

that includes an allowance for the use of rights of way facilities, and that allowance must be based on the rates it charges entrants.

Given a general mandate to allow for common carriage use of rights of way facilities, entrants and incumbents should be directed to negotiate rates, terms, and conditions. State commissions would become involved only if those negotiations fail. State commissions should also ensure that all entrants are given equivalent treatment and the rates, terms, and conditions imposed on them are fair. On the other hand, entrants should carry some of the burden of maintaining existing rights of way facilities. Thus, they should pay a relative use-based share of the costs of maintaining the facilities.

Entrants should have considerable latitude in choosing the way they will access the incumbent's facilities, but some care is needed to ensure that the right of way are available to late as well as early entrants. If many entrants want to use rights of way facilities, some congestion problems may arise, and allocation schemes, possibly based on auctions may be considered.

## **G. Competitive Services**

***Regulatory flexibility should be allowed for service determined by the Commission to be competitive.***

Broad pricing flexibility is appropriate for competitive services, with certain restrictions. Prices should always be above TSLRIC with imputation of tariffed rates for noncompetitive inputs.<sup>20</sup> In addition, some contribution to joint and common costs would also be appropriate. Such contribution may be required for each competitive service separately, or on an aggregated basis for all competitive services as a whole.

Regulatory flexibility should be allowed for filing of competitive services. The criteria for classification could include various indicators of market structure, including the substitutability and equivalency of alternative services, the number of competitors, barriers to entry, market share, changes in market share, and/or whether a price increase will lead to a decline in market share.

## **H. New Services**

***New services should be regulated in the same manner as existing services, according to the competitiveness of the market. If more competitors are in or meaningfully entering the market an abbreviated or automatic time line could be established for approval of new services.***

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<sup>20</sup> In a fully competitive market, the price floor could change to below TSLRIC.

New services should be regulated in the same manner as existing services, according to the competitiveness of the product market. If the new service is a bottleneck or monopoly service, it should be regulated in the same manner as a similar existing noncompetitive service. However in regulating new services, special care must be taken not to allow rivals to abuse the regulatory process to delay the introduction of new services by incumbents for competitive advantage. Nor should existing services be repackaged as new services in a manner which would circumvent regulatory requirements applicable to existing services. Even though new services should be treated like any other service, their tariffs should become effective subject to an automatic (or abbreviated) time frame followed by a further investigation and suspension if deemed necessary. Another avenue that may prove useful to regulators is the use of partial suspensions as opposed to full suspensions.<sup>21</sup> An obvious concern with the use of partial suspensions is that they would still need to be resolved in very short time frame because once customers receive one rate for service regulators are very reluctant to force them to pay more. This reluctance can be due to the fact that the end user has made a financial investment in acquiring equipment for the service. Regulators are also reluctant to create what is in effect a rate increase to a consumer because it is perceived as unfair to the consumer who has purchased service.

#### **I. Joint Marketing of Services**

***All service packages should be made available for resale. If regulated competitive and noncompetitive services are offered together on a packaged basis, they should also be offered separately and the packaged offering should pass an imputation test. If nonregulated competitive and regulated noncompetitive services are packaged together, at a minimum the price should set above the rate for noncompetitive services.***

Packaged services may be very appealing to consumers seeking one-stop shopping for telecommunications services. Eventually, prohibiting LECs from joint marketing may prevent them from competing. One option that deserves careful consideration is to prohibit LECs from jointly packaging competitive with noncompetitive services until the conditions for local exchange competition are in place, and rivals have effectively entered the local exchange market. Legal and regulatory restrictions which may inhibit incumbent LECs' joint marketing of services should not be imposed on new entrants.

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<sup>21</sup> Partial suspensions occur when a proposed service is allowed to go into effect while being investigated. This approach is used by some state and federal regulatory bodies.

Certain conditions should apply to packaged services. First, all packaged services should be made available for resale. Second, if regulated competitive and noncompetitive services are offered together on a packaged basis, they should also be offered separately and the packaged offering should pass an imputation test. If nonregulated competitive and regulated noncompetitive services are packaged together, at a minimum the price should be set above the rate for noncompetitive services.

#### **J. End User Restrictions**

***End user restrictions should be allowed in certain circumstances. Such restrictions would be appropriate for services that are subsidized or otherwise priced differently to different end user classes for public policy reasons, e.g., residential access services. End user restrictions may also be appropriate if a carrier has pricing flexibility to respond to marketplace conditions.***

User restrictions exist primarily to limit the provisioning of services to their authorized use, i.e., such as to stop a business customer from ordering a residential line. They restrict the eligibility criteria to certain types of customers. End user restrictions should be allowed in certain circumstances. Such restrictions would be appropriate for services that are subsidized or otherwise priced differently to different end user classes for public policy reasons, e.g., residential access services. End user restrictions may also be appropriate if a carrier has pricing flexibility to respond to marketplace conditions. Any end user restriction should also apply to resold services.

#### **K. Resale**

***Conditions should be encouraged that allow resale where economic while not discouraging facilities-based competition. Unrestricted resale should be permitted on all services, even those that are priced below cost. Exceptions are discussed in the previous section. It may be appropriate to recognize LEC avoided retail service costs, as an interim step toward TSLRIC plus a reasonable allocation of joint and common costs, in the rates they charge to other carriers.***

There are two separate but related issues concerning resale: (1) resale of retail services and (2) establishment of wholesale services that competitors may utilize to provide service to end users.

With respect to resale of retail services, incumbent LEC restrictions on resale of existing retail local services should be removed in most instances, consistent with long-standing FCC requirements to allow resale of all interstate services. Where certain local services may be subsidized for residential customers, e.g., network access or unbundled

loops, such services should not be resold to business customers, in order to avoid undesirable arbitrage and improperly inflate universal service support.

The unrestricted ability to resell incumbent LEC services on an aggregated basis may undermine rate discrimination determined by regulators to be appropriate, e.g., declining block usage rates designed to recover non-traffic sensitive costs. While such concerns are understandable, competition should not be delayed until rate designs are made entirely cost-based. It may take years to reform existing rates, even if this is determined to be desirable. There may be valid public policy reasons for maintaining some prices that are not cost-based. A requirement that resellers contribute equitably to universal service support may be an adequate resolution that would allow all incumbent LEC services to be resold, including those that may currently be subsidized.

A requirement that resale of flat-rated services be allowed may be reasonable, since resale would not increase any losses or economic inefficiencies associated with the services unless it would greatly stimulate demand for the services. However, it may be desirable to prohibit aggregation of customers for the purchase of a flat-rated service (so long as the LEC does not permit such aggregation to its own end users)

The FCC's prohibitions of resale restrictions for any interstate telecommunications services have worked well. Resale restrictions could reduce customer choice and be detrimental to smooth functioning of the PSTN under the intermeshed network of networks model. New entrants should not be allowed to impose resale restrictions on their services, except that they could require that resale be to the same class of customers or that there be an aggregation restriction for flat rate service if such a restriction is granted to the LEC. Contrary to some assertions, new entrants may see resale restrictions as a possible avenue to obtain market power. If business incentives exist to resell, entrants should not object to requirements that they allow resale.

There is some debate about the resale of competitive services. To the extent these services are regulated, resale restrictions should generally be prohibited for them as well

The issue of whether LECs should be required to offer wholesale services distinct from retail services has emerged as one with increasing interest and support. While the need for wholesale services was not isolated as an issue separate from resale of existing services in the questions sent out for public comment, the topic warrants separate treatment.

The purpose of offering services on a wholesale basis should be clearly defined and understood before a wholesale structure is adopted. Wholesale proposals have typically been for services very similar to existing retail end user services, but absent

retail functions such as marketing and billing. Several options exist for the pricing of such wholesale services:

1. Prices could be pegged to prices for related retail services, adjusted to reflect LEC cost savings (and possibly new costs) compared to the retail services (a "tops down" approach). A variation on this approach is that any contribution in the retail rates would be prorated, so that the wholesale rates would recover only a *pro rata* share of the contribution in the retail rates
2. Prices could be based directly on the costs of providing the wholesale services, without concern about the relationship between wholesale and retail pricing (a "bottoms up" approach). Pricing could be based on embedded or incremental costs, as deemed appropriate with a reasonable allocation of joint and common costs.
3. Prices could be set at levels set with the goal of ensuring that resale of the wholesale services is economically viable. Resellers have suggested that they may need margins in the range of 35% to ensure viability.
4. Prices could be set at levels that would "mirror" the price differences between bulk and low volume purchases in the interexchange markets.

In general the first of the pricing options described above may meet the goal of a "level playing field" between retail and wholesale rates. However, a concern exists that, if joint or common costs remain in the wholesale rate, competitors would be subject to a potentially insurmountable price squeeze. This concern deserves consideration.

Even though it is desirable to ensure that wholesale prices are at least above costs (the second option), an exception could occur if the retail rate itself has been set below cost for public policy reasons. However, as stated earlier, if resellers have to contribute to universal service support, even these services could appropriately be resold.

If there is a strong sense that the public interest is best served by a robust resale market, the third option may have merit. However, it raises concerns about economic efficiency if it results in below-cost wholesale rates, even if the carrier is not any worse off as a result of this policy. Pegging local wholesale/retail price differences to conditions in the interexchange market (the fourth option) appears unworkable in a practical sense and arbitrary. Both the third and fourth options could invoke legal debate regarding the opportunity to recover costs

As an alternative to viewing wholesale offerings as stripped-down versions of retail services, wholesale offerings could be viewed instead as unbundled services consistent with other unbundled offerings such as loops and ports. Loop and port offerings have little or no retail components. Rather than a separate class of wholesale services, it may be appropriate to provide loop, port, unbundled switch functionalities, and retail components on a "pick and choose" basis. Carriers could then choose, on a consistent basis, whether to buy loops or ports separately, whether to bundle them together in a "wholesale" network access line, or whether to add retail services for a more complete service package.

Another conceptual approach may be to develop a local switch platform offering, which would allow a competitor full access and use of a carrier's switch, just as the loop option allows competitors to use a carrier's loop. High contribution levels in switched access and vertical services create a strong incentive for carriers to provide their own switches, rather than use wholesale bundled network service or unbundled port offerings. A local switch platform offering could encourage resellers to stimulate usage, by allowing them to keep all associated revenues, and could also put pressure on the contribution levels in switched access and vertical service rates.

Another question has been raised regarding the relationship between wholesale services and switched access services. Functionally, wholesale services and switched access services are very similar. For example, local usage, local termination, switched access, and cellular access each use an incumbent LEC's local switch and loop to originate and terminate calls. Conceptually, there is no reason why this functionality should be offered under four different names and under four different rates, each of which is restricted to a particular type of carrier.

Some facilities-based new competitors have expressed concern that too-favorable wholesale prices and conditions could skew entry decisions and provide disincentives for network investments by new entrants. In addition, too-low wholesale prices could reduce incentives for incumbent LECs to continue investing in their networks. These are valid concerns. While this goal may be one of the most difficult tasks in implementing local competition, regulators should try to encourage conditions that allow resale where economic while not discouraging facilities-based competition.

There have been suggestions that costs of modifying current LEC systems to provide access to resellers be treated as a general cost of doing business and recovered from the broad customer base, similar to the way that equal access costs were recovered, rather than solely from the resellers. Potential resellers have also requested that they be compensated by the LEC for the LEC's use of a reseller's customer listing data whenever the LEC receives compensation for providing third parties with the reseller customer data, including through Billing Name and Address or LIDB services. Other issues that are raised by development of resale services include protection of proprietary

customer information, prevention of slamming, maintenance of quality of service, and access to numbering resources. These are emerging issues that are not addressed herein.

#### L. Stranded Investment

***A competitive local market would make the issue of recovery of stranded investment cost moot, at least from a purely economic perspective. However, other considerations could result in a regulatory decision that some recovery of past investment decisions by the incumbents is appropriate. Such a decision should focus solely on those investments associated with regulatory mandates regarding network functionalities that are universally available (basic service considerations) or due to governmentally mandated improvements in service quality.***

***If regulators determine that a mechanism for recovery of stranded investment cost is appropriate, recovery of stranded investment will differ depending on whether an incumbent is operating in a price based or rate of return environment.***

Stranded investment is an ephemeral concept but may be thought of as those recognized investments made in the past to provide regulated service which no longer have economic value, particularly in a competitive environment. Theoretically, in a monopoly environment regulated under rate base regulation, stranded investment does not exist. Every recognized investment and expense is recovered from ratepayers on a dollar for dollar basis.

In a multi-provider regulated environment, the potential exists for "stranded investment" due to improvements in existing technologies, introduction of new technologies, more efficient methods for providing service, and changes in consumer preferences. In short, the situation could exist at any time that one provider is able to provide service at lower cost and lower price than other providers. In a competitive, unregulated market, recovery of stranded investment is not an issue. Changes due to outdated technologies, consumer demand and poor decisions by management result in investment write-offs, which are considered part of the risk one assumes by deciding to enter a given market. Some incumbent providers, particularly rural providers, have argued that stranded investment may occur as the result of their traditional obligation to serve and under-depreciation of assets. These providers are implicitly arguing that certain investments will be "stranded" as new entrants provide local service and that these stranded costs are due to mandates by and approvals of state regulators. Another concern where the feasibility of effective competition is questionable, is that LECs'

incentives for continued investment in the network may be lessened if LECs view such investments as risky due to potential competition.

If stranded investment recovery is allowed, regulators should only contemplate recovery of those specific investments they have ordered the incumbent to make. For example, recovery may be appropriate for investments associated with regulatory mandated infrastructure changes or minimum quality standards since these changes are the direct result of action by regulators. However, even in such a limited case, regulators should carefully evaluate such a request to guard against the investment being used in the provision of services other than non-basic but recovered from basic local customers.

In traditional telephone company rate cases, regulators rarely determined if all investments were based on prudent or imprudent management decisions. Only a few state commissions have undertaken such an evaluation of investments associated with the provision of local service. In some cases, investments were appropriately included in rate base and depreciated because they were driven by regulators. Such investments include changing the definition of minimum level of service or directed network upgrades. The allowance of investments in rate base does not equal Commission approval for guaranteed recovery of full depreciation from the general body of ratepayers. An exception would be if regulators equated all costs incurred with the incumbent's obligation to serve.

For incumbents who are operating under price regulation in the interstate and/or intrastate jurisdiction, stranded investment recovery mechanisms should not be entertained by regulators. Price cap regulation was entered into partly because competition was making inroads into the LECs' telecommunications markets. Prices were initially established based on the LEC's embedded revenue requirement. Price caps often provided the LECs with rate flexibility for purposes of rebalancing rates as needed. If public policy compels recovery of a portion of a price cap LEC's "stranded investment", consideration may be warranted of only those investments made at the direction of the Commission.

Stranded investment recovery should not be considered for incumbents who are operating under rate of return regulation. However, if some recovery of stranded investment is required, only a portion of the LEC investment should be recovered from ratepayers. This should not include spare capacity of the rate base regulated LEC. The general provider of last resort obligation should not be considered a government mandate in the long term in those areas where local competition flourishes. This obligation, to the extent it exists or has existed, was the result of the traditional regulatory compact that characterized a monopoly environment and has been repaid through regulator and legislative protection of a single provider in most markets. In a multi-provider market for local service this obligation is likely to be eliminated although not instantaneously.

## M. Accounting Requirements

***Some accounting requirements must be placed on new entrants, particularly if they need to cost justify any of their rates. Full FCC accounting treatment may not be necessary, but the method must reflect the same basic financial results.***

If new entrants must cost justify some rates, such as terminating access, some type of cost study may be necessary. However, this purpose may be better accomplished by allowing the new carrier to employ its own accounting practices rather than compelling it to use FCC accounting conventions. If the new carrier can demonstrate that its circumstances warrant a departure from the established methods and that its own alternative technique will achieve a substantially equivalent or superior result, then there is no need to force it to adopt existing regulatory accounting conventions. Imposing FCC accounting rules on new carriers solely for the purpose of applying an equivalent regulatory burden does not serve the public interest.

## N. Structural Separation

***Structural separations should not be necessary for those markets and areas where facilities-based competition is expected to emerge. At the same time, incumbent LECs should not be allowed to use affiliates to transfer market power and bypass regulatory safeguards.***

Whenever a company operates in both competitive and non-competitive markets, there may exist the potential for cross-subsidization and anticompetitive practices. Two methods that have traditionally been used to guard against such abuse are accounting safeguards and structural separation. Potential local service competitors argue that structural separation between the wholesale and retail activities of an incumbent carrier should be required. Others contend that structural separation would be far more costly than beneficial.

Structural separation between wholesale and retail activities is a costly and time-consuming option that may be worthwhile only if facilities-based competition is considered unlikely for the foreseeable future. The degree of structural separation would be a major determinant of whether it is effective. For example, structural separation that is accomplished mainly by accounting procedures but still allows joint operations and sharing of personnel and facilities may be largely ineffective in preventing anticompetitive behavior, particularly if auditing and enforcement efforts are minimized. More complete separation, with separate personnel, facilities, and financing may be more effective. Divestiture would be the ultimate structural separation. However, nonstructural safeguards including accounting safeguards with auditing and enforcement, may be adequate if facilities-based competition is foreseeable.

While structural separation may not be required to prevent cross-subsidization, neither should it be allowed to occur in a manner that would permit anticompetitive behavior. An incumbent LEC should not be allowed to create "competitive" affiliates and transfer market power to the affiliate while bypassing regulatory safeguards. Any such affiliates should be scrutinized carefully and affiliate-transaction restrictions adopted as appropriate to prevent harm to the market.

## VI. MONITORING/CONSUMER SAFEGUARDS/SERVICE QUALITY

### A. Service Quality and Reporting

***Regulation and monitoring of telephone service quality must be continued during the transition to competition in order to ensure the adequacy of service provided to all consumers, particularly those who do not have effective competitive choices.***

***All carriers should be subject to reasonable reporting requirements. Such requirements must be sufficiently similar to allow meaningful evaluation of the status of competition.***

The existing public network has provided quality service and this must be maintained in the new environment. As competition develops, existing providers will pursue cost cutting measures which may result in a degradation of existing service quality. It will be imperative that some measures exist to monitor and ensure that consumers are not adversely affected. New entrants must also be monitored to verify they are providing an acceptable quality of service. The level of competition development will need to be monitored and analyzed to determine if the existing policies are allowing real competitive choices to develop. Some markets may need to be monitored to ensure service continues to be available and universal service continues to expand.

As a competitive environment develops, the existing reporting requirements may evolve into less definite measures, or require different information, especially as they relate to service standards. If the service quality is not adequate, consumers with choices will seek other alternatives. This evolution, however, will not happen immediately. Until it does, state regulators must have definite benchmarks that apply to all providers to ensure quality service to consumers regardless of what provider they choose.

The need for monitoring and reporting requirements to protect both customers and the market becomes even more vital in the transition to competition. The high quality ubiquitous communication system established over the last sixty plus years should not be sacrificed to only the promise of a competitive market. In a competitive market there are winners and losers. End users – especially those who are not offered competitive choices – should not be punished during this transition.

There is a definite need for regulators to monitor and evaluate both the progress of the development of competition and the type and quality of service being provided to ensure that quality of life and economic strength do not diminish in the pursuit of a competitive market. All providers must be subject to reasonable reporting requirements. Without similar requirements for all providers, it will be impossible to fairly evaluate the true evolution of competition.

Some of the reporting requirements that were instituted in the monopoly environment may not be necessary in a competitive one. It will take time and development of the market to determine what is appropriate and what is not. Performance measures should not be imposed just because they have been required in the past. For these tools to be effective, they must be constructed to meet the goals for which they are intended in this new evolving environment. For the market to develop, safeguards are necessary to protect the market from anticompetitive or discriminatory actions by service providers.

## **B. Provider of Last Resort and Universal Service Issues**

***The geographic unit for measuring or defining high cost areas should be much smaller than the present study area size in order to more precisely identify such areas and to more precisely target high cost assistance funds***

***The threshold for identifying high cost areas must be established taking into account that the threshold will be the principal determinant of the magnitude of the financial obligation for high cost assistance.***

***All telecommunications service providers should contribute toward high cost support.***

***Any service provider should be eligible to receive high cost support for the basic package of universal services to end users in its service area.***

***Current support mechanisms that directly target low income customers should continue.***

***Prior regulatory approval for withdrawal of services should be required of all service providers.***

The introduction of competition into the local telecommunications market will require changes to the current implicit and explicit mechanisms used to achieve the current level of universal service funding. As has already been seen in the long distance market and certain local business markets, large customer demands, varying access rates, and cost differences have caused some deaveraging, bypass and rate arbitrage. While these results may not, in and of themselves, be inappropriate, it is generally viewed that these results need to be mitigated to ensure that they do not result in residential telephone

service rates which threaten subscribership levels, whether the reason be low income or high rates.<sup>22</sup>

A related concern is that service should continue to be available to all those interested in receiving it within a competitive local exchange market. Under a monopoly framework of local exchange service, the incumbent provider had an obligation to serve in exchange for the exclusive franchise within a given geographic area.

Another concern is that incumbents' rates are now tied to their embedded investment which may or may not reflect economic costs. This concern has prompted some parties to advocate that proxies for current economic costs rather than embedded costs be the basis for computing the costs of local exchange service for the purpose of high cost assistance. This solution is advantageous in that it ensures that society is only paying for the least cost network available. It correctly incents companies to write-off expenses which are above the TSLRIC plus reasonable allocations standard mentioned in the Pricing and Rate Design Section. The perceived disadvantage is that it will harm the LEC's ability to serve its customers by removing from it a potentially large revenue stream.

A separate concern is whether or not it is appropriate to permit the LECs to recover the costs discussed in the stranded investment section of this paper via high cost assistance.

By establishing a smaller study area, or geographic unit of measurement for purposes of identifying high cost areas, there will be a more precise method of administering high cost assistance. This precision, however, is obtained at the expense of added complexities in administering the assistance mechanism. A disaggregation of study areas limits the potential for averaging of costs and prices to the detriment of incumbents and to the advantage of new entrants that may not be obliged to serve the entire service territory of the incumbent provider. This disaggregation also creates the incentive for pricing structures to track the cost disaggregation, which may lead to rate deaveraging.

The higher the dollar threshold for defining high cost, the smaller the fund will be, and vice versa. In determining the eligibility level and the magnitude of the assistance, weight should be given to the impact upon subscribership levels for establishing various eligibility threshold levels. A more stringent eligibility criterion will

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<sup>22</sup> The focus of this section is not on the qualitative definition of what services should be considered under the rubric of "universal service" nor does it focus on the challenge of quantifying the level of funding needed to assure universal service. Rather, this section will focus on the various aspects of developing a high cost assistance mechanism that is consistent with the policy goals of fostering local exchange competition in a manner that is respectful of and in furtherance of the goal of universal service.

make less assistance dollars available which all other things being equal would tend to impose upward pressure on local exchange rates.

In order to be fair to all service providers and to avoid having high cost fund assistance be a competitive advantage or obstacle, all regulated telecommunications providers should be contributors to the fund. Similarly, the allocation mechanism should assess the widest possible array of services so as to avoid creating competitive advantages/obstacles among various service categories and unnecessarily creating a bypass incentive. End user/retail bill assessments (as opposed to including carrier payments to one another) would have the advantage of avoiding a computation to factor out double recovery. However, unless there is a bright line between retail and wholesale customers, this distinction could be manipulated. For example a carrier could arrange its customer composition such that it only sells to other carriers, thereby making all its services solely wholesale services and thus avoid providing any contribution? The non-predetermination of which services should bear the assessment has the advantage of permitting companies to recover the assessment based upon market force considerations. The disadvantage is that less elastic, probably basic or essential services, could shoulder a disproportionate share of the assessment liability leading to equity problems. As with retail bill assessments, double recovery would need to be factored out.

To allow only the LEC to draw monies from the fund disincentivizes network efficiency, customer choice, and could serve to encourage costing disputes. To allow new entrants to receive the funding (via a virtual voucher mechanism or an obligation to serve an entire area) could cause stranded investment losses to the LEC unless mechanisms are put into place which allow for reuse or recovery of these investments. Also, if any carrier is allowed to receive funds on a per subscriber basis this may cause difficulties due to averaged costing for local service. However, to require that funding only be permitted where a carrier is serving the entire area will increase the difficulty of entry into an area unless resale or sale of the network is required.

A further complication in the universal service mechanism and the existence of competitive choice is the entry challenge to new entrants if incumbent LECs are not required to offer wholesale services between TSLRIC if the corresponding retail service is priced below TSLRIC and reselling carriers are not permitted to draw from the universal service assistance fund. If one of the goals in the structure of the universal service fund is to incent competitive choice, it will be very difficult for new reselling carriers to enter the market. By definition, their retail service rate will have to be higher than the LEC's rate. The LEC is getting a subsidy on a below cost service so long as it is providing the service itself and can pass the subsidy onto the retail rate. By not permitting the wholesale rate to be set below TSLRIC, the LEC continues to get the subsidy, albeit from a different source, but the reseller, unable to get the subsidy, will have to sell local service, at a rate higher than the incumbent LEC retail rate.

With the use of much smaller study areas any carrier should be allowed to receive per subscriber funding so long as it is providing a "universal basic service package" (as defined by the commission) to end users. If this causes any averaged cost/price disparities, the cost/price relationship of service can be re-evaluated. A new entrant can draw from the fund according to its self defined service area. A carrier could fulfill its service area obligation by reselling LEC service. However, because LEC resale rates must be at or above TSLRIC universal service funding can be received by the new entrant.

A carrier's obligation to serve, including but not limited to ubiquity issues, with respect to geographic territory as well as the public service aspects of common carriage, has been linked to the issue of the carrier's eligibility to receive high cost fund assistance. The obligation to serve is also implicated with the expression of concern that carriers' unrestricted or unmonitored exit from markets and various services could leave a gaping hole in the availability of service. During the transition from a regulated to competitive framework, some oversight of the carrier's service responsibilities must continue. This oversight should include the requirement that carriers must be obliged to serve within a given geographic area and all carriers, incumbents and new entrants alike must obtain prior approval before leaving a market or eliminating the provision of any services. The scope of the carriers' geographic territory should be the principal determinant for establishing eligibility to receive high cost assistance.

### **C. Consumer Issues Regarding Rights of Way**

***Uniformity in the regulatory requirements governing rights of way access should be considered in an effort to facilitate competitive providers' entry into the local exchange market and customer usage of the network.***

***Equitable allocation of rights of way access in a multi-provider environment should be implemented in a manner that is least disruptive and costly to local governing authorities and their residents.***

***Monitoring of the experience gained in allocating rights of way in a multi-provider environment should include the customer impacts of the access policies, such as the potential number of customer service requests that are denied or delayed due to rights of way access restrictions or limitations.***

***Consumer rights need to be identified and specifically articulated in the development of rights of way access policies.***

Access to rights of way by multiple service providers creates the potential for increased costs and burdens on localities that administer access, by virtue of the potential multiple physical intrusions on the right of way. Customer impacts of the access policies that are put into place by different locales should be monitored as one means for evaluating, adopting or revising policy options. Customer needs and concerns should also be considered in the initial implementation of policies governing right of way access by multiple service providers. For example, advance public notice should be posted when a provider will be undertaking to install facilities in rights of way. Also, a collaborative approach should be adopted for addressing environmental, societal and economic problems associated with multiple providers constructing, maintaining, and possibly abandoning rights of way.

Specific consumer safeguards should be adopted and should be required to be considered when a governing body adopts rights of way policy. Suggested examples of such rights include

1. Consumers need to be protected from use of public right of way in a manner that may be harmful to private property and/or the health and welfare of the general public.
2. Consumers need to be protected from the reduction of the useful life of the roads, sidewalks, water or other services located therein.
3. Consumers are entitled to reasonable advance notice of construction of facilities in rights of way located on or adjacent to their property.
4. All telecommunications service providers should provide a clear and concise written statement describing how consumer information relating to private property that is divulged to enable access to rights of way will be maintained, including the purposes for which it will be used.

## VII. CONCLUSION

***The role of state regulation will continue to evolve away from earnings regulation toward the establishment of rules to enable the local exchange market to achieve effective and efficient competition among all interested participants. The establishment of rules requires that the incumbents' historical monopoly presence be balanced against the new entrants' flexibility in targeting customers and markets that they view to be most economically attractive. Appropriate consumer safeguards must be incorporated into the rules and policies adopted for local exchange competition.***

Regulators' time and effort will increasingly shift away from earnings regulation of incumbent LECs toward emphasis on rules and policies designed to facilitate competition in the local exchange market. The trend toward non-earnings based regulation preceded the advent of local exchange competition by several years. The majority of states have adopted statutes, rules or policies which permit the implementation of a form of regulation other than earnings based ("alternative regulation"). Rate base/rate of return regulation has historically been linked to a monopoly framework for telecommunications. As the monopoly model continues to be called into question and eroded for various market segments in favor of competition, so too has rate base/rate of return regulation become increasingly subject to criticism, and ultimately, abandonment for many companies in many regulatory jurisdictions.

As the development of state and federal legislation has progressed over the last several years, states have continued to examine the issues and policy implications of local exchange markets in an effort to facilitate a competitive framework. States have played and will continue to play a key role as laboratories for experimentation. Other states that are in the midst of examining these issues may benefit from the experiences and knowledge of those states which have completed their examination. The states have acknowledged the policy objective of opening up the local exchange markets to competition through NARUC's advocacy with respect to pending federal legislative reform proposals.

As the local exchange market evolves toward competition, regulators' focus must evolve similarly away from earnings regulation toward review and revision of regulatory policies to facilitate the development of effective and efficient local exchange competition. It is important that this review be undertaken promptly so that states will be positioned to timely process applications for competitive LECs. Alternatively, the filing of such an application or applications has necessarily provided the impetus in some states. Such a review may be particularly important in those states where the population composition and the economics of local exchange competition may be less certain;

regulators may wish to initiate an examination to determine the appropriate restructuring of their policies and procedures that may make local exchange competition workable.

As the paper was developed, it became apparent that the role of regulation will continue to require the balancing of competing interests to implement fair rules of governance or oversight for competition. Whereas the traditional debate under rate base/rate of return may have been the utility versus the ratepayer (in the context of a rate increase request proceeding), the debate taking shape for local exchange competition appears to focus more on the rules and responsibilities to be applied to the incumbent LEC versus the competitive LEC. The imposition of fair rules on all market players is essential to assure that there develops efficient and effective competition in the market. The establishment of such rules must take into account that consumer safeguards will continue to be vital in the transition to competition. Until all customers have a true choice among LECs, consumer safeguards are needed to assure that each customer can continue to obtain access to the public switched network. The introduction of competition does not equate to the realization of full and effective competition. Full and effective competition is a necessary precursor to deregulation.

Through this paper, the NARUC Local Competition Work Group has reflected the experience and knowledge of a staff that is geographically dispersed throughout the country. With the assistance and support of similarly geographically dispersed industry participants, the staff has attempted to comprehensively identify and discuss the major issues attendant to opening up the local exchange market to competition. The recommendations contained herein are an effort to provide useful guidance but not direct mandates to resolve the various policy issues.

## **APPENDIX A--Committee on Standards and Cooperative Practices (CSCP)**

The New York Commission has established a Standards and Cooperative Practices Committee (CSCP) to deal with interconnection issues on a regular basis at the state level. This structure may be a model all states should develop to deal with their individual and unique problems on a consensus basis. This would not eliminate the states jurisdiction or the bonafide request process to deploy needed services.

The CSCP was established in New York in response to an industry need for coordination on issues relating to the provision of exchange access and telecommunications network interconnection in an Open Market Environment. The CSCP is responsible for ensuring the availability of appropriate channels for the timely identification, discussion and voluntary resolution of exchange access and telecommunication network interconnection service matters in an Open Market Environment in the Rochester Telephone service area. The Committee will take into consideration the special technical requirements of the disabled community and other customers with special needs. In addition, the CSCP will provide an action plan to facilitate timely resolution of these issues.

Participants can represent individuals or corporate entities from various interest groups which may be materially affected by issues discussed in the Open Market process. The CSCP can work efficiently and effectively only when representatives knowledgeable of the subject matter are in attendance, well prepared to discuss agenda topics and can speak authoritatively on behalf of their company. Recommendations of all participants will be considered carefully and in good faith in seeking and in reaching consensus recommendations and resolutions. This process would not replace bonafide service requests or limit the states' jurisdiction.

Consensus is established when substantial agreement has been reached among interest groups participating in the consideration of the subject at hand. Interest groups are those materially affected by the outcome or result. Substantial agreement means more than a simple majority, but not necessarily unanimity. The consensus process is to be free from interest group dominance requiring that all views and objections be considered. This requires that a concerted effort be made toward issue resolution. Under some circumstances, consensus is achieved when the minority no longer wishes to articulate its objection. If no consensus is reached, then government would retain jurisdiction and step in to resolve the disputed issue.

Such a committee could be structured the same as the one set up in the state of New York and other states such as Maryland. It is described below. The purpose of the committee would be to ensure the smooth operation of the network, emergency preparedness and network planning. Government needs to oversee such a group so as to make sure the group is not anticompetitive and does not violate antitrust laws. As for the recommendations of this group, the recommendations would be adopted on a

consensus basis, and if no consensus is reached, then government would retain jurisdiction and step in to make a decision.

A CSCP should be comprised of incumbent providers, new competitive providers, regulators and equipment vendors. The group should be established in each RBOC region or on a smaller scale so that the issues that are unique and specific to a region can be addressed. That group should also balance the desire for competitive equity with the needs for network interoperation and may need to at times temper the degree of unbundling and disaggregation of the network in order to maintain network integrity, emergency preparedness and reliability. Some of those limits will be defined by the technical characteristics of the network. That group should also perform many of the network oversight functions, currently performed by the incumbent, that ensure interoperability and maintenance coordination. States will retain all jurisdiction over these matters and the CSCP should work on a consensus and cooperative basis to facilitate network administration.

Before it may meet or take action, a charter for the committee must be filed with the state commission. The charter shall include the following information: (A) the committee's official designation; (B) the committee's objectives and the scope of its activities; (C) the period of time necessary for the committee to carry out its purposes; (D) the agency or official to whom the committee reports; (E) the agency responsible for providing the necessary support for the committee; (F) a description of the committee's duties and responsibilities and, if such duties are not solely advisory, a specification of the authority for such functions; (G) the estimated annual operating costs in dollars and person-years for such a committee; (H) number and frequency of committee meetings; (I) the committee's termination date, if less than two years from the date of the committee's establishment; and (J) the date the charter is filed.

The procedures governing this advisory committee shall include but is not limited to the following points: (A) any federal and or state Sunshine Act/Open Meeting laws must be observed unless the agency head concludes that the meeting is exempt, and the meeting should be electronically accessible through either conference calls or interactive video; (B) interested persons are permitted to attend, appear before or file statements subject to reasonable rules or regulations established by the state commission; (C) minutes of the meeting must be maintained and published electronically; (D) prior notice of meetings must be published; (E) an employee or officer of the state commission shall be designated to attend or chair each committee meeting, and that person is authorized to adjourn any committee meeting; (F) committee meetings shall be scheduled with the advance approval of the state commission employee/official so designated and the agenda for the meeting must be approved by that employee/official, and (G) copies of transcripts of these committee meetings will be made available to the public at actual cost.

The procedures adopted by the CSCP shall apply to the CSCP itself and to any subsequently established subtending committees or task forces. The CSCP guidelines provide the consistency desired for any subsequently established subtending

**committees or task forces as they permit the CSCP itself and the management of any participating entity to readily understand the status of an issue, regardless of the particular Committee or Task Force involved. The CSCP guidelines are a minimum baseline set of procedures to be followed by all CSCP sponsored Committees or Task Forces. Individual Committees or Task Forces may institute additional procedures that do not supersede or conflict with CSCP prescribed guidelines. The Committee or Task Force will request endorsement of the additional procedures from the CSCP.**

**These forums need to be managed carefully so that they do not become mechanisms to stall decisions. These forums should operate under guidelines on committee consideration of competitor complaints, similar to the ONA Task Force in New York. It is important that the focus remains on the technical issues, and not stray to the policy issues.**

## **Appendix B--Commenting Parties**

### **List of Respondents to LCWG Questionnaire**

Ameritech  
AT&T  
Bell Atlantic  
General Communications, Inc.  
Georgia Public Service Commission  
GTE  
LDDS Communications, Inc.  
Maine Public Utilities Commission  
MCI Telecommunications Corp.  
MFS Intelenet, Inc.  
National Rural Telecommunications Association and OPASTCO  
National Telephone Cooperative Association  
NYNEX Corporation  
Smithville Telephone Company  
SWB Corporation  
Sprint Corporation  
TCG  
TCI, Comcast and Cox  
TDS Telecom.  
Telecommunications Resellers Association  
US West Communications

### **List of Commenting Parties to LCWG Draft Issue Papers**

AT&T  
BellSouth  
CompTel  
GTE  
MCI  
TCG  
TRA