
**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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In the Matter of

Implementation of the Local)
Competition Provisions in the)
Telecommunications Act of 1996)

CC Docket No. 96-98

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**REPLY COMMENTS OF THE
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SUMMARY

If USTA has one point to make in its reply it is this: an incumbent LEC's network is not a thanksgiving turkey to be carved up at will by potential competitors. Yet, as the comments make clear, the IXCs and potential CLECs are already lining up to yank off the wings and the drumsticks, and devour every ounce of meat, leaving only scattered bones and the grocery bill for the ILECs. The ILECs' networks are to be disassembled in ways that are infeasible and unnecessary for competition. Every piecepart is then to be priced below cost or even given away in a blatant subsidy to new entrants.

Under proposals made by many commenters, the ILECs must engage in radical and unsound subloop unbundling; they must expend vast sums to prepare unbundled network elements with no obligation on the part of a new entrant to buy those elements and no guarantee that any costs will be reimbursed; they must permit competitors without any facilities to evade the resale pricing standards by buying components at cost and reconstructing a "virtual network"; they must permit the reconstruction of access (at a price equal to incremental cost) prior to access charge reform; and they must continue to provide universal service prior to the Joint Board's reform of the mechanisms for funding universal service.

At the same time, according to these filings, the ILECs are not to recover their actual forward-looking costs, but only the costs of some idealized, non-existent network, a result that places all the risk of technological obsolescence on the ILECs and gives all the benefits of technological advance to their competitors. In addition, the ILECs are not to recover their joint and common costs; they are not to recover their regulator-sanctioned embedded costs; they are not to recover any costs at all for the transport and termination of traffic; they are not to recover even the stripped-down costs of sundry unbundled elements insofar as those elements together

cost more than below-cost retail prices; yet they are to offer a further discount off those below-cost retail prices, and they are not even to recover all the costs of providing the services at wholesale.

The point of the 1996 Act is to permit competition, not to destroy the incumbent. Yet the radical proposals put forward in this proceeding would do exactly that. It is no good saying that the ILECs can make up their shortfalls through "sound management and ingenuity" (Sprint at 58) or "through more efficient operation and new services" (Comptel at 84). The ILECs cannot survive in a market where they are forbidden at every turn even to recoup their costs. The viability of the backbone network, upon which this country depends now and will depend for some time to come, will be undermined by such proposals. They are unfair, unwise, and confiscatory. They are also wholly contrary to both the letter and the spirit of the 1996 Act, particularly insofar as they would discourage facilities-based competition by making it so much cheaper to poach off existing ILEC facilities.

After reviewing the voluminous comments filed in this proceeding, USTA has identified ten key issues that are critical to the continued viability of the ubiquitous network. The following ten propositions are compelled by the language of the Act, by simple economics, by sound network engineering, by basic fairness, by good common sense, and by the constitutional prohibition against the taking of property without just compensation.

1. **Unbundling that is not technically feasible should not be mandated.** Any unbundling beyond the minimum standards set by the Commission should be left to negotiation pursuant to a bona fide request process. Subloop unbundling in particular is not technically feasible today and is nowhere in effect.
2. **Unbundled elements cannot be combined into "virtual networks"; that is resale, not unbundling.** Similarly, vertical services (such as CLASS services) are

retail services, not unbundled elements. They must be obtained pursuant to the avoided cost standard of section 252(d)(3).

3. **IXCs must continue to pay current access charges until access reform/universal service reform is completed.** IXCs cannot obtain access either as "transport and termination" or as unbundled elements. ILECs cannot be left holding the bag pending reform. That would be confiscatory, would eliminate the IXCs' incentive to participate in reform, and would harm universal service.
4. **TSLRIC can be used as an input to a price target for interconnection and unbundled elements only if (1) the price target includes joint and common costs; and (2) it is based on the forward-looking costs of an actual network, not the costs of some idealized network that doesn't exist and will never exist.**
5. **ILECs must be permitted to recoup their unrecovered embedded costs.**
6. **Wholesale prices must be based on net avoided costs.** Costs incurred in providing a service at wholesale must be considered in setting a wholesale rate. Overhead costs, which are not avoided, should not be subtracted from retail rates.
7. **If ILECs are required to make below-cost retail services available at wholesale rates, they must continue to receive the contribution for those services in the form of SLC, access charges, and universal service support.** ILECs must be made whole in this order, not in some future promised proceeding.
8. **With retail rates often below cost, forcing ILECs to price unbundled elements at a combined price of no more than retail rates would force them to sell those unbundled elements at a loss, and would discourage facilities-based entry.** Such a result is contrary to the Act, inefficient, and confiscatory.
9. **Mandatory bill-and-keep is contrary to the Act, inefficient, and confiscatory.**
10. **Regulators must carefully weigh the costs and benefits before subjecting small and mid-size ILECs to costly and onerous unbundling and interconnection requirements.**

The reasoning compelling each of these propositions is spelled out in these reply comments.

Although certain portions of the provisions leave room for interpretive debate, Sections 251 and 252 have certain fundamental characteristics that are straightforward and non-controversial: (1) Congress chose voluntary negotiation between parties as the chief vehicle for interconnection and unbundling arrangements; (2) the states are to serve as the direct arbitrators and facilitators of any disputes arising out of such negotiations; and (3) the FCC is given express authority to intervene as a decisionmaker only when a state fails to act. There is no call in the Act for prescriptive federal regulations that prejudge the results of negotiations under the Act, or that preempt the authority of the states to be the arbiters when disputes arise.²

Moreover, notwithstanding structural and jurisdictional issues, to the extent that superior ILEC bargaining power is offered as the primary rationale for promulgating detailed prescriptive federal rules, USTA believes that the concern is overblown and unwarranted. It is not true that "ILECs have all of the bargaining power," nor is it true that ILECs "have no incentive to negotiate." TCC Comments at 7.

First, as Professors Harris and Yao observe, unlike the long distance business where companies were *de novo* entrants with no brand recognition or positive service reputations, in the

²Furthermore, for the Commission to prescribe federal rules that attempt to preempt state authority over fundamentally intrastate matters would exceed the Commission's authority under Section 2(b) of the Communications Act, which provides that "nothing in this chapter shall be construed to apply or give to the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio." 47 U.S.C. § 152(b); see Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) (Section 2(b) constitutes . . . a congressional denial of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes") (emphasis in original). Given that Congress expressly declined to modify Section 2(b) in enacting Sections 251 and 252, and that Sections 251 and 252 apply largely to intrastate service and functions, the FCC has no direct authority to regulate them. See, e.g., Bell Atlantic Comments at 4-8; GTE Comments at 3-5; NARUC Comments at 9-16.

local exchange market, "entry will occur from a number of companies that are already large and well-known communications service providers, and for whom entry will be a product line extension rather than a new product introduction."³ By contrast, incumbent LECs are disadvantaged in several important ways relative to their imminent competitors: they are unable to target customers; they are required by State and federal regulations to offer "ubiquitous, below-cost basic service at geographically averaged rates on a ready-to-serve basis"; and they remain prohibited from offering a full range of telecommunications products on the same terms as others.⁴ In short, many if not most of the participants in interconnection and unbundling negotiations will not be the "Davids" to ILEC "Goliaths" that AT&T, MCI and Cox would have the Commission believe. In fact, quite the opposite could be true in scenarios where non-RBOC incumbent LECs, many of whom may be small or rural carriers, negotiate with the large IXCs, cable companies and competitive access providers.

Second, and more directly, the 1996 Act provides built-in incentives for RBOCs to negotiate interconnection arrangements that promote the emergence of facilities-based competition, since this is a statutory prerequisite for their entry into the interLATA services market. § 271(c)(2)(B). In fact, these large ILECs have every incentive to negotiate interconnection and unbundling arrangements as quickly and efficiently as possible, and Section

³Robert G. Harris and Dennis A. Yao, *Federal Implementation of the Telecommunications Act of 1996: Competition in the Local Exchange at 10* (May 16, 1996), (attachment to U S West comments) ("Harris and Yao"). AT&T's entry into the local exchange marketplace, for example, "is a natural product line extension of its long-distance and cellular services, taking advantage of its existing customer base"; according to recent surveys, AT&T has "a dominant consumer franchise and at least one in ten consumers believes that the telecommunications giant is the provider of their local service now." *Id.* at 11 (citation omitted).

⁴*Id.* at 15.

252(i) ensures that each local exchange market entrant reaps the benefit of whatever terms are negotiated by others. Agreements have been reached and are being reached today between RBOCs and local competitors. In reality, it is AT&T, and not the RBOCs, that has every incentive to promote "balkanization, delays and incessant litigation" (AT&T Comments at 8) to keep competition at bay for as long as possible in its own market.

Third, and most important, the notion that detailed federal prescriptions would be necessary to protect new entrants in bargaining with ILECs presumes that firms such as AT&T, MCI and others are powerless and that the states are either unwilling or unable to perform effective oversight -- which simply is not the case. Congress assigned the states to be direct arbiters of interconnection and unbundling disputes because they are in the best position to promote the pro-competitive goals of the 1996 Act while accommodating local market conditions. A "one-size-fits-all" approach to local interconnection matters was not envisioned by Congress, and USTA agrees with NARUC that the enactment of detailed federal rules "cuts against Congress's express choice for State monitored negotiation as the moving force" for Section 252 interconnection arrangements." NARUC Comments at 7.

⁵BellSouth and Ameritech, for example, have announced comprehensive interconnection arrangements with MCI Metro and MFS, respectively. See CLECs Get Down to Business Hammering Out Interconnection Deals, Local Competition Report (May 27, 1996); see also *id.* (observing that "[f]or the most part, the LECs have been cooperative with competitors in their requests to meet and begin defining the terms for interconnecting their networks"). SBC and American Telco, a long distance provider, also recently announced the signing of SBC's first local interconnection arrangement in Texas. Southwestern Bell, American Telco Sign Interconnection Agreement, Local Competition Report (May 27, 1996). Based upon information provided to USTA by its member companies, between 55 and 60 interconnection agreements have been signed, and there are more than 500 sets of negotiations now in progress. The states in which agreements have been signed contain nearly 70 percent of the nation's telephone access lines.

II. SECTION 251 CANNOT AND SHOULD NOT BE CONSTRUED TO ALLOW INTEREXCHANGE OR OTHER CARRIERS TO BYPASS EITHER THE COMMISSION'S ACCESS CHARGE REGIME OR THE RESALE PROVISIONS OF THE 1996 ACT

The long distance carriers in particular are unabashed in their intention to use Section 251 to interpret their way out of both the Commission's access charge regime and the Section 251(d)(3) resale pricing standard.⁶ Neither of these attempts is availing and both should be rejected. Indeed, the IXC attempts to circumvent the Act's resale provisions and the Commission's access charge regime have been emphatically opposed by developing facilities-based local competitors that recognize the adverse competitive and policy consequences of the IXC positions.

A. Section 251 Does Not Permit IXCs or Other Carriers to Circumvent Access Charges

The record strongly supports the Commission's tentative conclusion that Section 251 does not displace the current access charge regime. NPRM ¶ 161. Although interexchange carriers are "telecommunications carriers" under the Act, they provide neither "exchange service" nor "exchange access" when they seek solely to offer long distance service to their customer, as the Act requires. § 251(c)(2)(A) Moreover, as the Department of Justice has observed, this statutory construction is consistent with the promotion of competition in local exchange and exchange access markets.⁷ The language of Section 251(c)(2) is clear that the Section 251

⁶See, e.g., Comptel Comments at 58 ("We fully expect that carriers will prefer to obtain exchange access through co-carrier arrangements pursuant to 251(c)(2) rather than as ILEC customers purchasing service out of access charge tariffs.") (footnote omitted).

⁷DOJ Comments at 42. The Department further noted that "the contrary interpretation urged by some interexchange carriers would, in effect, directly replace the current interstate access regime by providing cost-based access to interexchange carriers, regardless of whether they had

interconnection process does not extend to IXCs in their capacity as IXCs, who simply provide toll service rather than connecting to the local exchange network to transmit or route calls to their own local exchange and exchange access services as the Act envisions.⁸

Although the IXCs largely appear to have given up their frontal assault with respect to access charges under Section 251(c)(2), they persist in their attempts to use Section 251(c)(3) to achieve the same result indirectly through the use of unbundled network elements.⁹ This interpretation is wrong as a matter of law, and ill-conceived as a matter of policy.

The Notice itself acknowledges that "allowing interexchange carriers to circumvent Part 69 access charges by subscribing under Section 251(c)(3) to network elements solely for the purpose of obtaining exchange access may be viewed as inconsistent with . . . Section 251(g), and contrary to Congress' focus in these sections on promoting local competition." NPRM ¶ 164. If the Commission's interpretation with respect to Section 251(c)(2) is correct -- and USTA believes that it is -- then interpreting Section 251(c)(3) in the manner that the IXCs suggest makes no sense. There is no indication anywhere in the 1996 Act that Congress intended for the Commission's access charge regime to be so easily bypassed. To the contrary, such a result cannot be reconciled with Section 251(g), which preserves the existing access charge structure until it is expressly superseded by new access charge rules. § 251(g).

Thus, for example, an IXC cannot buy "local switching" coupled with dedicated transport as unbundled elements and demand from the ILEC that it receive its originating interexchange

entered the market to provide exchange services or access services." Id.

⁸See, e.g., GTE Comments at 75; Time Warner Comments at 61.

⁹See, e.g., AT&T Comments at 27; MCI Comments at 77; TCC Comments at 28.

traffic over those elements, without paying access charges. Nor, conversely, can the IXC send its terminating interexchange traffic to the ILEC in that way. Both strategies would constitute blatant and unlawful evasions of the current access charge regime. Similarly, for an IXC to buy unbundled loops solely for the transport of access traffic would be contrary to the 1996 Act. As the Commission suggested in its NPRM (at ¶ 164), "the incumbent LEC's statutory obligation to provide network elements extends only to providing exclusive access to an entire loop, in which case an interexchange carrier could not, as a practical matter, purchase such access without having won over the local customer associated with the loop and providing that telephone exchange service to that customer (or arranging for others to provide it)."

Permitting interconnectors to avoid access charges when they use unbundled network elements to deliver toll calls would produce the same adverse policy consequences as using Section 251 to bypass access rates directly. It would eliminate the contribution that the public policy rate elements currently included in existing access rates currently provide to cover the total cost of the LEC network, while leaving LECs saddled with a higher cost structure and universal service obligations. See Bell Atlantic Comments at 11. Immediately, these competitors would begin to "cream-skim" the access traffic of large customers away from the LEC incumbents who would not be able to lower their access rates to compete because of their forced contribution to lower local rates.¹⁰ In the end, such a "flash cut" displacement of the current access charge regime could end up devastating the network -- and all because IXCs believe the Act gives them

¹⁰Moreover, the fact that competitors can "compete away" customers where prices are held artificially above cost does not mean that such competitors are entering the market efficiently; it indicates only that they are able to undercut an inflated price.

the right to engage in arbitrage. The Act does not, and the Commission should not countenance this result.¹¹

B. The Commission Should Not Permit Carriers to Circumvent the 1996 Act's Resale Provisions

Section 251(c)(3) also does not allow carriers to assemble unbundled network elements to reconstruct and provide retail services offered by incumbent LECs. See, e.g., AT&T Comments at 28-30. While this interpretation once again would permit the large IXC's and other carriers to engage in arbitrage between the resale and interconnection and unbundling provisions of the Act, it does not benefit the public, and the Commission should reject it.

AT&T itself agrees that resale under Section 251(c)(4) is "a necessary and important part of the transition to a vigorously competitive local service market." AT&T Comments at 28. More specifically, the provision is an important means of transitioning new entrants to an endpoint of offering the facilities-based local competition that is the touchstone of the 1996 Act. New entrants who do not install their own facilities and instead merely lease unbundled facilities to resell LEC services are given less preferential pricing discounts for a reason. The scheme of the Act, with its delineation of different cost standards that are tied directly to the degree of facilities-based competition a new entrant has achieved, see e.g., Cox Comments at 8, is expressly designed to provide that entrant with easy entry into the market on a resale basis, while also preserving its incentive to deploy its own local network.

¹¹See Speech of Reed E. Hundt, The Telecommunications Act of 1996: Evolution Not Revolution, Address at Northwestern University (May 10, 1996), at 6 (presented by Joe Farrell for Chairman Hundt).

The new facilities-based entrants into the local exchange marketplace recognize this fact. MFS, for example, observes that the "very distinct pricing methodologies for resale and for unbundled network elements make[] it clear that Congress did not intend for subsection (c)(3) to serve as a means for non-facilities-based carriers to obtain at a lower price than is available under subsection (c)(4) service that is *entirely* provided by the incumbent."¹²

On the other hand, the non-facilities-based local carriers, i.e., the IXCs and the telecommunications resellers, seek to corrupt this framework entirely. These carriers wish to construct "virtual networks" to reconstruct LEC services by buying piece-parts of incumbent networks at incremental cost (FRA Comments at 27), using "no facilities of [their] own" and relying "exclusively on ILEC networks" (AT&T Comments at 29). This does not promote facilities-based competition. Furthermore, such carriers could completely undercut the prices of other new facilities-based carriers who are forced to charge higher rates to recover the joint and common costs of their network deployment and operation.

Reading the Section 251(c)(4) resale provision and its accompanying pricing standard out of the Act flatly undercuts the 1996 Act's goal of promoting facilities-based competition:

Permitting a non-facilities-based carrier to repackage the ILEC's retail offerings under the cost-based rates provided for unbundled elements would subvert the pricing mechanism of the 1996 Act [and] . . . every would-be reseller, rebrander or refiler would opt for it, securing cost-based pricing for resold service, and rendering nugatory the resale pricing provisions of the 1996 Act. Facilities-based competition would likely be destroyed, in plain contradiction of Congressional intent. Resellers would obtain all the benefits of cost-based access to network elements, but would incur none of the risks and costs associated with investment in network facilities and actual operation of a network.

¹²MFS Comments at 37; see also Sprint Comments at 23-26 (noting that purpose of 1996 Act resale and unbundled network elements must be viewed "as means towards the ultimate end of facilities-based competition," and concluding that unbundled network elements should not be defined "so as to include service features offered on a retail basis to consumers").

MFS Comments at 38-39. USTA emphatically agrees, and therefore urges the Commission once again to clarify that the term "network element" does not include any retail service that is a telecommunications service under the Act.¹³ To the extent that a carrier seeks to purchase multiple unbundled "elements" to resell a "service," the requesting carrier should be required to comply with the resale provisions specifically tailored by Congress to address that activity.

III. INTERCONNECTION AND UNBUNDLING

The 1996 Act contemplates and affirmatively promotes a transition to facilities-based local competition. Unfortunately, this is neither the view nor the preference of certain parties to this proceeding. For these carriers, the 1996 Act portends access to a treasure trove of network innovation and capability for them to plunder and exploit at will, without regard for the Act's goals or consideration of long-term incentives for LECs to maintain and upgrade their networks.

According to AT&T, MCI, and TCC, for example, the Commission should interpret the Act:

- (1) to require the dismantling of ILEC networks into many tiny piece-parts, each made available at incremental cost;¹⁴
- (2) to permit IXCs and other carriers to reconstruct LEC retail services at cost using unbundled elements, bypassing both the Act's resale pricing standard and joint marketing restrictions, and the Commission's access charge regime;¹⁵

¹³Thus, IXCs could not bypass the Section 251 resale provisions by seeking to purchase at incremental cost so-called "vertical services," such as custom calling or call waiting. These clearly are retail communications services and not unbundled network elements.

¹⁴Comptel, for example, states: "Once they have secured the ability to use the ILEC's bottleneck local network in unbundled elements at cost-based rates to provide local service immediately, carriers can incrementally build out their own networks when and where it makes business sense to do so." See Comptel Comments at 25. Of course, if Comptel's overall view of the statute were accepted, carriers would never have an incentive to do so.

¹⁵See, e.g., TCC Comments at 32 (advocating that unbundled elements may be used by any carrier for any purpose, including the provision of interexchange access to itself).

- (3) to define as unbundled elements every conceivable functionality at the most granular level; "switching" would include all LEC vertical services, loops would be subdivided into subloops, and a variety of other retail services would be redefined as unbundled elements to be made available at less than full cost.
- (4) to require LECs to redesign their networks to suit the whim of each requesting carrier, and to bear the cost of all such modification. See MCI Comments at 45.

The incentives of such carriers to "go for broke" in unbundling the network is understandable but short-sighted. The Commission should not be swayed by these arguments. Many of the unbundling proposals of the IXCs and others do not make technical or economic sense, and they extend the statute far beyond its intended consequences.

The 1996 Act requires ILECs to offer interconnection and access to unbundled network elements; it does not require ILECs to radically redesign or customize their networks to the needs of each requesting competitor. The local exchange network is not a "buffet table" upon which competitors may gorge at will. In the NPRM, the Commission acknowledges expressly that Congress intended LECs to continue to develop as vigorous competitors, to continue to offer high quality service, and to continue to offer universal service to all Americans. NPRM ¶ 11. The Commission also acknowledges that nothing in the Act suggests that ILECs are to be divested in whole or in part of their local networks. Id. As it evaluates various unbundling proposals, the Commission should ensure that this is the case.

A. It Is Neither Contemplated by the 1996 Act nor in the Public Interest for the Commission to Identify More than Four Unbundled Network Elements.

In the NPRM, the Commission tentatively identified four network elements to which incumbent LECs must provide access on an unbundled basis under Section 251(c)(3): local loops, local switching, local transport special access, and databases/signalling systems. USTA supports the Commission's unbundling proposal to the extent that the NPRM appears to identify these four

elements as the minimum "set" that should be unbundled under the Act.¹⁶ These basic elements, incorporated into Commission guidelines, will adequately flesh out the Act with minimum elements, but leave plenty of room for the negotiations that Congress intended to occur. Furthermore, most parties across industry sectors agree with this breakdown of unbundled elements (though varying interpretations have been proffered as to each element's scope).¹⁷

The exceptions, not surprisingly, are the large IXCs. AT&T has proposed eleven minimum unbundled elements; MCI, fourteen; and TCC, sixteen. These carriers read the Act to require unbundling as an initial "explosion" of subparts to be made available to all carriers all at once. The proposals of AT&T, MCI and TCC make no sense and should be rejected.

Apart from the specific elements these carriers have proposed, the IXC proposals are incorrect starting points as a matter of process and contrary to the Act. In enacting Sections 251 and 252, Congress envisioned a process something like the following: (1) CLEC has a need for an unbundled network element in connection with a specific service it wishes to offer and approaches ILEC; (2) negotiation occurs; (3) ILEC either agrees, and process ends, or parties are unable to agree on whether element can reasonably be unbundled or other terms; (4) CLEC appeals to state commission for arbitration, with review by federal district courts. This is a far different process from the IXC approach, which is to convince the Commission to decree by

¹⁶USTA of course has offered its views on the definitional and policy parameters of each of these elements. For example, USTA opposes any suggestion that the Commission should require subloop unbundling, and opposes any effort to define the switching element in terms of capacity. See *infra* at 13.

¹⁷See, e.g., GTE Comments at 32-41; Sprint Comments at 30-42; MFS Comments at 42-48; Time-Warner Comments at 44; USTA Comments at 28-36.

regulatory fiat an ongoing, "one-size-fits-all" shower of granular elements and subelements that must be provided by all ILECs¹⁸

Rather than promulgating an exhaustive list of unbundled elements, the Commission should craft an approach to network unbundling that affords negotiating parties maximum flexibility to identify specific network elements to made available in accordance with their respective needs and capabilities. See Time Warner Comments at 44. The public interest is not served by piecing out the network in the overly granular manner that the IXCs suggest, which again is designed to encourage parasitic free-riding on the incumbent LEC network, rather than to encourage the development of true facilities-based competition.

B. Subloop Unbundling is Not Technically Feasible and Should Not Be Required

The comments in this proceeding uniformly support the Commission's decision to unbundle local loops as network elements, although there is some difference as to how to define the element. USTA again urges the Commission to adopt USTA's functional definition of an unbundled local loop in order to accommodate unbundling requests in a manner that preserves technological and network flexibility.¹⁹ ALTS has proposed a similar functional definition, which recognizes the need for such flexibility from the standpoint of new local competitors.²⁰

¹⁸For example, the IXC lists utterly fail to account for potential differences among LEC networks, which simply may not be capable of being unbundled in the same way at the same points.

¹⁹See USTA Comments at 29 (defining unbundled loop as the "transmission path from a point of interconnection determined by the incumbent LEC in the serving central office to an appropriate demarcation point on an individual customer's premises").

²⁰ALTS states that loops "must be defined to embrace, as a minimum preferred outcome, any transmission medium provided between the end office and the subscriber's premises." ALTS Comments at 27. USTA's proposal for the most part is congruent with this definition.

The record also reflects consensus among LECs,²¹ CAPs and CLECs,²² cable providers²³ and some IXCs²⁴ that subloop unbundling is of questionable technical feasibility at best, and should not be automatically required under the Act. Subloop unbundling instead should be addressed through the BFR process as USTA and others have recommended.²⁵

C. The Commission Should Adopt USTA's Proposed Port as the Unbundled Element for Switching

All parties to this proceeding also agree that switching should be a fundamental unbundled element made available by ILECs to requesting carriers. There is considerable confusion, however, as to how this element should be defined.

At one extreme is the somewhat vague notion of a switching "platform," endorsed by most of the IXCs and LEC competitors as a method of obtaining, at a non-compensatory rate, much, much more than basic switching functionality. TCC states that the switching element "would give a competing carrier access to . . . the switch on a capacity basis . . . whether or not actually being used by ILECs to provide their own current retail offerings." TCC Comments

²¹See, e.g., USTA Comments at 30 & Declaration of Dr. Charles L. Jackson; Bell Atlantic Comments at 23 & Declaration of Raymond F. Albers at 10-12; GTE Comments at 33-36 & Attachment 1 "Unbundling of Loops into Feeder and Distribution Services."

²²See, e.g., ALTS Comments at 28 (stating that subloop unbundling should be available upon bona fide request, and as part of negotiations).

²³See, e.g., NCTA Comments at 41-42 (noting that subloop unbundling "may not be technically feasible, nor may it be necessary to achieve the goals of the Act," and urging the Commission to "refrain from subelement loop unbundling at this time").

²⁴See, e.g., Sprint Comments at 31-32 (noting that it is not clear "that further unbundling of the loop is necessary for a competitive LEC to offer services to end users in an efficient manner," and recommending that subloop unbundling be left to a BFR-like process).

²⁵See, e.g., ALTS Comments at 28; Sprint Comments at 31; USTA Comments at 14-16.

at 30. Similarly, MFS has proposed a never-ending laundry list of functions as "potential network elements" that might be unbundled, including: E911 access and operator services; custom calling features; virtual private line services; sequential and rotary hunt; tone dial; Centrex; DID trunks; toll and local access restrictions; signalling; numbering; recording; routing; dialtone; and calling party ID. See MFS Comments at 47. Such approaches are flawed in several respects.

The first issue is one of technical definition; it does not make sense to unbundle a switch in the manner TCC or MFS suggest. The fundamental problem, as Sprint points out, is that "unbundling" the switch is something of a misnomer to the extent that the term implies the physical or technical separability of switching functionality between entities utilizing the switch:

Although some portions of the switch (for instance, the line card) can in fact be technically unbundled, the preponderance of the switch is a shared resource which cannot be physically partitioned into discrete components dedicated to the use of a purchaser. Unavoidably, the central processing unit, the operating and applications software, and the switch matrix itself are switch functions shared between the incumbent LEC and all new entrants utilizing that switch. In the case of local switching, the term "unbundling" (at least from a technical, not a pricing, standpoint) is primarily an issue of providing new entrants' access to shared switching functionalities rather than providing dedicated equipment or facilities.

Sprint Comments at 33-34. Switching system generic software and common hardware is not engineered and cannot be partitioned on a per line or per carrier basis.²⁶

A second problem grows out of the first, i.e., viewing separate software-defined "services" as segregable network "elements." MFS concedes that, since many of these services are software based, "it is difficult to anticipate physical unbundling," but states that "the services themselves can be unbundled from each other." MFS Comments at 47. But MFS has collapsed two

²⁶See Bell Atlantic Comments, Declaration of Raymond F. Albers, at 14. For a more detailed explanation of the vagaries and problems of the switch "platform" concept, see id., Declaration of Ross M. Richardson, at 5-8

concepts. To the extent that such services are defined, they are LEC retail services, and should be purchased as such under the appropriate price standard for resale under Section 251(c)(4). While carriers must, under the terms of the Act, be provided access to a "switching" functionality, the Act once again does not mean that LECs must fundamentally alter the manner in which their networks and services are configured. "Unbundling," in short, does not give MFS or AT&T *carte blanche* to special order features and functions that do not exist, and then require LECs to foot the bill for their R&D.²⁷

USTA has proposed a version of a switching "port" that it believes is (1) a reasonable compromise between the competitive interests of both ILECs and competitors, and (2) plainly meets the requirements of the Act. The "port" approach proposed by USTA would include a basic level of functionality such as voice, dialtone and basic switching functionality that would provide connectivity to switching associated with telephone lines and numbers, line-to-line switching capability, line-to-trunk switching capability, and inter-local switch connectivity. It would not, however, include vertical features such as custom calling, which would be made available as retail services that could be resold under the Act's resale pricing standard. USTA Comments at 33.

USTA's proposal is consistent with the view of Sprint, which correctly notes that vertical features and advanced functions beyond a basic switching functionality are already unbundled and provided at retail; accordingly, they are not and should not be defined as unbundled

²⁷The IXC's continually hold out the prospect that their unbundling proposals, and here, their vision of a switch platform, may yield "services based on existing LEC switch capabilities that the LEC is not currently providing." TCC Comments at 30 n.31. The Commission should view such claims with skepticism, especially given that the IXC comments offer no clue as to what those services might be.

"elements." Sprint Comments at 36. It is also consistent with the view of ALTS, to the extent that ALTS claims a need for switching to be defined in such a way "that all the necessary information to complete a call" is passed to interconnecting carriers. See ALTS Comments at 29. At the same time, USTA's proposal does not permit carriers to bypass the Act's retail pricing standards, nor does it discourage LEC incentives to innovate. USTA thus urges the Commission to adopt its proposal.

D. Operator Support Services and Directory Assistance, and Operational Support Mechanisms Are Not Unbundled Network Elements

There are numerous problems conceptually and specifically with the "laundry lists" of unbundled network elements variously proposed by AT&T, MCI and TCC. MCI in particular has included Operator Services and Directory Assistance, as well as Operations Support Systems, as unbundled elements. MCI Comments at 18. There is absolutely no basis for doing so.

Operator call completion and directory assistance are services, not network elements. They are not required to be unbundled, for example, under Section 271 of the Act, which only requires that Bell companies provide nondiscriminatory access to operator call completion services as a precondition to interLATA relief. Most carriers today already provide operator services to other carriers on a nondiscriminatory basis via either contract or interstate tariff. See Bell Atlantic Comments at 30.

Similarly, the definition of "network element" under the Act simply does not extend to a LEC's administrative, operational or marketing support systems and personnel. There is no sense in which these functions can be characterized as physical elements or related features and functions of a LEC's network. Nor does the Act require access to a LEC's back office operations, such as billing and collection or marketing services, in order to permit a competitor to provide

the same "quality" of local service as the LEC. LECs may be willing to entertain BFR requests to provide such services, but they are not required to unbundle them by statute.

IV. PRICING STANDARDS

The three pricing standards established by Congress -- for interconnection and unbundled elements; for the transport and termination of traffic; and for resale -- are quite different. In each instance, however, Congress permits the ILECs to recover their costs. But cost recovery is precisely what many of the commenters would deny the ILECs. With respect to each of the three standards, AT&T, MCI, DOJ and others would systematically squeeze out legitimate costs, and force the ILECs to subsidize new entrants through below-cost pricing. Such below-cost pricing is contrary to the Act, economically unsound, and would constitute an uncompensated taking of the ILECs property in violation of the Fifth Amendment.

A. Interconnection and Unbundled Elements

The view is widely held that TSLRIC is an appropriate starting point for the pricing of interconnection and network elements.²⁸ If so, TSLRIC is still only a starting point. Those who would stop the inquiry there would leave cost recovery woefully inadequate.

First, as most commenters concede, the ILECs must be allowed to recover their joint and common costs.²⁹ Thus, TSLRIC must either be defined to include such costs, or those costs must be added to any TSLRIC calculation. Second, TSLRIC must measure the forward-looking economic costs of existing networks, not the costs of fictitious networks based on infinitely

²⁸See, e.g., AT&T Comments at 48; MCI Comments at 61; Sprint Comments at 43; TRA Comments at 37; DOJ Comments at 26; Comptel Comments at 69; Cable & Wireless Comments at iv; American Communications Services Comments at 55; NCTA Comments at 49.

²⁹See also, Speech of Reec Hundt, at 6.

malleable engineering assumptions. If a CLEC wants an ideal network, it can build one (and bear the risk of guessing wrong); if it wants to use an ILEC's network, it has to pay the real costs of a real network. Third, the ILECs must be permitted to recover their embedded costs. Those costs were legitimately incurred pursuant to regulatory oversight, and they cannot be simply ignored.

Even with these adjustments, TSLRIC-plus should still not be used as a rigid pricing formula. The structure and text of the Act and practical administrative considerations counsel strongly against proceedings to establish actual pricing levels and overwhelmingly in favor of setting broad guidelines to be applied in private negotiations, arbitrations, and state review processes. The Commission may want to establish targets based on pricing proxies, but it must make clear that departures up or down from these proxies are appropriate based on individual circumstances.

1. Joint and common costs must be recovered

Joint costs are the costs shared by a particular group of services, which will be incurred even if any one service in the group were to be discontinued. Common costs are the costs of capital, labor, administrative overhead, and the like that are necessary to run a firm as a whole and which are incurred so long as the firm is operating at all. With the exception of the extreme and wilfully obstructionist position taken by MCI and, in places, AT&T, there is emerging consensus that TSLRIC does not adequately cover joint and common costs even when calculated on an element-by-element, as opposed to service-by-service, basis. The Department of Justice acknowledges in its comments that "TSLRIC rates may need to be adjusted to permit recovery of forward-looking joint and common costs that may not be included in the sum of element-by-