

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

In the Matter of )  
 )  
Implementation of the Local Competition ) CC Docket No. 96-98  
Provisions in the Telecommunications Act )  
of 1996 ) DOCKET FILE COPY ORIGINAL

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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## SUMMARY

NCTA strongly supports the Commission's proposal to establish uniform national rules to implement the goal of the Telecommunications Act of 1996 ("the Act") to "open all telecommunications markets to competition." The Act establishes a "pro-competitive, deregulatory national policy framework"; the policies embodied in the Notice develop that framework, and will speed the availability of competitive alternatives for consumers. By contrast, the failure to delineate clear national rules -- to rely instead solely on uneven State-by-State regulation or private negotiations between parties of grossly disproportionate bargaining power -- will squander opportunities for innovation and consumer choice presented by the enactment of the Act.

Adopting national standards, including pricing standards, is undoubtedly mandated by the statutory language and intent. National standards are needed to achieve the statutory purposes of removing statutory and regulatory barriers and economic impediments to competition. A uniform policy will also promote facilities-based competition by encouraging investment in, and deployment of, telecommunications capability by cable operators and other competitive local exchange carriers. With uniform standards, competitors will more easily construct and operate regional networks that benefit consumers by their economies of scale and scope.

States have a key role in the statutory scheme, too. The Notice recognizes the pivotal responsibility reserved to the States under the 1996 Act: they are charged with applying the requirements established by the Commission, in the context of negotiations between incumbent

local exchange carriers and competitors. In a very real sense, success or failure of the statutory scheme rests with the States.

The Commission's national standards should foster Congress's goal of encouraging robust competition from multiple providers. NCTA's comments offer seven principles.

First, the Commission must keep in mind the critical distinctions in the Act between incumbent local exchange carriers, which possess market power, and competitive local exchange carriers, which lack market power. These distinctions, which give new entrants the necessary breathing room to grow and develop, are fundamental. The Commission should minimize regulatory burdens on new entrants, including resale. The Commission should also clarify that competitors have the discretion to interconnect directly or indirectly with other carriers. State requirements that attempt to impose unbundling and other requirements intended for carriers with market power must be preempted.

Second, the Commission must realize in regulation Congress's strong preference for facilities-based competition in the 1996 Act. Resale can play an important role in stimulating price competition and enabling facilities-based carriers to expand their service areas, but only the existence of true facilities-based competition can justify reliance on market forces to protect consumers. In establishing the "wholesale rate" for resale by incumbent carriers, the Commission should avoid a discount so deep that it deters investments in new facilities. NCTA recommends an interim maximum wholesale discount of no more than 10 percent off retail rates.

Third, the Commission must ensure that the rules implementing the interconnection and unbundling obligations of incumbent local exchange carriers reflect the "co-carrier" relationship between incumbents and new entrants mandated by the Act. The requirement to provide

interconnection at any "technically feasible point" should include, at a minimum, interconnection at access tandems, end offices, and any other technically feasible meet point. A flexible and evolving definition of what constitutes a technically feasible interconnection point will permit the most efficient arrangements between incumbents and competitors. NCTA supports the Commission's proposal to place the burden on the incumbent to prove that a proposed point is technically infeasible.

Likewise, the Commission should specify a minimum set of network elements that incumbents must provide to requesting carriers. This list must be permitted to evolve, but initially it should include the following elements: unbundled local loop transmission (but not loop subelements), trunk side local transport, and local switching; access to 911 and E911 services, directory assistance services, and operator services; and access to databases and associated signalling necessary for call routing and completion.

New entrants are both the customers and the competitors of the incumbents from whom they purchase interconnection and network elements. The incumbent has substantial incentives to undermine the competitor's reputation and business operations through delay in providing requested services and facilities. The Commission should articulate guidelines to ensure the incumbent's compliance with the "good faith" negotiating requirement, and prevent the analogous requirement imposed on competitors from being used by incumbents to demand disclosure of proprietary business information.

The Commission should also require performance standards to be included in all interconnection agreements to discourage unreasonable and unsatisfactory delivery of services. Service intervals should be "unbundled" to reflect the fact that the competitor may not need the

incumbent to perform all of the functions associated with the incumbent's own provisioning of service to end users.

Fourth, the Commission must establish mechanisms for swift and sure enforcement of these rules and standards. Short timetables, complaint procedures that place the burden of proof on the incumbent to prove compliance, and substantial penalties will discourage widespread violations of the rules. In the first instance, State commissions should hear complaints under tight time frames. The FCC's complaint process should be available on appeal or if the State fails to act in a timely fashion.

Fifth, the FCC must implement pricing standards for interconnection, network elements, and transport and termination to permit efficient and expeditious entry by competitors; constrain anticompetitive pricing practices by incumbent local exchange carriers; and limit the administrative costs of regulation. Because the design and application of long-term pricing standards are controversial and time-consuming, development of interim benchmarks or proxies is essential to the development of competition.

In the long-term, charges for interconnection and unbundling should be priced on the basis of total service long-run incremental cost, without any allowance for embedded costs or implicit universal service subsidies but including an amount for forward-looking joint and common costs.

Consistent with the statutory language limiting recovery to "additional" costs, the charge for transport and termination should be based solely on total service long-run incremental costs, without any loading of joint and common costs. As an interim solution, the Commission can and should require bill-and-keep.

Sixth, the Commission should adopt standards to prevent widespread suspensions or modifications of the foregoing requirements from undermining Congress's efforts to establish national policy. State authority to grant suspensions and modifications must be narrowly construed. Likewise, the rural exemption should not be applied in a manner that frustrates fulfillment of the Act's pro-competitive objectives in these areas.

Seventh, consistent with the goal of the Act to remove barriers and economic impediments, the Commission should rule that burdensome certification proceedings and geographic service requirements constitute effective barriers to entry. Providing this guidance now would reduce regulatory uncertainty and minimize case-by-case litigation.

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**COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments in the above captioned-proceeding. NCTA is the principal trade association of the cable television industry.

Cable operators and their affiliates are already offering both local exchange and competitive access services, and the cable industry is aggressively pursuing entry into the competitive local telephony marketplace through numerous state certification proceedings.<sup>1/</sup> As

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<sup>1/</sup> Cable companies and their telephony affiliates have been certified as competitive LECs in 40 markets nationwide, and at least 11 companies are pursuing certification at the state level to provide local service. Time Warner, for instance, is providing local, long distance, custom calling features, facsimile, and 911 services to over 1,500 residential and business telephone customers in multiple dwelling units, single family homes, and office complexes in Rochester, New York. TCI, through various wholly-owned affiliates, has filed for certification in both Connecticut and Illinois and plans to file for authority in California to provide facilities-based competitive local exchange, resale, and interexchange services. Cablevision Systems Corporation provides switched and dedicated telecommunications services in New York State through its Cablevision Lightpath subsidiary. Continental Cablevision has obtained certificates to operate as a competitive LEC in 10 California counties, and statewide in Florida and New Hampshire. Jones Lightwave, a subsidiary of Jones Telecommunications, is already certified in Florida and is seeking regulatory authority to deploy residential voice service in multiple dwelling units in Alexandria, Virginia. Cox Fibernet, a subsidiary of Cox Communications, is certified to provide local service in Norfolk, Virginia, New Orleans, Louisiana, and Oklahoma City, Oklahoma.

facilities-based providers of competitive telecommunications services, NCTA's members have a vital stake in the adoption of rules that fulfill the mandate of the Telecommunications Act of 1996 to establish a pro-competitive, deregulatory national policy framework for telecommunications.

**I. THE NATIONAL POLICY FRAMEWORK EMBODIED IN THE 1996 ACT ENVISIONS UNIFORM FEDERAL STANDARDS ADOPTED BY THE COMMISSION AND APPLIED TO SPECIFIC CASES BY THE SEVERAL STATES**

To "open all telecommunications markets to competition," the Telecommunications Act of 1996 ("1996 Act")<sup>2/</sup> establishes a "pro-competitive, de-regulatory national policy framework"<sup>3/</sup> that assigns critical responsibilities to the Commission and to the States. In fulfillment of the Act's mandate for a "national process for enhancing competition, increasing consumer choice, lowering rates, and reducing regulation,"<sup>4/</sup> the Commission is charged with "establish[ing] regulations to implement the requirements" of Section 251.<sup>5/</sup> This directive requires the Commission to specify the interconnection, compensation, and unbundling obligations imposed upon incumbent local exchange carriers ("ILECs"), and to establish the pricing standards that will govern the ILECs' fulfillment of those obligations. NCTA strongly supports the Commission's intention, which is fully consistent with the language, policies, and

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<sup>2/</sup> Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) ("1996 Act" or "Act").

<sup>3/</sup> H.R. Conf. Rep. No 458, 104th Cong., 2d Sess. 113 ("Conference Report").

<sup>4/</sup> Notice ¶ 24.

<sup>5/</sup> 47 U.S.C. § 251(d)(1).

structure of the 1996 Act, "to adopt national rules that are designed to secure the full benefits of competition for consumers."

The framework embodied in Section 251 appropriately balances Federal and State responsibilities, and the respective roles of government and private negotiations, to foster the development of a competitive marketplace. To the States falls the pivotal responsibility for applying the requirements and standards established by the Commission, in the context of particular negotiations between ILECs and other carriers. Through this division of responsibilities, Congress sought to "remove both the statutory and regulatory barriers and economic impediments that inefficiently retard entry, and to allow entry to take place where it can occur efficiently."<sup>6/</sup> The combination of national rules, State oversight, and reliance on private arrangements to the extent possible will remove entry barriers and economic impediments and create an environment in which new entrants can and will make the substantial investments necessary to offer consumers a wide range of new and innovative services.

**A. The Act Directs the Commission to Establish Explicit National Rules**

The 1996 Act mandates that ILECs open their local exchange bottleneck facilities to interconnection with potential competitors,<sup>7/</sup> in accordance with the competitive checklist

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<sup>6/</sup> See Notice ¶ 12.

<sup>7/</sup> During floor consideration of the Senate version of the 1996 Act, Senator Lott noted that:

It is critical to recognize the reason why all of these barriers, restrictions, and regulations exist in the first place -- the so-called bottleneck. Opening the local network removes the bottleneck and ensures that all competitors will have equal and universal access to all consumers.

141 Cong. Rec. S7906 (daily ed. June 7, 1995) (statement of Sen. Lott); see also 141 Cong. Rec. H8289 (daily ed. August 2, 1995) (statement of Rep. Hastert) (noting the "list of areas (such as number (continued...))

established in Section 251. Notwithstanding the significant detail of the competitive checklist, the Commission is explicitly charged with applying its expertise to the task of implementing the requirements of that section.<sup>8/</sup> This directive reflects a clear choice by Congress in favor of specific, national ground rules to govern the transition to local competition. Such a choice is wholly consistent with the Act's overriding goal of designing a "national policy framework" that fosters competition in local telecommunications markets.<sup>9/</sup>

As evidenced by the short rulemaking timetable,<sup>10/</sup> Congress attached high priority to "the need to swiftly introduce telecommunications competition."<sup>11/</sup> In the face of the uneven and sporadic emergence of competition from State to State,<sup>12/</sup> the most effective way to carry out this goal is through the establishment of uniform, national ground rules that narrow the range of potential disputes among negotiating parties.<sup>13/</sup>

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<sup>7/</sup> (...continued)

portability, dialing parity, interconnection, equal access, resale, and unbundling) that give monopolies their bottleneck in the local loop. We agreed to remove the monopoly power in each and every one of those areas in our bill"; H.R. Rep. No. 204, 104th Cong., 1st Sess. 49 (1995) ("House Report") ("In the overwhelming majority of markets today, because of their government-sanctioned monopoly status, local providers maintain bottleneck control over the essential facilities needed for the provision of local telephone service").

<sup>8/</sup> See 47 U.S.C. § 251(d)( ).

<sup>9/</sup> Conference Report at 11 .

<sup>10/</sup> The Act requires the Commission to complete all actions necessary to establish regulations under Section 251 within 6 months of enactment. 47 U.S.C. § 251(d)(1).

<sup>11/</sup> See Notice ¶ 33.

<sup>12/</sup> See id. at ¶ 28; see also id. at ¶ 28 n.43 (Noting that more "than 30 states do not have rules governing local competition in place today; most of those states have not commenced proceedings to adopt the necessary rules").

<sup>13/</sup> See id. at ¶ 30. Indeed, ILECs have frustrated local competitors seeking interconnection by unnecessarily protracting the negotiation process.

National standards also encourage new entrants and promote facilities-based competition by facilitating investment in -- and deployment of -- new network equipment by competitors. As the Commission recognizes, "uniform network configurations could achieve significant cost efficiencies for new entrants."<sup>14/</sup> Fifty-one different sets of rules, by contrast, would require new entrants to conform their network design to multiple, inconsistent interconnection and unbundling requirements.<sup>15/</sup>

Adoption by the Commission of explicit, national rules is also consistent with both the language and the design of the Act itself. Congress did not simply enumerate the items in the competitive checklist, leaving the development of the checklist to case-by-case adjudications of disputes between parties seeking to negotiate interconnection agreements. In declining this approach, Congress undoubtedly was cognizant of the impossibility of relying solely on private, negotiated arrangements to undo market power in the telephone industry, as illustrated by the events leading up to the divestiture of AT&T and more recent efforts by commercial mobile radio service ("CMRS") providers, competitive access providers ("CAPs"), and others to obtain

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<sup>14/</sup> Notice ¶ 30; see also *id.* at ¶ 30 n.44 ("A uniform network design can be expected to reduce start-up costs, accelerate innovation, enhance interoperability of networks and equipment, and reduce the administrative burdens for both incumbent LECs and entrants.").

<sup>15/</sup> *Id.* at ¶ 30 ("if new competitors were required to modify their networks in different markets solely to be compatible with a patchwork of different regulations, they would likely incur additional expense, thereby increasing the cost of entry, a result that would be inconsistent with the pro-competitive goals of the statute").

interconnection with the ILECs' networks.<sup>16/</sup> While private negotiations play a critical role in tailoring individual interconnection agreements to the circumstances of the particular parties,<sup>17/</sup> Congress directed that these negotiations take place against the backdrop of a clear set of rules established in advance and the availability of swift and sure State arbitration and enforcement to ensure compliance with those rules.

Nor did Congress simply direct the States to define the obligations imposed by Section 251. In rejecting this approach, Congress recognized its fundamental irreconcilability with the goal of establishing "a national policy framework" to foster competition. To this end, the Act gives the Commission the authority to preclude State regulations that are inconsistent with, or prevent the implementation of, the requirements of Section 251.<sup>18/</sup>

While Congress delegated to the Commission the task of developing national rules to implement the Act's interconnection and unbundling obligations, it assigned the States the critical

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<sup>16/</sup> See, e.g., United States v. American Tel. & Tel. Co., 524 F. Supp. 1336, 1355-56 (D.D.C. 1981) (recounting evidence of bad faith interconnection negotiations with competitors by the integrated Bell system); MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1159 (7th Cir.), cert. denied, 464 U.S. 891 (1983); Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5450 (1994) (describing history of LEC and cellular interconnection negotiations, including a time during which LECs refused to provide trunkside interconnection to nonwireline cellular carriers).

<sup>17/</sup> Indeed, the Act permits parties to an interconnection agreement voluntarily to negotiate agreements that do not conform to the requirements of Section 251.

<sup>18/</sup> See 47 U.S.C. § 251(d)(3).

task of applying those rules to specific cases that arise within their respective jurisdictions.<sup>19/</sup> The States will have the front-line responsibility for assuring that the Act's mandate for competition is properly executed in local markets around the country. Consistent with this framework, in instances where an ILEC violates an interconnection agreement, complaints should be brought, in the first instance, to the appropriate State commission rather than to the FCC.<sup>20/</sup> State commissions are likely to have greater familiarity with the specifics of the agreement than the FCC, and will be able to act more rapidly in response to complaints. Clarifying this threshold State role will expedite accomplishment of the Act's objectives by discouraging forum shopping.<sup>21/</sup> The FCC's complaint process should remain available on appeal or if the State fails to act on a timely basis.<sup>22/</sup>

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<sup>19/</sup> See, e.g., *id.* at § 252(c)(1) (requiring States to resolve interconnection disputes in a manner that "meet[s] the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251"); *id.* at § 252(e)(2) (authorizing State rejection of an agreement that "does not meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251"); *id.* at § 252(f)(1) (barring States from approving any interconnection statement filed by a Bell Operating Company unless it "complies with . . . section 251 and the regulations thereunder").

<sup>20/</sup> Notably, the Act gives State commissions the authority to "provide a schedule for implementation of the terms and conditions by the parties to the [interconnection] agreement." *Id.* at § 252(c)(3). It would be logical to place upon the State commissions the initial responsibility for enforcing compliance with such a schedule. Cf. Notice ¶ 34.

<sup>21/</sup> The 1996 Act specifically charges the Commission with reviewing complaints that a Bell operating company has ceased to meet the conditions for interLATA entry. 47 U.S.C. § 271(d)(6). This special enforcement mechanism is not inconsistent with the general principle that State commissions should address complaints of noncompliance with interconnection agreements by ILECs. It is the Commission, not the State commissions, that must review BOC applications for interLATA authority and determine whether the BOC has satisfied the required conditions. By contrast, the State commissions are generally responsible for reviewing interconnection agreements involving other ILECs. State review of complaints arising out of these agreements is appropriate for the reasons stated in the text.

<sup>22/</sup> See *id.* at § 252(e)(5).

The Act also preserves the States' authority to adopt additional measures regarding interconnection and unbundling that build upon, and are consistent with the ground rules established by the Commission.<sup>23/</sup> Indeed, the very process of administering the Commission's ground rules in 51 different jurisdictions inevitably will yield divergent approaches to the manner in which the Act's interconnection and unbundling obligations are carried out on a day-to-day basis. The establishment of explicit, national rules does not necessarily preclude States from "address[ing] unique policy concerns that might exist within their jurisdictions" or "experiment[ing] with different pro-competitive regimes,"<sup>24/</sup> so long as the States act in accordance with the requirements established by the Commission.

**B. The Act Empowers the Commission to Set Pricing Standards**

The Commission's authority to implement the requirements of Section 251 encompasses the authority to establish pricing standards governing transport and termination, interconnection, the provisioning of unbundled network elements, and resale. That is clear on the face of the statute. Among the requirements of Section 251 are "just, reasonable and nondiscriminatory rates" for interconnection and unbundled network elements;<sup>25/</sup> the duty of ILECs to offer retail telecommunications service "for resale at wholesale rates"; and the local exchange carriers' ("LECs'") obligation "to establish reciprocal compensation arrangements" for the transport and

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<sup>23/</sup> Instances where existing State approaches can serve as "guideposts or benchmarks" for the Commission's national rules, see Notice ¶ 29, are noted throughout these comments.

<sup>24/</sup> See id. at ¶ 33.

<sup>25/</sup> 47 U.S.C. § 251(c)(2)(D); Id. at § 251(c)(3).

termination of telecommunications.<sup>26/</sup> A contrary conclusion would enable the States to adopt multiple, inconsistent pricing standards that would frustrate the objectives of the Act in general and Section 251 in particular.

Section 252's pricing standards are inextricably linked with Section 251, and thus with the Commission's implementing authority under the latter section. The pricing standards, while they are set forth in Section 252(d), explicitly relate back to the requirements of Section 251<sup>27/</sup> and must be read in conjunction with the competitive checklist. Similarly, the specific pricing standards set forth in Section 252 elaborate on the principles enumerated in Section 251, and are in fact incorporated by reference into Section 251.<sup>28/</sup>

In essence, the pricing standards are Federally-imposed constraints on the manner in which States must resolve pricing disputes that may arise in the context of their oversight responsibilities over interconnection agreement negotiations. In this regard, they are closely analogous to the Federally-imposed competitive checklist, which takes precedence over "inconsistent" State-imposed interconnection and access requirements.<sup>29/</sup> Just as the adoption of national standards is essential for the implementation of interconnection, unbundling, and the

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<sup>26/</sup> Id. at § 251(b)(5).

<sup>27/</sup> See id. at § 252(d)(1) (establishing pricing standard "for purposes of subsection (c)(2) of section 251" and "for purposes of subsection (c)(3) of such section"); id. at § 252(d)(2) (establishing transport and termination pricing standard "[f]or purposes of compliance by an incumbent local exchange carrier with the section 251(b)(5)").

<sup>28/</sup> See, e.g., id. at § 251(c)(2)(D).

<sup>29/</sup> Id. at § 251(d)(3).

other elements of the competitive checklist, such standards are vital to ensure the consistent application of the terms and concepts contained in Section 252(d).

**C. The Commission's Authority Encompasses the Intrastate Aspects of Interconnection and Unbundling**

NCTA strongly supports the Commission's tentative conclusion that its regulations implementing Section 251 apply to the intrastate aspects of interconnection.<sup>30/</sup> This position fully accords with the statutory language itself, which expressly gives the Commission the responsibility to establish rules governing ILEC interconnection with providers of telephone exchange service, an intrastate communications service.<sup>31/</sup>

Congress intended to create a national policy to promote telecommunications competition in every market, including the market for local services,<sup>32/</sup> and to give the Commission the authority to implement this policy. Even without an explicit amendment to Section 2(b) of the Communications Act,<sup>33/</sup> the specificity and comprehensive nature of Section 251 must take

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<sup>30/</sup> See Notice ¶ 37.

<sup>31/</sup> See 47 U.S.C. § 251(c)(2)(A) (requiring an ILEC to provide a requesting carrier with interconnection for the provision of telephone exchange service); *id.* at § 251(d)(1) (directing the Commission to establish regulations to implement "the requirements of this section"). Of course, an ILEC's obligation to provide interconnection and unbundling pursuant to Section 251 is not limited simply to instances in which requesting telecommunications are seeking to provide "telephone exchange service." For example, the Act provides that interconnection be provided to "any telecommunications carrier" and that unbundling be provided "for the provision of a telecommunications service." *Id.* at § 251(c)(2)-(3).

<sup>32/</sup> See, e.g., House Report at 71 (H.R. 1555 contained "specific requirements of openness and accessibility that apply to LECs as competitors enter the local market and seek access to, and interconnection with, the incumbent's network facilities") (emphasis added). H.R. 1555 also directed the Commission to implement those requirements.

<sup>33/</sup> 47 U.S.C. § 152(b).

precedence over the general limitations embodied in Section 2(b).<sup>34/</sup> Any other conclusion would create significant obstacles to the accomplishment and execution of the full objectives of Congress.<sup>35/</sup> Dividing the regulatory responsibility for physical interconnection and the availability of unbundled elements between Federal and State jurisdictions would severely frustrate -- if not defeat outright -- the core purposes of the 1996 Act.<sup>36/</sup>

Congress's intention to establish and implement a national policy framework that removes entry barriers and economic impediments would be thwarted if the Act were read to require the commencement of Federal and multiple State proceedings that attempt to demarcate the respective jurisdictional spheres with respect to Section 251, and then separately to define the interconnection and unbundling obligations and pricing standards that apply with respect to for

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<sup>34/</sup> The Supreme Court's decision in Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986), is consistent with this analysis. There, the Court noted that "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." Id. at 374. Unlike Section 220, which the Court found wanting as a source of preemptive authority, Section 251 plainly establishes a uniform, national policy and specifically confers upon the Commission responsibilities over interconnection for intrastate services.

<sup>35/</sup> See Hines v. Davidowitz 312 U.S. 52, 66-67 (1941); Jones v. Rath Packing Co., 430 U.S. 519, 526-27 (1977) (preemption occurs when Federal statutes manifest a clear intent to preempt state authority); Fidelity Savings and Loan Assn. v. de la Cuesta, 458 U.S. 141, 153 (1982) (Federal agencies may exercise the Federal government's preemption authority). See also Markham v. Cabell, 326 U.S. 303, 311 (1945) (When interpreting amended statutes, pre-revision provisions and amendments must be read "as parts of an integrated whole"); United States v. Morton, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole").

<sup>36/</sup> See Notice ¶ 38.

interstate and intrastate facilities.<sup>37/</sup> Multiple, potentially inconsistent implementation proceedings also would contravene the Act by untenably burdening new entry, discouraging investment in and deployment of new facilities, and gratuitously raising administrative costs. Indeed, the prospect that new entrants might be forced to determine in advance whether a particular network element would be used predominantly for interstate or intrastate purposes in order to determine which standard governs would slow competitive entry into telecommunications markets <sup>38/</sup>

Limiting the Commission's jurisdiction to the interstate aspects of interconnection unquestionably conflicts with the language, framework and purposes of the Act. Such a limitation therefore must be rejected.

**D. Parties to Existing Interconnection Agreements May Bring Those Agreements Into Conformity with the Act's Competitive Checklist**

Parties to agreements for interconnection, services, or network elements entered into and binding prior to the enactment of the 1996 Act must be given an opportunity to renegotiate those

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<sup>37/</sup> Indeed, such a reading would effectively obviate adoption of Section 251, since it effectively describes the status quo ante prior to the enactment of the 1996 Act. Since statutes must be construed in a manner that gives all of their terms operative effect, this interpretation of the Act must be rejected. See, e.g., United States v. Nordic Village Inc., 503 U.S. 30 (1992); United States v. Menasche, 348 U.S. 528, 538-39 (1955), Montclair v. Ramsdell, 107 U.S. 147, 152 (1882).

<sup>38/</sup> By contrast, construing the statute to impart plenary authority to the Commission over Section 251 would not offend traditional separations analyses. The separations process seeks to ensure that a provider that offers a service over network facilities on both an interstate and intrastate basis properly allocates its costs of service between the two jurisdictions. See, e.g., Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, 2 FCC Rcd 1298, 1300 (1987), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub. nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990). Assuming arguendo that there may be circumstances under which a new entrant would be subject to accounting and separations requirements, that same separations process can still occur. Thus, for example, a competitor whose costs of service include the purchase of an unbundled network element from an ILEC could apportion those costs between jurisdictions if it offers service on both an interstate and intrastate basis.

agreements pursuant to the new requirements set forth pursuant to Section 251. A number of carriers presently receive interconnection and access to unbundled network elements pursuant to agreements that predate the Act. In several instances, however, the terms and conditions for interconnection and access to unbundled elements are substantially inferior to the regime prescribed in the Act. Access to Section 251's competitive checklist would enable competitive local exchange providers ("CLECs") to improve those agreements. New entrants should not be forced to comply with the requirements of contracts that were reached as a result of unequal bargaining power between new entrants and ILECs. Indeed, any other result would undermine a central purpose of the 1996 Act, which seeks to ensure that LECs with market power are required to provide interconnection at reasonable and nondiscriminatory rates.<sup>39/</sup>

The 1996 Act provides that agreements "negotiated prior to the date of enactment" must be submitted to State commissions for approval.<sup>40/</sup> Thus, the plain language of the Act signals an intention to conform existing agreements to the new interconnection and unbundling regime established by Congress and the Commission.<sup>41/</sup> New entrants that decide not to continue their

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<sup>39/</sup> See Conference Report at 117.

<sup>40/</sup> See 47 U.S.C. at § 252(a)(1). State commissions may reject any agreement or portion of such an agreement if it discriminates against a telecommunications carrier that is not a party to the agreement or if it is not in the public interest. Id. at § 252(e)(2)(A).

<sup>41/</sup> In addition to the plain language of the 1996 Act, there is ample precedent to support the imposition of a Commission requirement that all parties to existing interconnection agreements be accorded the opportunity to reopen negotiations to bring those agreements into compliance with the Act. The Commission has the power to prescribe a change in contract rates when it finds them unlawful and may void other contract provisions if they disserve the public interest. See Western Union Tel. Co. v. Federal Communications Commission, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (Commission has the power to abrogate a settlement agreement between AT&T and local telephone companies for leasing special access facilities), citing FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353-55 (1956); United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 344 (1956).

existing interconnection agreements with ILECs should be permitted to avail themselves of the 1996 Act's new procedures and initiate negotiations.<sup>42/</sup>

Finally, the Commission should also make clear that the terms and conditions of existing agreements remain in effect during the pendency of negotiations over provisions subject to revision due to the passage of the Act. Any pre-Act agreements that remain in effect should also be available to any other telecommunications carrier.<sup>43/</sup>

## II. THE COMMISSION'S RULES MUST EFFECTUATE THE ACT'S CORE OBJECTIVES OF ENCOURAGING NEW ENTRY AND PROMOTING FACILITIES-BASED COMPETITION

In addition to removing regulatory barriers and economic impediments that retard competitive entry, the 1996 Act encourages competition by limiting the regulatory burdens on new entrants that lack bottleneck control over essential facilities.<sup>44/</sup> In implementing Section 251, the Commission must remain mindful of the critical distinctions in the Act between incumbent and competitive local exchange carriers. This distinction, which is intended to give

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<sup>42/</sup> See 47 U.S.C. § 252(a)(1). Consistent with Congress's intent to encourage negotiated arrangements, see S. Rep. No. 23, 104 Cong. 1st Sess. 20 (1995) ("Senate Report"), the 1996 Act does not limit the requests that new entrants may make for interconnection. Rather, the Act specifies that a carrier's request, and not Commission action, serves as the triggering mechanism under Section 252. Cf. American Tel. & Tel. Co. v. Federal Communications Commission, 487 F.2d 865, 873 (2d Cir. 1973) (carriers cannot be required to obtain Commission permission prior to filing tariff revisions).

<sup>43/</sup> See 47 U.S.C. § 252(i). If neither party to a pre-Act agreement seeks renegotiation, that agreement must be submitted to the State for approval under Section 252(e)(2)(A) to ensure that it does not discriminate against a non-party and that the implementation of the agreement is not consistent with the public interest.

<sup>44/</sup> See, e.g., Senate Report at 19 (limiting imposition of interconnection and unbundling requirements to "local exchange carriers with market power"); House Report at 74 (noting that "new entrants into the market for telephone exchange service will face tremendous obstacles since they will be competing against an entrenched service provider" and that "saddling the full weight" of the Act's interconnection and unbundling requirements on new entrants "will discourage persons from entering the market").

new entrants the necessary breathing room to grow and develop, is fundamental to the structure and purposes of Section 251

Facilities-based competition in particular is essential to breaking the ILECs' local monopolies and offering consumers meaningful service choices as well as reduced prices. The Act's resale requirements must be implemented in a manner that does not discourage the construction of new local telecommunications networks.

**A. The Act Promotes Telecommunications Competition By Minimizing Regulatory Burdens on New Entrants**

In order to effectuate its pro-competitive purposes, the 1996 Act explicitly and materially distinguishes between the obligations imposed upon ILECs and new entrants.<sup>45/</sup> Significantly, new entrants and other non-ILECs are explicitly exempt from certain requirements, which are imposed solely on ILECs,<sup>46/</sup> including:

- interconnection at any technically feasible point within the carrier's network;
- the unbundling of network elements;
- the offering of services for resale at a discount;

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<sup>45/</sup> Compare 47 U.S.C. § 251(b) with *id.* at § 251(c); see also Conference Report at 121 (noting distinction between duties imposed on "new entrants" and "incumbent LECs").

<sup>46/</sup> Under the 1996 Act, an ILEC is a carrier that belonged to the National Exchange Carrier Association ("NECA"), the carrier group that administers exchange access funds, as of the date of enactment. 47 U.S.C. § 251(h)(1). No new entrants or competitive carriers belonged to NECA on the date. While the FCC may reclassify a non-incumbent carrier as an incumbent, it may do so only if it finds that the non-incumbent "occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [the incumbent]" and that the non-incumbent "has substantially replaced an incumbent local exchange carrier." *Id.* at § 251(h)(2). Notably, the FCC, and not the State commissions, is charged with making this determination. Given the nascent state of local competition, however, there is no reason for the Commission to expend resources now to determine when a new entrant should be reclassified as an incumbent. *Cf. Notice ¶¶ 44-45.*

- reasonable public notice of information regarding network changes that would affect interoperability or the transmission and routing of services over the ILEC's network;
- collocation of equipment necessary for interconnection or access to unbundled elements.<sup>47/</sup>

The 1996 Act's legislative history underscores Congress's concern that "saddling [new entrants with] the full weight" of interconnection and unbundling requirements "will discourage persons from entering the market."<sup>48/</sup> Congress fully understood that new entrants "will face tremendous obstacles since they will be competing against an entrenched service provider," and thus it made every effort to limit the obligations imposed on CLECs.<sup>49/</sup>

The distinction between incumbents and new entrants in the 1996 Act reflects a compromise between the House and Senate versions of the legislation. The Senate bill imposed interconnection and unbundling requirements solely on LECs "determined by the [FCC] to have market power in providing telephone exchange service or exchange access service."<sup>50/</sup> By contrast, the House bill required all LECs to comply with these obligations, but empowered the FCC to modify or waive those requirements for carriers with 500,000 or fewer access lines

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<sup>47/</sup> 47 U.S.C. § 251(c).

<sup>48/</sup> House Report at 74.

<sup>49/</sup> With regard to entry into the telephony market by cable firms, Representative Fields noted that these companies will be "the only competitor in the residential marketplace." He emphasized that if there is undue regulation of cable companies, "they will not be able to roll out the services so they can truly compete with telephone, which is what [Congress] want(s)." See also Declaration of Bruce Owen, attached hereto as Appendix 1 ("Owen Declaration") at 6-11.

<sup>50/</sup> S. 652, 104th Cong., 1st Sess. § 101(a) (1995) (adding new Section 251(a) to the Communications Act of 1934).

installed nationwide.<sup>51/</sup> The enacted legislation "adopts a new model for interconnection that incorporates provisions from both the Senate bill and the House [bill]."<sup>52/</sup>

Specifically, the House proposal to impose requirements on all carriers survives as Section 251(b) of the Communications Act,<sup>53/</sup> which establishes a limited set of duties applicable to all LECs, including new entrants.<sup>54/</sup> The decision to impose a broader and more detailed set of obligations solely on ILECs pursuant to Section 251(c) reflects the Senate's conclusion that such requirements are appropriate only for carriers with market power. The careful melding of the House and Senate bills to produce Section 251 is clear evidence that Congress made a deliberate choice to distinguish between the obligations of new entrants and incumbents, and that this distinction is fundamental to the 1996 Act.

Under the carefully-defined structure of Section 251, only ILECs are required to provide interconnection to requesting carriers "at any technically feasible point."<sup>55/</sup> A provider of telecommunications services that is not an ILEC is obligated only to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."<sup>56/</sup> To the

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<sup>51/</sup> H.R. 1555, 104th Cong. 1st Sess. § 101(a) (1995) (adding Section 242 to the Communications Act of 1934).

<sup>52/</sup> Conference Report at 121.

<sup>53/</sup> 47 U.S.C. § 251(b).

<sup>54/</sup> Conference Report at 121.

<sup>55/</sup> See, e.g., Conference Report at 121 (describing the duties set forth in Section 251(c) as "additional obligations" imposed on "incumbent LECs").

<sup>56/</sup> 47 U.S.C. § 251(a).