Similarly, modifying rules that restrict LECs' ability to lower their rates or to offer APPs will allow consumers to reap the benefits of market-driven price reductions. These changes should not wait until a competitive test is met. On the contrary, as the Commission correctly pointed out, requirements that result in artificially high prices encourage entry by inefficient service providers. In addition, above-cost pricing can cause customers to consume other goods and services or to substitute dedicated facilities, even if the use of those facilities is not economically efficient.[38] The Commission acknowledged that "[t]he current price cap plan may inhibit a LEC from lowering its prices to cost in certain instances."[39] To maximize consumer welfare, the Commission needs to change these rules now.

Despite the Commission's tentative conclusion that these changes are warranted irrespective of the status of competition in a particular market, the Commission leaves the door open to some kind of competitive or market structure test. Any such test would be wrong. LECs should not be held hostage to a regulatory framework which the Commission admits needs improvement, particularly since many elements of the competitive test the Commission suggests are not even within the control of LECs. Indeed, it would be an abdication of the Commission's public interest responsibilities not to implement needed price cap changes as expeditiously as possible.

III. STREAMLINED REGULATION FOR LECS SHOULD BE BASED ON

[38] *Id.* at ¶¶ 24-25

[39] *Id.* at ¶¶ 83.

EASILY ADMINISTRABLE CRITERIA.

Stating that "increased competition for LEC services is inevitable," the Commission sought comments on various substantive and procedural issues relating to streamlined regulation of LEC services.[40] The Commission sought comment on whether the analytical framework used in the Interexchange Order[41] and the Commercial Services Order[42] is a reasonable basis for determining which of the LECs' services should be accorded streamlined regulation. The Commission also asked whether LECs should be permitted to offer individually negotiated contracts for streamlined services. In addition, the Commission sought comment on the procedures by which streamlined regulation should be established.

As discussed more fully below, Ameritech believes that the analytical framework used in assessing interexchange competition is largely -- though not entirely -- appropriate in the access services marketplace. Specifically, Ameritech believes that access competition is measured most accurately by reference to supply and demand elasticities -- the two factors upon which the Commission principally relied in assessing interexchange competition. On the other hand, the secondary factors in the Commission's interexchange analysis -- market share and pricing trends -- are not necessarily reliable measures of LEC competition and should not be essential components of any competitive test.

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[40] Second FNPRM at ¶¶ 133.

[41] 6 FCC Rcd. 5881;*recon* ., 6 FCC Rcd. 7569 (1991); *further recon.*, 7 FCC Rcd. 2677 (1992); Second Report and Order, 8 FCC Rcd. 3668 (1993); *recon.*, 8 FCC Rcd. 5046 (1993).

[42] 10 FCC Rcd. 3011 (1995).

Ameritech also believes that, in light of the large numbers of LEC streamlining requests the Commission will be required to process, it is imperative that the Commission establish objective, easily applied standards for determining whether streamlining is warranted. To this end, Ameritech proposes a standard for assessing both demand and supply elasticity in each product and geographic market. A LEC that meets these standards in a particular market should be subject to streamlined regulation in that market and should be permitted to offer contract carriage. Likewise, LECs that do not meet his test but that can nevertheless demonstrate substantial competition through a more qualitative showing, should be subject to streamlined regulation. Streamlining requests should be addressed through the declaratory ruling process.

A. Proposed Factors for Determining When Streamlined Regulation Is Warranted.

In the Interexchange Order, the Commission streamlined its regulation of most AT&T business services after concluding that those services were subject to "substantial competition." In the Commercial Services Order, the Commission extended streamlined regulation to other commercial services after finding that

> AT&T lacks the ability to exercise unilateral market power in the provision of these services and that there is sufficient competition among providers to justify moving AT&T's commercial services from price caps to streamlined regulation.[43]

In both orders, the Commission based its competitive analysis principally upon an assessment of demand and supply elasticities, as well as on market share data and

[43] Commercial Services Order, 10 FCC Rcd. at 3014. *See also id.* at 3018. "We find that there are adequate competitive alternatives to AT&T's commercial long distance services to constrain AT&T's exercise of monopoly power for these services."

AT&T's pricing behavior. The Commission proposes to rely on these same four factors in assessing competition for LEC services. The Commission seeks comment on the relative importance of these factors and on any other factors that may be proposed.

1. Demand Responsiveness.

Ameritech agrees with the Commission's proposal that

> the demand responsiveness of the LECs' customers should be an important factor in assessing the level of competition for LEC services for purposes of determining whether a service should be accorded streamlined regulation.[44]

As the Commission has recognized, high demand responsiveness, coupled with high supply responsiveness, constrains the ability of a firm to price anticompetitively. That is because if a sufficient number of customers are aware of and willing to consider alternative suppliers of access services, and those suppliers can accommodate those customers, no one supplier will be able to exercise market power.

In the Interexchange Proceeding, the Commission found that AT&T's large business customers are highly demand-elastic. The Commission based this finding on, *inter alia,* evidence that these customers tend to be sophisticated and knowledgeable purchasers of telecommunications services. The Commission also found that large business customers exercise "buyer power" by soliciting competitive bids and dividing their traffic among two or more interexchange carriers, and that

[44] 2nd FNPRM at ¶ 137.

they are willing to switch carriers to obtain price savings and desired features.[45] Likewise, in the Commercial Services Order, the Commission concluded that,

> AT&T's principal competitors provide a number of commercial services that are comparable to those offered by AT&T, and that customers are well aware of and make use of these alternative suppliers.[46]

It is self-evident that these conclusions apply with even more force to LEC access services. LEC access customers, being telecommunications service providers themselves (or in some cases the very largest users), are quintessential sophisticated purchasers of telecommunications services. To a far greater extent than AT&T's business customers, they are aware of their service options, and they are in a position to leverage their buyer power to obtain the best deal possible.

They are also more than willing to avail themselves of competitive alternatives, which may be CAP facilities or their own facilities that enable them to "self-provision" their own access.[47] Access services, even more than consumer

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[45] Interexchange Order at ¶¶ 37-40.

[46] *See* 2nd FNPRM at ¶¶ 135-136, *citing*, Interexchange Order at 5887 and Commercial Services Order at 3016.

[47] The largest purchasers of interstate access, AT&T, MCI, and Sprint, are all in the process of deploying local telephone and access services. Indeed, MCI has stated that, by year's end, MCI metro will have fiber optic facilities operational in 20 major cities representing 40% of the business access market. (MCI 1994 Annual Report at 3.) MCI has also announced planned capital expenditures of $500 million in 1995 alone on MCI metro, "with significant additional investments . . . over the next several years." (*Id.* at 6.) Likewise, it has recently been reported "that AT&T intends a full-scale attack on all seven of its Bell offspring simultaneously[.]" (John J. Keller, "AT&T Targets Home Markets of Baby Bells," *Wall St. J.*, Dec. 5, 1995, at A3.) AT&T has already been certified to provide local exchange service in Grand Rapids and Chicago. Similarly, Sprint has announced its intent to provide local exchange services and, through its partnership with Tele-Communications, Inc., Comcast Corporation, Cox Enterprises, and Teleport, already has direct access to one third of America's homes, a percentage Sprint maintains will increase as additional cable operators affiliate with the venture. (Sprint 1994 Annual Report at 4.) Sprint has announced that its "involvement in the project will give it a nationwide alternative to access services offered by incumbent local exchange carriers." (*Telecommunications Reports*, April 3, 1995, at 18.)

services offered by interexchange carriers, are fungible. There is essentially no difference between, say, a DS-1 facility offered by Ameritech and a DS-1 facility offered by a CAP. Especially since access costs represent a significant portion of their overall cost structure, the purchasers of access services have every incentive to use the cheapest service available. [48]

The only issue, therefore, that the Commission need address in considering whether buyers in a particular market are demand-elastic is whether those buyers, in fact, have an alternative available to them in that market. If an alternative is available, it should be a given that access customers will be aware of that alternative and willing to avail themselves of it to obtain a better deal. Consequently, in considering streamlining requests, the Commission should hold that demand-elasticities are presumptively high in any cluster of contiguous wire centers if, in each wire center in that cluster, at least one CAP and/or alternative local exchange carrier is providing or could readily provide the services in question or substitutable services.[49] In determining whether an alternative supplier is actually providing service to customers, the Commission should look at access tariffs, purchases of unbundled loops, reciprocal compensation payments, NXX assignments, or any

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[48] The extent to which Ameritech's access customers are willing to use alternative suppliers of access service is documented by a study recently conducted for Ameritech by an outside consultant, Quality Strategies. That study found that in Chicago and Grand Rapids, Ameritech's share of DS-1 local distribution channels had fallen to 54% and 53%, respectively, and its share of DS-3 local distribution channels had declined to 61% and 51%, respectively. Overall, in the eight markets researched, Ameritech's share of DS-1 and DS-3 services had both fallen to 77%.

[49] Since functionally equivalent services may be differentiated only in terms of term and volume requirements, it should not be necessary that the specific service be offered by an alternative supplier. Rather, it should be enough that the supplier has, or could readily obtain, the technical capability of offering the service in question.

other evidence that shows that an alternative supplier is, in fact, offering the services in question. The Commission should also consider the extent to which carriers are able to self-provision their own access in those areas.

2. Supply Responsiveness.

The other cornerstone to an analysis of competition for LEC services is supply elasticity. In order for demand-elastic customers to actually have choices, alternative suppliers must have sufficient capacity to serve those customers. As the Commission explained in the Second FNPRM:

> [S]ufficient excess or readily available supply capacities enable firms with relatively small market shares to be well-positioned to capture large numbers of their competitors' customers if their competitors choose to price above competitive rates.[50]

Thus, the Commission is correct when it states that "[s]upply responsiveness is a critical element in evaluating the level of competition for access services."[51]

As the Commission has noted, supply elasticities are particularly important in the context of telecommunications markets because of the nature of telecommunications facilities:

> In other markets, firms with relatively small market shares would not be well-positioned to capture large numbers of their rivals' customers if their rivals chose to price above competitive levels. The smaller firms would simply not be able to accommodate excess business without dramatic capital expansion. In the telecommunications market, by contrast, [various carriers] would appear to stand ready and able to accept vast amounts of additional traffic in the relatively short-term. Indeed, because these entities seem to have so much unused capacity, it would appear that their marginal costs of serving additional

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[50] 2nd FNPRM at ¶ 141.

[51] 2nd FNPRM at ¶ 138.

customers would be quite low. This, of course, would make them compete all the more vigorously in the marketplace.[52]

The Commission has recognized that there are two factors that determine the supply-responsiveness of a marketplace. One factor is the supply capacity of existing competitors in the marketplace. If those competitors have or can relatively easily acquire significant additional capacity, supply elasticities tend to be high.[53] The other factor is entry barriers. The Commission has stated that "even if existing suppliers lack excess capacity, supply elasticities tend to be high if new suppliers can enter the market relatively easily and add to existing capacity."[54]

Based on these factors, Ameritech proposes two alternative tests of supply elasticity for purposes of considering LEC streamlining requests. The first test relates to the ability of existing competitors to accommodate sufficient additional traffic to constrain LEC pricing. The second relates to the ability of new competitors to accommodate additional traffic.

The first test derives directly from the Commission's supply analysis in the Interexchange Order. In that order, the Commission determined that the interexchange marketplace was characterized by high supply elasticities based on its finding that MCI and Sprint could immediately absorb as much as 15 percent of

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[52] *In the Matter of Competition in the Interstate Interexchange Marketplace,* Notice of Proposed Rulemaking, 5 FCC Rcd. 2627 (1990) ("Interexchange NPRM") at ¶ 55. While this statement was made with specific reference to AT&T's interexchange competitors, it is no less true of LEC competitors who are also equipping their networks with fiber optic cable that enables them to serve large numbers of customers quickly and at minimal incremental cost.

[53] Interexchange Order at ¶ 143.

[54] *Id. See also, In the Matter of Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier,* FCC 95-427 (released Oct. 23, 1995) ("AT&T Non-Dominance Order") at ¶ 57.

AT&T's business day traffic without any expansion of their existing capacity. The Commission determined that this capacity was "more than sufficient" to constrain AT&T's pricing behavior. The Commission also noted that, within five months, MCI and Sprint, together, apparently could add about 25 billion minutes of new capacity to their networks for a combined investment of about $600 million.

A similar test should apply to LEC services. Specifically, the Commission should find that supply elasticities are high if competitive facilities are available to customers representing at least 25% of all access traffic in the geographic market in question (*i.e.*, any cluster of contiguous wire centers) and that those facilities can accommodate immediately at least one fifth of the traffic represented by those customers. If this test is met, a LEC that raises its prices would stand to lose 5% of its traffic overnight and as much as 25% of its traffic in a very brief period of time.

The second test derives from the Commission's recognition that supply elasticity is high if entry barriers are low. Under this test, the Commission would find that supply elasticities are high if: (i) certain conditions, that will ensure that local exchange competitors have a viable opportunity to enter and compete in the marketplace, have been met; and (ii) the viability of competition is corroborated by the presence of at least one certified competitive local exchange carrier offering service in the geographic area in question. The conditions that must exist to warrant a finding that entry barriers are low are:

(1) tariffs for unbundled loops and ports are in effect;

(2) arrangements for interconnection of competitive local exchange networks with the LEC network, including reciprocal compensation, are available;

(3) local numbers are portable, at least through interim number portability arrangements; and

(4) competitive local exchange providers have fair and equal access to numbering resources.

These conditions ensure low entry barriers by reducing the costs of entry and ensuring that new entrants have a viable opportunity to compete once they are in the market. For example, unbundled loops and ports obviate the need for a local exchange competitor to replicate a LEC's network in order to enter the marketplace. That competitor can simply purchase its own switching equipment and hook that equipment up to the LEC's local loops, or it could connect its own loops to the LEC's switches. In this manner, competitors can enter the marketplace quickly and cheaply. End office integration and reciprocal compensation enable competitors to terminate calls on the LEC's network and to earn revenues when they do so. Number portability enables them to compete on equal terms for customers who would be reluctant to change carriers if that required a change in telephone number. Finally, nondiscriminatory access to number resources ensures that local exchange competitors are able to obtain telephone numbers for their customers on fair and equal terms.

If these measures have been implemented, the Commission can be confident that entry barriers for LEC services are low. As additional corroboration that these measures are having their intended effect and that actual competition exists, the Commission could condition any finding of high supply elasticity on additional proof that at least one local exchange competitor has been certified and is providing local exchange services in the market for which streamlining is sought. This

additional showing will confirm the presence of actual competition in the market in question.

3. Market Share.

Noting that "a high market share does not necessarily confer market power," the Commission nevertheless proposed that "market share should be one factor, among others, to be considered in determining the level of competition in a given market for purposes of streamlined regulation."[55] Ameritech believes that, while evidence of a declining market share may indicate a lack of market power, a high market share does not indicate the existence of market power. Accordingly, while the Commission should consider a declining market share in corroboration of a competitive showing, the Commission should not otherwise consider market share in connection with streamlining requests.

The Commission has acknowledged that market share is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities.[56] As the Commission explained:

> [E]ven if one company enjoys a very high market share, it will be constrained from raising its prices above cost if its competitors have, or could easily acquire, the capacity to serve its customers at current price levels.[57]

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[55] Second FNPRM at ¶ 143.

[56] AT&T Non-Dominance Order at ¶ 68, *quoting*, Interexchange Order, 6 FCC Rcd at 5890.

[57] Interexchange NPRM at ¶ 51, *citing*, Landes and Posner, Market Power in Antitrust Cases, 94 *Harv. L.R.* 937 (1981) and Krattenmaker, Lande, and Salop, Monopoly Power and Market Power in Antitrust Law, 76 *Georgetown L.J.* 241 (1987).

For this reason, as AT&T has noted, in assessing interexchange competition, the Commission has long treated market share as the least important and least reliable indicator of market power.[58] The Commission has considered evidence of declining market share in support of a competitive showing, but it has never held that a high or constant market share is inconsistent with a competitive showing.

While the Commission has acknowledged that market share data may be an unreliable measure of interexchange competition, it can be an even less reliable measure of access services competition. Unlike the long-distance market, which is populated by millions of customers, no one of which singularly accounts for a significant share of all long-distance business, the access marketplace includes three carriers who, together, account for the vast majority of all access traffic. Indeed, those three carriers represent 90% of Ameritech's access traffic and 85% of its access revenues. If even one of those customers decided to move a significant portion of its traffic from a LEC to another provider of access services (including, potentially itself), LEC market share could decline precipitously. Thus, unlike the interexchange marketplace, where changes in market share occur incrementally, market share can change quickly and dramatically in the access service market. This makes market share a particularly unreliable measure of access services

[58] AT&T June 30, 1995, Reply to Comments on its April 24, 1995, *ex parte* filing in support of its Motion for Reclassification as a Non-Dominant Carrier, at 10-11. Reflecting the lack of weight accorded market share in the Commission's competitive analysis in the AT&T Non-Dominance Order, the Commission discussed market share in the same section in which it discussed other miscellaneous factors, such as implementation of equal access and the divestiture. Supply and demand elasticities, on the other hand, were discussed separately and in detail.

competition.[59] Moreover, just because a LEC has been able to hold onto the business of its largest customers, thereby retaining a high market share, does not mean that the LEC does not face substantial competitive pressures. On the contrary, because each purchaser of access accounts for so much business, LECs are incented to compete vigorously so as not to lose any customers. Accordingly, the Commission should hold that, while a low or declining market share may reinforce a competitive showing, a high market share or the absence of market share losses is not inconsistent with a competitive market, particularly if the Commission finds there to be high supply and demand elasticities in that market.

4. Pricing of Services Under Price Cap Regulation.

The Commission also seeks comment on whether it should consider evidence that a price cap LEC is pricing services below the price cap ceiling over a sustained period of time as additional evidence that such services are subject to competitive pressures in markets with high supply and demand elasticities. Ameritech believes that, while below-cap pricing would tend to corroborate a competitive showing and might be useful in contexts in which there is a lack of evidence on supply or demand elasticities, the Commission need not and should not require LECs to show below-cap pricing as a condition for streamlining, particularly if supply and demand elasticities are high.

Ameritech's position in this regard, is fully consistent with the Commission's interexchange competition analysis. Thus, while the Commission considered

[59] *See United States v. Baker Hughes, Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990) (market share statistics are misleading in a volatile and shifting market).

AT&T's below-cap pricing as additional evidence of competition in the Interexchange Order, the Commission declared AT&T to be nondominant despite the fact that AT&T's Basket-1 actual price index (ACI) has been at or very close to the price cap index (PCI) over a sustained period of time. Implicit in these decisions is the Commission's recognition that, while below-cap pricing may indicate competition, prices that are close to or at the price cap ceiling do not indicate that competition is lacking.

The same analysis should apply to LEC services. With an increased, up-front productivity factor reduction, it is becoming more difficult to sustain below-cap pricing over time. Indeed, Ameritech is currently operating pursuant to a 5.3% productivity factor, whereas, prior to being declared non-dominant, AT&T operated under a productivity factor of only 3.0%. Moreover, the Commission has adopted multiple productivity factors for LECs and has offered incentives, via eliminating of sharing obligations, for LECs to choose the highest factor. Requiring LECs to show below-cap pricing in order to obtain streamlining would tend to undercut these incentives and encourage LECs to choose the lowest productivity factor. In addition, LECs that have historically chosen lower productivity factors may find it easier to sustain below-cap pricing on a going forward basis than a LEC that has already lowered its prices due to higher productivity factors. Thus, requiring below-cap pricing as a precondition for streamlining is unnecessary and unworkable.

B. The Test for the Relevant Market for Regulatory Relief Should Not Be Drawn Too Narrowly.

Noting that many of its proposals require it to evaluate the competitiveness of specific markets, the Commission sought comment on how to define product and

geographic markets in access services.[60] The Commission proposed to define product markets based on the service bands and subcategories within each access service basket. It proposed to define geographic markets with reference to the three density zones established as a result of the expanded interconnection rules.

Ameritech believes that defining each service band and subcategory as a separate product market may result in markets that are too narrowly defined. For example, cross-elasticities exist between voice grade and high capacity services, although each would be viewed as a separate product market. Nevertheless, Ameritech agrees that these service categories would be relatively easy to administer and does not oppose this definition. Ameritech does oppose, however, the Commission's proposed geographic market definition.

In proposing this definition, the Commission itself recognized one of its weaknesses:

> "The original pricing zone definitions were based on traffic densities and cost characteristics for the trunking basket. . . . As a result, the zones may not be useful in defining relevant geographic markets for services in the traffic sensitive, common line and interexchange baskets."[61]

This is only one of the problems with defining density zones as geographic markets. Another problem, which exists even in the context of the trunking basket, is that the zones do not necessarily reflect the presence or absence of competition. Competition may more advanced in some areas within zones 2 or 3 than in zone 1. In the Ameritech region, for example, an area in which Ameritech faces some of its most

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[60] Second FNPRM at ¶¶ 116-126.

[61] *Id.* at ¶¶ 124.

intense competition is Grand Rapids, which is a combination of zone 2 and zone 3 offices, based on its traffic density characteristics. Placing Grand Rapids in the same geographic market as, say, Maple Heights, Ohio, which is also in zone 2, makes no sense. Ultimately, it would deny Ameritech the pricing flexibility needed to respond to competition in Grand Rapids and deny customers the full benefits that competition in the marketplace should bring.

A better market definition for purposes of assessing market power would be to define a geographic market as any group of contiguous wire centers. This group could correspond to a metropolitan statistical area, or a LATA, or it could represent a portion of either, depending upon how competition is developing. By defining geographic markets in this way, the Commission would be able to more closely map streamlined regulation to those areas with substantial competition. Problems of overinclusion or underinclusion would not occur.

Ameritech recognizes that the Commission indicated its disinclination to adopt a wire center definition of market area because of the potential administrative burden that might be created. The Commission did, however, note that "[o]ne possible solution would be to consolidate individual wire centers into geographic markets in some rational way, based on competitive considerations."[62] Recognizing clusters of contiguous wire centers where competitive circumstances are similar as discrete markets would be such a solution. It would strike the right balance between an overly narrow wire center-by-wire center market analysis and an overly broad zone-based market analysis.

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[62] *Id.* at ¶¶ 126.

C. Obtaining Streamlined Treatment Should Not Involve Unreasonable Delay.

The Commission also seeks comment on what procedures should be followed to implement streamlined regulation for a LEC. Ameritech suggests that LECs seeking streamlined regulation submit such requests through a petition for declaratory ruling. More important, though, than the name attached to the petition is that the Commission establish clear and objective standards for evaluating streamlining requests. Because there are so many LECs, each with multiple geographic and product markets, the Commission will almost certainly receive multiple requests for streamlining. Clear and objective standards for assessing these requests are essential to ensure that these requests can be addressed in a timely manner and do not result in excessive administrative burdens. Ameritech has proposed objective tests for evaluating supply and demand elastcities -- the critical elements of a competitive analysis. Ameritech urges the Commission to adopt these tests.

IV. LEC STREAMLINING SHOULD PARALLEL THAT GRANTED AT&T.

The Commission has correctly noted that streamlining for LECs might appropriately be modeled on the flexibility granted to AT&T. For the most part, this would involve removing the relevant services from price caps and permitting tariff filings on 14 days' notice and without cost support. The tariffs would be presumed lawful. The process would still enable the Commission to review the tariff in

advance and the Commission could institute any investigation it believed appropriate and would resolve any issues raised in a complaint proceeding.

The Commission also sought comment on whether LECs should be permitted to offer contract prices for services subject to streamlined regulation.[63] The Commission correctly stated that

> [P]ermitting price cap LECs to offer such contract rates would seemingly offer significant benefits for consumers without increasing the risk of anti-competitive, unreasonably discriminatory, or otherwise undesirable behavior by the LECs.[64]

The Commission noted, for example, that contract carriage would benefit consumers by allowing them to negotiate service arrangements that best address their particular needs. Moreover, contract carriage could stimulate competition and expand consumer choices by allowing LECs to offer customers the same types of contract services that the LECs' competitors may already be offering. The Commission also observed that contract carriage can promote efficiencies that LECs will be able to share with customers and result in lower prices for consumers. The Commission stated that these benefits are likely to be realized without any increase in the risk of predatory pricing or unreasonable discrimination.

Ameritech concurs wholeheartedly in the Commission's analysis. Contract carriage would benefit customers by enabling LECs to respond directly and specifically to customer needs. It would give customers more choices, thereby producing lower prices and better services. It would also enable LECs to compete on fairer terms in the marketplace. Given that LEC competitors routinely offer

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[63] *Id.* at ¶¶ 147-149.

contracts to their customers, denying LECs this option essentially forces LECs to compete with one hand tied behind their back. That is not only unfair to LECs, it is bad for consumers. It distorts the operation of competitive forces, resulting in inefficient investment and a suboptimal allocation of societal resources.

Ameritech also agrees with the Commission's assessment that allowing LECs to offer contracts for competitive services would not increase the risk of undetected predatory pricing or unreasonable discrimination. As the Commission has recognized, predatory pricing is unlikely to occur unless a carrier can eliminate competition and deter potential competitors from entering the market, all without detection. Otherwise, the short-term losses incurred as a result of the predatory prices cannot be recouped through subsequent monopoly profits, and the possibility of treble damages will deter any attempts at predation.[65] Given the size, sophistication, and resources of LECs' competitors -- including interexchange carriers that are in the process of entering the local exchange marketplace -- LECs could not possibly hope to drive and keep their competitors from the marketplace, much less do so without detection.

Nor would contract carriage increase the risk of unreasonable discrimination. Under the Commission's proposal, the pertinent terms of LEC contracts would be filed with the Commission and made generally available to similarly situated customers. Moreover, since contract rates would be offered only for services subject

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[64] *Id.* at ¶ 148.

[65] Interexchange Notice at ¶ 129.

to substantial competition, competitive forces would ensure that all customers of those services received just, reasonable, and nondiscriminatory rates.

The Commission should therefore adopt its contract carriage proposal. Contract rates should be permitted for all streamlined services. LECs offering contract rates should be required to file contract-based tariffs on 14 days notice, containing the information specified in the Second FNPRM.[66]

V. NONDOMINANT TREATMENT SHOULD BE AVAILABLE TO LECS UNDER APPROPRIATE CIRCUMSTANCES.

The Commission also sought comment on several issues relating to nondominant classification of LEC services.[67] Specifically, asserting that the Commission has not held that a carrier is dominant in the provision of some domestic services but nondominant for others, the Commission asked whether nondominant status should be determined on a market-by-market basis. The Commission also invited comment on whether the criteria established in the Competitive Carrier proceeding should govern LEC requests for nondominant status.[68] Finally, the Commission sought comment on the procedures that LECs

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[66] *See*, Issue 16b.

[67] Second FNPRM at ¶ 152-158.

[68] First Competitive Carrier Order, 85 FCC 2d 1; Second Report and Order, 91 FCC 2d 59 (1982), *recon denied*, 93 FCC 2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1984), *vacated*, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, MCI Telecommunications Corp. v. FCC, 113 S. Ct. 3020 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *rev'd*, MCI Telecommunications Corp. V. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

should follow to obtain nondominant status and on the tariff filing procedures that should apply to nondominant carriers.

Ameritech supports the Commission's proposal to consider requests for nondominance on a market-specific basis. This approach is compelled by the Commission's recognition that LECs provide services in distinct and separate product and geographic markets. If a LEC lacks market power in a particular market, there is no reason to apply a different regulatory regime to the LEC than to the other competitors in that market. Moreover, an asymmetrical approach would send distorted economic signals that impedes the efficient operation of market forces and reduce the benefits of competition. It would also be demonstrably unfair to LECs who would be denied the same competitive tools other market participants have.

Conferring nondominant status on a market-specific basis is also consistent with the Commission's phased-in approach to relaxed regulation of AT&T. In the Interexchange Order, the Commission streamlined its regulation of most AT&T business services. In subsequent orders, the Commission extended streamlined regulation, first to 800 services, and then to all commercial services. The Commission adopted this service-specific approach to streamlined regulation without even finding that the services streamlined constituted distinct markets. There is, therefore, no reason why the Commission should not pursue a market-specific approach in conferring nondominant status.

The Commission suggested that classifying a carrier as dominant for some domestic services and nondominant for others would represent a departure from

past practices.[69] This is untrue. The Commission already treats LECs as dominant for some purposes and nondominant for others. For example, the long-distance operations of independent LECs are classified as nondominant, if they satisfy certain conditions.[70] Thus, considering nondominance requests on a market-specific basis would really be nothing new.

The Commission also sought comment on the test that should apply to nondominance requests, and in particular, whether the Competitive Carrier criteria should apply.[71] Ameritech submits that these criteria, which comprise no more than a list of factors to be considered on a subjective basis, have already been superseded by subsequent Commission orders. The most obvious example is the Interexchange Order, wherein the Commission assessed market power principally with reference to supply and demand elasticities. Another example is the Mobile Services Order, wherein the Commission adopted a forbearance policy for cellular service providers, even though only two carriers provide facilities-based service in each geographic area.[72]

While the Commission did not actually declare cellular providers nondominant, the fact that the Commission found that a forbearance policy is in the public interest is telling. Indeed, if forbearance is in the public interest, even for

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[69] Second FNPRM at ¶ 153.

[70] Competitive Carrier, Fifth Report, 98 FCC 2d. 1191.

[71] Second FNPRM at ¶ 156.

[72] *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411 (1994) ("Mobile Services Order").

dominant cellular providers, there would seem little reason why only nondominant landline carriers are permitted to file tariffs on one day's notice.

The Mobile Services Order recognized the costs of both asymmetric regulation and of tariff filing requirements in general. For example, the Commission stated:

> Success in the marketplace should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs -- and not by strategies in the regulatory arena. [Thus] even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth.[73]

The Commission also found that "in a competitive environment, requiring tariff filings can inhibit competition."[74] This finding is consistent with the Commission's recognition in the Interexchange Proceeding that permitting AT&T greater freedom to lower prices with little or no advance warning to its competitors reduces the risk of tacit collusion among carriers in the marketplace.[75]

Given the Commission's recognition of the costs associated with advance tariff filing requirements and of asymmetric regulation, Ameritech submits that, if a LEC meets the "substantial competition test" for streamlining in a particular market, there is really no reason not to treat that LEC as a nondominant provider in that market. Surely a carrier that faces "substantial competition" does not have market power, which is the hallmark of a dominant carrier.

Nevertheless, Ameritech recognizes that the Commission will prefer to act cautiously and incrementally in reducing regulation even of the most

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[73] *Id.* at ¶ 19. *See also id.* at ¶ 15.

[74] *Id.* at ¶ 178.

[75] Interexchange Notice at ¶¶ 107-109.

competitively-provided LEC services. In light of this, Ameritech proposes the following phased-in approach to nondominance: LECs showing that they face substantial competition in any market will be subject to streamlined regulation in that market for 18 months. Thereafter, the LEC would automatically become nondominant in that market unless the Commission held otherwise.

This approach would enable the Commission to reduce regulation of competitively provided services on a gradual basis. In particular, it would enable the Commission to confer nondominant status only after it has the benefit of actual experience with streamlined regulation in the market in question. If, after eighteen months of a streamlined regime, competition has continued to thrive, and there is no evidence of anticompetitive activity, the Commission should be comfortable with the next incremental step -- nondominant status.

VI. CONCLUSION.

Although price cap regulation of LECs has been in effect for only five years and, in many respects, has worked quite well, the Commission is correct in concluding that significant improvements can be made to its incentive regulatory model. Ameritech agrees with the Commission that its public policy goals can be furthered and, particularly, consumers benefited by modifications which would: (1) encourage market-based prices; (2) encourage efficient investment and innovation; (3) encourage competitive entry in the interstate access and related local exchange

markets on an economically efficient basis; and (4) regulate noncompetitive services in the most efficient and least intrusive way.[76]

Several changes to the Commission's "baseline" price cap plan for LECs are appropriate regardless of the competitive environment faced by the individual carrier. In particular, the Commission's treatment of new services should be substantially modified to encourage innovation. The term "new service" should be restricted to new functionalities that add to a customer's range of options. In addition, expedited "Track 2" treatment with confidential treatment of cost support should be permitted for those new services that are not mandated by the Commission. In addition, no separate waiver or finding should be required for the introduction for new switched access rate elements.

Alternative pricing plans ("APPs") should be permitted to be filed on an interim basis (for no more than 180 days) on 14-days' notice and without cost support. To make the APP permanent, the LEC would have to make a restructure filing utilizing actual demand data from the APP's initial 90 days.

The Commission should avoid placing in advance any detailed restrictions on ICB arrangements but rather, because these situations tend to be unique, examine each situation on its merits.

The notice period for restructured filings should be reduced to coincide with the notice requirement applicable to normal in-band filings.

And, finally, the lower service band index limits should be eliminated as an unnecessary discouragement to efficient pricing. Existing upper band limits

[76] Second FNPRM at ¶1