the existing need for oversight regulation of the dominant LECs. If a two-track system is ultimately adopted by the Commission, it might make sense to consolidate the determination of whether a new service should be a Track 1 or a Track 2 service with a LEC's related request for an expedited determination regarding its Part 69 waiver. The process adopted must, however, not become so streamlined that interested parties have no meaningful opportunity to be heard and to challenge the Commission's proposed action.

In a very real sense, the Commission currently is involved in managing the competitive process and its authority must be exercised in a manner that allows competition to work. Given the realities of modern day administrative law, the Commission does not have the resources to actively monitor and enforce each and every market protecting restriction that its rules place upon the LECs. Competitors, therefore, must be able to freely discern, in an affordable fashion, the details of the LECs' filings. Competitors would then be able to supplement enforcement of the Commission's regulations. A balance must be struck between overburdening LECs with onerous regulations and providing competitors with a fair opportunity to ensure that the competitive safeguards established by the Commission are not being ignored.

Issue 5a Elimination Of The Lower Service Band Is Not In The Public Interest

In a misguided effort to promote competition, the NPRM proposes eliminating the lower service band limits.[16] The price cap regime, however, was instituted originally not to enhance competition, but to encourage the LECs to be more efficient. Within the price cap regime, the establishment of service baskets and price bands provides the chief protection against anti-competitive pricing by LECs. Any loosening of these two restrictions necessarily raises the possibility of anti-competitive pricing. It would be difficult to prevent LECs from off-setting reductions in prices for some categories with price increases in other less competitive categories.[17]

Thus, the continuing absolute dominance of the LECs in the local service marketplace, elimination of the lower service band limits would not be in the public interest. Although elimination of the lower band index limits could result in short term reduction in prices to certain consumers, in the long run the impact on facilities-based competition and the lower prices it would bring could be devastating. If LECs are allowed to freely price below the existing bands, emerging facilities-based competitors would have little or no protection from anti-

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[16] Id. at 75.

[17] This shifting of costs from competitive to non-competitive services can be accomplished without offsetting price increases by targeting price decreases (either required by price cap formula or in response to overall reductions in total company costs) exclusively to competitive services.

competitive LEC pricing. Elimination of the lower band restrictions would be appropriate in only those few limited circumstances where LECs can and have demonstrated that true competition exists.

Issue 5b Additional Limits Should Be Placed On A LEC's Ability To Increase Its Prices Unless Competition Is Demonstrated

The NPRM seeks comment on whether additional limits should be imposed on the ability of LECs to subsequently increase prices after LECs have decreased prices pursuant to the proposed relaxation of the lower band index requirement. TW Comm supports such limits. However, while the ability to immediately increase prices that were reduced for predatory purposes acts as some deterrent, the effectiveness of that deterrent will depend upon the potential reward that LECs could reap pursuant to the anti-competitive pricing and the degree to which the Commission is successful in eliminating barriers to entry.

The NPRM also proposes shifting the burden of proof from LECs to CLECs.[18] Instead of the dominant provider in a market bearing the burden of demonstrating that its proposed new rates are not predatory and below cost, the NPRM would put such burdens on emerging competitors. Such a burden shift would be unfair and extremely detrimental to competitors who will not easily be able to make such a showing given that all relevant cost information is under the LEC's control. This is

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[18] LEC Pricing Flexibility NPRM at para. 83.

particularly true given that a large proportion of the costs are fixed and shared with other services. Therefore, with the enormous potential for abuse of market power that the dominant LECs possess, the burden of proof must remain with LECs to demonstrate that their proposed prices are just and reasonable.

Issues 5c, 6a, 6b The Current Dearth Of Local Competition Does Not Warrant Additional Pricing Flexibility Or Price Cap Basket Revisions

The NPRM seeks comment on whether competitive developments in a particular service requires adjustments to the current basket structure.[19] As with the issue of modifying bands, the development of competition for particular services has not yet advanced to the point where adjustments to the current basket structures are required.

Price cap baskets should be changed, if at all, on a case-by-case basis and only as competitive conditions change for each individual price cap LEC. With competition only beginning to develop, any generic revisions to the price cap baskets would be premature until the LEC potential for cross-subsidization has been entirely limited by the emergence of other competitive options for customers.

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[19] Id. at para. 90.

Issue 6c Different Basket Structures Should Be Considered As Competition Develops

The NPRM seeks comment on the need to create new baskets as LECs enter into new services that may not be subject to competition.[20] Competition is likely to develop in a non-uniform manner. It will manifest itself at markedly different rates as a result of geography, population density, state commission action and varied customer demands. Given this fact, different basket structures for a particular LEC should be considered when competition has occurred in a particular market area.

Issues 7a, 7b, 7c Service Category Consolidation Is Premature

Consolidation of service categories[21] in order to allow LECs more pricing flexibility should not be undertaken at this time or in the foreseeable future. The LECs' ability to offset rate decreases for competitive services with rate increases for less competitive services must be closely monitored and limited. Consolidation of service categories is only appropriate when LECs' products have a high cross elasticity of demand, thus preventing them from offsetting increases in one service with decreases in the price of another. The burden of making such a showing must remain on the LECs. Should the Commission determine

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[20] Id. at para. 91.

[21] Id. at para. 93.

that service categories should be combined, the weighted average approach[22] is an option worthy of consideration.

Issue 8, 9a, 9b Operator Services And Operator-Related Calls Should Be Placed In Separate Traffic Sensitive Baskets

Comment is sought on the treatment of operator services and operator-related calls.[23] Specifically, whether such services should be placed in a separate service category in the traffic sensitive basket or combined with services. Because operator services are a distinct type of service, they should be placed in their own service category in the traffic sensitive basket, and not be combined with any other pre-existing service basket. Similarly, operator-related and directory assistance call completion services should be handled as a separate service category in the traffic sensitive basket. The NPRM's tentative proposal to place operator-related call completion services in a different service category from operator line transfer and line verification services is justified given the high potential for LECs to engage in cross-subsidization of these services.

LECs continue to have dominant market power in the provision of directory assistance based upon their ownership and control of the directory assistance data bases. Directory assistance related call completion service is not competitive

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[22] This approach establishes the new upper and lower bands based on the weighted average of the pre-existing upper and lower bands. LEC Pricing Flexibility NPRM at para. 95.

[23] Id. at paras. 96-102.

now, nor is it likely to become competitive in the near future. It, therefore, should be given its own service category in the traffic sensitive basket.

Issue 10a LECs Must Prove That Competition Exists Before Being Afforded Relaxed Regulatory Treatment

TW Comm is perplexed and dismayed that the Commission has tentatively proposed that LECs should immediately be afforded the relaxed regulatory treatment and pricing flexibilities contemplated by the NPRM.[24] The competitive marketplace should be allowed to develop to a far greater degree than that which exists today before relaxation of regulatory oversight is contemplated. As a threshold matter, conditions that would effectively remove entry barriers to competition are not even in place in most jurisdictions. Additional regulatory streamlining and pricing flexibility at this juncture while the LECs maintain virtual monopoly control over local services would destroy years of Commission effort to implement pro-competition policies. Before regulatory controls can be lessened, individual LECs must be required to make a showing that a substantial level of actual competition exists. This competitive showing must, at a minimum, be based upon an analysis of the percentage of access lines being provided by facilities-based competitors in a specified geographic area.

One possible competitive threshold for consideration

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[24] Id. at para. 103.

would be to impose the requirement that a LEC demonstrate the presence of significant competition as measured both by the intensity and extensiveness of other entities' market share. A LEC would be required to demonstrate that (1) on average, over thirty percent of the facilities-based access lines in a particular market are held by its competitors and (2) that competitors have collectively captured at least ten percent of the facilities-based access lines in ninety percent of the wire centers within the market. The first element is necessary to demonstrate that a certain threshold of intensity in competition is met. The second element ensures that the first threshold is not met with a skewed market presence by competitors. For example, if competitors had gained control of thirty percent of the lines in a few wire centers within a given market but had gained less than 5 percent in the rest of the market area, the LEC would satisfy the first threshold, but not the second. Prior to a LEC making such a showing, there is no reason to afford it increased regulatory flexibility in the relevant market.[25]

Issue 10b, 10c Regulatory Relaxation And Pricing Flexibility Proposals Should Be Implemented Gradually

The NPRM further proposes that LECs be able to take advantage of any or all of the proposed relaxed regulations, with the amazing suggestion that the cumulative effect of the changes will not cause competitive harm.[26] The exact relationship among

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[25] See infra pg. 52, 55.

[26] LEC Pricing Flexibility NPRM at para. 104.

the various proposals is a lesser issue. A larger concern is the proposed timing of the changes and the fact that LECs will be able to take full and immediate advantage of the Commission's proposed relaxed regulations and pricing flexibilities absent any demonstration of a competitive need to do so. TW Comm is not opposed to full and immediate implementation if the Commission has determined that effective actual competition as demonstrated by a competitive checklist and an actual market share analysis has been satisfied as proposed by TW Comm. However, if the Commission does not look at market share and actual competition but focuses only on potential competition, if regulatory changes are to be implemented, they should occur one item at a time so that affected parties and the Commission can carefully evaluate the impact of each change on the marketplace. This type of gradual approach to implementation would allow for an orderly transition, while maintaining the Commission's ability to prevent competitive harm.

Recognizing that pricing flexibility could result in predatory pricing by the LECs, the NPRM proposes placing additional limits on subsequent upward pricing.[27] TW Comm is not opposed to the Commission taking such action. The suggested limit of one percent, however, may or may not prove to be adequate. TW Comm is aware of no empirical data to support the establishment of a specific percentage limit.

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[27] Id. at para. 105.

Issues 11a, 11b A Competitive Checklist That Demonstrates The Removal Of Competitive Barriers Is An Appropriate Starting Point

As proposed in the NPRM, additional price cap flexibility for LEC access services would be conditioned upon the lowering of entry barriers.[28] Services would be removed from price caps altogether when the Commission had evidence of a certain level of actual competition for those services with the evidence being described in Section V of the NPRM entitled "Streamlined Regulation." The purpose of linking lessened regulatory oversight and additional pricing flexibility to the elimination of entry barriers would be to provide an incentive to LECs to open their markets to local competition.[29]

Implementation of the competitive checklist[30] is the first of many steps that need to be taken to ensure the possibility of the existence of competition. Competitive checklists are useful tools and provide an adequate starting point for analysis. They are, however, only one of many devices available for determining whether sustainable competition can exist in a particular market[31].

The competitive checklist proposed in the NPRM includes

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28 Id. at para. 106.

29 Id. at para. 107.

30 LEC Pricing Flexibility NPRM at paras. 108-110.

31 Should competition not develop, the ability to modify or add other factors to the competitive checklist must be available. The Commission, in the end, must judge the effect of its policies by the actual development or lack thereof of competition.

the following eight items, and, as noted in the NPRM, most of the criteria are also included in pending legislation:[32]

a. competing providers of local switched telephone service have been authorized and have become operational;[33]

b. local loops and switches have been unbundled, i.e., a LEC's competitors may obtain access to the local loop directly, without purchasing local switching or other services;

c. intrastate expanded interconnection is available through tariff or contract (physical or virtual collocation);

d. service provider number portability is available, i.e., end users are able to switch local service providers and retain their current telephone number;

e. compensation arrangements have been established for the LEC and its competitors to complete telephone calls originated on the other carrier's networks;

f. competitors have access to directory assistance, 911, and other databases;

g. intraLATA toll dialing parity is implemented, i.e., consumers are able to place calls dialing the same number of digits when using any local service provider; and;

h. competitors have implemented or announced plans to collocate, or otherwise deploy facilities, and serve customers in wire centers (or other geographic areas) that account for a significant portion of the incumbent LEC's business lines or interstate access revenues.

The NPRM recognizes that the last item measures near-term supply elasticity, but indicates that it may reflect whether

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32 H.R. 1555, 104th Cong., 1st Sess. (1995); S. 652, 104th Cong., 1st Sess. (1995).

33 Such an analysis should specifically determine if any facilities-based providers have been authorized and are fully operational.

entry barriers have been removed.[34]

The elimination of the seven entry barriers that are identified as "a" through "g" are threshold conditions without which a competitive marketplace cannot be expected to develop. However, the mere elimination of these barriers will not in and of itself necessarily assure that a competitive marketplace will develop. (The last item is not a barrier to entry but is rather a measure of whether competition has begun to emerge.)

The linkage of pricing flexibility to the elimination of entry barriers may create an incentive for the LECs to eliminate such barriers, but creating such a linkage is not sound policy. The linkage of LEC behavior to opportunities for financial gain or penalty can be appropriate if the arrangement is correctly designed, specified, and enforced. For example, under some state price cap plans, if a LEC fails to meet certain standards of service quality, the productivity factor is increased, thereby decreasing the amount by which the overall price cap may be raised; however, if the LEC meets the service quality standards established by the state commission, there is no change to the productivity factor. Under this model, the LEC is penalized if it fails to provide the service quality that it is expected to provide, but it is not rewarded simply for maintaining what should be the minimum level of performance. Similarly, LECs should not be "rewarded" for eliminating barriers to entry, <u>which they should be expected to do in the first place</u>.

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[34] <u>LEC Pricing Flexibility NPRM</u> at para. 108, n. 160.

Instead, if the Commission concludes that an incentive is necessary to encourage barrier-eliminating behavior by the LECs, it should penalize the LEC for failing to comply (rather than rewarding it for compliance).

Barriers to entry should be eliminated on their own merits to allow the development of efficient competition. As a separate matter, pricing flexibility should be granted only if sufficient competition arises to warrant it. The elimination of barriers to entry merely creates the opportunity for competition to evolve, but will not necessarily result in effective competition.

The Commission's eighth item, particularly the aspect that relies upon whether competitors serve customers that account for a significant portion of the LEC's market share, is an appropriate and reliable measure of whether sufficient competition has evolved to warrant a relaxation of pricing constraints. The Commission has based much of its policy development efforts and initiatives in recent years on the premise that, given the correct regulatory environment with all artificial economic and legal barriers removed, competition can be expected to develop in telecommunications markets. Efforts by incumbent LECs to portray competition as eroding scale and/or scope economies, creating stranded investment, and a litany of other horribles, cannot and does not justify retention of entry barriers merely for the purpose of slowing the development of an effective, price-constraining competitive marketplace. While

checklist items "a" through "g" are important,[35] the "acid test" of the elimination of entry barriers is whether or not competition actually develops (item "h").[36]

The presence of substantial competitive penetration is sufficient in and of itself to demonstrate that entry barriers (whether or not explicitly contained on the proposed checklist) are no longer still operative; conversely, the absence of actual competitive penetration is by itself fully sufficient to demonstrate that entry barriers and restrictions are still alive and well, even if all of the other items on the checklist are nominally satisfied. Since the Commission has already determined that competition is both economically feasible and in the public interest, it is entirely reasonable for the Commission to conclude that the absence of a sufficient level of competitive penetration is indicative of the persistence of LEC-imposed entry barriers.

Furthermore, the way items on the competition checklist are "checked off" will influence the prospects for true competition. For example, compensation arrangements for terminating local traffic on LEC and competitor networks may

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35 TW Comm would, however, urge the Commission to modify the checklist in several ways. For example, item a should be modified to specifically require an analysis of the status of facilities-based providers.

36 This checklist element also should be modified to require LECs to demonstrate that competitors have implemented or announced plans to collocate, or otherwise deploy facilities, and service customers in wire centers (or other geographic areas) that account for a significant portion of the incumbent LEC's business lines <u>and</u> interstate access revenues.

exist, but if the rates and terms of such agreements are uneconomic, e.g., if they require competitors to pay excessive charges for terminating traffic, the mere existence of the arrangement will not be an effective measure of competition. Similarly, if a LEC has unbundled its local loops and switches but prices them to include an exorbitant "contribution" rate element, item "b" might be "checked off" but again, the mere existence of a tariff for an unbundled loop will not allow competition to develop if the rate is uneconomic.[37] As a general proposition, the checklist is an important and necessary first step to evaluating the marketplace, but the Commission should also consider (1) whether the rates, terms, and conditions of the essential bottleneck elements are fair and economic;[38] and (2) most importantly, the effect of the elimination of the barriers on the actual development of competition.

The checklist tentatively set forth by the Commission is not without significant and troubling ambiguity, however. Many of the items on the checklist raise issues that need to be further defined and developed by the Commission before the

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[37] For example, NYNEX-Massachusetts has proposed to charge $21 per month for an unbundled residence loop (without any central office termination or usage), a rate that is some 25 percent higher than the price NYNEX charges its retail residential customers for a bundled dial tone line with flat-rate local calling. Massachusetts DPU 94-185, Investigation by the Department on Its Own Motion into IntraLATA and Local Exchange Competition in Massachusetts, Testimony of Paula Brown (NYNEX) (May 19, 1995).

[38] The rates, terms, and conditions of the LECs' provision of bottleneck elements directly relates to items "b", "c", "e", and "f" in the Commission's competitive checklist.

proposed checklist can be meaningfully used to evaluate the competitiveness of the local market. For example, the first item would require that competing providers of local switched telephone service have been authorized and have become operational. The Commission has not defined "operational," and yet this term lends itself to a wide range of interpretations, e.g., does operational mean that one competing provider has one customer, or two new entrants each serve 100 customers, or some providers have issued marketing literature, or a provider has been granted collocation in a LEC central office but does not yet serve any customers?

The fourth item requires the availability of service provider number portability, leaving open the possibility of a LEC argument that remote call forwarding ("RCF") or direct inward dialing ("DID") would suffice for this measure. However, true number portability - not the existence of inadequate substitutes for number portability - is essential to the development of effective competition. The interim "solutions" that have been recommended by the incumbent LECs to accommodate number portability — RCF and flexible DID — although useful as interim measures, are entirely unsatisfactory on any sustainable basis and must be replaced with true number portability as soon as possible. The RCF and DID options have technical limitations, and the LECs' proposed pricing for these arrangements typically are set so high as to significantly impair the ability of CLECs to compete, since the recurring rates often represent a substantial fraction of the total monthly revenues for local

service that could be derived from a CLEC subscriber. Moreover, CLECs are denied access revenues for terminating calls to "ported" numbers.

The Commission should consider including additional items in its competitive checklist such as:

- Competitors have been assigned central office NXX codes so that they have the same capability that LECs have to manage the use of NXX codes and the assignment of individual telephone numbers to their customers.
- Competitors are able to select their own rating areas, exchange boundaries, and local calling areas, and are not forced to accept those established by the incumbent LEC as if they were cast in stone.

The NPRM also explicitly seeks comment on the "Rochester model." The original Rochester Telephone Corporation ("RTC") model was predicated on the fact that there is a real distinction between wholesale and retail commission services. Since this premise was not fully implemented, it has not been completely proven nor has it been disproved. This fact, and the uncertainty surrounding the role that resale should play, must be carefully analyzed. Should the Commission adopt the mere existence of resale as a valid showing by LECs that "competition" exists, retail prices may be temporarily lowered. Such a policy would, however, create the real risk of continuing the current monopoly environment on a wholesale level, leaving the incumbent carriers with adequate market power to prevent the emergence of true facilities-based competition.

RTC's "Open Market Plan" ("OMP") was an important initial milestone in the development of local competition, not so

much because of its specific operating details, but rather because it represented the first significant effort by a LEC, its competitors, and its regulators to formulate market rules for the purpose of accommodating competitive entry. The OMP itself, as adopted by the New York Public Service Commission ("NYPSC"), represented a settlement of a contested regulatory proceeding that was accepted by the NYPSC, over considerable protests from some individual parties. While the settlement permitted the OMP to be implemented and allowed local exchange service entry to occur, it merely scratched the surface in creating the structural changes and market reforms that are essential if local competition is to succeed.

For example, as adopted by the NYPSC, the OMP did not address universal service subsidies and it permits RTC to use its substantial yellow pages directory profits, not realistically available to any competitor, to subsidize its own retail-level local services. In addition, the OMP did not set any implementation timeframes, with sanctions for failure to met them, for RTC to develop and install operating support systems to facilitate both facilities-based and resale competition.

The Rochester experience is useful but hardly the ultimate role model. Indeed, as a first-of-its-kind settlement, the parties to the agreement collectively made significant compromises in their positions, some of which the parties might

no longer be willing to make given hindsight. The OMP[39] settlement, for example, does not fully satisfy all of the elements on the proposed "competitive checklist."[40]

The NPRM attempts to draw a distinction between the measures of competition that would justify additional price cap flexibility (i.e., the lowering of entry barriers) and the measures of competition that would warrant the removal of services from price caps altogether (i.e., when the Commission had evidence of "a certain level of actual competition for those services" with the evidence being described in Section V of the NPRM, "Streamlined Regulation"). Instead of attempting to draw such a distinction, the basis of granting either additional price cap flexibility or the removal of services from price caps should be the presence of actual competition. Lessened regulation

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39 The actual experience of initial competitive development in Rochester may provide some insight regarding how local competition can be expected to develop. For example, customers are supplementing rather than substituting their service from Rochester with demand being for second lines rather than first lines. This scenario is in direct contrast with the experience in the long-distance market where customers are actively switching their long-distance provider. Thus, the initial experience in Rochester demonstrates that LEC market shares will not diminish quickly.

40 Absent true number portability (item d), for example, item e cannot be fully satisfied because the access revenues associated with calls that are forwarded to CLEC customers will be retained by RTC, rather than by the CLEC. Also, as discussed above, the mere fact that items on the Commission's list can be checked off does not reflect in any way the merits of the particular rates, terms and conditions of the items on the list.

should not be afforded to services based simply upon faith in the ultimate development of competition.

Issue 12 LECs Should Be Required To File A Petition When Seeking Relaxed Regulation

The NPRM invites parties to comment on the procedure LECs should use when seeking relaxed or additional pricing flexibility within the price cap regime.[41] At a minimum, any procedures adopted by the Commission must provide interested parties, such as CLECs, with a full and fair opportunity to participate regarding the Commission's interpretation of its rules for justification of pricing flexibility. A declaratory judgment proceeding, with full notice and opportunity to be heard for all parties, would also be acceptable. In general, a formal petition or request should be required of the LEC. Such a request must assume the validity of the underlying Commission rules and correctly place the burden upon the requesting party to prove that the application of those rules is no longer warranted.

A mere certification letter process would not be adequate because it fails to provide competitors with an adequate opportunity to review, analyze and participate in the process. A certification process also would make it very difficult for competitors to track LEC proposals. For similar reasons, the tariff review process is not an appropriate forum for such

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[41] LEC Pricing Flexibility NPRM at para. 115.

requests. Whatever process is ultimately adopted, the criteria should be clearly defined so that each determination does not necessitate all parties engaging in a detailed, expensive and prolonged litigation.

Background
Issues 13, 14a, 14b The Commission Should Consider The Entire Economic Market In Its Evaluation Of LECs' Market Power In The Provision Of Access Services

In order to determine whether a firm exerts market power, it is necessary to define the appropriate market within which the firm's power is to be assessed. The NPRM requests comment on the relevant product market and the relevant geographic market for assessing the market power of LECs in their provision of access services. Specifically, the NPRM seeks a model for defining product and geographic markets in access service that can provide definitions that can serve as the "base units for evaluating competition in the access markets."[42]

Although the Commission exercises regulatory oversight only over the LECs' interstate services, it would be a serious mistake to allow these jurisdictional boundaries to constrain analysis of the appropriate economic boundaries of a market. Relevant markets encompass intrastate and interstate services; indeed, it is unlikely that any competitor could survive if, for example, it were permitted to serve only one and not the other. Therefore, although the Commission does not regulate a LEC's

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[42] Id. at para. 116.

intrastate services, it must consider the LEC's provision of such services when it defines and examines markets.[43]

For example, if interstate switched transport service were characterized by high demand elasticity and high supply elasticity, if the same facilities were supporting intrastate message toll service, and furthermore, if the intrastate MTS market were not yet competitive, the LEC would have a unique and formidable advantage over any other facilities-based provider by virtue of its ability to share and to shift costs for the interstate switched transport with and to the intrastate toll market. There is no "interstate market" per se, and a narrow examination of an "interstate market" could lead one to the erroneous conclusion that the overall market for the LECs' services faces effective competition.

Of course, there may be examples where a given product market is competitive in both the interstate and intrastate jurisdictions. At some point in the future, a LEC's provision of special access services may be such that it is competitive within a particular geographic area, in both the intrastate and interstate levels. Indeed, it is probable that if competitive access providers ("CAPs") have constructed competitive networks for providing dedicated access between customer premises and interexchange carriers' points of presence and between LECs' central offices and IXCs' POPs, that such facilities will pose

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[43] The Commission has noted the relevance of state regulation on the Commission's level of interstate oversight. See Id. at para. 109.

competition for both the LECs' interstate and intrastate special access services.

Issue 13 <u>The Definition Of The Relevant Product Market Should Take Into Account The Substantial Common Costs That Support Differing Telecommunications Services</u>

The relative presence or absence of shared costs among products or among geographic areas directly and substantially influences the possibility for LECs to exert market power, particularly where the products or geographic areas encompass both competitive and noncompetitive elements. The more extensive the joint or shared costs as between a competitive and a monopoly service offered by an integrated, dominant LEC, the more difficult it will be for a competitor to overcome the substantial supply advantage enjoyed by the LEC.

Indeed, the presence of large shared (and often relatively fixed) costs argues for the treatment of such underlying facilities as "essential," permitting the competitor to access them on the same favorable terms as the LEC itself enjoys with respect to its competitive services. For example, a pole line is capable of carrying a broad range of distribution facilities, including dial tone, private line, special access, broadband, and video. From the LEC's perspective, adding video distribution cable facilities to an existing pole line imposes minimal incremental cost, because it is able to share the costs of the pole with its preexisting conventional (voice grade) services. Since it is not economically feasible for a new

entrant to duplicate the in-place poles, it has very little choice but to rent space on LEC and other utility poles for purposes of running its distribution plant. Unless the LEC charges the new entrant the same (marginal cost) price that the LEC itself incurs when it adds its own video dial tone cables to an existing pole, it gains an overwhelming economic advantage over rival cable TV operators.[44]

If, within a given geographic area, a LEC were to offer numerous competitive services and no monopoly services (a scenario that is many years off), the fact that the diverse services might share substantial common costs would not be troubling. The scenario that merits particular scrutiny — and the one that is likely to prevail for the foreseeable future — is one in which the products and/or geographic areas encompass a combination of competitive and noncompetitive services. The presence of a high percentage of common costs creates a strong incentive for LECs to shift such costs from the competitive market to the noncompetitive one. That is, although an individual market may appear intensely competitive, if an adjacent product or geographic market is not competitive, the appearance of competitiveness may be misleading and illusory.

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[44] An alternative, albeit less economically desirable, approach would be for the LEC to impute to itself whatever price it imposes upon its competitors for access to poles. But any arrangement whereby the LEC can use poles for its own competitive services at little or no marginal cost, while imposing substantial pole attachment costs upon its competitors, is fundamentally anticompetitive and at odds with the Commission's goals of achieving a level playing field that is truly conducive to fair and open competitive entry.

The presence of alternative suppliers of switched transport in the Manhattan area for example, may suggest that the product is competitive in the Manhattan market. However, two additional levels of examination are required before there can be a determination that the product is competitive in the Manhattan market. First, if there is no competition for intraLATA long-distance services (likely caused in part by the lack of 1+ presubscription), the competition for interstate switched transport may not be sufficiently robust to constrain the LEC's market power, because the LEC can easily shift common costs to the (noncompetitive) message toll service market. Second, there may be substantial competitive activity in lower Manhattan for switched transport, but if the competition is not effective throughout the Manhattan market, the service should not be declared competitive.

Alternatively, the LEC should be required to price switched transport identically throughout the given geographic area characterized by shared costs. Here, the LEC is forced to offer competitively-priced services even in those segments of the defined market in which no competition is yet to be found. The LEC is thus precluded from cross-subsidizing the competitive portions of the market with higher prices charged in the noncompetitive portions, and further is required to bring competitive price levels to all customers, whether or not any individual customer actually confronts a competitive alternative. If a LEC is willing to price its services under this "market-wide" arrangement, then the entire scope of the area within which