FCC 96-325 - FIRST REPORT AND ORDER

I. INTRODUCTION, OVERVIEW, AND EXECUTIVE SUMMARY

A. The Telecommunications Act of 1996

The three principal goals of the Telecommunications Act of 1996 are to: 1) open the local exchange and exchange access markets to competitive entry 2) promote increased competition in telecom markets already open including long distance service and 3) reform the universal service so that it is preserved and advanced in markets moving to competition. Under Section 271, Once Bell Operating Companies (BOCs) have taken the necessary steps, they are allowed to offer long distance service in the areas where they provide local exchange service, if the commission finds that entry meets certain statutory requirements and is consistent with the public interest.

B. The Competition Trilogy: Section 251, Universal Service Reform, and Access Reform

The rules in this Order are designed to accomplish only the first part of the trilogy which is to open the local exchange market and exchange access market to competition. The forthcoming report of the Federal/State Universal Service Joint Board will be the basis for the FCC to address universal service reform. The third part of the trilogy is access charge reform and interacts with Section 251 and universal service. The FCC will act upon this before or concurrent with a final order on universal service.

C. Economic Barriers

Existing rules limit the ability of new entrants to enter the market. The Act contemplates three methods for new entrants to compete -- construction of new networks, use of unbundled network elements, and resale. Rules will be adopted to require an arbitration process to offset the ILEC’s superior bargaining power.

D. Operational Barriers

This order will address operational barriers (dialing parity, access to right of way, collocation, and expeditious provisioning of resale and unbundled elements to new entrants) to new entrants and states are required to vigorously enforce these rules.

E. Transition

While a national policy of pro-competition is desirable, the FCC recognizes the existing rules of the states and requires suitable transitions be used. States shall use their own discretion to implement additional procompetitive policies under this order.

F. Executive Summary

1. Scope of Authority

The FCC expands its authority to both intrastate and interstate issues, establishes uniform national rules, and administers these rules.

2. Duty to Negotiate

Rules are established to require good faith negotiations between ILECs and new entrants and provides remedies for failure to do so.

3. Interconnection

The rule will require ILECs to offer interconnection at any technically feasible point equal in quality to that the ILEC provides to itself.

4. Access to Unbundled Elements

ILECs must provide nondiscriminatory access to local loops, local and tandem switches, interoffice transmission facilities, network interface devices, signaling and database functions, operations system support functions, and operator and directory assistance facilities.

5. Methods of Obtaining Interconnection and Access to UNEs

Physical collocation is required unless the ILEC demonstrates to the state commission that it is technically not feasible or space limitations prevent collocation. Virtual collocation and interconnection meet points will be required.

6. Pricing Methodologies

The appropriate pricing model for interconnection and access will be forward looking cost models (Total Element Long Run

Incremental Cost (TELRIC)) including reasonable forward looking joint and common costs.

7. Access Charges to Unbundled Switching

Collection of access charges shall not be altered by this order, ILECs shall not double recover them via interconnection and access, but for a limited period carrier common line charges and transport interconnection charges may be recovered.

8. Resale

Resale by ILECs to new entrants will be allowed and state commissions must identify avoided costs (marketing, billing, collection, etc) and adjust resale prices accordingly. The FCC sets default discount rates of 17-25% and states can set rates within this range.

9. Requesting Telecommunications Carriers

The FCC determines that any carrier offering local, interexchange, or international basic service for a fee is subject to these rules. Commercial or private radio service providers are not subject.

10. Commercial Mobile Radio Service (CMRS)

CMRS providers must enter into reciprocal compensation agreements with the ILECs to transport and terminate traffic. Such providers are not determined to be ILECs at this time.

11. Transport and Termination

The 1996 Act requires that transport and termination be set at "additional cost". TELRIC models should be used but the FCC sets a default range of 0.2 - 0.4 ¢/minute. (¶ 35)

12. Access to Rights of Way

LECs poles, ducts, conduits etc shall be made available in a nondiscriminatory way to cable television providers and other telecom providers.

13. Obligations Imposed on Non-incumbent LECs

Normally non-incumbent LECs will not be subject to the

requirements of this rule imposed on ILECs.

14. Exemptions, Suspensions, and Modifications of Section 251 Requirements

    Rural telephone companies with less than 2% of the nation's subscriber lines are exempt from this order, but state commissions shall have the authority for determining if a particular ILEC is exempt.

15. Commission Responsibilities Under Section 252

    The FCC is authorized to assume state responsibilities under this section if they "fail to act to carry out its responsibility" under this section. Standards and procedures are outlined that the FCC will use if it exercises this authority.

II. SCOPE OF THE COMMISSION'S RULES

A. Advantages and Disadvantages of National Rules

The FCC will set national rules believing it will facilitate negotiated agreements, ease entry for new competitors, help the states and the FCC to carry out the requirements of the Act, and permit additional procompetitive requirements of the states. In addition, BOCs that seek to offer long distance service must satisfy a "Competitive checklist set forth in Section 271. Many competitive checklist provisions require compliance with specific provisions of Section 251. Some national rules will help the states, the Department of Justice (DOJ)and the FCC carry out their responsibilities under Section 271. In addition nation rules that establish minimum requirements of Section 251 will provide states a consistent standard against which to judge checklist compliance.

B. Suggested Approaches for FCC Rules

The rules are minimum requirements and states may impose additional procompetitive requirements consistent with the Act. The rules are intended to provide parties guidance regarding their rights and obligations and will be reviewed periodically.

C. Legal Authority of the FCC to Establish Rules Applicable to

Intrastate Aspects of Interconnection, Services, and Unbundled Network Elements

The FCC believes Section 251, 252, and 253 fundamentally alters the regulatory system such that the FCC is authorized to set standards for intrastate aspects of interconnection and access, assume state authority if they fail to carry out the requirements of the Act, and Section 201 does not act as a state savings clause.

D. Commission's Legal Authority to Adopt National Pricing

The FCC believes the Act gives them power to adopt national pricing rules.

E. Authority to Take Enforcement Action

The FCC believes it has jurisdiction to remedy any parties failures under Section 251 and 252. Judicial review is not the only option to remedy or challenge state determinations.

F. Regulations of BOC Statements of Generally Available Terms

A single set of standards will be applied to both BOC statements of generally available terms and to arbitrated agreements.

G. States Roles in Fostering Local Competition

States will have key roles in arbitrating disputes, settling contract terms for interconnection and access, establishing procedures, and determining when virtual collocation will be permitted instead of physical collocation.

III. DUTY TO NEGOTIATE IN GOOD FAITH

A. Background

Section 251(c)(1) requires incumbent LECs to negotiate in good faith along with the requesting entrant on particular terms and conditions.

B. Advantages and Disadvantages of National Rules

The Commission believes it would be futile to define every action that might be inconsistent with good faith efforts. However, it will outline factors or practices that might be evidence of failure to negotiate in good faith.

C. Specific Practices that May Constitute a Failure to Negotiate in Good Faith

Good faith efforts will be determined on a case by case by the state commissions or the FCC. Nondisclosure agreements may be necessary and do not imply bad faith. A request to limit another parties legal remedies is not necessarily evidence of failure of good faith. Any efforts that seek to delay negotiations or postpone resolutions may be evidence, but here again must be determined on a case by case basis. Information should be provided to parties in negotiations in a timely manner. "Bona fide request" processes as part of the negotiations are not permitted.

D. Applicability of Section 252 Preexisting Agreements

The FCC concludes that the 1996 Act requires all interconnection agreements, "including any interconnection agreement negotiated before the date of enactment of the Act" to be submitted to state commission for approval pursuant to Section 252(e).

IV. INTERCONNECTION

This section discusses the interconnection obligations of Section 251(c)(2). Interconnection must be:
(1) provided at "any technically feasible point within [its] network;"
(2) "at least equal in quality to that provided by the local exchange carrier itself or...[to] any other party to which the carrier provides interconnection;"
(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 of this section and section 252."

A. Relationship Between Interconnection and Transport and

Termination - The FCC concluded that "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic.

B. **National Interconnection Rules** - The FCC determined that, as required by Section 251(d)(3), its rules permit states to go beyond the national rules and impose additional procompetitive interconnection requirements as long as the requirements are consistent with the Act and the FCC's rules.

C. **Interconnection for the Transmission and Routing of Telephone Exchange Service and Exchange Access** - "telephone exchange service and exchange access" imposes obligations for ILECs to provide interconnection for purposes of transmitting and routing telephone exchange traffic or exchange access traffic or both.

D. **Interexchange Service is Not Telephone Exchange Service or Exchange Access** - All carriers, including IXCs, may obtain interconnection pursuant to Section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange.

E. **Definition of "Technically Feasible"** - Technically feasible refers solely to technical operational concerns and not economic, space, or site considerations. The obligations imposed by Sections 251(c)(2) and 251(c)(3) include modifications to the ILEC's facilities necessary to accommodate interconnection or access to network elements. Specific, significant and demonstrable network reliability concerns associated with providing interconnection or access at a certain point will be regarded as relevant evidence that interconnection or access at that point is technically infeasible. Also, ILECs must prove to the state commission that a particular interconnection or access point is not technically feasible.

F. **Technically Feasible Points of Interconnection** - At a minimum, ILECs must provide interconnection at:

1. the line-side of a local switch (for ex., the main distribution frame);
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. the points of access to unbundled elements.

The FCC encouraged the identification of additional technically feasible points through negotiation and

arbitration.

G. **Just, Reasonable, and Nondiscriminatory Rates, Terms, and Conditions of Interconnection** - Section 251(c)(2)(D) requires ILECs to provide requesting carriers with interconnection at rates, terms, and conditions that are just,reasonable, and nondiscriminatory.

H. **Interconnection that is Equal in Quality** - This standard of Section 251(c)(2)(C) requires an ILEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the ILEC provides itself, a subsidiary, an affiliate, or any other party.

V. ACCESS TO UNBUNDLED NETWORK ELEMENTS

A. **Commission Authority to Identify Unbundled Network Elements**
The Act requires the FCC to identify network elements to be unbundled

B. **National Requirements for Unbundled Network Elements**
The FCC determined that establishing a minimum list of UNEs that ILECs must make availalbe to CLECs upon request would help achieve the procompetitive goals of Section 251(c)(3).

C. **Network Elements** - The FCC adopted the unbundled elements as physical facilities of the network and the features, functions, and capabilities associated with those facilities. For some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period, such as on a monthly basis. The FCC identified the local loop as a single network element; it asked the state to evaluate, on a case-by-case basis, whether to require access to subloop elements, which can be facilities or capabilities within the local loop.

The FCC pointed out that the only limitation placed on the definition of network element by TA 96 was that it must be "used in the provision of a telecommmunications service." The Commission determined that "network element" includes all "facilit[ies] or equipment used int he 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."

The definition also includes transport trunks, call-related databases, software used in such databases, and all other unbundled elements that we identify in this proceeding. The definition also includes information that ILECs use to provide telecommunications functions commercially, such as information required for pre-ordering, ordering, provisioning, billing, and maintenance and repair services.

D. **Access to Network Elements** - Access to network elements on an unbundled basis means ILECs must provide the facility or functionality of a particular element to requesting carriers, separate from the facility of functionality of other elements, for a separate fee. The purchasing carrier is entitled to exclusive use of the facility or capability of the facility for a period of time.

E. **Standards Necessary to Identify Unbundled Network Elements** - The FCC must consider the standards set forth in Section 251(c)(3) and 251(d)(2).

Section 251(c)(3) requires ILECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."

Section 251(d)(2) requires the FCC to "consider" at a minimum, whether access to proprietary elements is necessary (the "proprietary standard"), and whether the requesting carriers' ability to provide services would be impaired if the desired elements were not provided by the ILEC ("the impairment standard".) Section 251(d)(2)(A) requires the FCC and states to consider whether access to proprietary elements is "necessary", that is, whether it is a prerequisite for competition.

F. **Provision of a Telecommunications Service Using Unbundled Network Elements** - Section 251(c)(3) requires ILECs to provide access to UNEs in a manner that allows requesting carriers to combine such elements in order to provide a telecommunications service.

G. **Nondiscriminatory Access to Unbundled Network Elements and Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Unbundled Network Elements** - Section

251(c)(3) requires ILECs to provide nondiscriminatory access to network elements on an unbundled basis at rates that are just, reasonable, and nondiscriminatory.

Florida, along with other commissions and various competitors, argued that the FCC should adopt national standards governing the terms and conditions for the provision of unbundled elements to ensure that new entrants obtain nondiscriminatory access to elements. It was also argued that the FCC should establish requirements mandating nondiscriminatory performance for ordering, installation, provisioning, maintenance, repair and billing. The FCC agreed.

1. Nondiscriminatory Access to Unbundled Network Elements - refers to both the physcial or logical connection to the element and the element itself. Nondiscriminatory access in Section 251(c)(3) means at least two things: (1) the quality of a UNE that an ILEC provides, and the access provided to that element, must be equal between all carriers requesting access to that element and (2) where technically feasible, the access and the UNE provided must be at least equal-in-quality to that which the ILEC provides to itself.
2. Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Unbundled Network Elements - at a minimum means that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, must be equal to the terms and conditions under which the ILEC provisions such elements to itself. The terms and conditions must also allow an efficient carrier with a meaningful opportunity to compete.

H. **The Relationship Between Sections 251(c)(3) and 251(c)(4)** - The FCC concluded that Congress did not intend for Section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use UNEs to provide a telecommunications service.

I. **Provision of Interexchange Services Through The Use of Unbundled Network Elements** - Section 251(c)(3) permits IXCs and all other requesting telecommunications carriers to purchase UNEs for offering exchange access services or for providing exchange access services to themselves in order to provide interexchange services to consumers.

J. **Specific Unbundling Requirements** - ILECs must provide unbundled access to local loops, network interface devices, local and tandem switching capability, interoffice transmission facilities, signaling and call-related databases, operations support systems functions, and operator services and directory assistance facilities. OSS falls within the definition of "network element" and must be unbundled upon request under section 251(c)(3).

VI. METHODS OF OBTAINING INTERCONNECTION AND ACCESS TO UNBUNDLED ELEMENTS

A. **Overview** - Under Sections 251(c)(2) and 251(c)(3), any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements at a particular point. Section 251(c)(2) imposes an interconnection duty at any technically feasible point; it does not limit that duty to a specific method of interconnection or access to unbundled elements.

Physical and virtual collocation are the only methods of interconnection or access specifically addressed in Section 251.

B. **Collocation** - The FCC determined that it, along with the states, should adopt specific and detailed collocation rules to the extent possible. The FCC adopted the existing *Expanded Interconnection* requirements with some modifications.

VII. PRICING OF INTERCONNECTION AND UNBUNDLED ELEMENTS

A. **Overview** - Prices of interconnection, unbundled elements, resale, transport, and termination are critical terms and conditions of any interconnection agreement.

Section 252 requires that if carriers can agree on such prices voluntarily without government intervention, these agreements will be submitted directly to the states for approval; if the carriers, in voluntary negotiation, cannot determine the prices, state commissions will have to set those prices.

The FCC believes that it is critical for the FCC to establish among the states a common, pro-competition understanding of the pricing standards for interconnection and unbundled elements, resale, and transport and termination. To expedite the development of fair and efficient competition, the FCC considers it imperative to set forth rules and methodological principles for states to use in setting prices *(These rules and principles were challenged in the eighth Circuit Court by both state commission and ILEC companies; the challengers won the battle in the Eighth Court, but the FCC brought it to the Supreme Court and claimed the final victory.)*

Considering that not every state has the resources to implement the FCC's pricing methodology immediately in arbitration, the FCC establishes default proxies for state commissions to use when states resolve arbitrations in the period before they apply the pricing methodology. In most cases, these default proxies would provide price ceilings and states may select lower prices. Once a state sets prices according to an economic cost study, the defaults cease to apply.

B. Cost Based Pricing Methodology

Prices for unbundled elements under section 251 must be based on costs under the law, and that should be read as requiring that prices be based on forward-looking economic costs.

The FCC denies the recovery of embedded costs in excess of economic cost, ILECs' opportunity costs, universal service subsidies, and access charges. Under the forward-looking, cost-based pricing methodology, the FCC concludes that ILECs' rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred.

1. Application of the Statutory Pricing Standard - Based on the plain language of sections 251(c)(2), (c)(3), and section 252(d)(1), the FCC concluded that Congress intended to apply the same pricing rules to interconnection and unbundled elements. Also, since section 251(c)(6) requires that the ILECs provide physical collocation in terms and conditions that are identical to the standards for interconnection and unbundled elements in sections 251(c)(2) and (c)(3), collocation should be subject to the same pricing rules. Because collocation is a method of obtaining

interconnection and access to unbundled elements, collocation is properly treated under the same pricing rules.

2. Rate Levels - There is a lack of general agreement on the specifics of methodology for deriving prices based on long-run incremental costs (LRIC) or total service long-run incremental cost (TSLRIC). The FCC recognized that prices based on LRIC might not permit recovery of forward-looking costs if there are significant forward-looking joint and common costs among network elements.

Section 251(d)(1) requires, inter alia, that rates for interconnection and unbundled elements be based on "cost." The FCC believes that the statute contemplates the use of other forms of cost-based price regulation, such as the setting prices based on forward-looking economic cost methodologies (such as LRIC) that do not involve the use of an embedded rate base. Thus, prices for interconnection and unbundled elements pursuant to sections 251(c)(2), 251(c)(3), and 252(d)(1), should be set at forward-looking long-run economic cost. This means that prices are based on the TSLRIC of the network elements, which the FCC calls it Total Element Long Run Incremental Cost (TELRIC), which will include a reasonable allocation of forward-looking joint and common costs.

The difference between TSLRIC and TELRIC: the FCC's pricing methodology is commonly referred to as TSLRIC as the basis for pricing interconnection and unbundled elements, the FCC, however, coins the term TELRIC for following reasons. The ILECs offerings to be priced using this methodology are "network elements", rather than "telecommunications services," as defined by the 1996 ATC. More fundamentally, the FCC believes that TELRIC-based pricing of discrete network elements or facilities, such as local loops and switching, is likely to be much more economically rational than TSLRIC-based pricing of conventional services, such as interstate access service and local residential or business exchange service. Separate services are typically provided over shared network facilities, the costs of which may be joint and common with respect to some services. The costs of local loops and their associated line cards in local switches, for example, are common with respect to interstate access service and local exchange service, because once these facilities are installed to provide one service they are able to provide the other at no additional cost. By contrast, the network elements largely correspond to

distinct network facilities. Therefore, the amount of joint and common costs that must be allocated among separate offerings is likely to be much smaller using a TELRIC methodology than a TSLRIC approach that measures the costs of conventional services. Because it is difficult for regulators to determine an economically-optimal allocation of any joint and common costs, pricing elements, defined as facilities with associated features and functions, is more reliable from the standpoint of economic efficiency than pricing services that use shared network facilities.

Fifth Amendment Issues: the Supreme Court principle is that the determination of whether a rate is confiscatory depends on whether that rate is just and reasonable, and not on what method is used. The forward-looking, economic cost pricing TELRIC is a pricing method, and the FCC believes that the prices for interconnection and unbundled elements based on TELRIC are just and reasonable. Therefore, the rate based on this method is not confiscatory and does not violate the ILECs' rights under the Fifth Amendment of the Constitution.

3. Rate Structure Rules.
A general principle is that costs should be recovered in a manner that reflects the way they are incurred. Therefore, the FCC concludes, as a general rule, that ILECs' rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred.

Specific Rules:
1. The charges for dedicated facilities must be flat-rated, including, but not limited to, charges for unbundled loops, dedicated transport, interconnection, and collocation.
2. Recurring costs must be recovered through recurring charges, rather than through a nonrecurring charge. The exception is when and where recurring costs are *de minimis*, the FCC permits ILECs to recover such costs through nonrecurring charges. The FCC finds that recurring costs are *de minimis* where the costs of administering the recurring charge would be excessive in relation to the amount of the recurring costs.
3. States may, but need not, require ILECs in an arbitrated agreement to recover nonrecurring costs, costs that are incurred only once, through recurring charges over a reasonable period of time.

For shared facilities, it may be efficient to set prices using any of the following: a usage-sensitive charge; a usage-sensitive charge for peak-time usage and a lower

charge for off-peak usage; or a flat charge for the peak capacity that an interconnector wishes to pay for and use as though that portion of the facility were dedicated to the interconnector.

The costs of shared facilities including, but not limited to, much of local switching, tandem switching, transmission facilities between the end office and the tandem switch, and signaling, should be recovered in a manner that efficiently apportions costs among users. The cost of capacity is determined by the volume of traffic that the facilities are able to handle during peak load periods, and if usage-sensitive rates are used, then higher rates should be apply to peak period traffic, with lower rates for non-peak usage.

However, because of practical problems associated with peak-sensitive pricing, the FCC permits states to use either usage-sensitive rates or flat capacity-based rates for shared facilities, if a state finds that such rates reasonably reflect the costs imposed by the various users.

Geographic/Class-of-Service Averaging/Deaveraging: Geographic averaging prevents unreasonable or unlawful rate differences, but it could also distort competitors' decisions whether to lease unbundled elements or build their own facilities. The possible methods to deaverage interconnection and unbundled elements are to set rates by zone, LATA, or other area. Another issue is the deaveraging by class of service, for instance, whether business and residential loops, or loops developed using different technologies should be charged different rates; if so, how large a differential should be.

According to the 1996 Act mandates that rates for interconnection and unbundled elements be based on the cost of providing the interconnection and network elements, the FCC concludes that rates for interconnection and unbundled elements must be geographically deaveraged. The FCC specifies a three zone approach where the traffic is categorized as highest density, intermediate density, and lowest density, and states may, but need not, use these existing density-related rate zones. Where such systems are not in existence, states shall create a minimum of three cost-related zones.

Regarding class-of-service deaveraging, the FCC reached the opposite conclusion. Under the 1996 Act, wholesale rates for resold services will be based on retail rates less

avoided costs. Rates for interconnection and access to unbundled elements, however, are to be based on costs. Interconnection and unbundled elements are intermediate services provided by ILECs to CLECs, and there is no evidence that the cost of providing these intermediate services varies with the class of service the telecommunications carrier is providing to its end-user customers. Therefore, the FCC concludes that states may not impose class-of-service deaveraging on rates for interconnection and unbundled elements.

C. Default Proxy Ceiling and Ranges

In the interim period before states establish forward-looking, economic cost pricing, the FCC sets forth the default proxies. The default proxies serve, in most cases, serve as presumptive ceilings. States may set prices below those ceilings if the record before them supports a lower price. States should provide a reasonable basis for selecting a particular default price. In one case, for local switching, the default proxy is a range within which a state may set prices. The FCC adopts default proxies for particular network elements which the FCC believes will result in reasonable price ceilings or price ranges and will be beneficial to the states in conducting initial rate arbitrations, especially in the time prior to completion of a cost study.

1. *Proxies for Specific Elements.*

Loops: the FCC concludes that cost associated with unbundled loops should be recovered on a flat-rated basis and states should use a TELRIC methodology to establish geographically deaveraged, flat-rate charges for access to unbundled loops.

Local Switching: the FCC determines that a combination of a flat-rated charge for line ports, which are dedicated to a single new entrant, and either a flat-rate or per-minute usage charge for the switching matrix and for trunk ports, which constitute shared facilities, best reflects the way costs for unbundled local switching are incurred and is therefore reasonable. The FCC believes that a range between 0.2 cents per minute of use and 0.4 cents per minute of use for unbundled local switching is a reasonable default proxy. A state may impose a rate for unbundled local switching that is outside this range if it finds that a forward-looking economic cost study shows a higher or lower rate is justified.

Other Elements: the primary categories of network

elements identified in this order, other than loops and switching, are transport, signaling, and collocation.

For dedicated transmission links, states must use existing rates for interstate dedicated switched transport as a default proxy ceiling. Since 1991, ILECs interstate access rates have been subject price cap regulation, and have therefore been disengaged from embedded costs.

Transmission facilities between tandem switches and end offices are shared facilities and can be charged by using usage-sensitive rate or flat-rate. States may use as a default proxy ceiling the rate derived from the ILECs' interstate trunked transport rates.

States may also establish usage-sensitive charges to recover tandem switching costs. For states using such rates, the FCC establishes a default rate ceiling of 0.15 cents per minute of use.

Rates for signaling and database services should be usage-sensitive, based either on the number of queries or the number of messages, with the exception of the dedicated circuits known as signaling links, which should be charged on a flat-rated basis. The FCC establishes as a default proxy ceiling for these elements corresponding interstate access charges for these elements. For elements that have not been subject to the new services test, states may establish proxy ceilings by identifying the direct costs of providing the element and adding a reasonable allocation of joint and common costs.

The FCC has established rate structure rules for collocation elements in connection with the Expanded Interconnection proceeding (CC Docket No. 91-141, 9 FCC Rcd 5154, 5186 (1994)); therefore the FCC requires states to use the same rate structure rules for those collocation elements that the FCC established in the Expanded Interconnection proceeding. As a proxy ceiling, states may use the rates the ILEC has in effect in its federal expanded interconnection tariff for the equivalent services.

VIII. RESALE

Section 251(c)(4) imposes a duty on ILECs to offer certain services for resale at wholesale rates. The requirement that ILECs offer services at wholesale rates is described in

section 252(d)(3), which set forth the pricing standard that states must use in arbitrating agreements and reviewing rates of ILEC's available terms and conditions:
[A] State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications services requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

A. SCOPE OF SECTION 251 (C)(4)

Section 251(c)(4)(A) imposes on all ILECs the duty to offer for resale "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." The FCC finds no statutory basis for limiting the resale duty to basic telephone services and also concludes that each ILEC must establish a wholesale rate for each retail service.

Exchange access services are not subject to the resale requirements since end users generally do not purchase access services. Also, the FCC concludes that ILECs are not required to make services available for resale at wholesale rates to parties who are not "telecommunications carriers" or who are purchasing service for their own use. In addition, the FCC finds that independent public payphone providers are not "telecommunications carriers.

B. WHOLESALE PRICING

The statutory pricing standard for wholesale rates requires state commission to (1) identify what marketing, billing, collection, and other costs will be avoided by ILECs when they provide services at wholesale; and (2) calculate the portion of the retail prices for those services that is attributable to the avoided costs. Two methods can be used by states: (1) states identify and calculate avoided costs based on avoided cost studies; and (2) states select on an interim basis a discount rate from within a default range of discount adopted by the FCC. The FCC adopts a default range of rates that will permit a state commission to select a reasonable default wholesale rate between 17 and 25 percent below retail rate levels.

C. CONDITIONS AND LIMITATIONS

Section 251(c)(4) requires ILECs to make their services available for resale without unreasonable or discriminatory conditions and limitations.

1. Restrictions, Generally, and Burden of Proof: the FCC concludes that resale restrictions are presumptively unreasonable. Such resale restrictions are not limited to those found in the resale agreement. They include conditions and limitations contained in the ILECs's underlying tariff. Given the probability that restrictions and conditions may have anticompetitive results, the FCC concludes that it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4).

2. Promotions ans Discounts: an ILEC's obligation to make its services available for resale at the wholesale rate applies to discounted and promotional offerings. The FCC concludes that no basis exists for creating a general exemption from the wholesale requirement for all promotional and discount service offerings made by ILECs. However, the FCC also concludes that short-term (90 days) promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

3. Below-Cost and Residential Service: the issue here is whether below-cost and residential services are subject to section 251(c)(4). The FCC believes that below-cost services are subject to the wholesale rate obligation under section 251(c)(4) since the 1996 Act applies to "any telecommunications service" and thus does not exclude these types of services. Unlike the pricing of standard for unbundled elements, the resale pricing standard is not based on cost plus a reasonable profit. The resale pricing standard gives the end user the benefit of an implicit subsidy in the case of below-cost service, whether the end user is served by an ILEC or by a reseller.

4. Cross-Class Selling: there is a general agreement that residential services should not be sold to nonresidential end users. The FCC concludes that restrictions prohibiting such cross-class reselling of residential services are reasonable. Section 251(c)(4)(B) permits states to prohibit resellers from selling residential services to customers ineligible to subscribe to such services from the ILEC. This includes the prohibition of resale of Lifeline or any other means-tested service offering to end users not eligible to subscribe to such service offering. All other cross-class restrictions should be presumed unreasonable.

5. Incumbent LEC Withdrawal of Services: the FCC is concerned that the ILECs' ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with ILECs. The FCC declines to issue general rules on this subject and concludes that this is a matter best left to state commissions. However, the FCC says that if an ILEC grandfathers its own customers of a withdrawn service, such grandfathering should extend to reseller end users. For the duration of any grandfathering period, all grandfathered customers should have the right to purchase such grandfathered services either directly from the ILEC or indirectly through a reseller.

6. Provisioning: resellers and IXCs express concern that ILECs will not make services available for resale in a timely manners or fail to provide a minimal level of operational support and service quality. The FCC concludes that services 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. Practices to the contrary violates the 1996 Act's prohibition of discriminatory restrictions, limitations, or prohibitions on resale. This requirement includes differences imperceptible to end users because such difference may still provide ILECs with advantages in the marketplace. Additionally, the FCC concludes that ILEC services are to 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. The FCC notes that common carrier obligations continue to apply to ILECs in their relations with resellers. In terms of brand identification, the FCC concludes that where operator, call completion, or directory assistance service is part of the service or service package an ILEC offers for resale, failure by an ILEC to comply with reseller branding requests presumptively constitutes an unreasonable restriction on resale, but the FCC leaves to states the issue of how much to charge for the fees for unbranding or rebranding requests.

D. RESALE OBLIGATIONS OF LECS UNDER SECTION 251(B)(1)

Section 251(b)(1) requires resale of all telecommunications services offered by the carrier while section 251(c)(4) only applies to telecommunications services that the carrier provides at retail to subscribers who are not

telecommunications carriers. Section 251(b)(1) clearly omits a wholesale pricing requirement, therefore, the FCC concludes that the 1996 Act does not impose wholesale pricing requirements on non ILECs.

E. APPLICATION OF ACCESS CHARGES

In the NPRM, the FCC suggested that an entrant that merely resold a bundled retail service purchased at wholesale rates would not receive access revenues. The FCC concludes that the 1996 Act requires that ILECs continue to receive access charge revenues when local services are resold under section 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.

For the SLC, the FCC agrees that the ILECs can recover the SLC from resellers (the SLC is not subject to the wholesale pricing standard of 252(d)(3); the same thing holds for PIC). ILECs may assess the SLC and the PIC change charge on telecommunications carriers that resell ILEC services under Section 251(c)(4).

IX. DUTIES IMPOSED ON "TELECOMMUNICATIONS CARRIERS" BY SECTION 251(A)

A "telecommunications carrier" is defined as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services. A telecommunications carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing telecommunications services, except that the FCC shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

A "telecommunications service" is defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. Enhanced service providers, to the extent that they are providing telecommunications services , are also entitled to the rights under section 251(a) (the right to request interconnection and obtain access to unbundled elements at any technically feasible point in an ILEC's network).

As a general policy matter, all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise.