The importance of access to ILEC databases is critical. For instance, the ILECs maintain the only 911 database as well as control over the addition of names. Likewise, access by competitors to an ILEC's advanced intelligent network is necessary for single-number service capability. In both these examples, if the ILEC is not required to provide access to these unbundled network elements, they otherwise would be unavailable to CLECs. All of the above identified database and signalling network elements are provided today by carriers and, to some extent, other suppliers. Accordingly, it is technically feasible for ILECs to make these elements available.

3. Restrictions Must Be Placed on ILEC Access to CLEC Customer Information

The Commission should establish standards to ensure that access by CLECs to necessary databases and signalling of ILECs does not subject them to anticompetitive behavior. Through access to databases and signalling, ILECs can obtain customer proprietary network information ("CPNI") of a CLEC. Restrictions must be established to prevent ILECs from abusing their control over CPNI to gain an unfair market advantage. ILECs should not be permitted to transfer competitors' CPNI to any ILEC personnel for any purpose,[142] whether on an identifiable or on an aggregate basis.[143] All CLEC customer information should be restricted unless the customer itself chooses to provide such information to the incumbent independently.

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[142] See New York Telephone Company Network Interconnection Service Tariff, P.S.C. No. 914 - Telephone.

[143] Aggregating a CLEC's customer data does not protect the CLEC if it is the only competitor operating in a specific geographic area.

D. The Commission Should Adopt Provisioning Requirements (e.g., Service Intervals) and Enforce Them Through Mandated Penalties

Competitive telecommunications service providers are not end users. They are competitors of the ILEC. Unlike the end user, the CLEC's reputation and business operations are dependent upon the ILEC's effective and efficient provision of services. History reflects that incumbents with monopoly power have the incentive and ability to delay the provision of services.[144] The incentive for anticompetitive abuse must be balanced by the requisite degree of accountability.[145]

Performance standards should be included in all interconnection agreements to discourage unreasonable and unsatisfactory delivery of services. New entrants have encountered inefficient service and unreasonable delays in the deployment and installation of trunks, switching customers from ILECs to CLECs, issuance of number resources, and provision of number portability by ILECs.[146] The need for provisioning requirements further is evidenced by certain ILEC practices with respect to collocation implementation.[147] For instance, new entrants have been forced to seek the assistance of State commissions to ensure just, reasonable

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[144] See American Tel. & Tel. Co., 552 F.Supp. at 161, 171, 187-188, 195, 223. See also MCI, 708 F.2d at 1132-1133, 1139-1140.

[145] Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5172 (1994), modified by erratum on other grounds, 10 FCC Rcd 6566 (1995) (recognizing the need for the imposition of provisioning requirements).

[146] See e.g., *The Big Boys Come Calling*, N.Y. Times, October 23, 1995, at D1, D6; *Calls Waiting, Rivals Are Hung Up On Baby Bells' Control Over Local Markets*, Wall St. J., October 24, 1995, at A1, A6.

[147] See N.Y. Pub. Serv. Comm'n, Petition of ACC Syracuse Telecom Corporation for the Creation of an ONA task force to Address Technical and Economic Issues Relating to ACC's Request for Collocation and Related Services from New York Telephone Company, Order Resolving ONA Task Force Issues, Case No. 94-C-0577 (December 28, 1994).

and nondiscriminatory treatment concerning issues such as construction costs, construction time, interconnection facilities, number of engineers required, the number of engineering hours required, and the appropriate hourly wage for such engineers.[148]

In an environment where the new entrant has no other option than the incumbent for the provisioning of certain services, clear and specific standards, enforcement principles, and penalties must be established to prevent unjust, unreasonable and discriminatory practices in the provisioning of necessary facilities and elements. The Commission should adopt specific minimum standards for service provisioning, and require that specific performance standards be included in any agreement submitted to a State commission for approval. For instance, ILEC service intervals should be "unbundled" to reflect the fact that a competitor may not need the ILEC to perform all of the functions associated with the ILEC's own provisioning of service to end users. Activation of a new ILEC customer may require such time-consuming activities as new construction and truck rolls; activation of a CLEC customer may require only that the ILEC make a software change to move the customer's telephone number. In the latter case, a service interval that assumes construction or truck rolls imposes unnecessary and unjustified delay.

The enforcement of provisioning requirements and all other aspects of agreements between an ILEC and a CLEC should be swift and sure. First, where there are delays and other non-compliance by an ILEC, there should be a presumption that the agreement has been violated and the burden placed on the ILEC to explain why a penalty should not be levied.[149] Second,

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[148] Id.

[149] This presumption should also apply with respect to major service outages that disproportionately affect a CLEC.

the penalties for violations should include a substantial reduction in the rates paid for the particular service or services that have been delayed or have not been provided in compliance with an agreement. To serve as a meaningful sanction, this reduction should continue for at least one year after a determination that a violation has occurred. Finally, the ILEC should be liable for any costs incurred by the CLEC that result from the incumbent's facility failures or actions by ILEC personnel.

E. Pricing Standards Should Ensure Adequate Cost Recovery Without Imposing New Economic Impediments to Competition

Consistent with the goals of the 1996 Act, the implementation of the pricing standards in Section 252 should permit efficient and expeditious entry by competitors, constrain anticompetitive pricing practices by ILECs, and limit administrative costs of regulation.[150] Attached is an economic analysis on the pricing of access to local exchange networks ("Pricing Study") and the Declaration of Bruce M. Owen providing an empirical analysis of proxy pricing to guide the implementation of pricing standards.

Price regulation is necessary only where unbundled network elements, interconnection, or reciprocal compensation arrangements are not supplied on an effectively competitive basis.[151] Where arrangements and elements are available only from the ILEC -- or the ILEC's provision of the arrangement, interconnection or element is significantly more technically

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[150] NCTA Pricing Study, Attached hereto as Appendix 2, at 2-3.

[151] Id. at 3.

or economically efficient -- enforcement of these standards is necessary to prevent efficiency losses associated with the exercise of market power by ILECs.[152]

As the attached Pricing Study and declarations make clear, to the extent that government intervention in pricing is necessary, pricing policy design should include both long-term and interim perspectives. Because designing and applying the appropriate long-term pricing standards likely will be controversial and time-consuming, the development of interim benchmarks or proxies is essential to the development of competition.[153] Delaying competitive entry until long-term solutions are in place could itself be considered a barrier to entry.

1. The Statute Mandates Different Pricing Standards for Unbundled Network Elements and Transport and Termination

The Act explicitly distinguishes between charges for interconnection and unbundled network elements and charges for transport and termination, and establishes distinct pricing standards for each.[154] The standard applicable to the purchase of interconnection and unbundled elements presupposes a traditional carrier-user relationship between an ILEC and a CLEC that lacks switching, databases, or other network elements: the CLEC (customer) must pay the ILEC (carrier) a charge equal to the "cost" of the purchased element. In this context,

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[152] Id.

[153] Id. at 23; Owen Declaration at 15.

[154] 47 U.S.C. § 252(d)(1), (2).

the statute does not specify a particular cost methodology, other than to rule out a "rate-of-return or other rate-based proceeding" to determine cost.[155]

"Transport and termination," by contrast, clearly contemplates a co-carrier relationship in which each carrier transports calls from a meet point to the end users.[156] Transport and termination thus includes all functions, including switching, routing, and transport, that the receiving carrier performs after a call is handed off to it. A similar framework has been adopted by a number of States.[157] In the context of transport and termination, it would be inappropriate to impose a separate switching charge under Section 251(b)(1); a CLEC with its own switch is not a "user" that needs to purchase switching capacity or ports from an ILEC.[158] Rather, the Act provides that there must be mutual and reciprocal recovery by each carrier of the costs it incurs in terminating traffic originating on the other's network. Section

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[155] Id. at § 252(d)(1)(A). The Commission may also permit a "reasonable profit" to be included in the charge for interconnection and unbundled elements. Id. at § 252(d)(1)(B).

[156] Id. at § 252(d)(2)(A)(i) (terms and conditions for reciprocal compensation must provide for the "mutual and reciprocal recovery of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier") (emphasis added).

[157] Connecticut Dep't of Pub. Util. Control, DPUC Investigation into SNET Unbundling, at 64, 70-72; New York State Dep't of Pub. Serv., Competition II: Level Playing Field Issues, at 52, 71; New York State Dep't of Pub. Serv., Petition of Rochester Telephone Corp. for Approval of Proposed Restructuring Plan, Case 93-C 0103, Petition of Rochester Telephone Corporation for Approval of A New Multi Year Rate Stability Agreement, Case 93-C-0033, Opinion and Order Approving Joint Stipulation and Agreement ("Rochester Open Market Plan"), Opinion No. 94-25 (Nov. 10, 1994) at 30, Appendix (Joint Stipulation and Agreement) at 45-47; Oklahoma Corp. Comm'n, Local Competition Rules, Proposed Rule 165:55-7-11).

[158] To the extent a CLEC lacks switches or other network elements, it would purchase these elements at rates set pursuant to section 252(d)(1).

252(d)(2) contemplates a single charge for reciprocal compensation that covers each carrier's costs associated with transport and termination.[159]

Significantly, the Act specifies a methodology for determining the recoverable costs of transport and termination: a carrier may recover only a "reasonable approximation of the additional costs" of terminating calls.[160] This requirement manifests Congress's desire to encourage facilities-based competition by effectively requiring that the charge for transport and termination be limited to incremental cost, without any loading of overheads or joint and common costs.

The Act permits the Commission greater flexibility in defining the cost standard applicable to interconnection and unbundled elements. An incremental cost methodology is also the appropriate starting point for determining charges for interconnection and unbundled elements, but these charges could also include recovery of the ILEC's forward-looking joint and common costs.

2. Interconnection and Unbundled Network Elements

a. TSLRIC is the Appropriate Long-Term Pricing Standard

Pricing of facilities and functions under Section 252(d)(1) -- applicable to interconnection, unbundled network elements and collocation -- should be designed from the long-term pricing

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[159] 47 U.S.C. § 252(d)(2)(A)(i).

[160] Id. at § 252(d)(2)(A)(ii)

perspective of total service long-run incremental cost ("TSLRIC").[161] TSLRIC refers to the value of incremental costs when the increment is defined to be an entire service.[162] As indicated above, TSLRIC plus a reasonable allocation for contribution to forward-looking joint and common costs is consistent with the pricing standard mandated in Section 252(d)(1).[163] These charges should not, however, include embedded costs[164] or universal service subsidies. The funding of universal service should be dealt with in the pending universal service proceeding.

b. The Use of A Proxy Model Is A Necessary and Appropriate Interim Solution

Utilizing a proxy model to establish the TSLRIC and appropriate markup for interconnection and unbundled network elements is the most expeditious means of implementing the goals of the Act. Although the long-term goal should be to set rates based on TSLRIC, waiting while detailed cost studies are developed to support TSLRIC rates for interconnection and unbundling in all jurisdictions will seriously delay the introduction of competition.[165]

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[161] NCTA Pricing Study at 12. Collocation should be subject to the same pricing standard as interconnection because the purpose of seeking collocation is to interconnect with the incumbent LEC to gain access to the public switched network. Notice ¶ 122. 47 U.S.C. § 251(c)(6) clearly recognizes this relationship.

[162] NCTA Pricing Study at 12; see also attachment to NCTA Pricing Study for other definitions of key pricing terms.

[163] See id. at 18-19 (addressing issues to be considered in making these types of additional allocations).

[164] See id. at 13-14, 24-25 38 (addressing why embedded costs and legacy costs are not economic costs, and why they should not be recovered through prices for interconnection, unbundled elements, or transport and termination services).

[165] Owen Declaration at 15

This delay could be especially prolonged because the ILECs, from whom such cost information must be obtained, have every incentive to delay the introduction of competition.[166]

The Commission previously has employed regulatory proxies as substitutes for cost-based pricing,[167] and courts have permitted their use. For example, courts have upheld Commission-adopted benchmark rates, accepting the agency's ratemaking decisions based on its expertise and its use of the best information available, even when the Commission fails to amass additional useful data.[168] Moreover, courts have given expert agencies such as the Commission considerable discretion to adopt ratemaking decisions.[169] Agency ratemaking methods based on particular rate methodologies are given deference unless the expected results are arbitrary and capricious.[170]

Of course, an exact proxy is impossible and the use of proxies carries with it some risk. A proxy that is too high will retard the development of competition, but the absence of a proxy

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166 Id.

167 Transport Rate Structure and Pricing, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370, 5374, modified on other grounds, 8 FCC Rcd 6233 (1993).

168 Time Warner Entertainment Co., L.P. v. Federal Communications Commission, 56 F.3d 151, 166 (D.C. Cir. 1995) (citing NARUC, 737 at 1124, 1138-42), cert. denied, 133 226, L.Ed.2d 842, 1996 U.S. LEXIS 960 (1996). See also FTC Communications, Inc. v. Federal Communications Commission, 750 F.2d 229 (2d Cir. 1984).

169 See, e.g., Permian Basin Area Rate Cases, 390 U.S. 747, 800 (1968); FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944), Northern States Power Co. v. Federal Energy Regulatory Commission, 30 F.3d 177, 180 (D.C. Cir. 1994); United States v. Federal Communications Commission, 707 F.2d 610, 615 (D.C. Cir. 1983); American Tel. & Tel. Co. v. Federal Communications Commission, 572 F.2d 17, 23-23 (2d Cir.), cert. denied, 439 U.S. 875 (1978).

170 See Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942).

would have the same effect.[171] A proxy that is too low would impose costs on the ILECs. However, such a proxy also would provide an incentive for ILECs to develop cost data to justify a modified price as quickly as possible.[172] Thus, although the establishment of proxies is not ideal, it is the best method for implementing the Act immediately.

The decision to use a proxy requires a determination of whether the standard should be a minimum, a maximum, or a fixed standard. The answer to this question depends upon a review of the costs to the public from pricing errors.[173] For example, assuming facilities-based CLECs initially enter the local exchange market by reselling ILEC unbundled network elements while they construct their own facilities, an unduly high network element price will impose higher costs on them than otherwise. Nonetheless, these higher costs are temporary because they will be imposed only during the construction period, and may spur the CLEC to deploy its network more quickly.[174] If unbundled network elements are priced too low, there will be no incentive to deploy facilities because the cost of facilities-based entry may exceed revenues that can be generated at the prevailing retail market prices. Thus, to the extent that facilities-based CLEC entry is deterred by unduly high unbundled network elements, that deterrence is far less injurious to consumers than the permanent blockade created by unduly low unbundled network element pricing.[175]

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[171] Owen Declaration at 16

[172] Id.

[173] Id. at 17.

[174] Id.

[175] Id.

In the case of pricing for unbundled network elements and interconnection, proxies should be used to set ceilings. Floors are not necessary because ILECs will have no incentive in the near term to set predatory pricing for interconnection and unbundled elements.[176] There are several ways of establishing ceiling rates using proxies.[177] As Owen explains, access charges, ONA rates, and rates charged to CMRS providers are all unacceptable choices for establishing a ceiling.[178]

The best available means for developing proxies are cost studies and rates in actual or proposed tariffs.[179] These rates presumably are not below an ILEC's TSLRIC because they are often proposed by the ILEC.[180] There is risk, however, that these rates could be substantially above TSLRIC, especially where they have not been subject to review.[181] Nonetheless, these tariffs in conjunction with generic cost studies provide a sufficient basis from which to develop proxy-based rate ceilings for unbundled network elements and interconnection.[182]

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[176] Id. at 18.

[177] Id.

[178] Id. at 18-20.

[179] Id. at 21-30.

[180] Id.

[181] Id.

[182] Id. at 30-41 (the Hatfield Model is well-suited to developing proxies because it was specifically designed to estimate TSLRIC) id.

3. Transport and Termination

a. TSLRIC is the Appropriate Long-Term Pricing Standard

TSLRIC or less is the appropriate long-term pricing standard for transport and termination. Under a TSLRIC methodology, reciprocal compensation rates for transport and termination should be based on the incremental cost to terminate an additional call originating on another carrier's network.[183] These rates should not include any overheads, common costs, legacy costs, or markups.

As demonstrated above, reciprocal compensation applies to all termination services from the point of interconnection to the end user. Thus, transport and termination should broadly encompass the reciprocal arrangements between "peer networks" (or co-carriers) including interconnection. For purposes of reciprocal compensation, the network functions of each carrier are equivalent. Reciprocal compensation arrangements permit the mutual benefit received by each carrier from the ability to terminate its traffic on the other carrier's network to flow in both directions. By requiring that each co-carrier be responsible for what happens to traffic within its network, the Commission can create incentives for each co-carrier to minimize the costs of carrying that traffic.[184]

b. Bill-and-Keep is an Appropriate Interim Solution for Pricing Reciprocal Compensation that Can Be Mandated by the FCC

In view of the likely delay in developing pricing studies to implement TSLRIC, some interim solution is necessary. The statute itself provides such a solution. Underscoring the co-

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[183] NCTA Pricing Study at 38.

[184] Id. at 33.

carrier relationship implicit in transport and termination, the Act does not preclude the Commission from adopting bill-and-keep or other arrangements that "afford the mutual recovery of costs through the offsetting of reciprocal obligations."[185] As demonstrated by the attached Pricing Study, bill-and-keep is an appropriate interim compensation arrangement.

Bill-and-keep is not restricted to situations where there is agreement of the parties; the Commission has clear authority under the Act to order it. Section 252(d)(2)(B)(i) does not limit bill-and-keep to the situation where LECs waive their right to some other form of compensation. Rather, that provision clarifies that regulators are not precluded from imposing or approving "arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." As the legislative history indicates, this subsection was intended solely to clarify that the Act's mutual compensation mandate could be implemented by use of "a range of compensation schemes," including bill-and-keep arrangements.[186] Section 252(d)(2)(B)(i) was not intended to supply the LECs with an avenue to circumvent FCC or State determinations regarding which methodology is the most appropriate means of compensating carriers for the transport and termination of calls.

Bill-and-keep is appropriate because the relevant economic costs to each carrier may be close to zero.[187] Indeed, the costs of reciprocal compensation rate development -- billing,

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[185] 47 U.S.C. § 252(d)(2)(B)(i).

[186] Conference Report at 120.

[187] NCTA Pricing Study at 33.

collection, and audit -- may outweigh the efficiency benefits of exact cost-based pricing.[188] In addition, the risks of utilizing bill-and-keep on an interim basis are minimal. Low reciprocal compensation rates provide incentives for carriers to stimulate use of the public switched telephone network. Unduly high rates, on the other hand, threaten the development of local exchange competition.

Bill-and-keep also provides an appropriate "threat point" in any negotiations between CLECs and ILECs.[189] With its disproportionate market power, an ILEC has little if any incentive to conclude negotiations with a competitor on mutually agreeable terms. A bill-and-keep "default" levels the playing field to some degree, since an ILEC knows that a failure to agree will result in an in-kind exchange of traffic without cash payment. Of course, where bill-and-keep is determined to be the most efficient means for co-carriers to compensate one other for the use of the other's network to terminate calls, the parties could agree to continue it in place as a long-term solution.[190]

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[188] Id. at 31.

[189] See id.

[190] See Conn. DPUC Docket No. 94-10-02, DPUC Investigation Into the Unbundling of the Southern New England Telephone Company's Local Telecommunications Network, Late-Filed Exhibit No. 8. Existing bill-and-keep arrangements between SNET and Woodbury, and SNET and New York Telephone Company suggests that some incumbent LECs have found bill-and-keep arrangements to be the most efficient for the mutual exchange of traffic.

F. Resale by ILECs

1. Permissible Restrictions on Discounted Resale Services

To ensure that the availability of resale does not deter facilities-based competition, the Commission should clarify the scope of services to be made available at "wholesale rates" under Section 251(c)(4). As a general matter, this provision applies only to "total service" resale of telecommunications services provided to end users.[191] Thus, an ILEC should not be required to provide customized resale services (e.g., residential or business exchange access service without operator or directory assistance). Nor should ILECs be required to offer features for resale at wholesale rates that are not otherwise stand-alone end user telecommunications services (e.g., call waiting or call forwarding). Capabilities for providing such services would be available to a reseller as network elements, priced in accordance with Section 252(d)(1).

The Act itself authorizes a State to prohibit a reseller from purchasing residential services at the wholesale rate and reselling them to business customers.[192] Such a restriction is a reasonable means of preventing unfair arbitrage of services that are likely to be provided to the reseller below cost. If allowed to occur, such arbitrage could significantly reduce economic incentives for competitors to invest in their own facilities.[193]

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[191] The Act itself limits the discount to "telecommunications service[s] that the [incumbent] carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A).

[192] Id. at § 251(c)(4)(B).

[193] To the extent that lifeline services are permitted to be resold, any associated subsidy should flow to the incumbent if it offers the service at the discounted rate. The subsidy should flow to the reseller if the service is priced based on the actual cost of the offering.

2. The Wholesale Rate for Resale is Unrelated to the Aggregated Price of Unbundled Elements

The availability of discounted total service resale and access to unbundled elements offer CLECs two means of offering telecommunications services, but the Act establishes different pricing schemes for each of these means.[194] Given this fundamental distinction, there is no necessary relationship between the resale rate of a particular service and the aggregated price of the network elements that constitute that service.[195] Indeed, it is reasonable to assume that the wholesale rate for total service resale would be less than if a carrier sought to assemble the service by buying the component parts separately. If each network element is priced in accordance with the statutory standard, the rate for each will be appropriate.

Using the resale rate to cap the price for an aggregation of network elements would effectively establish a separate pricing standard for aggregated elements that is not authorized by the statute. Imposing this new constraint on the price of network elements would likely deter facilities-based competition by sending false price signals to competitors deciding whether to purchase capacity or elements from an incumbent or make the substantial investment necessary to construct separate facilities.[196]

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[194] Compare id. at § 252(d)(1) (unbundled elements) with id. at § 252(d)(3) ("wholesale rate" for total service resale).

[195] See Notice ¶ 184.

[196] Any potential for a "price squeeze" on competitors, see id., is best avoided by ensuring that unbundled network elements are appropriately priced; CLECs relying on unbundled elements have access to the same revenue streams that the incumbent LEC does (i.e., intrastate toll, vertical features and access charges); and that CLECs can enter into appropriate reciprocal compensation arrangements (including bill-and-keep) with incumbents.

G. The Commission Should Articulate Guidelines Regarding Good Faith Negotiations of Interconnection Agreements

The Act imposes a duty upon the ILECs to negotiate in good faith interconnection agreements that fulfill the requirements set forth in Section 251 and the Commission's regulations.[197] Requesting telecommunications carriers also are required "to negotiate in good faith the terms and conditions of such agreements."[198]

The good faith requirement reflects the fact that monopoly providers in the telephone industry have utilized delaying tactics and bad-faith negotiation strategies to thwart interconnection arrangements and thereby slow the onset of competition. Prior to divestiture, the integrated Bell system sought to forestall competition by conducting "negotiations with competitors in bad faith, stringing the competing carriers along for long periods with groundless technical objections, intermittent delays and occasional concessions, and then inexplicably reverting to earlier positions repudiating previously negotiated compromises, or unilaterally ceasing negotiations."[199] Likewise, cellular licensing was marked by "difficult negotiations" between ILECs and non-wireline cellular licensees.[200] ALTS has submitted materials to the

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[197] 47 U.S.C. § 251(c)(1).

[198] Id.

[199] American Tel. & Tel. Co., 524 F. Supp. at 1356. See also id. at 1356 n.84.

[200] See 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); see also Cellular Declaratory Ruling, 2 FCC Rcd at 2911 (Telocator asserts that cellular operators are experiencing extensive problems negotiating interconnection arrangements, including unreasonable delay, unreadable technical limitations, and unjustifiably high rates).

Commission indicating that ILECs have sought to delay interconnection with potential local exchange competitors via questionable negotiating tactics.[201]

The Commission has considered the principle of "good faith" negotiations in the context of LEC-to-cellular interconnection, imposing a duty on LECs to negotiate in good faith with cellular carriers in the Commission's original cellular orders.[202] Although the Commission has determined that evaluations of whether carriers have negotiated in good faith must be made on a case-by-case basis,[203] it has provided some examples of what it considers bad faith, including when a carrier unilaterally files a tariff on its own terms or otherwise renders negotiations meaningless.[204] The Commission also has suggested that bad faith with respect to the negotiation of one term of an agreement constitutes bad faith for purposes of the entire agreement.[205]

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[201] See Implementing Local Competition Under the Telecommunications Act of 1996, A Proposed Handbook for the FCC, Association for Telecommunications Services (ALTS), March 1996 ("ALTS Handbook") at 10 (stating that "SWB has created an 'Account Team' which makes sure CLECs comply with the way SWB interprets state certification requirements under the '96 Act, demands that the 'good faith' negotiations be confidential, and insists that interconnection requests be 'specific' by demanding to know which services a CLEC intends to offer").

[202] See Cellular Communications Systems, Reconsideration, 89 F.C.C. 2d 56, 81-82 (1982) (establishing right of cellular carriers to reasonable interconnection to be negotiated with the telephone company); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 59 RR 2d 1275, 1284 (1986) (terms and conditions of interconnection must be negotiated in good faith between cellular carriers and telephone company).

[203] The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding), Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, 2371 (1989).

[204] Id. at 2370.

[205] Id. at 2371.

In order to facilitate good-faith negotiations and expedite the consummation of interconnection agreements between ILECs and potential competitors, the Commission should articulate national guidelines, while permitting the States to resolve bad-faith negotiation disputes on a case-by-case basis in accordance with those guidelines. The record in the AT&T divestiture case, the Commission's experience in the LEC-to-CMRS interconnection context, and the more recent anecdotes regarding ILEC resistance to good-faith negotiation with potential local competitors can assist in the formulation of such guidelines.

An ILEC should not be permitted to use the "good faith" requirement imposed on requesting carriers[206] to divulge proprietary service and marketing plans, financial data, and other confidential information as a condition of entering negotiations for interconnection, network elements, or transport and termination. Efforts by ILECs to obtain a new entrant's business forecasts for purposes of providing interconnection, collocation or unbundled elements should be specifically rejected.[207] Nor should contracts or tariffs require that the competitor provide the incumbent with additional information about CLEC business plans or networks.[208] Similar unreasonable preconditions such as requiring a requesting carrier to obtain a certificate of public convenience and necessity (CPCN) or other State formal authorization prior to

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[206] See 47 U.S.C. § 251(c)(1)

[207] New York Telephone Draft Resale Tariff, Sections V(D)(3)-(4) (filed April 1, 1996)

[208] See id.

commencement of negotiations should be prohibited.[209] Nor should ILECs be permitted to withhold from requesting carriers interconnection agreements which they have already entered into, since the availability of such agreements can expedite the negotiation process and protect against discrimination.[210] Such requirements would obviously frustrate the very competition goals that the statute is intended to foster.

Likewise, tactics such as forcing CLECs to sign onerous nondisclosure agreements or agreeing to limit their legal remedies in the event that negotiations fail or agreed-upon terms are not executed would thwart the purposes of the Act.[211] The Commission also should consider articulating guidelines with respect to disputes arising from ILEC assertions concerning the impact of a carrier's request on network reliability, given the record regarding monopoly telephone providers using spurious claims of technical infeasibility to delay or block interconnection.[212] In addition, the Commission also should weigh enumerating a list of tactics that might be worthy of sanctions, such as delaying negotiations in order to deny interconnection to a competitor that seeks to offer an innovative product or service that the ILEC itself lacks or is still in the process of developing.

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[209] A requesting carrier that has filed for a CPCN or other formal State authorization should be presumptively determined to be negotiating in good faith.

[210] See 47 U.S.C. § 252(i)

[211] See ALTS Handbook at n. 8 (noting that "some ILECs are also demanding that CLECs sign affidavits attesting that negotiated agreements comply with Section 271).

[212] See generally American Tel. & Tel. Co., 524 F. Supp. at 1348-52.

IV. THE ACT'S MANDATE FOR COMPETITION REQUIRES THAT THE AUTHORITY TO GRANT SUSPENSIONS AND MODIFICATIONS BE NARROWLY CONSTRUED

State authority to grant suspensions and modifications of the requirements of Section 251 must be narrowly construed to avoid undermining the pro-competitive, national policy framework established by the 1996 Act. Congress directed the Commission to "implement the requirements" of Section 251 and authorized it to preempt enforcement of any State "order[] or policy" that conflicts with or impedes implementation of that section.[213] Thus, the Commission clearly has authority to provide guidance with respect to the States' exercise of the exemption and waiver authority prescribed in Section 251(f).

A. The Act Imposes a Heavy Burden of Proof on Carriers Seeking Suspensions and Modifications

Section 251(f)(2) provides that a LEC with less than 2 percent of the Nation's aggregate number of installed subscriber lines may petition a State commission for a suspension or modification of "the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition."[214] By its terms, the suspension authority only can be triggered if the waiver request involves a Section 251 requirement that applies to telephone exchange service facilities. To the extent that a Section 251 requirement does not directly apply to a carrier's telephone exchange service facilities, it cannot serve as the basis for a suspension or modification request under subsection (f)(2). Accordingly, the Commission could specify those Section 251 requirements -- such as

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[213] See 47 U.S.C. § 251(c).

[214] Id. at § 251(f)(2).

resale, reciprocal compensation and the duty to negotiate -- that are presumptively unsuitable to trigger a waiver request under subsection (f)(2) because they do not apply to a carrier's telephone exchange service facilities.[215]

Congress specified that a waiver could be granted under subsection (f)(2) only if it is "necessary" to avoid three circumstances:[216]

(i) a significant adverse economic impact on users of telecommunications services;[217]

(ii) an unduly economically burdensome requirement;[218] and

(iii) a technically infeasible requirement.[219]

The "necessity" standard imposed by the Act signifies an intention to permit waivers only in instances in which there is tangible evidence that a waiver is demonstrably required to avoid the three circumstances described above.

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[215] SNET has already petitioned the Connecticut Department of Public Utility Control for relief from the requirement to provide retail services for resale at the statutorily-defined wholesale rate. DPUC Docket No. 96-03-19, Petition of the Southern New England Telephone Company for Suspension of Section 251(c)(4) of the Telecommunications Act of 1996.

[216] 47 U.S.C. § 251(f)(2)(A) emphasis added).

[217] Id. at § 251(f)(2)(A)(i). Note that the focus is on the carrier's customers, rather than the carrier itself.

[218] Id. at § 251(f)(2)(A)(ii). By its terms, this provision precludes waivers of requirements that impose economic burdens that are not excessive. By permitting waivers only where economic burdens are "undue," Congress sought to limit carriers' ability to circumvent the Act's mandate merely because they might impose some economic hardship. The Act establishes pricing standards that will permit carriers to charge for network elements at a level that will enable them to recover their costs plus a reasonable profit. Thus, the onus will be on carriers seeking waivers under this provision to demonstrate that a particular requirement imposes an extraordinary economic hardship.

[219] Id. at § 251(f)(2)(A)(iii). Because Section 251 already incorporates a "technical infeasibility" standard into its key requirements, waivers sought under this provision should be rare.

The Act also requires that carriers demonstrate that the waiver or modification sought "is consistent with the public interest, convenience and necessity."[220] The Commission should make clear that suspensions or modifications that would frustrate the Act's objectives of promoting competitive choice for telecommunications and encouraging new entry are presumptively impermissible.[221] Likewise, the public interest requirement implies that grant of the waiver would provide a benefit to the public, rather than simply to the carrier itself.[222]

Widespread suspensions or modifications of Section 251 will frustrate the core purposes of the Act by undermining Congress's efforts to establish a national policy to remove barriers to competition. States and ILECs should not be permitted, through the waiver process, to

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[220] Id. at § 251(f)(2)(B).

[221] See, e.g., BellSouth Telecommunications Petition for Limited Waiver of Network Disclosure Requirements, Memorandum Opinion and Order, 9 FCC Rcd 4847, 4848 (Com. Car. Bur. 1994) (denying waiver sought by BellSouth as inconsistent with requirement that "any waiver of the network disclosure requirements must be narrowly tailored to preserve the effectiveness of the network disclosure requirements"); Pacific Bell Petition for Waiver of 800 Data Base Access Time Requirements; BellSouth Petition for Waiver of 800 Data Base Access Time Requirements, Memorandum Opinion and Order, 1995 FCC LEXIS 1375, at *11 (Com. Car. Bur. 1995) (permitting waivers sought by Pacific and BellSouth that "are limited in scope and will not undermine the overall effectiveness of the 800 data base system"); Application of Mobile Phone of Texas, Inc. for Authority to Construct Additional Facilities in the Public Land Mobile Service on Frequency 152.09 MHz for Station KLF 902 at Palo Pinto, Texas, Memorandum Opinion and Order, 5 FCC Rcd 3459, 3461 (Com. Car. Bur. 1990) ("granting a waiver of Section 22.31 would specifically undermine the policy underlying the rule, and we decline to do so"); American Tel. & Tel. Co. Petition for Limited Interim Waiver of Requirements of Third Computer Inquiry, Order, 5 FCC Rcd 5991, 5992 (Com. Car. Bur. 1990) (permitting waiver where carrier "demonstrated unique circumstances" and after concluding "that this narrow waiver will not undermine the Commission's Computer III policy and will serve the public interest").

[222] See, e.g., US West Communications, Inc. Petition for Limited Waiver of Network Disclosure Requirements, Memorandum Opinion and Order, 6 FCC Rcd 3398, 3399 (Com. Car. Bur. 1991) (permitting "a limited waiver" that would "not undermine the Commission's network disclosure rules, and will significantly enhance public safety").

impose new barriers or avoid the requirements of the Act or impose barriers and thereby subvert the uniform policy intended by Congress.

B. The Rural Exemption Should Not Be Construed in a Manner that Frustrates Fulfillment of the Act's Purposes in Rural Areas

Congress sought to extend the benefits of consumer choice and new competitive entry to telecommunications customers in both urban and rural areas.[223] Accordingly, the rural exception set forth in Section 251(f)(1) was carefully crafted to avoid granting rural ILECs a blanket exemption from the Act's requirements. Instead, upon a rural ILEC's receipt of "a bona fide request for interconnection, services, or network elements" encompassed by Section 251(c), the Act provides that the "State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible," and consistent with the Act's universal service provisions.[224] Thus, once a rural ILEC receives a bona fide request for interconnection pursuant to subsection (c), termination of the exemption is presumed to be appropriate except in certain limited circumstances.[225]

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[223] Senate Report at 61 (statement of Sen. Burns) ("Through sound legislation, we have jobs creation, while expanding the competitive choices available to all American, including rural and small town residents."); 141 Cong. Rec. S7888-7889 (daily ed. June 7, 1995) (statement of Sen. Pressler) ("[This bill] establishes a process that will make sure that rural and small-town America doesn't get left in the lurch.").

[224] 47 U.S.C. § 251(f)(1)(B) (emphasis added).

[225] Applying these factors should only rarely result in a finding against a request for interconnection. The Act already limits carriers to providing elements and interconnection that is "technically feasible" and enables them to charge at levels sufficient to recover their costs plus a reasonable profit. Moreover, as the Commission itself has recently acknowledged, the goal of preserving universal service must be implemented in a manner consistent with the pro-competitive objectives of the Act. Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45, FCC No 96-93 ¶ 17 (released March 8, 1996).

The Commission should provide guidance regarding the meaning of the term "bona fide" request, to avoid protracted disputes over whether a particular telecommunications carrier's request interconnection, services, or network elements under subsection (c) has properly triggered State commission inquiry into the permissibility of preserving the exemption. For instance, the Commission should make clear that the term "bona fide" does not permit rural ILECs or States to impose burdensome "pre-filing" requirements on requesting telecommunications carriers as a condition of State review of the request.

The Commission also should make clear that the limitation on the rural exemption set forth in subparagraph (C) must be strictly construed.[226] In any area in which a rural ILEC commences providing video programming to subscribers after the date of enactment, the ILEC is ineligible for the rural carrier exemption.[227] Strict enforcement of this provision is critical to promoting the emergence of competition and the introduction of new technologies choices for consumers in rural areas. If rural telephone companies are able to offer cable and telephony service jointly while frustrating the ability of rural cable operators to provide competing telephony services, rural consumers will be deprived of competitive opportunities in telephony services and, quite possibly, in video services as well.

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[226] 47 U.S.C. § 251(f)(1)(C).

[227] Conference Report at 122. ("The exemption is not available where an incumbent cable operator makes a request to an incumbent telephone company providing video programming in the same service are, except where rural telephone companies offer video programming directly to subscribers on the date of enactment.")