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| **To:** | Brad Ramsay | **Date:** | May 16, 1996 |
| **Fax #:** | 202-898-2213 | **Pages:** | 43, including this cover sheet. |
| **From:** | Mary Newmeyer | | |
| **Subject:** | Alabama Comments on FCC 96-98 | | |

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COMMENTS:

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Thanks Again,
Mary

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# STATE OF ALABAMA

ALABAMA PUBLIC SERVICE COMMISSION
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WALTER L. THOMAS, JR
SECRETARY

May 16, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street N
Washington, D.C. 20554

Re: CC Docket No. 96-98, Notice of Proposed Rulemaking, In the Matter of Implementation of the Local Competition provisions in the Telecommunications Act of 1996

Dear Mr. Caton:

Enclosed please find for filing in the above captioned proceeding, an original and twelve copies of the comments of the Alabama Public Service Commission on the matters addressed in this proceeding.

Respectfully,

Mary E. Newmeyer

Mary E. Newmeyer
Federal Affairs Adviser

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| **In the Matter of** | ) | **FCC 96-182** |
| | ) | |
| **Implementation of the Local Competition Provisions in the Telecommunications Act of 1996** | ) | **CC Docket No. 96-98** |
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| | ) | |

**COMMENTS OF THE**
**ALABAMA PUBLIC SERVICE COMMISSION**

Mary E. Newmeyer,
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May 16, 1996

**Summary**

Sections 251, 252, and 253 of the Telecommunications Act of 1996 represent the bulk of Congress's mandate for competition in the telecommunications industry. Congress defined with a great amount of certainty the roles of state commissions and the FCC in the aforementioned sections of the 1996 Act. It is apparent from the far reaching reservations of state authority in the 1996 Act that Congress intended for the states to have a vital role in the development of competition in their respective jurisdictions. The FCC was also charged with the vital role of oversight of those state efforts and was authorized by Congress to assert preemptive jurisdiction when the states act outside of the framework established by the 1996 Act.

It is unfortunate that the FCC has perceived the 1996 Act as conferring upon it preemptive authority which was clearly not intended by the 1996 Act. The Interconnection NPRM is replete with tentative conclusions premised on the theory of implied preemption asserted by the FCC. Accordingly, the majority of the APSC's comments in response to the NPRM are legal arguments which support the APSC's position that the 1996 Act preempts the states only where Congress clearly specified in the Act.

The overly prescriptive national interconnection rules proposed by the FCC would illegally impede upon the jurisdiction of the states where intrastate matters are concerned. Aside from the jurisdictional issue, the binding national rules proposed by the FCC would have the effect of impairing competition rather than fostering it. Numerous states such as Alabama have already established rules to encourage competition based on their unique jurisdictional requirements. The national rules proposed in the NPRM would displace these existing state rules and produce a chaotic result that would impede competition.

While loosely crafted national rules in some areas would be helpful to the states in their efforts to stimulate competition, the states should be allowed to retain the flexibility they need to foster competition in their respective jurisdictions. The APSC asserts that this was Congress's intention in promulgating the 1996 Act.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| **In the Matter of** | ) | **FCC 96-182** |
| | ) | |
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**COMMENTS OF THE**
**ALABAMA PUBLIC SERVICE COMMISSION**

The Alabama Public Service Commission (APSC or Alabama PSC) hereby submits its initial comments pursuant to the Federal Communications Commission's ( FCC or Commission) Notice Of Proposed Rulemaking (NPRM) in CC Docket No. 96-98 on Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (the 1996 Act). The FCC proposes in the NPRM to implement portions of §§ 251, 252, and 253 of the 1996 Act. We have organized our comments to follow, as closely as possible, the structure of the NPRM.

## I. INTRODUCTION

### A. Background

The Alabama PSC agrees that the extent to which local service competition develops in the marketplace depends on the capabilities of inventors, entrepreneurs and financiers, as well as the Commission and its state counterparts. The FCC at paragraph 5 and footnote 10 of the NPRM references its understanding of the status of state activities supporting the development of competition in the local exchange market. The Alabama PSC asserts that the report[1] on which the

[1] Common Carrier Competition, CC Report No. 96-9, NPRM fn 10

FCC relied for its evaluation of the activities of the states in opening local exchange markets to competition is incomplete and does not present an accurate representation of state actions. The Commission's conclusion that more than 30 states had not adopted laws or regulations providing for local competition is incorrect. We know there are a number of states, including Alabama, that have taken action to open the local market to competition and others that have proceedings in progress to finalize rules to implement competition that were not included in the Commission's representations regarding state actions to promote local competition.

The Alabama PSC opened a generic docket on local competition on January 30, 1995 and issued its Order adopting a Price Regulation and Local Competition Plan on September 20, 1995[2]. BellSouth was granted a change to price regulation and its territory was opened to local exchange competition effective as of the date of the order, September 20, 1995. There are presently ten parties in active negotiations with BellSouth in Alabama for interconnection. The APSC has certified one new local service provider; has held hearings on two additional local service providers' petitions for certification; and, has another petiton set for hearing on May 20, 1996. The APSC order addresses many of the issues included in the 1996 Act and included in this NPRM. We will reference those issues further in subsequent sections of our comments. Alabama was not referenced in the NPRM as

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[2] South Central Bell filed a petition to restructure its form of regulation on February 2, 1995. The parties to the Local Competition docket and the Price Regulation ultimately presented a Stipulation and Agreement addressing both dockets. After some additional modifications proposed by the Attorney General; review and modification by the staff; and the resolution of issues in two additional related dockets the Alabama Public Service Commission issued its Report and Order on: *Petition of South Central Bell Telephone Company to Restructure Its Form of Regulation*, Docket No. 24499; *All Telephone Companies Operating in Alabama, Generic Hearings on Local Competition*, Docket No. 24472; *Streamlined Regulation of Interexchange Carrier and Reseller Telecommunications Services*, Docket No. 24030; *Complaint By AT&T Communications of the South Central States, Inc. Against South Central Bell on April 25, 1995*, Docket No. 24865.

one of the states that had taken actions on local competition. It must, therefore, be included in the "more than 30 states" that have not taken action. We believe there are other states that were incorrectly omitted in the FCC's CC Report No. 96-9.

## II. PROVISIONS OF SECTION 251

### A. Scope of the Commission's Regulations

In addressing the national rules proposed by the NPRM at paragraphs 25-41, the Alabama Public Service Commission recognizes that Congress, without question, intended the Telecommunications Act of 1996 ("the 1996 Act") as a "procompetitive deregulatory national policy framework" designed to accelerate the development of telecommunications technologies for the benefit of American consumers by opening all telecommunications markets to competition. That intention was clearly stated by the House and Senate conferees at page 1 of the Joint Explanatory Statement of the Committee of Conference. What is totally unclear is how the FCC construed that statement and the requirements of Sections 251(d)(1) and 253 of the 1996 Act as "specific statutory directives" clarifying Congress's intention that the FCC would, itself, implement a "procompetitive deregulatory national policy framework" separate from the one established in the Act itself.[3]

Section 251(d)(1), of the 1996 Act, indeed confers upon the FCC a duty to, within six months from the enactment of the 1996 Act, complete all actions necessary to establish regulations to implement the requirements of Section 251. In arriving at its unfounded conclusion that Section 251(d)(1) authorizes it to implement a national policy framework through the promulgation of far-reaching, explicit national rules which govern both the interstate and intrastate aspects of

[3] NPRM at para. 26

interconnection, service and network elements, the FCC, presumes preemptive authority which is not conferred by the 1996 Act. The FCC's presumptive conclusion completely disregards the specific reservations of state authority in Section 251 and numerous other sections of the 1996 Act which will be addressed in greater detail in the discussion which follows.

A more accurate reading of the 1996 Act, and the accompanying Joint Explanatory Statement of the Committee of Conference, reveals that the Congressionally envisioned role of the FCC was to merely establish implementation guidelines of a procedural nature designed to ensure that the states timely promulgate rules, regulations and guidelines that are within the framework of the 1996 Act. The FCC, indeed, has some oversight authority pursuant to the 1996 Act, but it is clear that the FCC is to utilize that authority only when the states act outside of the framework provided by the 1996 Act.

Had Congress intended for the FCC to establish binding national rules regarding the specifics of intrastate interconnection, services and network elements (as is implied by the FCC in its NPRM) it would have clearly and unambiguously amended the Telecommunications Act of 1934 ("the 1934 Act") to reflect such a preemptive intention. Congress, instead, left intact the language in Section 2(b) of the 1934 Act which specifically states that the FCC has no jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for, or in connection with, intrastate communications services by wire or radio."[4]

The significance of the jurisdictional dichotomy imposed by Section 2(b) of the 1934 Act is highlighted by the fact that at one point during the legislative process which led to the promulgation of the 1996 Act, Section 2(b) of the 1934 Act was eliminated. However, the subsequent restoration

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[4] § 2(b) of the 1934 Act is codified at 47 USC § 152 (b)

of Section 2(b) clearly indicates that after consideration of whether the regulations mandated by Section 251(d)(1) of the 1996 Act should apply to both interstate and intrastate interconnection, services and network elements, Congress decided that they should not.

The U.S. Supreme Court squarely addressed the issue of preemption in regard to Section 2(b) of the 1934 Act with great specificity in Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 106 S. Ct. 1890, 90 L.Ed 2d 369, (1986). In that case, the states argued that the plain and unambiguous language of Section 2(b), of the 1934 Act, denied the FCC jurisdiction to compel the states to utilize FCC-established depreciation practices and schedules in connection with the setting of intrastate rates. The Court held that there was no merit to the FCC's argument that Section 2(b) did not control because the plant on which the FCC sought to impose its depreciation practices and schedules was used interchangeably to provide both interstate and intrastate service. In discounting the FCC's preemptive arguments, the Court stated:

> "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law,... when there is outright or actual conflict between federal and state law,...where compliance with both federal and state law is, in effect, physically impossible, where there is implicit in federal laws a barrier to state regulation,...where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."

The APSC asserts that none of the broad preemptive scenarios discussed by the Court in Louisiana are present where the 1996 Act is concerned. Congress clearly limited the preemptive scope of the 1996 Act by specifically defining when the FCC has authority to preempt actions or inactions of the states. Two of the best examples of the limited preemptive authority of the FCC are found at Sections 252(e)(5) and 253(d) of the 1996 Act. Section 252(e)(5) grants the FCC

preemptive authority only in situations where states fail to carry out their enumerated responsibilities in reviewing interconnection agreements pursuant to the requirements of Section 252. Even in those instances where states fail to act, it is clear that Section 252(e)(5) confers to the FCC only such preemptive authority as is necessary to perform the specific duties enumerated in the preceding subsections of Section 252. Jurisdiction clearly returns to the state once the FCC has performed the function the state commission failed to perform.

The preemptive authority conferred to the FCC pursuant to Section 253 also has limitations. It confines the preemptive authority of the FCC to situations where a state or local statute, regulation or requirement prohibits the ability of any entity to provide interstate or intrastate telecommunications service. Even then, the FCC may preempt the enforcement of such a statute, regulation or requirement only to the extent necessary to remove a resulting prohibition to competition or to correct any inconsistencies the statute, requirement or regulation has with the framework provided in the 1996 Act.

Congress confined the preemptive authority of the FCC to limited sets of circumstances, and reserved to the states considerable latitude in matters such as the review of interconnection agreements under Section 252; the continuation or termination of the 251(f) exemption for rural local exchange companies ("LECs"); and the responsibility for ruling on requests for suspension or modification from specified requirements of the 1996 Act pursuant to Section 251(f)(2). Thus it is clear that Congress intended to preserve the broad discretion afforded the states over "charges, classifications, practices, services, facilities or regulations for, or in connection with, intrastate communication service" by Section 2(b) of the 1934 Act. Perhaps the strongest evidence of this Congressional intention is found at Section 251(d)(3) of the 1996 Act where the FCC is expressly

prohibited in its prescription and enforcement of implementation requirements from:

> ...precluding the enforcement of any regulation, order or policy of a state commission that (A) establishes access and interconnection obligations of LECS; (B) is consistent with the requirements of this section (Section 251); and ( C) does not substantially prevent implementation of the requirements of this section (Section 251) and the purposes of this part (Section 251(d)).

The above-noted Congressional preservations of power to the states, and the carefully and narrowly defined preemptive language in the 1996 Act, clearly indicate that Congress did not intend to confer upon the FCC the broad preemptive authority which would be necessary to promulgate the explicit national rules envisioned by the FCC in its NPRM. Further, it is clear that Congress recognized the compatibility of state laws governing telecommunications matters when it confined the preemption of those laws, rules and regulations in Section 253, of the 1996 Act, to situations where those laws, rules and regulations contained or created outright prohibitions to competition. It, therefore, cannot be argued that Congress intended for federal law to so thoroughly occupy the field of telecommunications regulation that state telecommunications law is excluded. To the contrary, it is apparent that Congress afforded the states considerable latitude in promulgating rules and regulations suited to their jurisdictions so long as the states act within the framework provided by the 1996 Act.

In sum, the pervasive national rules governing both interstate and intrastate aspects of interconnection services and network elements proposed by the FCC in its NPRM were neither envisioned nor authorized by Congress in its promulgation of the 1996 Act. How the FCC so expansively interpreted its responsibility in developing the implementation guidelines called for pursuant to Section 251(d) of the 1996 Act is truly difficult to fathom. To argue that by enacting Section 251 of the 1996 Act after 2(b) of the 1934 Act, Congress intended for Section 251 to take

precedence over contrary implications based on Section 2(b) is without merit since Congress gave no directive in that regard.[5] To the contrary, Congress' informed decision to retain the jurisdictional division of authority set forth at Section 2(b) of the 1934 Act must be construed as a directive that the provisions of § 251 do not take precedence over the language of § 2(b)

Despite Congress's clear language limiting the preemptive scope of the act and its decision to leave the jurisdictional dichotomy imposed by Section 2(b) of the 1934 Act intact, the FCC blatantly attempts to argue by implication that the 1996 Act is more preemptive than its clear language would indicate. Such preemption by implication has been strongly disfavored by the U.S. Supreme Court for decades and cannot be utilized by the FCC to justify preemptive actions which Congress did not intend[6]. Congress expressly prohibited the implied preemption approach argued by the FCC at Section 601(C) of the 1996 Act which clarifies that the 1996 Act "shall not be construed to so defy, impair or supersede federal, state, or local law unless expressly so provided in such Act or amendments."

Given the Supreme Court's general abhorrence for preemption by implication, and the unambiguous Congressional mandate of Section 601 ( c) of the 1996 Act, confining preemption to the express provisions of the Act, the jurisdictional arguments relied upon by the FCC to justify the imposition of overly-prescriptive national rules are clearly without merit. As noted previously, Congress knew the limited circumstances under which it wanted to preempt the states and did so expressly in the 1996 Act. Congress also made it clear in § 601( c) of the 1996 Act, however, that

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[5] NPRM at para. 39

[6] See Dept. of Revenue v. ACF Industries, 114 S. Ct. 843, 851 (1994); Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 2401 (1991); Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947).

where it did not specify preemption, the FCC was not to imply preemption based on corollary provisions or by inference.

From the foregoing, it is clear that Congress intended to reserve to the states broad discretion to decide the intrastate aspects of interconnection, service and network elements pursuant to the framework provided by the 1996 Act. Only when states deviate from the provisions of the 1996 Act in specified situations is the FCC authorized to assume narrowly defined jurisdiction over intrastate matters.

Even if it is incorrectly assumed that the FCC was given authority to promulgate broad national rules which govern intrastate aspects of interconnection, services, and network elements under the 1996 Act, the utility of such rules, in furthering the purposes of the 1996 Act, would, at best, be questionable. Variations in technical, geographic and demographic conditions in local markets demand fundamentally different regulatory approaches. Overly prescriptive rules, even if suited to market and economic conditions found in numerous jurisdictions, might nonetheless present an obstacle to competition in areas where the conditions supporting such a pervasive rule are not present.

Development of competitive markets will not occur uniformly throughout the United States. In some areas, only a few, if any, competitors may emerge in the early phases. In other areas, hundreds of companies may attempt to compete. The size of the competing companies, and the areas they seek to serve, will also vary widely. A plethora of decisions concerning the prices of intercompany services and rates charged to consumers will, accordingly, be required. As market conditions change, adjustments to those decisions will be necessary in order to facilitate the development of competition and to ensure that the regulatory environment remains competitively

neutral

The required adjustments to changing conditions can be best made by state regulators acting within the framework of the 1996 Act. State regulators who are already experimenting with price cap regulation, rate freezes, and other means of protecting consumers, as competitive conditions change, are in the best position to make these decisions since they have the expertise concerning local economic conditions. State regulators can more readily create mechanisms that are responsive to local needs and do so in a timely manner.

Given the countless scenarios that are likely to develop across the country as competitors enter the local exchange market, it is unlikely that a single set of prescriptive rules will fit every situation that might arise. Rules that are too prescriptive could disrupt some of the creative solutions that states have already implemented. State commissions need flexible, broad implementation regulations from the FCC so that they can establish rates and monitor conditions in a way that allows them to act efficiently as they facilitate the development of competitive markets. Only then can state commissions protect ratepayers from unreasonable rate changes.

Many states, including Alabama, are already well along the road to developing a competitive marketplace. The APSC authorized local competition in September of 1995 and currently has open dockets in which proceedings concerning interconnection rules, unbundling and all other issues related to local competition are ongoing.

Action by the FCC is unnecessary as long as states such as Alabama are making progress toward the ultimate goal of competition and are adjusting and improving their state-developed competition plans within the framework of the 1996 Act. Only in situations where a state has failed to attempt implementation of the goals of the 1996 Act, or is pursing an agenda that conflicts with

those goals should the FCC intervene. Consumers will reap the benefits of competition much sooner if states are allowed to continue to move forward as they have been. Overly prescriptive national rules will impede competition rather than promote it, because the current competitive efforts of states such as Alabama will be stifled. National rules that displace existing state rules will result in confusion, uncertainty and counterproductive regulatory conflict.

It is with the foregoing jurisdictional arguments and objectives in mind that the APSC now turns its comments to the non-jurisdictional technical aspects of the matters discussed in the NPRM under the heading of "Scope of the Commission's Regulations."

At paragraph 34, of the NPRM, the FCC seeks comments on how its national rules can best be crafted to assist the states in carrying out the responsibility of arbitrating disputes between parties to interconnection agreements under Section 252 of the 1996 Act. The APSC asserts that the promulgation of such rules is beyond the jurisdiction of the FCC for the reasons previously stated in these comments. The promulgation of such standards governing state arbitration would displace the clearly defined role of the states in contravention of Section 252 of the 1996 Act. States should arbitrate pursuant to state standards and state law.

The APSC notes that in situations where the FCC is required to arbitrate disputes between an incumbent LEC and new entrants pursuant to Section 252(c) of the 1996 Act, the FCC should adhere to all requirements of state law which do not conflict with the 1996 Act since the FCC will essentially be acting for the affected state. Only in that manner will there be no discrepancy concerning what law governs when the FCC acts and the matter in question returns to the involved state for implementation.

At NPRM paragraph 36, the FCC tentatively concludes that it should adopt a single set of

standards with which both arbitrated interconnection agreements and Bell Operating Company ("BOC") 252(f)(1) statements of generally available terms should comply. While there may be sufficient statutory justification for requiring BOC 252(f)(1) statements of terms and conditions to comply with FCC-adopted standards, the APSC asserts that those same standards should apply only to Section 252 arbitrated agreements over which the FCC assumes jurisdiction pursuant to Section 252(e)(5). The application of any proposed FCC rules over arbitration agreements which are still within the jurisdiction of the states would be counter to the standards established by Section 252 of the 1996 Act.

The FCC seeks, at NPRM paragraph 41, comments on the relationship between Section 251 and 252 and the FCC's existing enforcement authority under Section 208. Clearly, the FCC's complaint jurisdiction under Section 208 encompasses complaints concerning violations of Sections 251 and 252 of the 1996 Act. That jurisdiction coexists, however, with that of the states as it always has. Nothing in the 1996 Act curtails the complaint authority of the states, or abrogates the longstanding holdings of the federal courts that the FCC's complaint authority does not preempt corollary state claims based on the same conflict. In re: Long Distance Telecommunications Litigation, 831 Fed.2d. 627, 633-634(6th Circuit, 1987). Accordingly, states should hear complaints regarding their arbitration orders pursuant to state law.

**B. Obligations Imposed by Section 251( c) on "Incumbent LECs"**

**1. Duty to Negotiate in Good Faith**

The FCC seeks comments at NPRM paragraph 47 on the extent to which it should establish national guidelines regarding "good faith" negotiation under Section 251(c)(1) and what the content of those rules should be. Further, the FCC seeks comments regarding what practices by LECs should

be deemed violative of the 251(c)(1) duty to negotiate in good faith. The APSC asserts that the determination of whether a telecommunications carrier has negotiated in good faith should be made on a case-by-case basis because the duty to negotiate in good faith can vary depending on the circumstances present. Accordingly, the FCC should not attempt to set guidelines which set forth hard and fast rules governing good faith negotiations. Any rules established by the FCC in that regard should be loosely crafted and should not specifically delineate how LECs must fulfill their duty to negotiate in good faith concerning such matters as: resale, number portability, dialing parity, access to rights-of-way and reciprocal compensation

At paragraph 48 of the NPRM, the FCC seeks comment on whether the language of Sections 252(a)(1) and 252(c)(1) require parties that have existing interconnection agreements to submit those agreements to state commissions for approval and whether one party to an existing agreement may compel renegotiation (and arbitration) in accordance with the procedures set forth in Section 252. It would be inappropriate for the APSC to comment on these matters at the present time since the APSC has itself put these same issues out for comment in Alabama. The APSC would, however, reserve the right to respond to these issues in the reply comment cycle of this proceeding if the APSC is in the procedural posture to do so at that time.

**2. Interconnection, Collocation, and Unbundled Elements**

**a. Interconnection**

The NPRM tentatively concludes that uniform interconnection rules would facilitate entry by competitors in multiple states and requests comments on the consequences of not establishing such specific rules.[7] The APSC agrees that national uniform interconnection guidelines developed by the

[7] NPRM para.50-51

FCC might be helpful so long as those guidelines are not overly prescriptive where intrastate interconnection matters are concerned. Due to the diverse technical, geographic and demographic conditions that prevail in each state, the states should determine the degree to which any guidelines established are utilized. The APSC envisions a scenario similar to the one presently utilized for access charges wherein states mirror the FCC structure for access charges, but have varying rates, elements and rules.

At NPRM ¶ 53 - 54, the FCC seeks comment on the relationship between the obligation of incumbent LECs to provide "interconnection" under 251(c)(2) and the obligation of the incumbent LEC and all LECs to establish reciprocal compensation arrangements for the "transport and termination" of telecommunications pursuant to 251(b)(5) and how to interpret the term "interconnection" in Section 251(c)(2). The APSC asserts that the term interconnection refers to all facilities linking two networks and could include transport and termination in some circumstances. Pricing issues will be best addressed for both items in 252(d) through negotiation/arbitration agreements approved by the State Commissions.

**(1) Technically Feasible Points of Interconnection**

At NPRM ¶ 56 - 59, the FCC seeks comments on what constitutes a "technically feasible point" within an incumbent LEC's network for purposes of Section 251(c)(2)(B) of the 1996 Act. The APSC is of the opinion that the term "technically feasible point" should be a demarcation point between LECs to establish interface, points of test, and division of responsibility of operation. Any definition considered should accommodate any technological advancements including future designs and enhancements. Some FCC established guidelines of a non-prescriptive nature would be helpful to ensure that network reliability is maintained when determining interconnection points.

The APSC asserts that any FCC established minimal guidelines governing "technically feasible points of interconnection" must leave the states considerable latitude to determine whether interconnection at a greater number of points would be technically feasible. Such a practice would not limit nor make it more difficult for carriers to develop a network. Where disputes arise concerning "technically feasible points of interconnection," LECs would have the responsibility of demonstrating such technical infeasibility to the state.

**(2) Just, Reasonable, and Nondiscriminatory Interconnection**

At NPRM ¶ 60 - 62, the FCC seeks comments on how to determine whether the terms and conditions for interconnection arrangements are just, reasonable and nondiscriminatory. The FCC further seeks comment on whether it should adopt explicit national standards for the terms and conditions for interconnection. It is the position of the APSC that the FCC should adopt general guidelines addressing the installation, maintenance and repair of interconnection facilities for all LECs. The APSC asserts, however, that the specific guidelines governing interconnection maintenance and repair of interconnection facilities should be promulgated on the state level and should include incentives to all LECs, as well as penalties for not meeting performance standards and requirements established for timely installation and repair. The parties could address these matters in their arbitrated/negotiated agreements.

**(3) Interconnection that is Equal in Quality**

At NPRM ¶ 60 - 62, the FCC seeks comments on how to establish criteria for determining whether interconnection provided by incumbent LECs is equal in quality to the interconnection it provides itself or its subsidiaries or affiliates. The APSC does not believe the FCC should establish national guidelines governing this subject since Alabama, and likely many other states, has existing

quality of service standards which do address the quality of interconnection. In our local competition order[5], we require all providers to meet our service quality standards and reporting requirements. A national standard would not be appropriate given the different network configurations which dictate different interconnection approaches.

**(4) Relationship Between Interconnection and Other Obligations Under the 1996 Act**

The FCC seeks comment at NPRM ¶ 64 - 65 concerning its tentative conclusion that it has the authority to require, in addition to physical collocation, virtual collocation, and meet point interconnection arrangements, as well as any other reasonable method of interconnection. The FCC also seeks comment on various state requirements regarding interconnection methods.

It is the position of the APSC that incumbent LECS should provide interconnection at all technically and economically feasible and reasonable points within their networks. While general guidelines from the FCC concerning matters such as physical collocation, virtual collocation, and meet point interconnection arrangements, would be helpful, State commissions should not be limited to those guidelines. The state commission should have the latitude to act in response to negotiated agreements reached between the various parties through negotiation and/or arbitration as envisioned by the Act.

**b. Collocation**

The FCC tentatively concludes, at NPRM ¶ 67, that it should adopt national standards where appropriate to implement the collocation standards of the 1996 Act. At NPRM ¶ 73, the FCC seeks comment as to whether these standards can be set by readopting the FCC's prior standards governing physical and virtual co-location that were established in the expanded interconnection proceeding.

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[5] Id.

Further, the FCC, at NPRM ¶ 67 - 76, seeks comments concerning state approaches to collocation.

The APSC sees some merit in establishing broad national guidelines governing collocation so long as state commissions have the ultimate determination of whether a carrier is required to provide virtual collocation in accordance with Section 251(c)(6) of the 1996 Act. The APSC believes that a readoption of the rules and guidelines governing collocation as adopted by the FCC in its expanded interconnection proceeding, would be sufficient.

The APSC, pursuant to order,[9] in Informal Docket U-3449, established a policy that permits tier one local exchange carriers to offer expanded interconnection for intrastate special access either on a physical or virtual collocation basis pursuant to negotiated agreement between the parties. Should the parties fail to agree on the terms of the collocation arrangement, the interested parties seeking collocation for intrastate special access at a given central office can file a petition with the APSC requesting specific terms of the collocation arrangement be ordered. The APSC reviews all such petitions on a case-by-case basis with due consideration being given to the equities involved in providing physical versus virtual collocation at a given central office. The APSC believes this approach is consistent with the 1996 Act although we were eventually preempted by the FCC in their Expanded Interconnection Docket.

**C. Unbundled Network Elements**

In its analysis of Sections 251(c)(3), (d)(1), and (d)(2) of the 1996 Act, at NPRM ¶ 74 - 116, the FCC discusses the unbundling of network elements. More specifically, the FCC tentatively concludes at NPRM ¶ 77, that it should develop a minimum set of network elements that incumbent

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[9] Informal Docket U-3449

LECs must unbundle. The FCC further concludes that, pursuant to Section 252(c)(3), that the states may require additional unbundling of incumbent LEC networks beyond the FCC-established minimums. NPRM ¶ 79. The FCC also discusses the issue of its assumption of state responsibility pursuant to Section 252(c)(5) without the establishment of the explicit nationwide requirements, NPRM ¶ 80.

The APSC concurs that the FCC should identify a minimum set of network elements that incumbent LECs are required to unbundle. Pursuant to the authority of Section 252(c)(3) of the 1996 Act, the state commissions should then utilize these FCC-established minimum standards and additional state standards in evaluating interconnection agreements in regard to unbundling.

In response to the FCC's request for information concerning unbundling policies the states have imposed (NPRM ¶ 81), the APSC notes that it has, by order, required that LECs will, at a minimum, unbundle their local networks into the following basic network functions: (1) local loop; (2) local switching; (3) local interoffice facilities; and (4) signaling. These elements, as well as additional elements, are currently being considered in the workshops that were established in the APSC's Local Competition Order.[10] The tentative conclusions reached in the workshops are that additional elements such as centralized message database service; directory assistance; access to emergency services; access to 800 database; access to operator services; white page listings and directories; signaling, access to numbers; line identification database service; and, exchange lines should be unbundled. The intent of the APSC is to require LECs to unbundle all network elements to the extent that it is reasonable and technically and economically feasible.

**(1) Network Elements**

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[10] Id.

At NPRM ¶ 83 - 85, the FCC discusses whether it should promulgate a definitive list of minimal network elements that must be unbundled, or whether it should develop a broader, more flexible definition that lends itself to redefinition by the states. Not surprisingly, the APSC supports the latter approach. New local entrants should have the flexibility of reselling services or entering into local interconnection agreements or any combination thereof

**(2) Access to Network Elements**

At NPRM ¶ 86 - 90, the FCC analyzes what is meant in the 1996 Act by "access to unbundled network elements" and "technically feasible points of interconnection." The FCC specifically seeks comment at NPRM ¶ 87 concerning whether the states as well as the FCC may practically apply a dynamic definition of access to interconnection elements on an unbundled basis at any technically feasible point during the arbitration process.

The APSC asserts that it should be the states that are in the position of ensuring *nondiscriminatory access to unbundled network elements thru the negotiation or arbitration process.* This authority is inherent in Section 251(d)(3) of the 1996 Act. Further, an incumbent LEC should provide unbundled elements at least equal in quality to those it provides itself, an affiliate or subsidiary, and should offer discount rates in situations where elements provided are of a lesser quality.

**(3) Specific Unbundling Proposals**

The APSC previously addressed its position regarding the specific unbundling issue. We reserve the right , however, to file reply comments on this matters.

**d. Pricing of Interconnection, Collocation, and Unbundled Network Elements**

At paragraphs 117 through 120 of the NPRM, the FCC attempts to justify its desire to

establish national pricing principles for both intrastate and interstate services and facilities by expansively interpreting the provisions of Sections 251 and 252 of the 1996 Act in clear contravention of Section 2(b) of the 1934 Act. The FCC boldly states at NPRM ¶ 118 that its statutory duty to implement the pricing requirements of Section 251, as elaborated in Section 252, is reasonably read to require that the FCC is to establish pricing principles, interpreting and further explaining the provisions of Section 252(d) for the states to apply in establishing rates in arbitrations and reviewing BOC statements of generally available terms and conditions. Based on this unfounded conclusion, the FCC goes on to extol the benefits of the national pricing guidelines.

The FCC's above-noted attempts to justify the establishment of national pricing guidelines for both intrastate and interstate services and facilities, including wholesale rates for purposes of resale, are yet another exercise in preemption by implication. For the reasons stated previously in these comments, these attempts at implied preemption are without merit and are, in fact, contrary to the plain language of the 1996 Act.

The provisions of Section 252(d)(1) make it clear that the determination of interconnection and network element rates are a function of the states. Similarly, Sections 252(d)(2) and 252(d)(3) exclusively reference state responsibility in the determination of the charges for the transport and termination of traffic and the wholesale rates for resold services, respectively. Only if the states fail to fulfill their statutory obligation with respect to the provisions of Section 252 is the FCC authorized to assert limited jurisdiction.

Even if it is incorrectly assumed that the FCC has jurisdiction to establish national pricing guidelines that govern both interstate and intrastate services and facilities, such an approach would yield chaotic, if not disastrous, results. Such an overly simplistic approach does not lend itself to the

flexibility required to accommodate the vastly different circumstances present in each geographic area. This was likely the reason that Congress left the determination of rates and charges for intrastate services and facilities under the jurisdiction of the states.

In order to allow the states to fulfill their jurisdictional responsibility, the APSC feels that the current FCC Part 36 (separations) should remain intact at this time. One of our primary concerns for retaining current separation requirements is that our order on Local Competition and Price Regulation[11] addresses and requires action on exogenous changes which are not reflected in the consumer price index, such as changes/shifts in Interstate/Intrastate allocations. Furthermore, we are concerned with the possibility of shifting costs to the state jurisdiction and more specifically to the local ratepayer. It is also too early in the local interconnection process and the interpretation of the 1996 Act to simply abandon this vital part of past and possible future regulation. The jurisdictional separations requirements must be retained.

The FCC's egregious attempts to formulate national pricing guidelines continue throughout the NPRM at paragraphs 121 through 157. Almost all of the tentative conclusions reached in those paragraphs are premised on the unfounded assumption that the FCC has broad authority to dictate such national pricing principles.

The FCC correctly concludes, at NPRM ¶ 123, however, that the language of Section 251(d)(1) precludes states from setting rates by use of traditional cost of service regulation with its detailed examination of historical carrier costs and rate bases. The APSC concurs that the statute contemplates the use of other cost based regulation, such as price cap regulation, that is indirectly based on cost, or the setting of prices based on forward-looking cost methodology that does not

[11] Id.