivalent, in an ILEC central office, and the network interface device at the customer premises." [¶ 380] Thus, two and four-wire analog loops used for voice transmission, as well as two and four wire digital loops used for ISDN, ADSL, HDSL and DS1-level signals are included in the definition.

The FCC identifies the main distribution frame in a local exchange carrier (LEC) central office as the appropriate access point for the loop. If it is not technically feasible for the LEC to provide access to these facilities they will not be required to do so. For example, if a loop exceeds the maximum allowable length for the provision of high-bit-rate digital service it may have to be broken down into subloops and sold that way. [¶ 381] However, the FCC rejects the suggestion that competitors be required to "take ILECs as they find them," and instead finds that ILECs have a duty to undergo some modification of their facilities in order to provide certain services, with the cost being born by the requesting carrier. For example, if a requesting party seeks to provide ADSL and the loop is not conditioned for digital signals, the ILEC must condition the loop, but the requesting party must pay for the conditioning. In addition, ILECs must provide cross-connect equipment between an unbundled loop and the requesting carrier's collocated equipment. [¶ 386] The FCC declined to adopt a specific cutover time limit, however, preferring to monitor the situation under its regulations that provide for the provision of service on a nondiscriminatory basis. [¶ 387]

The FCC declined to identify any subloop elements to be unbundled, but will allow subloop unbundling by the states or through contracts between the parties. [¶¶ 389-391] The FCC concluded that the technical feasibility of subloop unbundling would be better determined on a case-by-case basis by the states. The only exception is the FCC's requirement that competitors using their own loops be allowed to connect to the network interface device (NID). [¶ 392] Whether competitors can be allowed to connect directly to the NID was left up to the states.

2. Switching Capability [¶¶ 397 - 427]

The second element identified by the FCC as one that must be unbundled to meet the minimum requirements, is the switching capability of the ILECs' networks. *The FCC found that it was technically feasible and desirable to require unbundled access to the ILECs' Local and Tandem Switching capabilities but not their Packet Switching Capability.*

With respect to local switching, the FCC noted that Congress had already recognized the technical feasibility and desirability of unbundling in § 271 of the Act which specifically requires BOCs to provide "local switching unbundled from transport, local loop transmission, or other services" as a precondition to providing interLATA service. [¶ 410] The local switching element is defined to include line-side and trunk-side facilities plus the features, functions, and capabilities of the switch. [¶ 412]

The FCC also rejected the argument that vertical switching features, such as call waiting, be considered purely retail, and found that competitors must be given access to such features. Under the minimum requirements, the FCC has recognized only a single local switching element however, rather than identifying separate local switching and vertical switching elements. The FCC found that the local switching element must include all functionality rather than merely a point of access to the switch in order to comply with the requirements of 251(c)(3) that ILECs provide the network elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunication service." [¶ 422 (citing, 47 U.S.C. §251(c)(3))]

The FCC rejected all of the arguments put forth by the ILECs that providing access to an unbundled local switching element at the ILECs' central office would not be technically feasible. [¶¶ 415-418] In fact, the FCC found that customized routing, whereby the requesting carrier would be allowed to specify the outgoing trunks that would carry certain classes of the carrier's traffic is also technically feasible and access will be mandated.

The FCC also found that it was technically feasible for the ILECs to provide access to their tandem switches unbundled from interoffice transmission facilities. It noted that some states already require unbundling of this element. [¶ 425] The Tandem switch element is defined to include the facilities connecting the trunk distribution frames to the switch, and all functions of the switch itself.

Finally, the FCC concluded that its record was insufficient to determine the technical feasibility of unbundling the ILECs packet switches. The FCC left open the possibility of identifying this as an unbundled element in the future after further review.

3. *Interoffice Transmission Facilities* [¶¶ 428 - 451]

The FCC held that unbundled access to interoffice transmission facilities was technically feasible and would promote competition. Therefore, the order requires ILECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch and to dedicated transmission facilities between ILEC central offices. [¶ 440] Furthermore the ILEC must provide access where technically feasible to all transmission capabilities, such as DS1, DS3, and optical carrier (e.g., OC3) levels. The ILEC must provide unbundled access to interoffice facilities between end offices and switching offices and serving wire centers. Unbundling these facilities will, according to the FCC speed new entry into the market by allowing competitors to purchase all interoffice facilities from the ILEC or to combine some ILEC facilities with some of the competitor's. [¶ 441] As part of this element, competing carriers must be granted access to digital cross-connect system functionality. [¶ 444] Unlike some other

elements, however, in consideration of the economic impact on rural LECs, the FCC expressly limited the provision of unbundled interoffice facilities to existing ILEC facilities.

4. *Databases and Signaling Systems* [¶¶ 452-504]

In its Notice of Proposed Rulemaking (NPRM), the FCC tentatively concluded that these elements should be unbundled and sought comments from the parties regarding the best point of interconnection and the functions that should be made available to competitors. The most common system, Bellcore's SS7, transmits signaling information in packets, from a local switch to a signaling transfer point (STP). The STP switches packets onto other links according to the information contained in the packet. The FCC concluded that STP to STP interconnection would be required in order to allow for the exchange of signaling information. The FCC found that access to unbundled signaling links and STPs is technically feasible and essential to the development of competition.

In addition, the FCC also required the ILECs to provide unbundled access to their call-related databases for the purpose of switch query and database response through the SS7 network. For example, ILECs must provide access to their Line Information Database, their Toll Free Calling Database and Number Portability downstream databases. [¶ 484] However, the FCC found that it was not technically feasible to separate the SCP from its associated STP, noting that the vast majority of parties stated that it was impossible to access call-related databases in any manner other than connecting to the STP that is directly linked to the call-related database.

Although the FCC found that it was also technically feasible to allow access to ILECs' Advanced Intelligent Network Service (AIN), it held that such access needed to be mediated in order to protect data and to ensure against excess traffic volumes. Therefore, this access is not included in the minimum unbundling requirements. ILECs must provide competitors sufficient access to design and use their own AINs. However, access to the ILECs AIN will only be required if an agreement is mediated. The State commissions can adopt mediation mechanisms if necessary, and the ILECs may adopt reasonable certification and testing programs for carriers proposing to access AIN call-related databases. [¶ 488]

The FCC concluded that access to service management systems (SMS) must be provided to allow competitors to create, modify, or updated information in call-related databases. The FCC found the technical feasibility as well as necessity for this access so that competitors can effectively use the call-related databases. Again, however, the FCC noted that the SMS access to AIN's may need to be limited on a case-by-case basis through mediation, particularly since some parties identified proprietary concerns regarding this access. [¶ 496] Nonetheless, such access was found to be necessary under § 251(d)(2)(A).

Finally, the FCC stated that it had insufficient evidence to determine the technical feasibility of interconnection to third party call-related databases. Access to these may be included in the amended rules but will not be required at this time.

5. *Operation Support Systems* [¶¶ 504 - 528]

The FCC held that operations support systems fall squarely within the statutory definition of "network element" and so competitors must be given unbundled access to them. These systems are defined as "pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an ILEC's databases and information." [Rules §51.319(f) and ¶ 523] The FCC noted that some states already require access to these databases, thereby indicating the technical feasibility. Furthermore, it found that these services are essential to allowing new entrants to compete against incumbents. It recognized that provision of this access might require some modification to existing systems, thus access will not be required until January 1, 1997.

6. Other Network Elements [¶¶ 529 - 541]

Finally, the FCC followed up on its request in the NPRM for suggestions of additional elements that should be unbundled. In the Order the FCC found that access should also be provided to directory assistance and operator services on an unbundled basis. The access must be provided at any technically feasible point. [¶ 534] The FCC notes that such access must conform with § 222 which restricts the access of competitors to each others customer proprietary network information (CPNI). Specifically, requiring access to directory assistance information does not require ILECs to divulge unlisted and unpublished telephone numbers. [¶ 535] Competitors must be allowed access to insert customer information into the databases as well as reading the information contained therein. The implementation of the information insertion portion of the access can be mediated between the parties. [¶ 538]

E. Access to Network Elements [¶¶ 265-270]

The FCC's NPRM sought comments on how to interpret the statutory requirement that ILECs provide "access" to network elements "on an unbundled basis." [¶ 265] It concluded that these terms mean that "ILECs must provide the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements, for a separate fee." [¶ 268]

F. Provision of Telecommunications Service Through Use of Unbundled Network Elements [¶¶ 289-297]

Section 251(c)(3) requires that access be provided "in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service. The FCC concluded that this language "bars ILECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend." [¶ 292] For example, the ILEC cannot separate elements that are ordered in combination unless the requesting carrier asks for the separation. The incumbent carrier must combine elements that the requesting carrier is physically unable to combine. [¶ 294] The FCC did not require the ILECs to combine elements in any technically feasible manner, as such a requirement could affect the integrity of the ILECs system. However, ILECs may be required to provide the same element in different ways depending upon the use to which the requesting carrier plans to put it, to the same extent that the ILEC uses the elements differently itself. [¶ 297]

G. Nondiscriminatory Rates, Terms and Conditions [¶¶ 298 - 316]

The FCC's NPRM requested comments on the possibility of adopting minimum national requirements governing the terms and conditions for the provision of unbundled elements. The FCC concluded that it is necessary to establish rules defining the obligations of the ILECs to provide nondiscriminatory access on just and reasonable terms and conditions. [¶ 307] It concluded that adoption of these rules will reduce litigation costs and enable states to conduct arbitrations more quickly. The FCC concluded that nondiscriminatory access referred to both the physical or logical connection to the element as well as the element itself. [¶ 312] According to the FCC the term nondiscriminatory access means that the quality of the element and the quality of the access to it must be the same for all carriers, including, where technically feasible, the same quality of access to the element that the ILEC provides to itself. The FCC allows disparate treatment of the ILEC on occasion, recognizing that it may not always be technically feasible to provide the identical quality of access. [¶ 313] Finally, the FCC notes that the requirement that the access provided the requesting carrier must be at least as good as that provided to the ILEC does not excuse the ILEC from providing higher quality access when requested and when feasible.

The FCC held that providing the unbundled elements the terms on "just and reasonable terms and conditions" means that, at a minimum, "whatever the terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the ILEC provisions such elements to itself." [¶ 315]

H. Relationship between §§ 251(c)(3) and 251(c)(4) [¶¶ 317 - 341]

Section 251(c)(4) provides that ILECs must offer "for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers that are not telecommunications carrier." [¶ 317; 47 U.S.C. § 251(c)(4)] In the NPRM the FCC sought comments on how to reconcile this provision and the unbundled element section. Some parties argued that the existence of both provisions indicated that "resellers" with no facilities of their own must purchase combined network elements at wholesale prices and that "unbundled elements" would be available only to facilities based carriers. The FCC rejected this, concluding that the language does not suggest a limitation on the rights of requesting carriers. [¶ 328] Thus carriers will have the option of purchasing entire network services at wholesale prices or creating their own services by combining unbundled elements.

I. Provision of Interexchange Services Through the Use of Unbundled Elements [¶¶ 342 - 365]

In the NPRM, the FCC tentatively concluded that interexchange carriers were entitled to access to unbundled elements. The FCC affirmed this conclusion, finding that it was compelled by the language of the statute which allows access to unbundled elements for the provision of "telecommunications service" which clearly includes exchange access and interexchange services. [¶ 356] However, the FCC also concluded that it had the authority under the 1934 Act to adopt a transitional plan whereby carriers purchasing access to unbundled network elements to provide interexchange and exchange access services will not be required to pay federal or

state access charges, except as described in Section VII (Pricing of Interconnection and Unbundled Elements), *infra*.

VI. METHODS OF OBTAINING INTERCONNECTION AND ACCESS TO UNBUNDLED NETWORK ELEMENTS

A. Overview [¶¶ 543-554]

Because § 251(c)(2) of the Telecommunications Act does not limit the ILECs' duty to interconnect to a specific method of interconnection or access to unbundled elements, the FCC concluded that **any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements at a particular point.** The FCC placed the burden of proof on the refusing LEC to establish that specific technical or space limitations exist that render physical collocation infeasible. The FCC refused to limit interconnection points to only those location where collocation is possible, noting that this was never Congress' intent, given the interconnection obligations of ILECs under § 251(c)(2) to make interconnection available at "any technically feasible point."

The FCC also required ILECs to provide virtual collocation, having determined that smaller carriers may prefer virtual collocation in certain instances, as a less costly method of collocation, and that such provision will not impose an undue burden on the ILECs, because the requesting carriers themselves bear the costs of this method of interconnection. The FCC found nothing under the Telecommunications Act to limit its authority to require the provision of virtual collocation. The FCC noted that, without such authority, competitive providers would be forced to undertake costly and burdensome actions to convert back to physical collocation arrangements, despite the fact that they may have been satisfied with their existing virtual collocation arrangements. The FCC found that the prospect of not requiring ILECs to provide virtual collocation would serve only to restrict the expanded interconnection choices available to requesting carriers—a prospect contrary to the procompetitive intentions of the Telecommunications Act.

In addition to physical and virtual collocation, the FCC also required ILECs to make available, upon request, other methods of technically feasible interconnection, such as meet point arrangements. Despite the fact that meet point arrangements may require ILECs to build out facilities, the FCC found that such arrangements are within the scope of the ILECs' §251(c)(2) and (3) *interconnection* obligations, and that, under such an arrangement, it is appropriate for both carriers to contribute a reasonable portion of the economic costs of the arrangement. However, the FCC declined to extend the requirement to provide meet point arrangements for *unbundled access*, stating that, in an access arrangement pursuant to §251(c)(3), the new entrant should bear all of the economic costs of a meet point arrangement because the interconnection point will be a part of the new entrant's network, and will be used to carry traffic between elements in the new entrant's network.

Finally, the FCC created a rebuttable presumption that if a particular method of interconnection is currently employed between two networks or has been used successfully in the past, such a method is technically feasible for *substantially similar network architectures*.

The ILECs must bear the burden of demonstrating the technical infeasibility of a particular method of interconnection or access at any individual point.

B. Collocation

1. Collocation Standards [NPRM 555-607]

a. Adoption of National Standards

The FCC adopted explicit national standards to implement the collocation requirements of the Telecommunications Act, in an effort to remove barriers to entry and speed the development of competition. The FCC noted that the record established in its *Expanded Interconnection* proceeding indicated that the ILECs have an economic incentive to interpret regulatory ambiguities to delay entry by new competitors, and, as a result, detailed national collocation rules are warranted. However, the FCC allowed state commissions the flexibility to apply *additional* collocation requirements that otherwise are consistent with the Telecommunications Act and with the FCC's national collocation rules.

b. Adoption of Expanded Interconnection Terms and Conditions for Physical and Virtual Collocation under § 251

In establishing its collocation regulations, the FCC adopted its previous *Expanded Interconnection* rules, with certain modifications. The FCC found that the expedited statutory time frame and limited record addressing collocation under § 251 of the 1996 rendered impractical the development of numerous new substantive collocation requirements in this Order. Nevertheless, the FCC acknowledged that certain modifications to its *Expanded Interconnection* rules were necessary, given the specific physical collocation mandate of §251(c)(6) and the different service arrangements required under § 251(c)(2) and (3) of the Telecommunications Act.

The FCC chose not to require federal tariffing requirements for collocation arrangements, but expressly stated that its *Expanded Interconnection* tariffing requirements for interstate special access and switched transport will continue to apply for those services. However, the FCC strongly urged state commissions to be vigilant in their review of intrastate physical and virtual collocation tariffs, stating that, historically, ILEC tariffs have warranted close scrutiny.

c. The Meaning of the Term "Premises"

As proposed in its *Interconnection NPRM*, the FCC chose to define "premises" in a broad manner, to include "LEC central offices, serving wire centers, and tandem offices, [and] all buildings or similar structures owned or leased by the incumbent LEC that house network facilities." The FCC also will treat any structures that house LEC network facilities on public rights-of-way as ILEC premises. The FCC adopted this broad definition in an effort to allow collocation at points *other than those specified for collocation under the existing Expanded Interconnection requirements*.

However, the FCC refused to adopt a definition of premises that depends on whether interconnection or access to unbundled network elements at a particular point is "technically feasible," or on whether it is "practical" to collocate equipment at a particular point. The FCC emphasized that because neither physical nor virtual collocation is required at points that are not technically feasible, the definition of premises adopted in this Order will enable competitors to take advantage of opportunities to collocate equipment, without imposing undue burdens on LECs of any size.

d. *Collocation Equipment*

In an effort to promote fair competition consistent with the Telecommunications Act, the FCC defined the equipment "necessary" for collocation as equipment that is "used" or "useful," but not necessarily "indispensable." To this end, FCC generally required ILECs to permit the collocation of "equipment used for the purpose of interconnection or access to unbundled network elements." The FCC noted that, even if a collocater could use *other* equipment to perform a similar function, the specified equipment still may be "necessary" under § 251(c)(6) of the Telecommunications Act, because it may be cheaper or more efficient.

The FCC permitted transmission equipment, such as optical terminating equipment and multiplexers, to be collocated on LEC premises. LECs are required to continue to permit collocation of any type of equipment currently being collocated to terminate basic transmission facilities under the *Expanded Interconnection* requirements. As with space exhaustion and technical infeasibility, the burden is on the ILEC to demonstrate to the state commission that the equipment sought to be collocated is not "necessary." The FCC does not require ILECs to collocate equipment used to provide enhanced services, nor does it require ILECs to accept the collocation of any equipment "without restriction." In addition, the FCC does not require ILECs to accept the collocation of switching equipment, *at this time*, asserting that switching equipment does not appear to be used for the actual interconnection or access to unbundled network elements. Rather, the cross-connect equipment generally is the only equipment used for interconnection or access to unbundled elements.

The FCC did recognize that the line between switching and multiplexing equipment is quite obscure, and thus reserved for state commissions the right to determine whether the piece of equipment at issue actually is used for interconnection or access to unbundled elements. However, the FCC expressly reserved the right to reexamine this issue at a later date. Finally, the FCC required ILECs to physically collocate microwave equipment facilities *except where this is not practical due to technical reasons or space exhaustion*.

e. *Allocation of Space*

The FCC adopted restrictions on the "warehousing" of space by interconnectors, as well as measures to ensure that ILECs themselves do not unreasonably warehouse space. To this end, ILECs are not permitted to set maximum space limitations without demonstrating that space constraints make such restrictions necessary, because such maximum limits could constrain a collocater's ability to provide service efficiently. However, the FCC does permit ILECs to retain a limited amount of space for specific future uses, although ILECs may not reserve space for future use on terms more favorable than those that apply to other

telecommunications carriers seeking to hold collocation space for their own future use. The FCC refused to apply a different set of rules regarding space availability to small, rural carriers, declaring the rules adopted in this Order to be sufficiently flexible.

f. Leasing Transport Facilities

Despite the fact that the FCC's *Expanded Interconnection* policies required collocators to interconnect collocated equipment with their own transmission facilities, the FCC refused to require competitive entrants to bring transmission facilities to LEC premises in which such entrants seek to collocate facilities. Instead, the FCC requires ILECs to permit new entrants to collocate and connect their equipment to unbundled network transmission elements obtained from the ILEC. The FCC believes that the purposes of § 251 are broader than the purposes of the FCC's *Expanded Interconnection* policies, and that prohibiting competitors from connecting unbundled network elements to their collocated equipment is contrary to the provisions of §251(c)(3) of the Telecommunications Act.

g. Co-Carrier Cross Connect

Under this Order, ILECs are required to permit two or more collocators to interconnect their networks at the ILEC's premises, *as long as the equipment is used for interconnection with the ILEC or access to the ILEC' unbundled network elements*. The FCC found that allowing ILECs to prohibit collocated carriers from cross-connecting their equipment would serve only to force interconnectors to route transmission facilities outside of the LEC's premises.

h. Security Arrangements

The FCC will continue to permit LECs to require reasonable security arrangements to separate an interconnectors's collocation space from the ILEC's facilities. The physical separation provided by the collocation cage adequately addresses security concerns. However, because ILECs have both the incentive and the capability to impose higher construction costs than the new entrant might need to incur, the FCC affords collocating parties the right to subcontract the construction of the physical collocation requirements with ILEC-approved contractors. The FCC specified that ILECs must not unreasonably withhold approval of such contractors, and declined to allow ILECs to subject interconnectors' personnel to minimum training and proficiency requirements, leaving such concerns to be resolved through the negotiation and arbitration process.

i. Allowing Virtual Collocation in Lieu of Physical

Because the space limitations and technical practicality issues will vary considerably, depending on the location at which competitor equipment is to be collocated, these issues will be resolved more effectively on a case-by-case basis. The FCC provided guidance to aid the state commissions in their analysis of whether a ILEC should be released from its physical collocation obligations, by requiring ILECs to provide state commissions with detailed floor plans or diagrams of any premises where an ILEC alleges there to be space constraints. This requirement will enable state commissions to evaluate whether a refusal to allow physical collocation on the grounds of space constraint is justified. The FCC also advised state

commissions to utilize AT&T's approach for guidance, which requires an ILEC specifically to identify the space on its premises that is used for various purposes, as well as specific plans for rearrangement/expansion and steps taken to avoid exhaustion.

The FCC declined, however, to adopt any rules for determining when physical collocation should be deemed impractical for technical reasons, stating only that its *Expanded Interconnection* experience has not demonstrated that technical reasons are a significant impediment to physical collocation. ILECs are not required to lease additional space or provide trunking at no cost in instances where they have insufficient space for physical collocation. However, ILECs are required to take into account the demands of interconnectors when planning renovations and leasing or constructing new premises, and must relinquish any space held for future use before denying virtual collocation due to a lack of space (unless the ILEC can demonstrate that virtual collocation at that point is not technically feasible).

Where virtual collocation has been proven to be unfeasible, ILECs are required to provide other forms of interconnection and access to unbundled network elements *to the extent technically feasible*. ILECs are not required to offer virtual collocation under the nominal sale and repurchase option. Finally, ILECs are not required to provide virtual collocation that is equal in all functional aspects to physical collocation, because § 251(c)(6) does not specify any requirements for virtual collocation.

2. Legal Issues [¶¶ 608-617]

a. Relationship between Expanded Interconnection Tariffs and § 251

Because § 251(i) expressly upholds the FCC's authority under § 201, which provides the statutory basis for the FCC's *Expanded Interconnection* policies, the FCC has determined that the Telecommunications Act, as a matter of law, does not displace the *Expanded Interconnection* rules. Rather, the Telecommunications Act actually provides the FCC with the discretion to preserve its existing rules and tariffing requirements, to the extent they are consistent with the Telecommunications Act.

The FCC refused to eliminate the ability of competing carriers to seek tariffed interstate service under the FCC's *Expanded Interconnection* rules, in lieu of negotiating a § 251 and 252 interconnection agreement, stating that to maintain these rules is consistent with the Telecommunications Act's goal of permitting competitive entry through a variety of entry strategies. The FCC did, however, acknowledge that the rules implementing §§ 251 and 252 of the Telecommunications Act are broader than its *Expanded Interconnection* requirements, and stated that a future review of its *Expanded Interconnection* requirements may be necessary.

b. Takings Issues

The FCC determined that the Court of Appeals ruling in the *Bell Atlantic v. FCC*¹ decision does not preclude the collocation rules adopted in this Order. The FCC reasoned that,

¹ *Bell Atlantic v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996).

because the court held that the Communications Act of 1934 did not permit the FCC to take LEC property without *express* authorization, the question of the FCC's statutory authority to require physical or virtual collocation now largely is moot, given the express authorization under § 251(c)(6) of the Telecommunications Act that compels ILECs to require physical collocation, and, where infeasible or due to space exhaustion, virtual collocation. The FCC found that its express statutory authorization to require physical and virtual collocation has left remaining the single issue of just compensation, which the FCC declared to be satisfied under the ratemaking methodology implemented in this Order.

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VII. PRICING OF INTERCONNECTION AND UNBUNDLED ELEMENTS

In general, the FCC requires that the prices for interconnection and access to unbundled network elements be based on an estimate of the economic costs of the element, which the FCC defines as the long run incremental costs of the element or interconnection plus a reasonable contribution to common costs (described below). Until states have the opportunity to complete the necessary cost studies, they may use default proxy costs set by the FCC as a price ceiling for various unbundled network elements. The proxy costs are summarized on Attachment 1.

A. Pricing Based on Economic Cost

The FCC adopted a pricing standard for interconnection and access to unbundled network elements that is intended to emulate the cost-based pricing of a competitive market. [¶ 679] It also concluded that the same pricing standard should apply to physical collocation since collocation is a form of access to unbundled network components. [¶ 629] It observed that several states have required variants of long run incremental costs, [¶ 631] and placed the burden of providing cost studies to support interconnection prices on incumbent local exchange carriers. [¶ 680] The FCC indicated that it intends to open a rulemaking to consider various long run cost models. [¶ 790]

The FCC defined several types of costs, including "economic costs" which it defined in a peculiar manner as the forward-looking incremental costs plus a portion of the forward-looking joint and common costs. [¶¶ 676-678] It also coined a new cost definition, Total Element Long Run Incremental Costs (TELRIC) which the FCC uses as the basis for setting prices for interconnection and access to unbundled network elements. *In general, the FCC requires that prices for interconnection and access to unbundled network elements be the sum of (1) TELRIC and (2) a reasonable allocation of forward-looking common costs.* [Rules § 51.505(a)]

TELRIC are the forward-looking costs over the long run of the facilities and functions that are directly attributable to a particular element. TELRIC has three major components — operating expenses, depreciation cost and the appropriate risk-adjusted cost of capital (i.e., a normal profit). [¶ 703] In addition, there are several other aspects of TELRIC, emphasized by the FCC: [Rules §51.505(b)]:

- ▶ **Efficient network configuration.** TELRIC is measured assuming the most efficient telecommunications technology available and the least-cost network configuration given the existing location of the incumbent carrier's wire centers. [¶ 682]
- ▶ **Forward-looking cost of capital.** TELRIC is calculated using a forward-looking cost of capital that presumably projects market growth, increased competition and other factors affecting risk. The cost of capital is what investors must be paid to induce them to invest in the assets used for the element. In a sense, it is the profit or return associated with the element. [¶¶ 699-700]
- ▶ **Depreciation.** TELRIC is calculated using forwarding-looking economic depreciation rates. [¶ 686] Depreciation measures the expected change in economic value of assets used to provide the element. [¶ 703]
- ▶ **Directly attributable costs.** TELRIC includes all costs and only those costs that are directly attributable or caused by a particular element. [¶ 682] Retailing costs, marketing expenses, billing and other functions associated with retail offerings may not be included in the TELRIC of a network element since they are not directly attributable to the network element. Administrative costs may be included in the TELRIC only if they vary with the provision of the network element. An incumbent carrier's cost study must explain why or how a specific function included in the TELRIC is necessary to provide a particular element. [¶ 691]
- ▶ **Long run.** TELRIC studies shall cover a period long enough that all costs are treated as variable and avoidable (*i.e.*, no fixed costs). [¶ 692]
- ▶ **TELRIC is the Basis for Permanent Rates.** The FCC requires states to use TELRIC as the pricing standard for interconnection and access to unbundled rates. They may use interim rates until they have had a chance to develop TELRIC-based rates, which would apply from that time forward. [¶ 693] Thus, there will likely be many state proceedings to develop the appropriate TELRIC.
- ▶ **TELRIC Includes Profits.** The FCC declined to add reasonable profits to the prices for interconnection or access to unbundled network elements because profits (through the cost of capital) are included in TELRIC. [¶¶ 699-703]

The **reasonable allocation of forward-looking common costs** is defined as an appropriate allocation of forward-looking economic costs efficiently incurred in providing a group of elements that cannot be directly attributed to an individual element. [Rules § 51.505(c)] Retail costs, such as customer billing or other expenses incurred to provide retail services are excluded from these common costs [¶ 694] so it is not clear whether common costs for network elements would be significant. Incumbent carriers have the burden of developing and proving that particular costs are common to the provision of network elements. [¶ 695]

The FCC indicated that reasonable allocation of common costs would be determined by individual carriers subject to review and approval by state commissions. It indicated that reasonable allocation methodologies include a fixed allocator (*i.e.*, a uniform percentage

markup over TELRIC for all elements) or an allocation of a small share of common costs to critical elements. It indicated that Ramsey pricing (*i.e.*, high allocations of common costs to elements with low elasticities) was unreasonable. [¶ 696] The FCC also required that the sum of TELRIC and a reasonable allocation of common costs shall not exceed the stand-alone costs of the element (*i.e.*, the costs that an efficient firm would incur if it produced only the element in question). [Rules § 51.505(c)(2)(A)]

The FCC also explicitly excluded several items from consideration in calculating the economic costs of interconnection or unbundled network elements, including: [Rules § 51.505(d)]

- **Embedded costs**, *i.e.*, costs incurred by the incumbent carrier in the past cannot be considered. [¶¶ 704-707]
- **Retail costs**, including the costs of marketing, billing, collection, and other costs associated with offering retail services to subscribers who are not telecommunications carriers are excluded from the economic costs of interconnection and access to unbundled network elements.
- **Opportunity costs**, including the revenues the incumbent carriers would have earned if they did not offer unbundled elements are excluded from the economic costs of interconnection and access to unbundled network elements. The FCC explicitly rejected the use of the Efficient Component Pricing Rule often advocated by incumbent carriers. [¶¶ 708-711]
- **Universal service subsidies** may not be included in the prices of interconnection or access to unbundled network elements. [¶¶ 712-732] The FCC held that "States may not, therefore, include universal service support funding in the rates for elements and services pursuant to §§ 251 and 252, nor may they implement mechanisms that have the same effect." The FCC also observed that to the extent that New York's "pay or play" mechanism is intended to fund universal service, it violates the Telecommunications Act. [¶ 713]

The FCC concluded that requiring incumbents to price interconnection and access to unbundled network elements at economic cost did not constitute a Taking. [¶¶ 733-740]

B. Access Charges and Unbundled Network Elements

The FCC allowed all telecommunications carriers to purchase unbundled network elements. The problem that creates is that long distance carriers could purchase local switching, a local loop and local transport elements at the economic cost based prices mandated by the FCC and avoid paying access charges which are laden with subsidies and priced substantially above costs. The FCC developed an interim mechanism to avoid this market distortion until it has had the opportunity to restructure access charges. It ordered that any carriers that purchase local switching on an unbundled basis for the purpose of originating and terminating interstate traffic must pay the usage sensitive carrier common line (CCL) and 75% of the transport interconnection charge (TIC) for an interim period. The interim period

shall be the shorter of: (1) June 30, 1997; (2) the effective date of the FCC's final decisions in the universal service and access charge dockets; or (3) if the incumbent carrier is a Bell operating company, the date the incumbent is authorized to provide interLATA service. [¶¶ 720-727].

The FCC also ordered that states adopt a similar interim mechanism for intrastate access charges and universal service additives. The FCC allowed states to continue state universal service programs based on intrastate access charges for a similar brief, clearly defined period. [¶¶ 729-730] State mechanisms must end on the earlier of: (1) June 30, 1997; (2) when state commissions conclude proceedings to restructure access charges and eliminate universal service subsidies embedded in access charges; or (3) on the date that an incumbent Bell operating company is authorized to provide interLATA service. [¶¶ 731-732]

C. Rate Structure Issues

The FCC addressed several rate structure issues. In general, the FCC ordered that rates should reflect the manner in which costs are incurred. [¶ 743] Specifically, it required that the prices for dedicated facilities (including, unbundled loops, dedicated transport, interconnection and collocation) should be flat-rated and not usage sensitive. [¶ 744; Rules § 51.509]

The FCC prohibited states from allowing non-recurring charges for facilities with recurring costs except where the recurring costs are *de minimis*. [¶¶ 745-748] The FCC permitted states to allow for recovery of non-recurring costs with recurring (e.g., monthly) charges. [¶ 749] The FCC also required that states take steps to avoid double recovery of costs that may be shared among interconnectors. For example, if a collocator improves a building, then that collocator may be entitled to a *pro rata* refund of charges for the building improvement if other interconnectors subsequently collocate in the building. [¶¶ 750-751] The FCC also observed that interconnectors may be entitled to a refund of a portion of their costs if they cancel service. For example, if a collocator ends its collocation, it may be entitled to a refund of the economic value of the collocation cage it may have paid for. [¶ 751]

The FCC declined to require *peak-load pricing*, but allowed states to implement peak load pricing recognizing that there are substantial administrative costs associated with such price structures. [¶¶ 755-757]

The FCC required that states *geographically deaverage prices* for interconnection and unbundled network elements according to principles similar to its zone-density pricing of local transport. The FCC ordered that states establish at least three cost-related zones to implement deaveraged rates for interconnection and unbundled network elements. [¶¶ 764-765] The zones must reflect differences in costs. For example, a state might establish a unbundled loop prices for urban areas, rural areas and suburban areas.

The FCC did not allow states to set different class-of-service rates for interconnection and unbundled network elements. [¶ 766] For example, a carrier could not establish a different unbundled loop rate for interconnectors according to whether the carrier intends to serve business or residential customers.

E. Proxy Cost/Price Ceilings

The FCC presented proxy costs that could serve as price ceilings until state commissions had an opportunity to require the incumbent carriers to perform the necessary cost studies. The proxy costs are summarized in Attachment 1. Note that *the FCC required that states that use the proxies must also establish geographically deaveraged rates so that the proxies are the average price over the three or more geographic zones.* [¶ 784]

The proxy costs for unbundled loops (shown in Attachment 1) were derived from long run incremental cost models performed by various states, the Sprint/US West benchmark cost model and the Hatfield model submitted in the FCC's universal service proceeding. [¶¶ 792-794]

Based on its review of comments, the FCC concluded that a flat-rated charge for line ports, and either a flat-rated or per minute usage charge for the switching matrix were appropriate for switching charges. [¶ 810] The FCC concluded that a reasonable default proxy cost for unbundled local switching is between 0.2¢ and 0.4¢ per minute. The FCC grandfathered any states that set a rate of 0.5¢ per minute or less pending completion of an economic cost study. The proxy set by the FCC is the average rate that includes both the flat-rated port charge and any usage charges. [¶ 815]

For unbundled dedicated transmission links (*i.e.*, the links between end-offices and long distance carriers), states are directed to use the existing rates for interstate dedicated transport as a default proxy ceiling. [¶ 821] For traffic that terminates at tandem switches, the states are directed to use a proxy rate of 0.15¢ per minute to recover tandem costs. [¶ 824]

F. Imputation and Discrimination

The FCC did not require imputation of unbundled loop charges and interconnection charges in the retail rates of incumbent carriers because such imputation would have forced states to engage in major rate rebalancing. [¶ 848]

The FCC concluded that discrimination references in the Telecommunications Act were more stringent than the general prohibition against "unreasonable discrimination" in the Communications Act of 1934. The FCC held that state rules that permit non-cost based discriminatory prices are prohibited. [¶ 862] It also held that it would be unlawful for incumbent carriers to charge one class of interconnectors (*e.g.*, CMRS providers) an interconnection rate that was different than another class of interconnectors unless the differences reflected differences in cost. [¶ 861]

VIII. RESALE [¶¶ 863 - 984]

Summary of Statutory Resale Requirements

As required by § 251(c)(4) of the Telecommunications Act, ILECs must offer for resale at wholesale rates any telecommunications service that the LEC provides at retail to

subscribers who are not telecommunications carriers. In addition, ILECs are prohibited from imposing unreasonable or discriminatory conditions or limitations on the resale of such services. Section 251(c)(4) specifies, however, that state commissions may "prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to different category of subscribers."

Section 252(d)(3) sets forth the pricing standard that states must use in arbitrating agreements and reviewing rates under BOC statements of generally available terms and conditions, requiring state commissions to determine wholesale rates on the basis of retail rates charged to subscribers, less the portion attributable to any marketing, billing, collection, and other avoidable costs.

A. Scope of § 251(c)(4)

The FCC concludes that the resale requirement of § 251(c)(4)(A) requires ILECs to establish a wholesale rate for each retail service that (1) meets the statutory definition of a "telecommunications service;" and (2) is provided at retail to subscribers who are not "telecommunications carriers." Despite the contentions of the ILECs that the resale duty is limited to basic telephone services, the FCC found no statutory basis for limiting the resale requirement to basic telephone services. However the FCC did not, as some requested, prescribe a minimum list of services that are subject to the resale requirement. Instead, the FCC points out that the Telecommunications Act only requires ILECs to resell at wholesale rates those services which the ILEC offers to retail customers. Thus, the FCC determined that state commissions, ILECs, and resellers can determine the services that an ILEC must provide at wholesale rates, "by examining the ILEC's retail tariffs." [¶872]

The FCC also determined that exchange access services are not subject to the §251(c)(4) resale requirements, noting that "virtually all commenters in this proceeding" agree with this determination. [¶ 873] The FCC reasons that exchange access services are predominantly offered to, and used by, IXCs, not end users (whereas §251(c)(4) was designed to apply to services targeted to end users, because only those services would involve avoided costs that could be used to generate a wholesale rate). [¶ 874] Finally, *the FCC concluded that § 251(c)(4) does not require ILECs to make services available for resale at wholesale rates to parties that are not "telecommunications carriers," or to parties who are purchasing service for their own use*, because the purpose of the wholesale pricing requirement is to facilitate competition on a resale basis. Moreover, the negotiation process set forth in § 251 requires ILECs to negotiate agreements, including resale agreements, with "requesting telecommunications carrier or carriers," not with end users or other entities.² [¶ 875]

Finally, the FCC concludes that, according to the plain language of the Telecommunications Act, the ILEC must make available at wholesale rates "retail services that are actually composed of other retail services, i.e., bundled service offerings." [¶ 877]

² The FCC concluded that independent public payphone providers are not "telecommunications carriers," so that ILECs are not required to make available service to such providers at wholesale rates. [¶ 876]

B. Wholesale Pricing [¶¶ 878 - 934]

Section 252(d)(3) provides that wholesale rates are to be set on the basis of retail rates charged to subscribers for the requested service, less any portion attributable to any marketing, billing, collection or other avoided costs. Emphasizing the importance of resale to the development of competition, the Order promulgates national rules for use by state commissions in setting wholesale rates. These principles would apply to the arbitration or review of wholesale rates, as a means of promoting expeditious and efficient entry into the local exchange market. The FCC maintains that clear resale rules will provide an incentive for parties to reach agreement on resale arrangements in voluntary negotiations.

The FCC establishes two methods for determining wholesale rates. The first and preferred method is a methodology requiring state commissions to identify and calculate avoided costs based on avoided cost studies. The second method allows states to select, on an interim basis, a discount rate from within a default range of discount rates adopted by the FCC. The second method is meant to be a temporary solution, in order to enable state commissions to complete arbitration proceedings within statutory time frames, even if the state is not able to conduct full-scale avoided cost studies that comply with the criteria set forth in the Order for cost studies. [¶ 908]

The FCC adopted a minimum set of criteria for avoided cost studies to determine wholesale discount rates. In so doing, the FCC's purpose was to have criteria to ensure consistency in state interpretations of § 252(d)(3), while still providing the state commissions broad latitude in selecting the costing methodologies that conform to the state's own ratemaking practices for retail services.

The default range of rates permits a state commission to select a default wholesale rate between 17 and 25 percent below retail rate levels. Avoided costs would then be determined by multiplying the retail price by the selected discount rate. A state commission may only use the default wholesale discount rate in three instances: (1) in a state arbitration proceeding if an avoided cost study that satisfies the criteria set forth in the regulations does not exist; (2) where a state commission has not completed its review of such an avoided cost study; or (3) where a rate established by a state commission before release of the Order is based on a study that does not comply with the FCC's criteria. Nonetheless, the default rate is to be used as an interim measure only, and state commissions must establish wholesale rates based on avoided cost studies "within a reasonable time" from when a default rate is selected.

1. *Criteria for Cost Studies*

With respect to the debate regarding whether § 252(d)(3) sets forth an "avoided" cost standard or an "avoidable" cost standard, the FCC rejected the arguments of commenters who contend that the LEC must actually experience a reduction in its operating expenses for a cost to be considered "avoided" for the purposes of § 252(d)(3). Instead, the FCC interprets the Telecommunications Act as requiring states to make an objective assessment regarding what

costs are reasonably avoidable when a LEC sells its services wholesale.³ The FCC therefore concluded that a "reasonably avoidable" standard should be applied, based on an avoided cost study that includes indirect, or shared, costs as well as direct costs. The FCC also determined that a portion of contribution, profits, or mark-up may also be considered "attributable to costs that will be avoided" when services are sold resale. [¶ 912] Finally, the FCC concluded that an avoided cost study may not calculate avoided costs based on non-cost factors or policy arguments, and may not make disallowances for reasons not provided for in § 252(d)(3).⁴

The FCC neither prohibits nor requires the use of a single, uniform discount rate for all of an ILEC's service, however the FCC's default wholesale discount is to be applied uniformly. States may approve nonuniform wholesale discount rates, so long as those rates are set on the basis of an avoided cost study that includes a demonstration of the percentage of avoided costs that is attributable to each service or group of services. [¶ 916]

The FCC notes that several state commissions have already made interim or final determinations with respect to wholesale rates, and the Order provides a summary of the post-Telecommunications Act state decisions announced to date, including California, Colorado, Georgia, Illinois, Louisiana, Maryland, New York, and Ohio. [¶¶ 898-899]

The FCC notes that with respect to proposed criteria for cost studies, MCI and AT&T submitted models, while Sprint submitted a study for calculating wholesale rates. MCI's model used publicly available USOA data for a sample of eight companies. Both MCI's and AT&T's avoided cost models used an embedded cost approach, starting with publicly-available accounting data. Sprint's sample study focuses on its LEC subsidiary operations in Tennessee, as a model of how the avoided cost approach it advocates would be applied.

In sum, the following criteria must be included in cost studies:

Costs Presumed Avoidable	Specifically, all costs recorded in accounts 6611 (product management), 6612 (sales), 6613 (product advertising) and 6623 (customer services) are presumed to be avoidable, as well as costs recorded in accounts 6621 (call completion services) and 6622 (number services). These presumptions may be rebutted by an ILEC, if the LEC can prove to the state commission that specific costs in these accounts will be incurred with respect to services sold at wholesale, or that costs in these accounts are not included in the retail process of the resold services.
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³ The FCC notes that this was the approach taken by the state commissions in Colorado, Georgia, Illinois, New York and Ohio.

⁴ In so doing, the FCC rejected the argument that discount rates should be low in order to avoid discouraging facilities-based competition, as well as the arguments of those commenters who suggested that wholesale discount rates should be set at higher levels to ensure the viability of reseller business.

Costs Presumed Avoided	General support expenses (accounts 6121-6124), corporate operations expenses (accounts 6711, 6612, 6721-6728), and telecommunications uncollectible (account 5301) are presumed to be avoided in proportion to the avoidable direct expenses identified above.
Costs Presumed Not Avoidable	Plant-specific and plant non-specific expenses (other than general support expenses) are presumptively not avoidable.

Note: for carriers designated as Class B under § 32.11 of the rules that use summary accounts in lieu of the accounts designated above, the avoided cost study criteria will apply to the relevant summary account in its entirety.

2. *Default Range of Wholesale Discount Rates*

Noting that commenters advocated a range of wholesale discount rates from 4.76 percent to 55 percent, the FCC was not persuaded by arguments presented by parties at the lower and higher ends of the range of possible discounts. The FCC rejected the arguments of commenters who argued for a maximum discount of 10 percent so as not to discourage facilities-based competition, as well as arguments for higher wholesale discounts at levels that would ensure the viability of local exchange resale business.

The FCC determined that AT&T's model was unsuitable for establishing a range of default wholesale discount rates, because the model incorporates numerous assumptions and was submitted with AT&T's reply comments, so that other parties were not able to analyze it in more detail.⁵ Instead, the FCC used MCI's model, with some modifications, along with the results of certain state proceedings, including Georgia and Illinois, to establish the range of default wholesale discount rates at 17-25 percent. This range of default discounts is to be used in the absence of an avoided cost study that meets the FCC's criteria. *Thus, state commissions that have not set wholesale prices based on avoided cost studies meeting the FCC's criteria as of August 8, 1996 must use a default wholesale discount rate between 17 and 25 percent.* In addition, states must articulate the basis for selecting a particular discount rate within the 17-25 percent range, and must "within a reasonable time" establish wholesale rates based on carrier-specific avoided cost studies meeting the FCC's criteria. [¶ 932; 934]

A state commission may submit its avoided cost study to the FCC for a determination of whether it complies with the criteria. If a party (either a reseller or an ILEC) believes that a state commission has failed to act within a reasonable period of time, that party may file a petition for declaratory ruling with the FCC that the state has not complied with this rule.⁶ [¶ 932]

⁵ However state commissions are not precluded from using this model in a wholesale rate proceeding.

⁶ State commissions which, as of August 8, have adopted an interim wholesale pricing decision that relies on an avoided cost study meeting the FCC's criteria, may continue to require an ILEC to offer services for resale under such interim wholesale prices in lieu of the default discount range, as long as the state commission's interim pricing rules are fully enforceable by resellers and followed by a final decision within a reasonable period of time that adopts an avoided cost study meeting the FCC's criteria.

C. Conditions and Limitations [¶¶ 935- 971]

1. Restrictions, Generally, and Burden of Proof

ILECs are required, pursuant to § 251(c)(4), to make their services available for resale without unreasonable or discriminatory conditions or limitations. The FCC concludes that resale restrictions and conditions are presumptively unreasonable.⁷ ILECs can only rebut this presumption if the restrictions are narrowly tailored. Moreover, resale restrictions are not limited to those found in a resale agreement; they include conditions and limitations contained in the ILEC's underlying tariff. [¶ 939]

2. Promotions and Discounts

Given that § 251(c)(4) requires that ILECs must offer for resale at wholesale rates "any telecommunication service" that the carrier provides at retail to noncarrier subscribers, the FCC concludes that **no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by ILECs.** The FCC notes that a contrary rule would allow ILECs to avoid the statutory resale requirements by shifting their customers to nonstandard offerings.

However the FCC points out that this reasoning does not address the issue of whether all short-term promotional prices are "retail rates" for the purpose of calculating wholesale rates pursuant to § 252(d)(3).⁸ The FCC recognizes that short-term promotions may serve procompetitive ends through enhanced marketing and sales-based competition, and concludes that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation. The FCC therefore establishes a **presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers,** while promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to § 251(c)(4)(A). In order to avoid potential abuse of promotional discounts, the FCC has also established the following safeguards: (1) no benefit can be realized more than ninety days after the promotional offering is taken by the customer if the promotional offering was for ninety days; and (2) ILECs may not use promotional offerings to evade the wholesale obligation, for example by consecutively offering a series of 90-day promotions. [¶ 950]

While the FCC is also concerned that conditions attaching to promotions and discounts could be used to avoid the resale obligation, it recognizes that there may be reasonable restrictions on promotions and discounts. Thus, the FCC leaves to state commissions the task of developing, as necessary, rules concerning which discount and promotion restrictions may

⁷ In determining that resale restrictions are presumptively unreasonable and therefore in violation of §251(c)(4), the FCC reasons that the ability of ILECs to impose resale restrictions and conditions evidences market power and may indicate an attempt to the ILECs to preserve their market position; whereas in a competitive market, sellers are not able to impose significant restrictions and conditions on buyers, because such buyers would turn to other sellers.

⁸ The Telecommunications Act does not define the term "retail rate."

be applied to resellers in marketing their services to end users, for use in the state's arbitration process under § 252. [¶ 952] However with respect to volume discount offerings, the FCC concludes that it is presumptively unreasonable for ILECs to require individual reseller end users to comply with ILEC high-volume discount minimum usage requirements, if the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand.⁹

3. *Below-Cost and Residential Service*

The FCC has determined that, subject to certain cross-class restrictions (discussed below), below-cost services are subject to the wholesale rate obligation under § 251(c)(4).¹⁰

4. *Cross-Class Selling*

With respect to the provision in § 251(c)(4)(B) that allows state commissions to prohibit certain cross-class selling by resellers, the FCC concludes that restrictions prohibiting such cross-class reselling of residential services are reasonable, to prevent, for example, resellers from reselling wholesale-priced residential service to business customers. The FCC concludes further that § 251(c)(4)(B) allows state commissions to make similar prohibitions on the resale of Lifeline or any other means-tested service offering to end users not eligible to subscribe to such service offerings.

With respect to shared tenant services, however, which are made possible through the resale and trunking of flat-rated services to multiple customers, the FCC concludes that any restrictions on the resale of flat-rated offerings to multiple end users are presumptively unreasonable. Finally, the FCC concludes that all other cross-class selling restrictions should be presumed unreasonable. [¶ 962]

5. *ILEC Withdrawal of Services*

While the FCC is concerned about the ability of ILECs to avoid making a service available at wholesale rates by ceasing to offer the service on a retail basis, the FCC declined to issue general rules and instead left the issue to be resolved by state commissions.¹¹ [¶ 968] The FCC therefore concludes that its general presumption that restrictions on resale are unreasonable does not apply to ILEC withdrawal of service. The FCC establishes, however, that if an ILEC withdraws service and then grandfathers its own customers of a withdrawn service, such grandfathering must also extend to reseller end users, so that during the

⁹ The FCC notes, however, that in calculating the proper wholesale rate, ILECs may prove that their avoided costs differ when selling in large volumes.

¹⁰ In so ruling, the FCC reasons that differences in ILEC revenue resulting from the resale of below-cost services should be accompanied by decreases in expenditures that are avoided because the service is being offered at wholesale.

¹¹ The FCC notes that many state commissions have rules regarding the withdrawal of retail services and have experience regulating such matters.

grandfathering period, all grandfathered customers have the right to purchase the grandfathered services either directly from the ILEC or indirectly through a reseller.

6. Provisioning

Service made available for resale must be at least equal in quality to that provided by the ILEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users. In addition, ILEC services must be provisioned for resale with the same timeliness as they are provisioned to that ILEC's subsidiaries, affiliates, or other parties to whom the carrier directly provides the service, such as end users. [¶ 970]

D. Resale Obligations of LECs Under § 251(b)(1) [¶¶ 972 - 977]

The FCC concludes that the Telecommunications Act does not impose wholesale pricing requirements on CLECs, reasoning that by definition, CLECs lack the market power possessed by ILECs, and were therefore not made subject to the wholesale pricing obligation in the Telecommunications Act. The FCC notes that the wholesale rates of CLECs will face competition by ILECs, making a wholesale pricing requirement for CLECs unnecessary.

E. Application of Access Charges in the Resale Environment [¶¶ 978 - 984]

The FCC concludes that the Telecommunications Act requires that ILECs continue to receive access charge revenues when local services are resold under §251(c)(4). IXCs must still pay access charges to ILECs for originating or terminating interstate traffic, even when their end user is served by a telecommunications carrier that resells ILEC retail services. The FCC explains that new entrants that purchase retail local exchange services from an ILEC at wholesale rates are only entitled to resell those retail services, and not other services, such as exchange access, that the ILEC may offer using the same facilities. Thus, IXCs will still need to purchase access services from ILECs through existing interstate access tariffs, outside of the § 251(c)(4) resale framework. [¶ 980]

IX. DUTIES IMPOSED ON "TELECOMMUNICATIONS CARRIERS" BY § 251(A) [¶¶ 985 - 998]

With respect to the duties required of all telecommunications carriers, as set forth in § 251(a), the FCC determined that to the extent a carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of "telecommunications carrier." The term "telecommunications carrier" is defined in 47 U.S.C. § 153(44) as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in § 226.)"

Specifically with respect to CMRS providers, *the FCC concludes that CMRS providers are telecommunications carriers and are thus obligated to comply with § 251(a)*. In addition, the FCC concludes that to the extent a PMRS (private mobile radio services) provider uses capacity to provide domestic or international telecommunications for a fee directly to the

public, it too will fall within the definition of "telecommunications carrier" under the Act, and will be subject to the duties listed in § 251(a).¹²

The FCC determined, however, that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services," (because such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications service"), so that such operators of private networks are not subject to the requirements of § 251(a). [¶ 994] Conversely, to the extent an operator of a private telecommunications network offers telecommunications services for a fee directly to the public, the operator is a telecommunications carrier, subject to the duties in § 251(a).

Finally, with respect to the issue raised by the requirement in § 251(a) that all telecommunications carriers must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," the FCC concludes that telecommunications carriers should be permitted to provide interconnection pursuant to § 251(a) either directly or indirectly, "based upon their most efficient technical and economic choices." Pointing out that unlike the interconnection duty in § 251(c), which applies to ILECs, § 251(a) interconnection applies to all telecommunications carriers, including those with no market power. Thus, given the lack of market power of telecommunications carriers required to provide interconnection via § 251(a), and pursuant to the clear language of the statute, the FCC finds that indirect connection (e.g., two CLECs interconnecting with an ILEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to § 251(a).

Finally, with respect to the provision of § 251(a)(2) which prohibits telecommunications carriers from installing network features, functions, and capabilities that do not comply with standards or guidelines established under §§ 255 and 256, the FCC finds that it would be premature to attempt to establish specific requirements or definitions of terms to implement the provision, given that the FCC and the Architectural and Transportation Carriers Compliance Board have not developed standards or guidelines under § 255. The FCC intends to issue a further notice of proposed rulemaking seeking comment on what accessibility and compatibility requirements apply to telecommunications carriers who install network features, functions and capabilities.

X. COMMERCIAL MOBILE RADIO SERVICE (CMRS) INTERCONNECTION [¶¶ 999 - 1026]

The FCC sought comment on whether interconnection arrangements between ILECs and CMRS providers fell within the scope of §§ 251 and 252.

A. CMRS Providers and Obligations of Local Exchange Carriers under § 251(b) and Incumbent Local Exchange Carriers under § 251(c) [¶¶ 1001-06]

¹² The FCC will determine whether the provision of mobile satellite service (MSS) is CMRS (and therefore common carriage) or PMRS based on the factors set out in the *CMRS Second Report and Order*, 9 FCC Rcd at 1457-58 (1994) [¶ 996]

Section 251(b) imposes duties only on LECs, and § 251(c) imposes duties only on ILECs. Section 3(26) of the Telecommunications Act defines "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access," but "does not include a person insofar as such person is engaged in the provision of" CMRS service under § 332(c), "except to the extent that the Commission finds that such service should be included in the definition of that term." The FCC therefore sought comment on whether CMRS providers should be classified as "local exchange carriers" subject to § 251(b).

The FCC concluded that CMRS providers will not, at this time, be treated as LECs. Thus, CMRS providers are not currently subject to the obligations of § 251(b), or to the obligations of ILECs under § 251(c). The FCC noted that some CMRS providers, such as paging providers, might be excluded even if other CMRS providers were found to be LECs, because paging providers "do not offer local exchange service or exchange access."

B. Reciprocal Compensation Arrangements under § 251(b)(5) [¶¶ 1007-26]

The FCC determined that LECs are obligated, under §§ 251(b)(5) and (d)(2), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, pursuant to the rules governing reciprocal compensation set forth below in Part XI, below.

C. Interconnection under § 251(c)(2) [¶¶ 1009-15]

Section 251(c)(2)(A) provides that an ILEC must provide interconnection with its local exchange network to "any requesting telecommunications carrier . . . for the transmission and routing of telephone exchange service and exchange access." **The FCC has found that CMRS carriers meet the statutory definition of "telecommunications carriers."** LECs must therefore make interconnection available to these CMRS providers in conformity with §§ 251(c) and 252, including offering rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

The Telecommunications Act defines "telephone exchange service" as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . and which is covered by the exchange service charge, or . . . comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." The FCC found that cellular, broadband PCS, and covered SMR (Specialized Mobile Radio) providers fall within the second part of the definition of providing service comparable to telephone exchange service. ILECs are therefore required to provide interconnection to CMRS providers who request it for the transmission and routing of telephone exchange service or exchange access, under § 251(c)(2).

D. Jurisdictional Authority for Regulation of LEC-CMRS Interconnection Rates [¶¶ 1010-24]

The FCC sought comment on the relationship between § 251 and § 332(c). The FCC concluded that it has the authority to apply §§ 251 and 252 to LEC-CMRS interconnection.

Sections 251 and 252 "create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers." The FCC reserved the option to revisit this decision in the future, particularly because § 332 generally precludes states from regulating rates and entry of CMRS providers. **The FCC stated that states may not impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and arbitrated pursuant to §§ 251 and 252.** The FCC is also reviewing allegations that states or local governments are setting up barriers to entry or regulating CMRS providers.

XI. COMPENSATION FOR TRAFFIC TERMINATION -- OBLIGATIONS IMPOSED ON LECs BY § 251(B)

A. Reciprocal Compensation for Transport and Termination of Telecommunications [¶¶ 1027-1118]

1. Statutory Language [¶ 1027]

Section 251(b)(5) of the Telecommunications Act provides that all LECs, including ILECs, have the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 251(d)(2) states that, for the purpose of compliance by an ILEC with § 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions both: (1) provide for the "mutual recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of another carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."

The Telecommunications Act also provides that the foregoing language shall not "preclude arrangements that afford the mutual recover of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements). The Telecommunications Act also states that the above language does not authorize the FCC or any state "to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or require carriers to maintain records with respect to the additional costs of such calls."

2. Definition of Transport and Termination of Telecommunications [¶¶ 1028-45]

The FCC sought comment in the NPRM on whether "transport and termination of telecommunications" under § 251(b)(5) should be limited to certain types of traffic. The FCC also sought comment on whether § 251(b)(5) also encompasses telecommunications traffic passing between neighboring LECs that do not compete with one another. Furthermore, the FCC noted, and sought comment in the NPRM, on the title of § 252(d)(2), "Charges for Transport and Termination of Traffic," which could be interpreted to permit separate charges for these two components of reciprocal compensation.

a. *Distinction between "Transport and Termination" and Access*
[¶¶ 1033-38]

The FCC stated that it recognized that "transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions," and that "[u]ltimately, we believe that the rates that local carriers impose for the transport and termination of local traffic . . . and long distance traffic should converge." However, the FCC found that the reciprocal compensation obligations in § 251(b)(5) "should apply only to traffic that originates and terminates within a local area" as defined by the FCC, and that § 251(b)(5)'s reciprocal compensation provisions "do not apply to the transport or termination of interstate or intrastate interexchange traffic."

The FCC found that state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under § 251(b)(5). (The FCC found that states *do not* have this authority with regard to traffic to or from a CMRS network.) Traffic originating or terminating outside of a particular local area would be subject to interstate or intrastate access charges.

The FCC concluded that the obligations under § 251(b)(5) will apply to all LECs in the same state-defined local exchange service areas, including neighboring ILECs. For competing LECs whose local service areas are not the same, the FCC expects the states to determine whether intrastate transport and termination of traffic between these LECs should be governed by reciprocal compensation obligations under § 251(b)(5) or by intrastate access charges (for the portions of the LECs' local service areas that are different). The FCC also expects the states to decide whether § 251(b)(5)'s reciprocal compensation obligations apply to the exchange of traffic between ILECs that serve adjacent service areas.

For the purposes of § 251(b)(5), the FCC will define "local service area" for calls to or from a CMRS network as the Major Trading Areas ("MTAs"), the largest wireless licensed territories (as set forth in Rand McNally's 1992 Commercial Atlas). Thus, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under § 251(b)(5).

In the cases where territory in multiple states is included in a single local service area, and a local call from one carrier to another crosses state lines, the FCC will conclude that the applicable rate for any particular call should be that established by the state in which the call terminates. This eliminates confusion over which of two differing states' rates should apply to a call.

b. *Distinction between "Transport" and "Termination"*
[¶¶ 1039-40]

The FCC has decided to treat transport and termination as two different functions. For the purposes of § 251(b)(5), "transport" will be defined as "the transmission of terminating traffic that is subject to § 251(b)(5) from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party (or equivalent facility provided by a non-incumbent carrier)." The FCC recognized that many alternative

arrangements exist for the provision of transport between two networks, and that charges for transport under § 251(b)(5) "should reflect the forward-looking cost of the particular provisioning method."

The FCC defines "termination" as the switching of traffic that is subject to § 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises. The FCC stated that alternatives for transport "are not likely to exist in the near term," and thus forward-looking costs are to be calculated differently, as discussed in the unbundled elements section of this summary.

c. *CMRS-Related Issues* [¶¶ 1041-45]

Although § 251(b)(5) does not state to whom the LECs' obligation of establishing reciprocal compensation arrangements for the transport and termination of traffic runs, the FCC found that because CMRS providers are telecommunications carriers under the Telecommunications Act, **the LECs' duty to establish reciprocal compensation arrangements applies to all local traffic transmitted between LECs and CMRS providers.** Further, the FCC has concluded that a LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic. As of the effective date of the *Interconnection Order*, LECs must cease charging CMRS providers or other carriers for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

As noted above, traffic between an ILEC and CMRS network that originates and terminates within the same MTA (as defined by the parties' locations at the beginning of the call) is subject to transport and termination rates under § 251(b)(5), rather than interstate or intrastate access charges. Under the FCC's existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, or in the case of certain CMRS interstate service, such as some roaming traffic (which is routed to a customer's local cellular number over interstate facilities when the customer is utilizing a cellular system in another state). The FCC has concluded that it will apply its new transport and termination rules to maintain the status quo for CMRS providers.

Because CMRS customers may be mobile during a single call, complicating the assessment of transport or termination rates or access charges, the FCC concluded that two carriers may calculate overall compensation amounts "by extrapolating from traffic studies and samples" rather than determining, in real time, the cell site to which a mobile customer is connected. The location of the initial cell site when a call begins will be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.

3. *Pricing Methodology* [¶¶ 1046-68]

In the NPRM, the FCC requested comment on how to interpret § 252(d)(2) of the Telecommunications Act, specifically asking whether the FCC should establish a generic pricing methodology or impose a ceiling to guide the states in setting charges for transport and

termination of traffic. The FCC also sought comment on the use of an interim pricing mechanism to address concerns about unequal bargaining power in negotiations.

a. *Statutory Standard* [¶ 1054]

Section 252(d)(2) states that reciprocal compensation rates for transport and termination of traffic shall be based on "a reasonable approximation of the additional costs of terminating such calls." The FCC has decided to use the same pricing standards established under § 252(d)(1) for interconnection and unbundled elements to establish rates for transport and termination of traffic under § 252(d)(2).

b. *Pricing Rule* [¶ 1055]

States have three options for establishing transport and termination rate levels. First, a state may conduct a thorough review of economic studies prepared using the TELRIC-based methodology outlined above in the section on the pricing of interconnection and unbundled elements. Second, a state may adopt a default price pursuant to the default proxies outlined below. If a state chooses a default price, it must either begin review of a TELRIC-based economic study, request that the FCC review such a study, or subsequently modify the default price in accordance with any revised proxies the FCC may adopt. (The FCC plans to initiate a future rulemaking on developing proxies using a generic cost model, and to complete that proceeding during the first quarter of 1997.) Third, in some circumstances states may order "bill and keep" arrangements, as discussed below.

c. *Cost-Based Pricing Methodology* [¶ 1056-59]

The FCC has concluded that states that choose to set transport and termination rates through a cost study must use the forward-looking economic cost-based methodology discussed above in the section on unbundled network elements. According to the FCC, the network elements involved with the termination of traffic include the end-office switch and local loop. The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. The FCC has therefore determined that, once a call has been delivered to the ILEC end office serving the called party, the "additional cost" to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching; non-traffic sensitive costs should not be considered "additional costs" when a LEC terminates a call that originated on the network of a competing carrier.

To ensure that rates for reciprocal compensation promote competition, the FCC has concluded that termination rates should include an allocation of forward-looking common costs that is no greater proportionally than allocated to unbundled local loops. Also, rates for transport and termination of traffic shall not include an element that allows ILECs to recover any lost contribution to basic, local service rates represented by the interconnecting carriers' service.

d. *Default Proxies* [¶¶ 1060-62]

For some states, a TELRIC-based pricing methodology may not be feasible within the time required for the arbitration process. Thus, "for the time being," *the FCC has adopted a default price range of 0.2¢ (\$0.002) per minute to 0.4¢ (\$0.004) per minute of use for calls handed off at the end-office switch.* Thus, according to the FCC, a state, during an arbitration proceeding, may either complete a cost study, as described above, or adopt a default price within the accepted range, pending completion of the cost study. States should explain the basis for selecting a particular default price subject to the applicable ceiling. The FCC "observe[d] that the most credible [cost] studies in the record before us fall at the lower end of this range, and we encourage states to consider such evidence in their analysis." Further, in establishing transport rates under the Telecommunications Act, the FCC expects states to be guided by the price proxies established for unbundled transport elements discussed above. (See Part VII *supra*.)

States that have already adopted end-office termination rates based on an approach other than a forward-looking cost study, either through arbitration or rulemaking proceedings, may keep such rates in effect, pending their review of a forward-looking cost study, as long as they do not exceed 0.5¢ (\$0.005) per minute. (As discussed below, states may also order "bill and keep" arrangements subject to certain limitations.)

When a state must determine the rates for transmission facilities that are dedicated to the transmission of traffic between two networks, states should be guided by the default price level the FCC is adopting for the unbundled element of dedicated transport. The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, for two-way trunks, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier. The proportion may be measure either based on the total flow of traffic over the trunks, or based on the flow of traffic during peak periods. Carriers operating under arrangements that do not comport with these principles are entitled to convert their arrangements to proportional payment as of August 8.

e. *Rate Structure* [¶¶ 1063-64]

The FCC has decided to require all interconnecting parties to be offered the option of purchasing dedicated facilities for the transport of traffic on a flat-rate basis. No matter what specific arrangements result in the dedicated facility, the costs of that facility should be recovered in a cost-causative manner and that usage-based charges should be limited to situations where costs are usage sensitive. The provider of the dedicated facility is presumptively entitled to a rate that is set based on the forward-looking economic cost of providing the portion of the facility that is used for terminating traffic that originates on the network of a competing carrier.

The FCC realized that the costs of transporting and terminating traffic during peak and off-peak hours may not be the same. The differences in peak and off-peak costs are likely to vary by network and the amount of traffic terminated at a switch. The FCC encouraged negotiating parties to address such pricing schemes in the negotiating process. The FCC

refrained from imposing any particular obligations on the states in this regard. However, off-peak loading schemes, adopted through the arbitration process, must comply with the FCC's default price level (between 0.2 and 0.4¢ per minute) if not based on a forward-looking cost study.

f. Interim Transport and Termination Rate Levels [¶¶ 1065-68]

The FCC has ordered ILECs to provide transport and termination of traffic, on an interim basis, pending resolution of negotiation and arbitration regarding transport and termination prices, and approval by the state commission. A carrier may obtain such an interim arrangement only after requesting negotiation with the ILEC. The interim arrangement will cease upon occurrence of: (1) an approved negotiated agreement; (2) an approved arbitrated agreement; or (3) the period for requesting arbitration passes with no such request.

The FCC has also concluded that interim prices for transport and termination shall be symmetrical. This requirement shall not apply with respect to requesting carriers that have existing interconnection arrangements that provide for termination of local traffic by the ILEC.

In states that have set forth transport and termination rates on completed or reviewed forward-looking cost studies, an ILEC receiving a request for interim transport and termination shall use these state-determined rates. In states adopting a default price as discussed above, ILECs must use these rates. In states where neither situation exists, the FCC requires that ILECs set interim rates at the default ceilings for end office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use) and transport described above. Again, the FCC believes that the true forward-looking cost of end-office switching is closer to 0.2 cents per minute of use. "States must adopt "true-up" mechanisms to ensure that no carrier is disadvantaged by an interim rate that differs from the final rate established pursuant to arbitration." Thus, the FCC has determined that default prices need not in all instances await the conclusion of the negotiation, arbitration, and state approval process.

4. Symmetry of Compensation [¶¶ 1069-95]

Symmetrical compensation arrangements are those in which the rate paid by an ILEC to another telecommunications carrier for transport and termination of traffic originated by the ILEC is the same as the rate the ILEC charges to transport and terminate traffic originated by the other telecommunications carrier. ILECs are not likely to purchase interconnection or unbundled elements from CLECs, except for termination of traffic, and possibly transport. The FCC therefore sought comment in the NPRM on whether rate symmetry requirements are consistent with the Telecommunications Act. Illinois, Maryland, and New York have established different rates for termination of traffic on an ILEC's network, depending on whether the traffic is handed off at the ILEC's end office or tandem switch. California and Michigan have established one rate that applies to transport and termination of all competing local exchange carrier traffic on ILEC networks, regardless of whether the traffic is handed off at the ILEC's end office or tandem switch, although this rate does not apply to CMRS.

a. Symmetry Generally [¶¶ 1085-93]

The FCC has concluded that it will adopt the ILEC's transport and termination prices as a **presumptive and reasonable proxy for other telecommunications carriers' additional costs of transport and termination**. If both parties are ILECs, the FCC concluded that the larger ILEC's forward-looking costs should be used to establish the symmetrical rate for transport and termination, because larger ILECs are generally in a better position to conduct a forward-looking cost study. The FCC determined that symmetrical compensation gives competing carriers incentives to minimize their own costs of termination because their termination revenues do not vary directly with changes in their own costs.

The FCC therefore directed states to establish presumptive symmetrical rates based on the ILEC's costs for transport and termination of traffic when arbitrating disputes under Section 252(d)(2) and in reviewing BOC statements of generally available terms and conditions. If a competing local service provider believes that its cost will be greater than that of the ILEC for transport and termination, then it must submit a forward-looking cost study to rebut this presumptive symmetrical rate. In that case, the FCC directed the states in arbitration proceedings to depart from symmetrical rates only if the states find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate. In doing so, the states must: (1) give full and fair effect to the FCC's economic costing methodology set forth in the *Interconnection Order*, and (2) create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate. In the absence of such a submitted cost study, reciprocal compensation for transport and termination shall be based on the ILEC's cost studies.

The FCC will permit states to establish transport and termination rates in the arbitration process that vary according to whether traffic is routed through a tandem switch or directly to the end-office switch. In this case, states should also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an ILEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the ILEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the ILEC's tandem switch, the FCC has found that the appropriate proxy for the interconnecting carrier's additional costs is the ILEC tandem interconnection rate.

The FCC has decided that there should be an exception for interconnection between ILECs and **paging providers** with respect to the rule that states must establish presumptive symmetrical rates based on the ILEC's costs for transport and termination of traffic. In the case of paging carriers, the FCC has decided that ILECs' forward-looking costs may not be reasonable proxies for the costs of paging providers, because paging providers' networks may be distinctly different from either ILEC wireline networks or cellular carriers. Also, most calls terminated by paging companies are brief (averaging 15 seconds) and contain no voice message. The FCC will initiate a further proceeding to try to determine what an appropriate proxy for paging costs would be, and, if necessary, to set a specific paging default proxy. In the interim, if ILECs and paging companies cannot negotiate agreed-upon rates, the FCC has directed states, when arbitrating such disputes, to establish rates for the termination of traffic by paging providers based on the forward-looking costs of such termination to the paging provider. The paging provider seeking termination fees must prove to the state the costs of terminating

local calls. The FCC has also concluded that the default price for termination of traffic *does not* apply to termination of traffic by paging providers.

b. *Existing Non-Reciprocal Agreements between Incumbent LECs and CMRS Providers* [¶¶ 1094-95]

The FCC already has an existing rule, § 20.11, that requires that interconnection agreements between ILECs and CMRS providers comply with the principles of mutual compensation, and that each carrier pay reasonable compensation for transport and termination of the other carrier's calls. The FCC has found that ILECs have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposes charges for traffic originated on CMRS providers' networks, in violation of § 20.11. Accordingly, the FCC concludes that **CMRS providers that are party to pre-existing arrangements with ILECs that provide for non-mutual compensation may renegotiate the agreements with no termination liabilities or contract penalties.** Pending negotiation or arbitration, symmetrical reciprocal compensation provisions shall apply, with the transport and terminate rate that the ILEC charges the CMRS provider from the pre-existing agreement applying to both carriers, as of the effective date of the *Interconnection Order*.

5. *Bill and Keep* [¶¶ 1096-1118]

The FCC defined bill-and-keep arrangements as those in which neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network. Instead, each network recovers from its own end users the cost of both originating traffic delivered to the other network and terminating traffic received from the other network. Bill-and-keep does not preclude a positive flat-rated charge for transport of traffic between carriers' networks.

The FCC has concluded that states may impose bill-and-keep arrangements if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so, as defined by the FCC.

The FCC has also concluded that states may adopt specific thresholds for determining when traffic is roughly balanced. **If states impose bill-and-keep, the arrangements must either include provisions that impose compensation obligations if traffic becomes significantly out of balance or permit any party to request that the state impose such compensation obligations** based on a showing that the traffic flows are inconsistent with the threshold adopted by the state. States may also apply a general presumption that traffic between carriers is balanced and is likely to remain so. A party asserting imbalanced traffic arrangements must prove to the state that such imbalance exists; bill-and-keep would be justified unless the complaining carrier rebutted the assumption. States that have adopted bill-and-keep arrangements prior to August 8 may retain such arrangements, unless a party proves to the state that traffic is not roughly balanced. If the carrier show that traffic is not balanced, the state is to determine the transport and termination rates based either on the forward-looking economic cost-based methodology or consistent with the FCC's default proxies as noted above.

In determining whether traffic is balanced, the FCC has decided that precise traffic measurement is not necessary. Approximations based on samples and studies comparable to reports on percentages of interstate use, often used for access charge billing, are sufficient. Alternatively, states may require that traffic flowing in the two directions be measured as accurately as possible during a specific period, which may begin no later than six months after an interconnection arrangement goes into effect. All carriers must cooperate with the states in implementation of this measurement. States that adopt a traffic flow measurement approach may adopt a "true-up" mechanism to ensure that no carrier is disadvantaged by an interim rate that differs from the rate established once the measurement is undertaken. States may also require that local traffic and access traffic be carried on separate trunk groupings if they find such measures are necessary to ensure accurate measurement and billing.

The FCC rejected arguments that mandating bill-and-keep violates the takings clause of the Constitution. **The FCC also declined to adopt bill-and-keep as a single, nationwide policy that would govern all LEC-CMRS transport and termination of traffic, thus rejecting its own tentative conclusion in the *LEC-CMRS Interconnection NPRM*.**

B. Access to Rights of Way [¶¶ 1119-1248]

Section 251(b)(4) imposes on each LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with § 224" of the Communications Act of 1934, as amended. Section 224(f)(1) imposes on all utilities,¹³ including LECs, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." (The term "telecommunications carrier" excludes any ILEC as that term is defined in § 251(h).)

The FCC sought specific comment on the exception set forth in § 224(f)(1), which permits "utilities providing electric service" to deny access on a non-discriminatory basis "where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes." Also, the FCC sought comment on § 224(h), which requires owners of rights-of-way to provide written notification of its intent to modify a right-of-way to notify any entity that is attached to the right-of-way so that the attaching entity would have a reasonable opportunity to add to or modify its attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making the right-of-way accessible.

1. Section 224(f): Non-discriminatory Access [¶¶ 1123-86]

a. Generally [¶¶ 1143-50]

¹³ A utility is "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-ways used, in whole or in part, for wire communications," but does not include any railroad, any cooperative, or any federally or state-owned entities. 47 U.S.C. § 224(a)(1).

The FCC has concluded that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-by-case basis. (The forum for such resolutions is discussed in greater detail below.) The FCC has concluded that there are too many variables with respect to the vast amount of poles and conduits.

b. Specific Rules [111] 1151-58]

The FCC has established five rules of general applicability as set forth below. "Aside from the[se] conditions, [the FCC] will not adopt specific rules to determine when access may be denied because of capacity, safety, reliability, or engineering concerns." (The FCC did, however, reject the proposals of some utilities that their determinations should be presumed reasonable.)

- (1) In evaluating a request for access, a utility may continue to rely on such codes as the NESC to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. Utilities may incorporate such standards into their pole attachment agreements. Other industry codes also will be presumed reasonable if shown to be widely-accepted objective guides for the installation and maintenance of electrical and communications facilities.
- (2) Federal requirements, such as those imposed by FERC and OSHA, will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities under § 224(f)(1).
- (3) State and local requirements affecting pole attachments will be considered. (The authority of a state to preempt federal regulation of pole attachments is discussed below.) "For present purposes," the FCC has concluded that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under § 224(c). The FCC stated that it believes "it would be unduly disruptive to invalidate summarily all such local requirements." However, where a local requirement "directly conflicts" with an FCC rule, the FCC's rules "will prevail." The FCC also noted that § 253 invalidates all state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide . . . telecommunications service," but this restriction does not prohibit states from imposing requirements "to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Section 253 also specifically recognizes the authority of state and local governments to manage public rights-of-way and to require fair and reasonable compensation for use of the rights-of-way.
- (4) Where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Except as specifically provided by the FCC, utilities must charge all parties attachment rates that do not exceed the maximum amount permitted by the formula the FCC has devised for such use (under § 1.1404 of the FCC's rules). Other terms and conditions must also be applied on a nondiscriminatory basis.

- (5) Except as specifically provided by the FCC, utilities may not favor themselves over other parties with respect to provision of telecommunications or video programming services.

2. *Guidelines Governing Certain Issues* [¶¶ 1159-86]

a. *Capacity Expansions* [¶¶ 1161-64]

The FCC has decided that lack of capacity on a utility's facility "does not automatically entitle a utility to deny a request for access." Because modification costs will be borne only by the parties directly benefitting from the modification, neither the utility nor its ratepayers will be harmed, according to the FCC. However, the FCC found it "inadvisable" to adopt specific rules to determine the circumstances in which a utility must replace or expand an existing facility and when the utility may reasonably deny a request due to difficulties in providing access. Utilities must "take all reasonable steps to accommodate requests for access in these situations"; before denying access based on lack of capacity, a utility must "explore potential accommodations in good faith with the party seeking access." The FCC will not require parties seeking access to "exhaust" possibilities for leasing capacity from other providers, such as through resale, before requesting expansion of a facility.

b. *Reservation of Space by Utility* [¶¶ 1165-70]

The FCC will permit an electric utility to reserve space if such reservation is consistent with "a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service." The electric utility must permit use of reserved space by attaching entities until the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use. The FCC will require the utility to give the displaced entity the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment. The FCC will not allow electric utilities to reserve or recover reserved space to provide telecommunications or video programming service and then to force a previous attaching party to incur costs of facility modification or expansion. The FCC declined to establish a presumptively reasonable amount of pole or conduit space that an electric utility may reserve. Disputes between parties will be resolved on a case-by-case basis.

c. *Definition of "Utility"* [¶¶ 1171-74]

The FCC has concluded that utilities that do not use their facilities for wire communications are not mandated by the Telecommunications Act to provide access to their facilities. However, "the use of any . . . right-of-way for wire communications triggers access to all . . . rights-of-way owned or controlled by the utility, including those not currently used for wire communications." The FCC includes electric utility internal communications in its definition of "wire communications."

d. *Application of § 224(f)(2) to Non-Electric Utilities* [¶¶ 1175-77]

Although the language of the Telecommunications Act expressly states that the access provision exceptions of lack of capacity, safety, reliability, and generally applicable engineering purposes are limited to "utilit[ies] providing electric service," the FCC has found it proper for non-electric utilities "to raise these matters." If a non-electric utility chooses to deny access on the basis of these exceptions, the FCC closely scrutinize the denial, particularly where competitive parties are concerned.

e. Third-Party Property Owners [¶¶ 1178-81]

The FCC has concluded that the scope of a utility's ownership or control of an easement or right-of-way is a matter of state law. The FCC stated that "the access obligations of § 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access." For cable operators, access to easements will be interpreted in conjunction with court cases interpreting § 621(a)(2).

The FCC has also determined that a utility will be "expected" to exercise its powers of eminent domain to expand an existing right-of-way over private property to permit attachments. According to the FCC, "Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that 'intends to modify or alter such . . . right-of-way . . .'" 47 U.S.C. § 224(h).

f. Other Matters [¶¶ 1181-86]

While the FCC agreed that utilities should be able to require that only properly trained persons work in the proximity of the utilities' lines, the FCC refrained from requiring that parties seeking access use the individual employees or contractors hired or pre-designated by the utility. However, a utility may require that individuals working in or near electric lines have the same training as the utility's own workers.

The FCC found that the access provisions in the Telecommunications Act prevented it from creating a blanket exclusion for transmission facilities. The FCC determined that transmission facilities were akin to poles, ducts, conduits, or rights-of-way, but stated that to the extent that safety and reliability were greater issues for transmission facilities, utilities could, under appropriate circumstances, deny access "if legitimate safety and reliability concerns cannot be reasonably accommodated."

The FCC decided that § 224(f)(1) does not mandate that a utility make available "on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower" although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled elements under § 251(c)(6). The FCC stated that Congress intended § 224(f) to permit entities to "piggyback" along distribution networks owned or controlled by utilities, "as opposed to granting access to every piece of equipment or real property owned or controlled by the utility."

3. Constitutional Takings [¶¶ 1187-92]

In response to the concerns of some commenters that the provisions in the Communications Act mandating access to rights-of-way are unconstitutional under the Fifth Amendment, the FCC stated that it "has no power to declare any provision of the Communications Act unconstitutional." However, the FCC found that because Congress provided for compensation to pole owners for access, the statutory mandate does not necessarily deprive utilities of property without due compensation.

4. *Modifications* [1193-1216]

The FCC has concluded that absent a private agreement establishing notification procedures, **written notification of a modification to a right-of-way must be provided by a utility controlling the right-of-way to attaching parties at least 60 days prior to initiation of the physical modification itself.** Notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification.

In the case of emergencies, the notice requirement would not apply except that notice should be given as soon as reasonably practicable, "which in some cases may be after the modification is completed." The FCC also stated that utilities and attaching entities "should exchange maintenance handbooks or other written descriptions of their standard maintenance practices." Changes to such practices should be made only upon 60 days written notice. The FCC "encourages" communications between utilities and attaching entities.

To the extent that the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will have the obligation to assume the cost of the modification, or bear its proportionate share of cost with all other attaching entities participating in the modification. If the user's modifications affect other attachments who do not request modification, the modification cost will be covered by the initiating or requesting party.

Where multiple parties join in a modification, each party's proportionate share of the total cost will be based "on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification." A party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be found to be sharing in the modification and will be responsible for its share of the costs.

The FCC will permit modifying parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher should be reduced to take account of depreciation to the facility that has occurred since the modification. Parties taking advantage of this cost-saving mechanism will be obligated to maintain records. The FCC will determine specific methods for allocating costs in another proceeding.

Although modifications may provide incidental benefits to other attaching parties, the FCC has decided that the costs should not be borne by attaching entities that did not choose to modify their own facilities. The FCC cites legislative history to support its position. Also, modification may result in excess capacity that becomes a source of revenue for the facility owner, although the owner did not share the costs of the modification. However, the FCC does

not believe that as a consequence, the facility owner is required to use those revenues to compensate the party that paid for the modification. The FCC found that the Telecommunications Act does not grant attaching parties interests in the facilities.

5. *Dispute Resolution* [¶¶ 1217-31]

If a utility does not provide access with 45 days of receipt of a written request for access, the FCC has required that the utility confirm the denial in writing by the 45th day. The denial must be "specific, and include all relevant evidence or information supporting the denial." The denial must also set forth how the evidence relates to one of the reasons for denying access under § 224(f)(2), lack of capacity, safety, reliability, or engineering standards.

Upon receipt of a denial of notice from the utility, the requesting party shall have 60 days to file its complaint with the FCC. The FCC also stated that it "does not believe" that stays or other equitable relief will be granted in the absence of a specific showing, beyond the prima facie case, that such relief is warranted.

The FCC has determined that utilities shall have the ultimate burden of proof in denial-of-access cases. However, parties seeking attachment who file complaints with the FCC must establish a *prima facie* case. The complainant must state the ground given for denial of access, the reasons those grounds are unjust or unreasonable, and the remedy sought. The complaint must be supported by the written request for access, the utility's response (if any), and information supporting the complainant's position.

A utility that receives a legitimate inquiry regarding access to its facilities or property must make maps, plats, and other relevant data available for inspection and copying by the requesting party, "subject to reasonable conditions to protect proprietary information." The FCC found that this requirement would "eliminate" the need for costly discovery. If the FCC requests additional information from any party, that party will have five days within which to comply with the request.

The dispute resolution procedures set forth by the FCC for obtaining access to utility facilities are available regardless of whether a party seeking attachment invokes § 224(f) (obligating utilities to provide access to rights-of-way) or § 251(b)(4) (which requires LECs to provide access to rights-of-way consistent with § 224).

However, if a party is seeking access to the facilities of an ILEC, that party will have the option of invoking the procedures established in § 252 in lieu of filing a complaint under § 224. Section 252 governs the negotiation, arbitration, and approval of agreements between ILECs and telecommunications carriers for interconnection and unbundled network elements. Thus, a party invoking this section may petition a state for arbitration of a dispute over access to a right-of-way. If a party wishes to invoke § 252, it must so state in its written request for access to the ILEC's right-of-way. Section 224 will provide for the default procedures if a telecommunications carrier fails to make an affirmative election between the two provisions. Section 252 can only be invoked against ILECs, and ILECs cannot use § 251(b)(4) or § 224 to gain access to the facilities and properties of a LEC or of a utility.

6. *Reverse Preemption* [¶¶ 1232-40]

Section 224(c)(1) provides that

Nothing in this section shall be construed to apply to, or to give the FCC jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any cases where such matters are regulated by the State.

With regard to access requests that can only arise under § 224, the FCC determined that state authority to preempt federal regulation is clear. The FCC found that requests pursuant to § 251(b)(4) (providing "access . . . consistent with § 224") also incorporated the state preemption provisions of § 224(c)(1). Also, when a telecommunications carrier seeks access rights from an ILEC and chooses to seek negotiation and arbitration rights under § 252, the state may also exercise its preemption rights in § 224 with regard to the access to rights-of-way issues.

Section 224 does not provide for a certification process for state preemption of federal regulation. Thus, parties or states relying on state preemption must notify the FCC and cite supporting state laws or regulations.

C. *Imposing Additional Obligations on LECs* [¶¶ 1241-48]

Section 251(c) imposes obligations on ILECs in addition to the obligations of §§ 251(a) and (b). § 251(c) states that ILECs have obligations regarding (1) good faith negotiation; (2) interconnection; (3) unbundling network elements; (4) resale; and (5) providing notice of network changes; and (6) collocation. The FCC sought comment on whether it should establish procedures by which interested parties could prove that a particular LEC should be treated as an ILEC. **The FCC declined allow states to unilaterally impose on non-incumbent LECs obligations that the Telecommunications Act expressly reserved for ILECs, but has decided to allow states or interested parties to petition the FCC to classify a carrier as an ILEC pursuant to § 251(h)(2).** ILEC obligations will not be imposed on non-ILECs "absent a clear and convincing showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an ILEC, has substantially replaced an ILEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of § 251."

XII. *EXEMPTIONS, SUSPENSIONS AND MODIFICATIONS OF § 251 REQUIREMENTS* [¶¶ 1249 - 1265]

Section 251(f)(1) of the Telecommunications Act grants rural telephone companies an exemption from the requirements of § 251(c), until such time as the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state commission determines that the exemption should be terminated. Section 251(f)(2) permits LECs with fewer than two percent of the nation's subscriber lines to petition for suspension or modification of the requirements of §§ 251(b) and (c). State commissions are

required under §251(f) to make such determinations, following criteria and procedures set forth in § 251(f).

Thus, the FCC determined that the determination whether a LEC in a particular instance is entitled to exemption, suspension or modification of the requirements of § 251 should be primarily left to state commissions. However the FCC establishes a very limited set of rules interpreting the requirements of § 251(f), in order to assist states in their application of those provisions. First, LECs bear the burden of proving to the state commission that a suspension or modification of the requirements of § 251(b) or (d) is justified. Second, rural LECs bear the burden of proving that continued exemption of the requirements of § 251(c) is justified, once a bona fide request has been made by a carrier under § 251. Finally, ***the FCC concluded that only LECs that, at the holding company level, have fewer than 2 percent of the nation's subscriber lines are entitled to petition for suspension or modification of requirements under § 251(f)(2).***

XIII. ADVANCED TELECOMMUNICATIONS CAPABILITIES [¶¶ 1266-68]

The Telecommunications Act requires that the FCC encourage the deployment of advanced telecommunications capabilities to all Americans. The FCC declined to adopt rules regarding this requirement in this proceeding.

XIV. FCC ARBITRATION PROVISIONS OF § 252 AND MOST FAVORED NATIONS

A. Section 252(e)(5) FCC Action in Lieu of State Commission

Section 252(e)(5) of the Telecommunications Act requires the FCC to assume responsibility for any proceeding or matter in which the state commission "fails to carry out its responsibility" under § 252. The FCC sought comment in the NPRM on whether it should adopt rules to carry out its obligation under § 252(e)(5). Section 252(e)(4) provides that, if the state commission does not approve or reject (1) a negotiated agreement within 90 days, or (2) an arbitrated agreement with 30 days from the time the agreement is submitted by the parties, the agreement shall be deemed approved. The FCC requested comment on the relationship of this provision and its obligation to assume responsibility under § 252(e)(5). In addition, the FCC sought comment on whether it should adopt standards or methods for arbitrating disputes in the event it must conduct an arbitration under § 252(e)(5).

The FCC concluded that establishing regulations to carry out its obligations under § 252(e)(5) will provide for an efficient and fair transition from state jurisdiction, should the agency have to assume the responsibility of the state commission under § 252(e)(5). [¶ 1283] The FCC emphasized, however, that the § 252 arbitration rules adopted in the Report and Order apply only to instances where the FCC assumes jurisdiction under § 252(e)(5). *Id.* [Rules § 51.807(a)]

According to the FCC, the rules established will give notice of the procedures and standards the FCC would apply to mediation and arbitration, avoid delay if the FCC had to

arbitrate disputes in the near future, and may offer guidance for the states in implementing their own mediation and arbitration procedures. [¶ 1283] *The FCC, however, expressly declined to adopt national rules governing arbitration procedures, finding that the states are in a better position to develop arbitration and mediation rules that support the Act's objectives. Id.*

1. *State Commission's Failure to Act*

Section 51.801 of the new rules provides that the FCC must preempt a state commission's jurisdiction under § 252 of the Act and assume the preempted state commission's responsibility under that section, if a state commission fails to act to carry out its responsibilities under § 252 of the Act. A state commission fails to act when it fails to respond within a reasonable time to a § 252 request for mediation or arbitration or fails to complete an arbitration with the time limits specified in § 252(b)(4)(C) of the Act. That section requires the state commission to conclude its resolution of the matter no later than nine months after the LEC received the request for interconnection, services or access to network elements. Under § 51.801(a), the FCC must issue the preemption order within 90 days after receiving notice (or taking notice) of such failure. [Rules, § 51.803(d)]

The FCC's authority to assume the state commission's responsibilities, however, is not triggered when an agreement is "deemed approved" under § 252(e)(4) due to state commission inaction. Section 252(e)(4) provides for automatic approval if a state fails to approve or reject a negotiated or arbitrated agreement within 90 day or 30 days, respectively. The FCC concluded that automatic approval under § 252(e)(4) does not constitute a failure to act. [¶ 1286]

2. *Procedures for FCC Notification of a State Commission's Failure to Act*

To seek federal preemption of a state commission's jurisdiction for failure to act, a party must file with the FCC a petition, supported by an affidavit, stating with specificity the basis for the petition and providing information supporting the claim. [Rules § 51.803(a)] According to the FCC, requiring less detailed notification increases the likelihood that frivolous petitions will be made. A detailed written petition, on the other hand, will facilitate FCC decision making as to whether § 252(e)(5) jurisdiction should be assumed. [¶ 1287] The petitioning party must serve the petition on the state commission and the other parties to the proceeding or matter for which preemption is sought on the same date that it serves the FCC. [Rules § 51.803(a)] The state commission and parties to the proceeding may file a response within fifteen days from the date of service. *Id.* The petitioning party has the burden of proving that the state commission failed to act to carry out its § 252 responsibilities. [Rules § 51.803(b)]

3. *The FCC May Take Notice of State Commission Failure to Act*

The new rules permit the FCC to take notice on its own motion that a state commission has failed to act. § 51.803(c) The FCC must issue public notice of its action and the state commission and parties to the proceeding have fifteen days following issuance of the public notice to file comments on whether the FCC is required to assume the state commission's § 252 responsibility. *Id.*

4. *The FCC Retains Jurisdiction After Assuming Jurisdiction Under §252(e)(5)*

Section 51.805 of the new rules provides that the FCC retains jurisdiction over a proceeding for which it assumed responsibility pursuant to § 252(e)(5). The FCC noted that there is no provision in the Telecommunications Act for returning jurisdiction to the state commission and, moreover, that the FCC would be in the best position to efficiently conclude the matter. [¶ 1289] Section 51.805 also requires the FCC, *at a minimum*, to approve or reject any interconnection agreement adopted by negotiation, mediation or arbitration, if it has assumed the state commission's responsibilities pursuant to § 252(e)(5).

Section 51.805(a) provides that agreements reached pursuant to mediation or arbitration pursuant to § 252(e)(5) of the Telecommunications Act are not required to be submitted to the state commission for approval or rejection. Noting that § 252(e)(5) provides for the FCC to assume the state commission's responsibility and to act for the state commission, the FCC reasoned that the latter action includes acting for the state commission under § 252(e)(1), which calls for state commission approval of "any interconnection agreement adopted by negotiation or arbitration." Where a state has failed to act, the FCC acts on behalf of the state and no additional state approval is required. [¶ 1290]

5. *The FCC is Not Bound by State Law When It Assumes § 252(e)(5) Jurisdiction*

Under § 51.807(b) of its new rules, when the FCC assumes jurisdiction under §252(e)(5), it is not bound by state laws or standards that would have applied to the state commission in such a proceeding. The FCC noted that while states are permitted to establish and enforce other requirements, these are not binding standards for arbitrated agreements under § 252 (c). [¶ 1291]

6. *FCC Adopts "Final Offer" Method of Arbitration*

The FCC concluded that *final offer arbitration* would best serve the public interest. [¶ 1292] Under this procedure, each party submits a final offer concerning the issues subject to arbitration, and the arbitrator selects one of the offers or portions of both of such offers. The final offer arbitration procedure may be either *entire package* (where the arbitrator must select the entire proposal submitted) or *issue-by-issue* (where the arbitrator must select, on an issue-by-issue basis, one of the proposals submitted). With either variation of final offer arbitration, the arbitrator may not modify the proposal selected. [Rules § 51.5]

Each final offer must (1) meet the requirements of § 251 (including the rules prescribed by the FCC pursuant to that section); (2) establish rates for interconnection, services, or access to unbundled network elements according to § 252(d) (including the rules prescribed by the FCC pursuant to that section); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. [Rules § 51.807(f)] If a final offer submitted by one or more parties fails to comply with these requirements, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of § 252(c), including requiring parties to submit new final offers within a time frame specified by the

arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of § 252(c). *Id.*

7. *Post-Offer Negotiations Permitted*

Section 51.807(d)(3) provides that, to provide an opportunity for final post-offer negotiations, the arbitrator may not issue a decision for at least fifteen days after submission to the arbitrator of the final offers by the parties. According to the FCC, permitting post-offer negotiations will increase the likelihood that the parties will reach consensus on unresolved issues and will allow parties to tailor counter-proposals after arbitration offers are exchanged. [¶ 1293] Post-offer negotiations, however, must be consistent with § 251, including the regulations prescribed by the FCC. [Rules § 51.807(e)]

8. *Arbitration Limited to Requesting Carrier and ILEC*

The FCC concluded that participation in the arbitration proceeding will be limited to the requesting carrier and the ILEC in order to assure a more efficient process and minimize the amount of time need to resolve disputed issues. [¶ 1295] The FCC will, however, consider requests by third parties to file written pleadings. [Rules § 51.807(g)]

B. "Most Favored Nations" Requirements of § 252(i)

Section 252(i) of the Telecommunications Act requires that ILECs make available to any other requesting telecommunications carrier any individual interconnection, service, or network element on the same terms and conditions as contained in any agreement approved under § 252 to which they are a party. The FCC reached a number of conclusions regarding the meaning and application of § 252(i). First, the FCC concluded that adoption of national standards to implement § 252(i) will assist carriers in determining their respective obligations and facilitate development of a uniform legal interpretation of the Act's requirements. [¶ 1309] The FCC further concluded that § 252(i) entitles all carriers with interconnection agreements to "most favored nation" status regardless of whether such a clause is in their agreement. [¶ 1316] Carriers may obtain any individual interconnection, service, or network element under the same terms and conditions as contained in any publicly filed interconnection agreement without having to agree to the entire agreement. [¶ 1314] The FCC, however, found that § 252(i) permits differential treatment based on the LEC's costs of serving a carrier. [¶ 1317]

The FCC also concluded that carriers seeking interconnection, network elements or services pursuant to § 252(i) need not make such requests pursuant to the procedures for initial § 251 requests, but instead may obtain access to agreement provisions on an expedited basis. [¶ 1321] The FCC elected, however, to leave to state commissions the details for making agreements available to requesting carriers on an expedited basis. *Id.*

SECOND REPORT AND ORDER

The FCC divided its interconnection docket into two phases, but simultaneously released orders for both phases. The Second Report and Order covers the second phase topics of Dialing Parity, Non-Discriminatory Access, Network Disclosure, and Numbering Resources.

II. DIALING PARITY

A. In General

The FCC concluded that the purpose of the statutory dialing parity requirements -- to facilitate competition in the local and toll markets -- would be best served by adopting federal standards, upon which the states could impose additional requirements as necessary. The FCC determined that its specific authority to prescribe dialing parity requirements was derived from § 251(b)(3) of the Telecommunications Act, which imposes a duty upon LECs to provide dialing parity in all telecommunications services to competing providers of telephone exchange service and telephone toll service. The FCC noted, however, that it would not require Commercial Mobile Radio Service providers to provide dialing parity or nondiscriminatory access because it does not consider them to be LECs. Finally, the FCC stated that the statutory dialing parity requirements extend to international services, as well as those offered on an interstate, intrastate, local or toll basis.

B. Implementation of the Toll Dialing Parity Requirements

Claiming that the statutory language precluded use of access codes for dialing parity, the FCC found that the dialing parity requirement should be implemented by presubscription. Under such a regime, customers will be able to route a particular category of traffic to a preselected carrier without dialing access codes. The FCC also concluded that at a minimum, § 251(b)(3) requires that customers be entitled to choose presubscribed carriers for both intraLATA and interLATA toll calls. Because the FCC views the statute as a floor, it found that each state could alter this structure if it believes that, for competitive and public interest reasons, customers should instead presubscribe to carriers on an intrastate and interstate toll call basis.

The FCC imposed special requirements on the LECs to ensure that they cooperate with the state commissions. The FCC required each LEC -- including the BOCs -- to submit a plan to the appropriate state commission(s), in which the LEC would detail its implementation proposals, and the method by which it will permit customers to select alternative service providers. For LECs other than BOCs, the plan also must identify the LEC's base LATA. Again, the FCC noted that its requirements only serve as a floor, and invited the states to impose additional information requests as necessary. All LECs must obtain state approval of

their implementation plans prior to in fact implementing toll dialing parity. If a LEC feels that the state commission is slow in acting, it may file its plan directly with the FCC, which will in turn open the plan for public notice and comment consideration.

The FCC also addressed several presubscription issues in announcing its implementation rules. For example, the FCC concluded that deployment of a separate presubscription choice for international calling would be consistent with the Telecommunications Act, but deferred further consideration of the issue until it could review its technical feasibility. In addition, the FCC adopted a minimum nationwide presubscription methodology for implementing the toll dialing parity requirements. ***It chose the "full 2-PIC" method as its minimum standard, which allows customers to presubscribe to two separate carriers for interLATA and intraLATA calls respectively.*** The FCC cited the full 2-PIC method for its wide availability and state commission familiarity with the standard, but invited state commissions to evaluate the impact of other potential methodologies as well.

C. Implementation Schedule for Toll Dialing Parity

The FCC required that all LECs provide intraLATA and interLATA toll dialing parity no later than February 8, 1999. If a state commission elects not to evaluate a LEC's toll dialing plan, as discussed above, the LEC must file its plan with the FCC no later than 180 days before the 1999 deadline. States are invited by the FCC, however, to accelerate the implementation schedule if necessary.

Furthermore, all LECs must provide toll dialing parity throughout a state based on LATA boundaries coincident with their provision of in-region, interLATA or in-region, interstate toll services in the particular state. As in the case of the 1999 deadline, any LEC that is not able to have a state commission review its implementation plan must file it with the FCC no later than 180 days prior to the date it wishes to begin provision of in-region, interLATA toll services.

Moreover, the FCC has established a grace period for non-BOC LECs that are currently providing, or will be providing by August 8, 1997, any in-region, interLATA or in-region, interstate toll services. Until August 8, 1997, such LECs will be able to provide these services prior to offering dialing parity to their customers. If a LEC cannot meet the 1997 deadline, it must notify the FCC by that date and explain its reasons for the delay. A non-BOC LEC that does not obtain state commission review of its plan under this scenario must file its implementation plan no later than 90 days from the date of the present order.

Finally, the FCC noted that the Telecommunications Act does not confer any discretion on it or the state commissions to permit BOCs to defer, waive, or suspend their dialing parity obligations. Only small LECs -- those with less than 2 percent of the nation's subscriber lines -- are statutorily permitted to seek a waiver from the statute's dialing parity requirements. [See 47 U.S.C. 251(f)(2) (1996)]

D. Implementation of the Local Dialing Parity Requirements

Pursuant to § 251(b)(3), the FCC concluded that a LEC must permit all customers within a defined local calling area to dial the same number of digits to make a local telephone call, regardless of the customer's or called party's chosen local service provider.

The FCC anticipated that local dialing parity would eventually be achieved through the implementation of other § 251 requirements (e.g., number portability and interconnection), and so it declined to adopt a schedule for implementation or any additional guidelines for local dialing parity. However, the FCC did state that the provision of nondiscriminatory access to telephone numbers does not on its own meet the requirements of local dialing parity. Only the ability to dial the same number of digits regardless of provider affiliation would mean true local dialing parity.

The FCC also clarified its position on non-uniform local calling areas -- areas within which seven-digit dialing is not necessarily a local call, or ten-digit dialing is not necessarily a toll call. According to the FCC, such disparities do not undermine the implementation of local dialing parity, so long as all customers, regardless of the identity of their providers, are subject to the same dialing requirements.

E. Consumer Notification and Carrier Selection Procedures

The FCC determined that it had no need to prescribe detailed consumer notification or carrier selection procedures in this order. Instead, the FCC encouraged the states to each adopt such safeguards and educational policies as would best serve its particular consumer needs and local circumstances. However, the FCC noted that all state policies must be consistent with the presubscription and other guidelines set forth in its present order, as well as other federal policies on verification and "anti-slamming" procedures.

The FCC also decided that each dial-tone provider -- often the ILEC -- should not be allowed to assume that new customers who have not selected a toll provider are automatically its own customers for toll service. To be consistent with the practices in the interLATA toll market, the FCC concluded that nonselecting customers should be required to dial an access code to route their intraLATA or intrastate toll calls to the carrier of their choice until they make a permanent and declarative selection.

F. Cost Recovery

The FCC's response to cost recovery issues in the dialing party area mirrored its treatment of the same issues in the number portability area. According to the FCC, its Number Portability Order¹⁴ provided a useful mechanism for determining which costs were recoverable, and also how to allocate the recoverable costs among eligible telecommunications carriers. The FCC held that costs should be calculated on a "competitively neutral" basis, with the states using whichever allocation mechanism (e.g., gross revenues, number of lines, number of active numbers) would best serve their individual purposes. Unlike the Number Portability Order,

¹⁴ Telephone Number Portability, CC Docket No. 95-116, FCC 96-286 (rel. July 2, 1996) ("Number Portability Order").

however, the FCC concluded that not all carriers should be made part of this calculation, since § 251(b)(3) by its own terms only applies to providers of telephone exchange service and telephone toll service.

III. NONDISCRIMINATORY ACCESS TO OPERATOR SERVICES AND DIRECTORY LISTINGS

A. Definition of "Nondiscriminatory Access" Generally

The FCC defined "nondiscriminatory access" contained in § 251(b)(3) to mean that a LEC that provides telephone numbers, operator services, directory assistance, and/or directory listings must permit competing providers to have access to those services that is at least equal in quality to the access that the LEC provides to itself. The phrase includes both: "(1) nondiscrimination between and among carriers in rates, terms, and conditions of access; and (2) the ability of competing providers to obtain access that is at least equal in quality to that of the providing LEC.

The FCC added to its definition by stating that it should cover any operator or directory assistance services, including features of those services, even though such services and features may not necessarily fit the statutory definition of "telecommunications services." The FCC believed that in order for the nondiscriminatory access provisions to have effect on access to telecommunications services, it must make sure that LEC provides full access to competing providers for these adjunct services and features as well.

B. Nondiscriminatory Access to Telephone Numbers

The FCC concluded that a LEC providing telephone numbers must permit competing providers identical access to those numbers. However, the FCC also believed that its actions in other dockets on number administration issues would adequately address any concerns in this area, and declined to take action in this order.

C. Nondiscriminatory Access to Operator Services

1. *The Definition of Operator Services*

In defining operator services, the FCC relied upon the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).¹⁵ Using TOCSIA's definition as a base, the FCC defined operator services as "any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call." The FCC noted that, unlike TOCSIA's provision, this definition included completion of calls by an access code by the consumer and also automatic completion of calls with billing to the originating telephone. All services that fit this comprehensive definition, the FCC concluded, are subject to the nondiscriminatory access provisions of § 251(b)(3).

¹⁵ 47 U.S.C. § 228(e)(7) (1996).

The FCC further concluded that busy line verification, emergency interrupt, and operator-assisted directory assistance should all be considered forms of operator services, because they assist customers in arranging for the billing, completion, or both, of a telephone call. In addition, the FCC noted that § 251(b)(3) applies to operator services provided on both an interstate and intrastate basis.

2. *The Scope of Nondiscriminatory Access to Operator Services*

The FCC defined nondiscriminatory access to mean that "a telephone service customer, regardless of the identity of his or her local telephone service provider, must be able to connect to a local operator by dialing '0' or '0 plus' the desired telephone number." The FCC also offered three additional elements to this definition:

- 1) LECs must only permit nondiscriminatory access to operator services, and have no duty beyond factors under their control, to ensure that a competing provider's customers can access its services;
- 2) LECs are not required to provide call handling methods or alternate billing arrangements different from those it provides to itself or its affiliates; and
- 3) LECs do not have a duty to provide nondiscriminatory access to operator services if they do not provide such services themselves.

The FCC also established a procedure for the resolution of disputes over nondiscriminatory access to operator services. First, in such a dispute, the initial burden is on the providing LEC to demonstrate that it has provided nondiscriminatory access, that problems with such access are not within its control, and that its own staffing, maintenance, or cumbersome ordering procedures did not contribute to the degradation in access. The FCC declined to implement any additional enforcement mechanisms or standards in its order, believing that disputes concerning nondiscriminatory access could be resolved through its normal enforcement authority.

In addition, the FCC addressed nondiscriminatory access to the "00" access method used for access to presubscribed long distance services. The FCC concluded that if a LEC permits its own customers to access their presubscribed long distance carriers through this method, it must also provide competing providers with the same access to any features or functions necessary to enable the competing provider to offer "00" services to its customers as well.

Furthermore, the FCC concluded that its decisions in this order on operator services and directory assistance should have no effect on other obligations on ILECs imposed by the Telecommunications Act. In other words, the FCC reinforced that the duty of ILECs to provide these services as unbundled elements under § 252 of the Telecommunications Act is a matter separate from the nondiscriminatory access decisions at issue in this order.

Finally, the FCC addressed the "branding" requirements for operator services. It concluded that a providing LEC's failure to comply with the reasonable, technically feasible request of a competing provider for the rebranding of operator services or elimination of any brand on operator services creates a rebuttable presumption that the providing LEC unlawfully

restricted access to those services. In order to rebut this presumption, a providing LEC must show that it lacks the capability to meet the rebranding request.

D. Nondiscriminatory Access to Directory Assistance and Directory Listings

The FCC interpreted nondiscriminatory access to directory assistance and directory listings to mean that all customers should have access to each LEC's directory assistance services on a nondiscriminatory basis. However, as in the case of operator services, the FCC qualified its comprehensive definition by excluding those LECs that do not offer directory assistance services to their own customers.

The FCC also determined that § 251(b)(3) requires LECs to share their subscriber listing information with competing providers upon request, in "readily accessible" tape or electronic formats and in a timely fashion. According to the FCC, such a policy will save competitors the costs of translating the information and entering it into their own systems. The FCC added, however, that a LEC is only required to provide the listings in a format consistent with its own directory. The FCC also noted that ILECs must provide greater access to databases as an unbundled element of their network under § 252 of the Telecommunications Act.

LECs bear the burden of ensuring that the customers of competing providers do not obtain access to unlisted telephone numbers, or any other proprietary information that a LEC customer has specifically requested be unavailable for public dissemination. The FCC issued this rule to make sure that LECs understood that their duty does not extend to all directory information in their possession, but only to the same quality and type of directory services they provide for their own customers. The FCC also concluded that competing providers will be held to the same standards as the providing LECs in terms of releasing unlisted numbers and other proprietary information. In addition, the FCC noted that states could supplement these restrictions on the use of directory service information, so long as they did not impose requirements in a discriminatory manner on certain providers.

The FCC also established a limited enforcement mechanism to ensure nondiscriminatory access to directory assistance services. If a dispute arises, the LEC must show that it is permitting nondiscriminatory access to directory assistance and directory listings, and also that any disparity in access is not caused by factors within its control. The FCC concluded that its traditional enforcement mechanisms would suffice to ensure compliance with its nondiscriminatory access rules.

Furthermore, the FCC addressed the branding of directory assistance services by concluding that a LEC's failure to meet a competing provider's reasonable, technically feasible request for rebranding or elimination of branding of directory assistance services creates a presumption that the LEC has unlawfully restricted access to those services. The FCC noted that this presumption is rebuttable, if the LEC can show that it lacks the capability to satisfy the competing provider's request. Finally, the FCC added, states could choose to impose other branding requirements if desired.

E. Unreasonable Dialing Delay

The FCC concluded that unreasonable dialing delays for local and toll calls, and for nondiscriminatory access to operator and directory assistance services, are prohibited under the Telecommunications Act. As a practical matter, the FCC determined that this meant that the dialing delay experienced by the customers of a competing provider using these services should be no greater than those suffered by the customers of a LEC using the same services. Although the FCC considered the possibility of adopting a technical standard -- some formula for calculating unreasonable delays -- it settled on this comparative standard because of the lack of comments on this issue and its lack of knowledge as to what an unreasonable delay in these developing services might actually be.

If a dispute should arise between a LEC and a competitor over dialing delay issues, the FCC determined that the burden should be placed upon the LEC to demonstrate that it has processed the telephone call on the same terms as it would process calls involving its own customers. Terms to be considered in this inquiry include the amount of time a LEC needs to process incoming calls, and also the prioritization of calls by the LEC's system.

IV. NETWORK DISCLOSURE

A. Scope of Public Notice

Section 251(c)(5) requires ILECs to "provide reasonable public notice of changes in the information necessary for the transmission and routing of services¹⁶ using that local exchange carrier's facilities or networks, as well as any other changes that would affect the interoperability¹⁷ of those facilities and networks." Consequently, the FCC ordered ILECs to disclose information about network changes if those changes "affect competing service providers." Specifically, the FCC required disclosure of any changes which:

- (1) affect competing service providers performance or ability to provide a service; or
- (2) otherwise affects the ability of the ILEC's and a CLEC's facilities or network to connect, to exchange information, or to use the information exchanged.

¹⁶ "Telecommunications services" means the offering of telecommunications services for a fee directly to the public, or to such classes of users as to be effectively available directly to the public. "Information services" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications system. However, the FCC determined that inclusion of "information services" in this definition did not vest information service providers with substantive rights under other provision of § 251.

¹⁷ The FCC defined "interoperability" to mean "the ability of two or more facilities, or networks, to be connected, to exchange information, and use the information that has been exchanged."

Examples include changes that effect "transmission, signaling standards, call routing, network configuration, logical elements, electronic interfaces, data elements, and transactions that support ordering, provision, maintenance and billing."

The FCC interpreted § 251(c)(5) to impose disclosure requirements only on the ILECs. The FCC also refused to grant exemptions for smaller ILECs. However, it noted that under §251(f)(1), certain smaller ILECs are exempt from the FCC rules until: 1) they receive a *bona fide* request for interconnection, services, or network elements; and 2) their state commission determines that the request is not unduly economically burdensome. Smaller ILECs may also seek relief from these rules under § 251(f)(2).

In addressing the question of sufficiency, the FCC stated that appropriate notice must include:

- ▶ the date changes are to occur;
- ▶ the location at which changes are to occur;
- ▶ types of changes;
- ▶ the reasonably foreseeable impact of changes to be implemented; and
- ▶ a contact person who may supply additional information regarding the changes.

Information provided in these categories must include: references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment, as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection. However, the FCC stated that providing notice of the reasonably foreseeable impact of changes does not require ILECs to educate a competitor on how to re-engineer its network, to be experts on the operations of other carriers, or impose a duty on the ILEC to know the competing service provider's service performance or abilities.

B. How Public Notice Should be Provided

ILECs may fulfill their network disclosure requirements either by: (1) providing public notice through industry fora, industry publications, or their own publicly accessible Internet sites; or (2) by filing public notice with the FCC's Common Carrier Bureau, Network Services Division. ILECs using the former option must also file a certification with the FCC identifying the proposed change(s), stating that public notice has been given, identifying the location of the information, and stating how the information can be obtained. The ILEC must also maintain both the information disclosed in its public notice and any non-disclosed supporting information that is nevertheless relevant to the planned change, until the change is implemented. Furthermore, the FCC also indicated an intent to explore the possibility of constructing hypertext links from the FCC's home page to ILEC sites.

Section 251(c)(3) requires provision of notice within a "reasonable time in advance of implementation." In order to provide a clear and simple timetable for disclosure, and because no categorization scheme encompasses every potential change affecting interconnection, the

FCC's order adopts a disclosure timetable based on the *Computer III* order.¹⁸ Specifically, the FCC adopted the following timetable:

- ▶ ILECs must disclose planned changes at the "make/buy point,"¹⁹ and at a minimum of twelve (12) months before implementation
- ▶ If the planned changes can be implemented within twelve (12) months, of the make/buy point, then public notice must be given at the make/buy point, but at least six (6) months before implementation.
- ▶ If the planned changes can be implemented within six (6) months of the make/buy point, ILECs may invoke a special "short term filing" procedure.

Under the terms of the short term filing procedure an ILEC must include with its notice to the FCC a certificate of service which:

- (1) certifies that a copy of the ILEC's public notice was served on each provider of telephone exchange service that interconnects directly with the ILEC's network a minimum of five business days in advance of the filing; and
- (2) provides the name and address of all such providers of local exchange service upon which notice was served.

The FCC will then issue short term notice of all such filings. This notice will be deemed final on the tenth business day after release unless a provider of information services or telecommunications services that directly interconnects with the ILEC files an objection with the FCC and serves it on the ILEC no later than the ninth business day after the FCC's public notice.²⁰ After the filing of an objection, the ILEC has five days to respond.²¹ If the ILEC

¹⁸ For these same reasons, the FCC declined to adopt MFS' proposal which would have imposed a tripartite scheme which involved notice periods ranging between eighteen (18) and six (6) months depending on the size of the network modification.

¹⁹ The "make/buy point" is defined as the time at which the ILEC decides to make for itself, or procure from another entity, any product, the design of which affects or relies on a new or changed network interface. "Product," in turn, means any hardware or software for use in an ILEC's network or in conjunction with an ILEC's facilities that, when installed, could affect the compatibility of the network, facilities or services of an interconnected provider of telecommunications or information services with the ILEC's network, facilities or services. The "make/buy point" also includes the point at which the ILEC makes a "definite decision" to implement a network change in order to begin offering a new service or change the way in which it provides an existing service. A ILEC makes a "definite decision" when it moves beyond exploration of the cost and benefits of a change and determines that the change is warranted, establishes a timetable for anticipated implementation, and takes the first step toward implementation of the change within its network.

²⁰ Such an objection must state: (1) specific reasons why the objector is unable to implement adjustments to accommodate the ILEC's changes by the date the ILEC has specified, including specific technical information, questions, or other assistance required that would allow the objector to accommodate those changes; (2) specific steps the objector is taking to implement changes to

chooses to respond, the FCC will then issue an Order fixing a reasonable public period. Otherwise, the ILEC's notice shall be deemed amended to specify implementation on the latest date stated by an objector.

The FCC's order requires the ILECs to supply public notice information that is "adequate and useful." Thus, the ILEC must keep its public notice information complete, accurate, and up-to-date in whatever form it has chosen for disclosure. The ILEC must also refrain from providing preferential disclosure to selected entities prior to full public disclosure at the make/buy point.

The FCC did not, however, require the ILECs to delay network changes that they are currently implementing. Instead, the FCC's order requires that ILECs give public notice as soon as it is practical. Such disclosure must occur, (1) before the ILEC begins offering service using the changes to its network; and (2) no later than thirty (30) days after the effective date of the rules adopted in its order.

The FCC declined to address the question of enforcement. Several commenters suggested that, given credible allegations of notice violations, the FCC should delay or prohibit the implementation of changes. In addition to that remedy, however, the FCC noted that it has a "range of other penalties it could impose," and elected to wait to determine appropriate intervention until such sanctions become necessary to ensure adequate disclosure of public notice information.

Concluding that the "judicious use of non-disclosure agreements" will help to protect incentives to develop innovative network improvements, the FCC's order also permits the use of nondisclosure agreements subject to certain restrictions. Because § 251(c)(5) places an affirmative obligation on the ILECs to ensure appropriate disclosure, disclosure of proprietary information must be accomplished on appropriate terms as soon as possible after receiving a request for disclosure from a competing provider. However, because the timetable previously provided "will not allow excessive time for negotiation of the terms of nondisclosure agreements," the applicable public notice period will be tolled upon receipt of a request for such

accommodate the ILEC's changes on an expedited basis; (3) the earliest possible date by which the objector anticipates that it can accommodate the ILEC's changes, assuming it receives the assistance requested in item (1) (not to exceed six months from the date the ILEC gave original notice); (4) an affidavit of the objector's president, chief executive officer, or other corporate officer with the ability to bind the corporation, that he or she has read the objection, that the statements contained in it are true and that it is not interposed for the purposes of delay; and (5) any other information relevant to the objection.

²¹ Such a response shall: (1) include information responsive to the allegations and concerns identified by the objectors; (2) state whether the implementation date(s) proposed by the objector(s) would be acceptable; (3) indicate any specific technical assistance that the ILEC is willing to give to the objector(s); and (4) state any other information relevant to the ILEC's response.

disclosure.²² The FCC's order also specifically exempts market and technical trials from the requirements of §251(c)(5).

V. NUMBERING ADMINISTRATION

A. Designation of an Impartial Number Administrator

Congress has required the FCC to designate an impartial administrator of telecommunications numbering and has conferred upon the FCC exclusive jurisdiction over those portions of the North American Number Plan (NANP) that pertain to the United States. In the *NANP Order*,²³ the FCC stated its intention to undertake the steps to create the North American Numbering Council (NANC),²⁴ and formally directed the NANC to designate the new NANP administrator. The FCC declined either to modify its *NANP Order* or to delegate permanent oversight of that function to the states.

B. Delegation of Numbering Administration Functions

In order to preserve its ability to set broad policy on numbering administration matters, the FCC retained its authority to set policy with respect to all facets of number administration in the United States. However, because state commissions are uniquely positioned to understand local conditions and to determine what type of area code relief best suits local circumstances, ***the FCC specifically left to the states the resolution of matters involving the implementation of new area codes.*** Accordingly, the FCC ratified the actions previously taken by the various states, so long as those actions do not conflict with the guidelines listed below.

In order to ensure that different state commissions do not interpret its existing guidelines in a manner inconsistent with the FCC's intention, the FCC set forth certain guidelines states must follow in implementing area code relief. ***First, the FCC reiterated the numbering guidelines which it originally articulated in its Ameritech Order.***²⁵ In that order, the FCC stated that the number administration should:

²² These tolling provisions do not apply to the "short term notice procedure." Furthermore, in accordance with the requirement that the ILEC keep its public notice information up to date, the LEC may have to amend its public notice to indicate the notice has been tolled or to specify a new implementation date.

²³ *Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, 11 FCC Rcd 2588, 2608 (1995)(hereinafter "*NANP Order*").

²⁴ The North American Numbering Council ("NANC") is a Federal Advisory Committee created for the purpose of addressing and advising the FCC on policy matters relating to administration of the NANP. NANC will provide the FCC advice reached through consensus to foster efficient and impartial numbering administration.

²⁵ *Ameritech Order*, 10 FCC Rcd 4596.

- (1) seek to facilitate entry into the communications marketplace by making numbering resources available on an efficient and timely basis;
- (2) not unduly favor or disadvantage any particular industry segment or group of consumers; and
- (3) not unduly favor one technology over another.

Thus, the FCC concluded that *geographic splits and boundary realignments are presumptively consistent with the FCC's guidelines and that overlays which segregate only particular types of telecommunications service or technologies into discrete area codes are unreasonably discriminatory.*

Second, the FCC stated that even if the overlay served all services, the plan must still meet two conditions.

- (1) The plan must call for mandatory 10-digit dialing by all customers between and within area codes in the area covered by the new code; and
- (2) Every existing telecommunications carrier, including CMRS providers, authorized to provide telephone exchange service, exchange access, or paging service in the affected area code 90 days before the introduction of a new overlay area code must have available at least one NXX in the existing area code to be assigned during the 90-day period preceding the introduction of the overlay.

The FCC imposed the latter requirement in an effort to minimize the advantage an ILEC holds over new entrants when a new code is introduced through an overlay. Accordingly, given the need for numerous overlays, the FCC declined to prohibit overlays until achievement of permanent number portability is achieved. Furthermore, although the FCC retained the authority to hear petitions raised by parties over proposed area code plans, the FCC stated that, "we expect that with the clarifications we provide in this Order, there will be a reduced need for such petitions." The FCC also declined to issue more specific procedures to be invoked if states fail to follow the numbering guidelines.

Based on these guidelines, *the FCC over-ruled the Texas Commission's order which imposed a wireless-only overlay.* In the *Ameritech Order*, the FCC indicated that pursuant its guidelines, the presence of: (1) exclusion; (2) segregation; or (3) take-back, renders a service-specific overlay plan unacceptable and violative of the Communications Act. These elements necessarily cause an area code relief plan to favor one technology over another. Consequently, the FCC concluded that the Texas Commission's wireless overlay plan violated the *Ameritech Order* on its face.

The FCC authorized the state commissions to perform function associated with initiating and planning area code relief, as distinct from adopting final area code relief. Prior to this order, the LECs, as code administrators, had the sole ability to initiate and develop area code relief plans. The FCC's order allows states to begin performing that function, even after the transfer of administrative responsibility from the LECs to the new NANP administrator occurs. Because

not all states commissions will want to undertake this function, however, states desiring to engage in area code relief planning must notify the new NANP administrator within 120 days of the selection of that administrator.

Until number administration functions are transferred to the new NANP administrator, the FCC authorized Bellcore to continue performing its number administration functions. In deciding this issue, the FCC declined to authorize the state to perform these functions on fairness and efficiency grounds. Instead, the FCC, citing Bellcore's past experience in conducting those procedures, the need for efficient and effective number administration, and the lack of a suitable alternative, relegated number administration tasks to Bellcore.

The FCC also addressed the issue of "code opening" fees. Several providers expressed concerns that fees for numbering administration may be imposed in a discriminatory manner. Consequently, in accordance with §§ 202(a) and 251(b)(3), the FCC emphatically emphasized that any attempt by the incumbent LEC to delay or deny code assignments for competing providers violates the Act.

C. Cost Recovery for Numbering Administration

The FCC also required that cost recovery for number administration be borne by all telecommunications carriers on a competitively neutral basis. In order to achieve that goal, the FCC required that:

- (1) only "telecommunications carriers," as defined in § 3(44),²⁶ be ordered to contribute to the costs of establishing numbering administration; and
- (2) such contribution shall be based only on each contributor's gross revenues from its provision of telecommunications services.²⁷

However, for the purposes of computing gross revenue, the FCC also requires all telecommunication providers to subtract from their gross revenues expenditures "for all telecommunications services and facilities that have been paid to other telecommunications carriers," thereby ensuring that carriers which repurchase telecommunications facilities and services from other carriers bear competitively neutral burdens.

²⁶ Section 3(44) defines the term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services.

²⁷ The FCC concluded that it would reach a more equitable apportionment of the burden of cost recovery for numbering administration by basing each contributor's contribution on its gross revenues (instead of, for example, imposing a flat fee contribution on all telecommunications carriers).

D. Section 271 Competitive Checklist Requirement the BOCs Provider Non-Discriminatory Access to Numbers for Entry into In-region InterLATA Services

Several BOCs requested that the FCC find that by complying with the *NANP Order*, a BOC satisfies the competitive checklist requirement of nondiscriminatory access to numbers under § 271(c)(2)(B). The FCC declined to address that issue, instead deciding to look specifically at the circumstances and business practices of the BOCs on a case by case basis.

Loop Rate Deaveraging Methodology

Methodology

STEP 1

- *For each state, create a list of every wire-center operated by the subject LEC or by every LEC.*
- *For each wire-center, identify the total number of working loops and either the average working loop length or the total working loop length*
- *Use the number of working loops and either the total loop length to compute the average loop length or the number of loops and average length to compute the total working length*
- *Sort the wire-center list into ascending order based on the average loop lengths*

x

xSTEP 2

- *Examine the sorted list and try to identify two logical breaking points, if possible*
- *If that examination results in three groupings each with 25% to 50% of total loops, accept the groups; otherwise, make additions to or deletions from each group to an adjacent group to bring each grouping within the 25%-50% range*
- *Transfer the sorted list of wire-centers with average loop lengths and total loop length data to the attached worksheet*

x

xSTEP 3

- *On the worksheet, sum the number of working loops and the total working lengths for all groups*
- *Compute an average loop length for all loops by dividing the sum of working loop lengths by the sum of working loops*

x

xSTEP 4

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- *For each group, sum the total loops and the total loop lengths*
- *For each group, divide the total loop length by the total loops to derive an average loop length for each group*

x

xSTEP 5

- *Compute an average proxy price per loop-foot by dividing the FCC mandated proxy loop price ceiling by the average loop length for all loops (from STEP 3)*

x

xSTEP 6

- *Multiply the average loop length for each group (from STEP 4) by the average proxy price per loop-foot (from STEP 5) to determine the deaveraged loop proxy price for each group*

**WORKSHEET TO DISAGGREGATE FCC PROXY LOOP PRICE CEILING
INTO THREE DEAVERAGED GROUPINGS**

Wire Center (CLLI Code)	# of Working Loops	Avg Working Loop Length	Total Working Loop Length	Working Loops/Group	% of Total Loops	Total Working Length/Grp	Avg Length Per Group
Office A	STEP 2	STEP 2	STEP 2				
Office B	STEP 2	STEP 2	STEP 2				
Sub-Tot Grp 1				STEP 4a	%	STEP 4a	STEP 4b
Office C	STEP 2	STEP 2	STEP 2				
Office D	STEP 2	STEP 2	STEP 2				
Sub-Tot Grp 2				STEP 4a	%	STEP 4a	STEP 4b
Office E	STEP 2	STEP 2	STEP 2				
Office F	STEP 2	STEP 2	STEP 2				

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Sub-Tot Grp 3	STEP 3	STEP 3	STEP 4a	STEP 4a	%	STEP 4a	STEP 4b
Totals					100%		
Avg Wkg Length							

STEP 5

Item	Price
FCC Proxy Price	\$ XX.XX
Avg Wkg Loop Length	
Avg Proxy \$/Loop-foot	\$0.0XXXX

STEP 6

LOOP PRICES	Avg Length Per Group	\$/Loop/Mo
Group 1		\$ XX.XX
Group 2		\$ XX.XX
Group 3		\$ XX.XX

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