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

ORIGINAL

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

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MAY 30 1996

REPLY COMMENTS OF AT&T CORP.

David W. Carpenter
David M. Levy
Peter D. Keisler
David L. Lawson

Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Attorneys for AT&T Corp.

Mark C. Rosenblum
Roy E. Hoffinger
Stephen C. Garavito
Richard H. Rubin

Its Attorneys

Joel E. Lubin
Richard N. Clarke
Karen E. Weis

295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-2631

May 30, 1996

SUMMARY

The rules proposed in the NPRM and in AT&T's Comments have been vigorously advocated by the Justice Department and an array of industry participants. The Department, for example, agrees that implementation of the 1996 Act's local competition provisions requires explicit national rules that assure (1) maximum ability on the part of alternative local exchange carriers ("ALECs") to use unbundled network elements at TSLRIC-based prices to provide exchange and exchange access services, and (2) the existence of independent, commercially viable service resale opportunities. See DOJ at 8-32 & 52-55. In addition, a number of state commissions recognize that explicit national rules will assist them in carrying out their separate, vitally important responsibilities under the 1996 Act.

By contrast, ILECs, other state commissions, and a few competitive access providers ("CAPs") have urged positions that would assure that the 1996 Act would create no serious additional opportunities for local exchange competition. Claiming that the Commission has no authority to adopt all or some of the rules it proposes, they seek to transform the revolutionary national policy of the 1996 Act into unenforceable and meaningless exhortations to states and ILECs. Under their positions, the 1996 Act would leave state commissions with the same authority that they possessed before and require ILECs to assume only those obligations that they agreed to in the past or would voluntarily "negotiate" in the future. But the 1996 Act was enacted to end that regime -- and the comments confirm that any significant state-by-state variations would severely impede the development of local competition.

Thus, § 251(d) could scarcely be clearer in requiring the Commission to adopt the pricing standards and other regulations required to effectuate the Act's purposes. In turn, Section 252 expressly provides that state commissions must ensure compliance with the Commission's § 251 regulations when they arbitrate disputes (§ 252(c)) and rule on general ILEC interconnection

terms (§ 252(f)), so claims that these regulations do not "preempt" state law are spurious. Further, because the Commission's § 251 regulations only apply in instances in which voluntary agreements are not reached, they will not prescribe a "one size fits all regime," but will create some realistic possibility that parties will in fact reach private agreements that both serve their unique needs and advance the Act's goals.

ILECs and certain CAPs have alternatively proposed "rules" that are purportedly designed to promote the "facilities-based competition" that they erroneously claim to be the sole object of the 1996 Act. But their proposals would assure that neither facilities-based nor any other form of competition develops. For example, by requiring only minimum unbundling and by precluding combinations of unbundled elements, the ILECs' proposed rules would require literally billions of dollars of facilities investment before any ALEC could use unbundled elements. Because their proposed rules would simultaneously foreclose the only other possible entry vehicle -- service resale under § 251(c)(4) -- no new competition could develop. In this regard, experience in the long distance industry demonstrates that the investments required to create alternative facilities will not be made unless there first are maximum entry opportunities through either leased facilities or resale.

The ILECs' positions on the unbundling and pricing of network elements are equally flawed. Although the Act establishes multiple means of entry and directs that each ALEC be permitted to choose the vehicle most efficient for it, the ILECs seek to maintain the power to determine where and on what terms their competitors interconnect. Several ILECs thus declare that they will grant only those forms of access that they already make available, on the extraordinary ground that any other arrangements would require further expenditures by them and thus are not "technically feasible." Congress eliminated such economic concerns from consideration. The ILECs further seek to deny ALECs their statutory rights to use all "features, functions, and capabilities" (§ 153(45)) of the unbundled network elements they purchase and to "combine such elements in order to provide . . . telecommunications service" regardless whether the ALEC owns its own facilities. § 251(c)(3).

Nor is there any substance to the ILECs' claim that there are economic or legal problems with the TSLRIC-based pricing standards proposed by the Justice Department, AT&T and many others. Contrary to the ILECs' strawmen claims, TSLRIC-based pricing will foster the efficient investment decisions that lead to competitive pricing and provide the ILECs with opportunities to recover all of the forward-looking economic costs of their carrier-to-carrier operations -- including legitimate shared and common costs. It is thus the only economically sound pricing standard. The ILECs' constitutional and statutory objections to TSLRIC are frivolous. TSLRIC-based prices are fully compensatory, not confiscatory, and implement the 1996 Act's requirement of forward-looking economic cost-based rates.

National rules are also necessary to deter evasion of § 251(c)(4)'s requirement that each ILEC service be available for resale at a wholesale rate that is computed by subtracting marketing, billing, and other avoided costs from each of the ILECs' existing retail rates. In this regard, the ILECs and certain CAPs and CATV firms have sought to gut these requirements and to prevent service resale from serving its purpose of fostering other forms of competition by allowing firms to enter markets and build up customer bases before offering local services in other ways.

Finally, while adoption of the rules proposed in the NPRM is an essential and necessary step, the promise of the 1996 Act will not be realized unless there are parallel reforms in the Commission's access charge regulations. As the American Petroleum Institute and other consumers have demonstrated, the multibillion dollar overcharges that result both harm consumers and stifle the prospects for competition.

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's April 19, 1996 Notice Of Proposed Rulemaking ("NPRM"), AT&T Corp. ("AT&T") submits these reply comments on the rules necessary to implement the interconnection, unbundling, resale, and related duties imposed on incumbent local exchange carriers ("ILECs") by § 251 of the Communications Act ("Act"), as amended by the Telecommunications Act of 1996 ("1996 Act").[1] These Reply Comments address the ILECs' and other parties' claims (1) that national rules are improper, (2) that the § 251(c)(3) unbundling duties should be qualified in numerous ways and subject to extraordinary preconditions, (3) that unbundled element and other prices cannot be based on TSLRIC, and (4) that § 251(c)(4) resale should be severely limited in scope and operation.

I. THE ACT REQUIRES THE COMMISSION'S ADOPTION OF EXPLICIT NATIONAL RULES.

A number of states recognize that the Commission's adoption of explicit national rules would genuinely assist states in performing their separate, complex, and critically important tasks under the Act.[2] But other state commissions and ILECs argue that the Commission lacks

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[1] Appendix A contains a list of commenters and the abbreviations used to refer to each.

[2] See, e.g., Kansas Comm. at 2-5 (supporting NPRM's conclusions in their entirety); North Dakota PSC at 1-2 (explicit national rules governing unbundling, interconnection and pricing would facilitate state's task); Mass. AG at 1-3 (supporting explicit national rules governing
(continued...)

legal authority to adopt such rules, and that the Act permits only the adoption of "general" rules that leave all elaboration of the 1996 Act's fundamental requirements to 51 different state utility commissions and federal courts. Four claims have been raised. None has substance.

A. The Commission Has Authority To Adopt "Preemptive" National Rules.

The most extreme contention is made by Bell Atlantic, GTE, NARUC, and several state commissions, who claim that neither the 1996 Act nor the Commission's implementing regulations can "preempt" any state law affecting intrastate services and that the Commission's regulations cannot bind state commissions when they conduct arbitrations or rule on ILEC statements of generally available terms. However, § 251(d) expressly provides that the Commission "shall" complete "all actions" necessary to adopt implementing regulations by August 8, 1996. Moreover, the Act provides that any such state commission orders must not only comply with the federal standards of § 252, but also "ensure that [the ILECs] meet the requirements of section 251, <u>including the regulations prescribed by the Commission pursuant to section 251</u>." § 252(c)(1)(emphasis added); <u>accord</u>, § 252(f)(2); <u>see</u> § 253.

The express terms of §§ 251, 252, and 253 render irrelevant statements about preemption of state law being "disfavored" and eliminate any need to consider whether preemption should be "implied." <u>Cf.</u> NARUC at 11-14; <u>see</u> <u>also</u> § 601(c)(1). Congress has exercised its authority under the Commerce Clause of the Constitution in the most direct and unequivocal terms by

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[2] (...continued)
pricing as well as the other requirements of § 251); Kentucky PSC at 3-4 (same); Louisiana PSC at 18 (same); Wyoming PSC at 29-30 (same); Tex. Off. of Pub. Util. Counsel at 1-5 (same); Texas PUC at 4 ("explicit rules may be helpful" to implement all but the pricing requirements of § 251); Mass DPU at 5 ("in general it is good policy . . . for the Commission" to adopt "specific national rules implementing § 251 of the Act, without the inclusion of pricing principles"); New York DPS at 25 (supporting explicit national rules for unbundled elements, interconnection, and collocation); California PUC at 24 ("national standards would be helpful to implement the collocation requirements of the 1996 Act").

imposing explicit federal duties on ILECs and by mandating that states enforce those federal requirements. In this regard, no commenter has disputed AT&T's showing that if the Commission were to fail to prescribe explicit regulations now, it would ultimately have to make the same determinations in connection with hundreds of piecemeal federal court review and other proceedings occurring after state commissions act. See AT&T at 8-11.

Bell Atlantic, GTE, NARUC, and others rely principally on § 251(d)(3)'s provision that, in "prescribing and enforcing regulations," the Commission shall not preclude the enforcement of state laws that are "consistent with the requirements of this section" 251 and that do not substantially prevent implementation of its requirements and "the purposes of this part" of the Act. See Bell Atlantic at 2 & 5 n.2, NARUC at 13-14. But Congress enacted § 251(d)(3) precisely because § 252(c)'s terms and settled law explicitly require state commissions to ensure compliance with whatever regulations are adopted by the Commission. See AT&T at 4-5. Section 251(d)(3) thus adopts a standard that the Commission is to apply in formulating regulations and acting on waiver applications to assure that its preclusive regulations are limited to those it finds necessary to implement the terms and purposes of the 1996 Act.

There is similarly no substance to the arguments that Bell Atlantic, GTE, and NARUC have made based on § 2(b) of the Act or the 1996 Act's legislative history. The short answer to these claims is that § 251 expressly authorizes the Commission to adopt whatever implementing regulations are necessary to promote the 1996 Act's goal of exchange service competition -- indeed, the ILECs even argue (erroneously) that § 251(c) applies exclusively to exchange and other jurisdictionally intrastate services and cannot affect the provision of interstate access or other interstate services.[3] And it is well settled that § 2(b) does not "negat[e] the

[3] See USTA at 59-62; Bell Atlantic at 8-12; GTE at 74-77; NYNEX at 9-18; Pacific at 78-80; BellSouth at 62.

Commission's exercise of its lawful authority" under such explicit provisions of the Act even when the Commission precludes the enforcement of state regulations that affect intrastate services. NARUC v. FCC, 880 F.2d 422, 425 (D.C. Cir. 1989); see AT&T at 6 & n.5 (citing cases). Similarly, even if § 2(b) could otherwise be found applicable, the explicit provisions of § 251 would impliedly repeal § 2(b) to the limited extent the Commission regulation would affect state regulation over jurisdictionally intrastate services.[4]

In these regards, GTE's and NARUC's reliance on the legislative history of the 1996 Act is misplaced. That history vividly confirms that Congress understood and intended that § 2(b) could not prevent the Commission from exercising its explicit authority under § 251(d) to adopt regulations that would preclude enforcement of state laws that would impair implementation of the Act's purpose of fostering local competition.[5]

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[4] In contrast to § 332 of the Act (compare Bell Atlantic at 7), regulations adopted under § 251 were not intended to affect state jurisdiction over retail rates, which is the reason § 2(b) was not here repealed. In this regard, the unbundled network elements, interconnections, and collocation arrangements required by § 251(c) are intercarrier arrangements for facilities that are not jurisdictionally separated but would be inseparably provided for use in local exchange and interstate access services alike. Thus, § 2(b) would not have prevented the Commission from ordering these intercarrier arrangements prior to the 1996 Act (see AT&T at 6 n.5 (citing cases); Expanded Interconnection, 7 FCC Rcd. 7369 (1992)) -- although states could then have used their now-preempted certification authority (see § 253) to prevent ALECs from using the facilities to offer local and other intrastate services.

[5] In particular, the initial House and Senate versions of the 1996 Act each contained (redundant) language that specifically exempted determinations made under Part II of the Act from § 2(b). See NARUC at 10 & n.8. When that language was dropped in the bill approved in the Conference Committee, the Conference Committee did not list this change as a substantive "difference" between the House or Senate bills and the Conference Committee Bill that required explanation, but treated it as one of the "minor drafting and clerical changes" that required no discussion. See Joint Explanatory Statement at 113. Congress plainly understood that both the terms of § 2(b) and settled interpretations of it established that it could have no applicability to the Commission's exercises of explicit authority under § 251(d), § 253, or other provisions of the 1996 Act designed to foster exchange and exchange access competition.

B. The Commission Has The Same Authority To Adopt Pricing Standards As It Does To Adopt Other Regulations.

Other state commissions recognize the Commission's general authority to adopt explicit national regulations, but urge an exception for pricing. They claim that the Commission lacks authority to establish standards assuring that interconnection, network elements, and collocation arrangements are priced at just and reasonable rates, because under § 252 states are to determine the specific rates thereof based on cost (and without reference to rate of return proceedings). See, e.g., Texas PUC at 4; New York DPS at 25; Mass. DPU at 4.

The § 251(d) requirement that the Commission adopt implementing regulations is fully applicable to the § 251 pricing provision. Section 251(c)(3) imposes a single indivisible duty on ILECs to make unbundled elements available at "just and reasonable" rates, for that is an essential precondition to effective competition. Because § 251(d)(1) requires the Commission to complete all actions necessary to establish regulations to carry out all the requirements of § 251, the Commission has express authority to establish regulations that will assure that rates for unbundled elements satisfy these standards. The one form of state action that would be certain to defeat "the purposes of this Part" of the Act (§ 251(d)(3)) and to have the "effect" of preventing new entrants from providing local telecommunications services (§ 253(a)) would be rules that allowed ILECs to charge excessive prices for unbundled elements or wholesale services and thereby to effect price squeezes or preclude economic entry. That is why § 252(d)(1) establishes federal standards that states must apply in determining specific prices for elements, interconnections, or services, and why § 251(c)(3) of the Act imposes a separate duty on ILECs to offer these facilities and services at "rates . . . that are just, reasonable and nondiscriminatory" in accord with the "requirements of this section [251] and section 252."[6]

C. Explicit National Rules Are Essential To Effective Private Negotiations And State Proceedings Alike.

Virtually every ILEC and several state commissions argue that the Commission's adoption of explicit national rules that would be applied under §§ 252(c) & (f) is inconsistent with the Act's provisions for voluntary negotiations.[7] Each echoes Ameritech's assertions (p. 7) that such an approach somehow "preempts meaningful carrier negotiations" and "fails to provide adequate flexibility" to carriers and states by prescribing a "one size fits all" regime.

These claims ignore that § 251 and the Commission's implementing regulations come into play only if parties fail to reach voluntary agreements. The Act makes it explicit that any voluntary agreement will take effect "without regard to the standards set forth in subsections (b) and (c) of section 251" or the Commission's implementing regulations so long as it does not "discriminate against a telecommunications carrier" and is "consistent with the public interest." §§ 252(a)(1) & (e)(2). By establishing minimum requirements and "default" rules that will effectuate the Act's purposes, explicit national rules will radically enhance the likelihood of voluntary agreements that foster the Act's goals. In that event, the outcomes dictated by the Commission's regulations will provide adequate starting points for negotiations from which

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[6] Indeed, the adoption of such pricing regulations not only will assist states -- as many recognize (see pp. 1-2 n.2, supra) -- but also is essential to the orderly implementation of the Act. If the Commission were not to promulgate explicit national rules now, the 51 state commissions would receive no deference in their interpretation of those federal statutory requirements. See AT&T at 10. Rather, these pricing determinations would be subject to de novo review under § 252(e)(6) of the Act by some 51 separate federal district courts, who would then be asked to decide whether federal law permits or requires the use of particular embedded cost, LRIC, TSLRIC, or other costing or pricing standards. In turn, the federal courts are then likely to refer such questions to this Commission under primary jurisdiction principles, particularly because the same issues would then otherwise be independently before the Commission in piecemeal proceedings brought under §§ 208, 252, 253, or 271 of the Act. See AT&T at 9-11.

[7] See, e.g., SBC at 7; NYNEX at 3; Pacific at 2-3; Bell Atlantic at 1-2; BellSouth at 2-3.

parties can and will flexibly depart as their needs dictate. Absent such rules, negotiations could never fulfill the promise of the 1996 Act.[8]

D. National Rules Are Also Essential To Eliminate Entry Barriers That Result From State-By-State Variations.

Finally, other ILECs and certain state commissions claim that national standards would needlessly preclude "experimentation." However, the comments make clear that immense burdens on entry would result if the minimum requirements of the 1996 Act had to be separately litigated before 51 different state commissions, and that these burdens could be heightened by the commitments of some states to their historic regulatory policies.

Potential entrants have confirmed the NPRM's tentative conclusion and AT&T's prior showing that decisions to enter local markets are made on regional or national bases, and that any obligation to litigate basic terms and conditions of entry on a state-by-state basis will operate as a powerful entry barrier. For example, Comcast's comments provide concrete evidence of how that requirement has prevented it from entering a number of markets in a number of states, and demonstrate, in particular, that regional entry decisions are determined by whether individual states have policies favoring competition. Comcast at 9-15.

Any one state's policies also affect entry decisions in other states. That is starkly the case for the many media markets that cross state boundaries: e.g., New York City, Connecticut

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[8] In this regard, no one disputes AT&T's showing (AT&T at 7) that GTE, SNET, and other non-BOC ILECs have no incentives whatever to enter into meaningful agreements affecting 20% of the population. Nor is there any dispute that the BOCs' theoretical incentives to comply with § 251 in order to obtain interLATA authority are diminished by their recognition that there are other very substantial independent preconditions to relief that are not easily satisfied. See AT&T at 7-8. In this regard, virtually all of the handful of agreements cited by USTA and others as evidence that negotiations are "working" govern only terminations of traffic for CAPs who require some such arrangements now to provide some form of limited service to the tiny fraction of customers reached by their networks, not the unbundling of network elements, their prices, or terms of service resale that are preconditions to widespread competitive alternatives.

and Northern New Jersey or the District of Columbia and surrounding communities in Northern Virginia and Maryland. Any substantial variation in the rules applicable in states in these and other multi-state metropolitan areas would either preclude entry in these areas or make it far more costly. The same is true of any two States with areas of similar geographic, demographic, technological, and other such conditions. Entry will be easier and more efficient in all such states if the same basic interconnection and unbundling arrangements and rate structures, for example, are available in each state. Conversely, state-by-state variations will preclude entry or make it far less efficient and effective.

The comments of a number of state commissions confirm these points and show how the objectives of the 1996 Act will be defeated if its fundamental requirements are not uniformly implemented. For example, 8 state commissions jointly filed comments stating that each failed to grant non-incumbent applications for local authority only because potential entrants did not apply. See Maine, et al., at 4-5. But because each of those states contains attractive local service markets (as evidenced by applications filed in each since enactment of the 1996 Act), the only plausible explanation for the prior dearth of applications is that no new entrant wanted to litigate the terms and conditions of entry in each such state. This confirms that explicit national regulations are essential both to the development of competition in the 35 States that have not authorized it and to the maximization of its potential elsewhere.[9]

Indeed, these and other state commission comments highlight some of the ways in which

[9] Similarly, the comments of some state commissions underscore that a comprehensive national requirement of LEC-to-CMRS interconnection is needed. The Commission has been given plenary jurisdiction under Section 332(c) of the Act to order such interconnection. More fundamentally, whether under Section 332(c) or under Section 251, the Commission should act decisively to avoid piecemeal state regulations that impose exorbitant interconnection and "pay or play" duties on CMRS providers, purport to subject CMRS providers to state entry and rate regulation contrary to the Act, or otherwise erect impermissible barriers to competition. Compare New York DPS at 14-18; Michigan PSC at 20; Florida PSC at 35-36.

a failure to adopt national rules could impede implementation of the 1996 Act's goals. In particular, these comments recount how state commissions were able to use incentive regulation and other devices to obtain concessions from ILEC monopolies in other areas, and they express concern that the introduction of competition would undermine these existing regulations and prevent them from balancing the need for competition against other social goals.[10] However, without in any way minimizing the significance of what these state commissions accomplished under the prior regulated monopoly regime, the object of the 1996 Act was to end that regime and eliminate all legal and economic barriers to local competition at the earliest possible time. Even the possibility that an individual state might cling to remnants of its regulated monopoly regulations is a compelling reason for the Commission to adopt the explicit national rules discussed in the NPRM and in the Comments of AT&T, the Justice Department, and others.

II. THE COMMENTS CONFIRM THE NEED FOR DETAILED INTERCONNECTION, NETWORK ELEMENT, AND COLLOCATION RULES.

A. The Commission Should Reject The ILECs' Attempts To Radically Undermine The Statutory Rights Granted By Sections 251(c)(2) And 251(c)(3).

The ILECs' comments confirm the Justice Department's conclusion (pp. 6, 9-10) that, without clear and specific national rules to enforce the Act's interconnection and unbundling mandates, there is "no basis in economic theory or experience" to expect the ILECs through negotiations to provide the "wide variety of facilities and services" that the ALECs will need "in order to enter these markets successfully." The ILECs make several arguments that are flatly contrary to the language and purposes of the interconnection and unbundling provisions of the Act, and that seek to eliminate the competitive opportunities those provisions were designed to create. The Commission should expressly reject each of these arguments.

[10] See, e.g., Idaho PUC at 8-9; Indiana URC at 15; Iowa at 5-6.

1. <u>The Commission should reject the ILECs' attempt to redefine "technical feasibility."</u> Sections 251(c)(2) and 251(c)(3) grant ALECs the right to interconnect and to obtain unbundled network elements "at any technically feasible point within the carrier's network." Several ILECs nonetheless contend that interconnection or unbundling arrangements may be denied to ALECs solely because of economic considerations. In particular, they argue that if any additional investment is needed to make an arrangement available -- even if it simply involves establishing a new billing system -- the arrangement is not "technically feasible." <u>See</u>, <u>e.g.</u>, Bell Atlantic at 16; GTE at 20; NYNEX at 64; SBC at 27; USTA at 11; U S West at 48 n.106, 49. The effect of this argument would be to limit the Act to requiring only arrangements that the ILECs currently make available anyway -- as several ILECs admit.[11]

This argument is startling. It would give the ILECs complete control over the types of interconnection and unbundling arrangements available to their competitors. As the Justice Department states (p. 16), however, the Act enables entrants "to combine facilities in a manner that <u>they</u> deem to be most efficient" (emphasis added) because "Congress thought that competitive entry would be facilitated by allowing potential entrants to choose the points at which they would interconnect with an ILEC's local network, rather than allowing ILECs to limit interconnection points to those that would least threaten their incumbent's advantage."[12]

[11] <u>See</u>, <u>e.g.</u>, Bell Atlantic at 16 (unbundled elements and interconnection points should be limited to "those in use today"); GTE at 20 (technology must already be "in place"); Pacific at 21 (technically feasible points are "those employed today"); NYNEX at 64 (ILEC not required to provide any feature it "does not currently provide"); USTA at 11 n.14 (limited to "inventory on hand"); SBC at 85-86 (same).

[12] The principle applies not only when ALECs interconnect for the purpose of obtaining unbundled network elements, but also when ALECs interconnect to terminate traffic to ILEC customers. Bell Atlantic's suggestion (<u>see</u> Albers Aff., ¶ 5) that the ILEC should be able to select the point of interconnection at which it will receive terminating traffic from an ALEC is thus contrary to the Act and must be rejected. The ILEC is likely to have a widely dispersed (continued...)

The ILECs' comments underscore the need for the Commission's proposed rule (¶¶ 56, 58, 87) placing the burden of proving any claim of technical infeasibility on the ILEC. The Commission should likewise adopt its tentative conclusion (¶ 57) that an ILEC's previous offering of an arrangement, or the current offering of an arrangement by another ILEC using similar network technology, should establish, at least presumptively, its technical feasibility.[13] Indeed, the Commission should find that any point in an ILEC network where connections are made today -- whether between the ILEC and another carrier or by the ILEC to itself -- is a point where ILEC-ALEC interconnection is technically feasible.

The Commission should also expressly reject claims that economic considerations can justify denial of an interconnection or unbundling request on the ground that it is "technically infeasible." Congress could scarcely have been clearer in foreclosing any consideration of economics in determinations of "technical feasibility."[14] The ILECs are fully protected with respect to the economics of interconnection and unbundling because parties requesting a technically feasible arrangement will pay the true economic cost of providing it.

As the Justice Department notes (p. 19), "introducing questions of 'economic' feasibility

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[12] (...continued)
network with hundreds of end offices and tandems. In contrast, an ALEC may initially have only one switch. If the ILEC can choose the point of interconnection, it can impose tremendous trunking costs on ALECs by forcing them to interconnect at distant interface points.

[13] See Ameritech at 12; DOJ at 17; ALTS at 19; ACS at 11-12; ACTA at 17; C&W at 13-14; Citizens at 9; Continental at 21; HTI at 4; LDDS at 36; MCI at 11; MFS at 16; NCTA at 38; New Jersey BPU at 2; Sprint at 14; Teleport at 23; TIA at 8; Time Warner at 29-30.

[14] Elsewhere in the Act, Congress used the language "technically feasible and economically reasonable" when it wished both standards to apply. See § 264(h)(2)(A) (emphasis added). By contrast, the House Commerce Committee deleted the phrase "economically reasonable" from an earlier draft of the unbundling provisions, precisely because it feared that "this requirement could result in certain unbundled services, elements, features, functions, and capabilities not being made available." H. R. Rep. No. 204, 104th Cong., 1st Sess. 71 (1995).

into the determination of 'technical' feasibility" will only "delay the process." Moreover, the ILEC suggestion that an unbundling arrangement is "technically infeasible" whenever new equipment is needed would permit ILECs to deny ALECs some of the most basic unbundled elements altogether. For example, unbundling the loop -- which the ILECs agree is required -- will in some circumstances require the ILEC to install additional equipment.[15] The mere fact that some implementation work may be necessary does not render the arrangement technically infeasible (although it may require a deadline for completion).[16] Here, most of the unbundled elements and interconnection points that AT&T has recommended can be implemented and tariffed by January 1, 1997, because little additional work needs to be done to amend the procedures already in place to order, provision, maintain, and bill for them.[17]

2. The Commission should reject the ILECs' attempt to limit network elements to facilities-based carriers. The Act likewise forecloses the ILECs from impeding entry by

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[15] Some ILECs use Integrated Digital Loops that aggregate the traffic of several customers and terminate directly on the switch. If an ALEC purchases one or more "loops" that are combined in this manner, the ILEC will need to add terminal equipment to disaggregate the traffic so that each customer's "loop" can be accessed individually. Further, because testing for such loops is typically performed through the ILEC's switch, new processes and systems may be required for the ILEC to test and maintain unbundled loops that are connected to an ALEC switch.

[16] The Commission followed that procedure when it ordered LECs to implement the database system necessary to achieve 800 number portability. When the Commission issued that order, it recognized that additional development and implementation work was necessary, and set an appropriate deadline -- but that did not prevent the Commission from determining at the outset that the new system would be feasible. See Memorandum Opinion and Order on Reconsideration, Provision of Access for 800 Service, CC Docket No. 86-10 (Aug. 1, 1991).

[17] Because of the Commission's Expanded Interconnection orders, ILECs already make dedicated transport, and combinations of signaling links and STPs, available as unbundled elements, and the ILEC data base queries (LIDB and 800) are available through their access tariffs. Loops and "switch ports" are likewise tariffed in some states as well. And while the "switch port" as it has been tariffed to date generally does not satisfy the statutory requirements for unbundled elements (see infra pp. 17-19), the unlawful use restrictions that the ILECs have imposed on that offering can easily be eliminated. The only elements which may not be available as promptly are some subloop elements. See infra p. 17.

requiring ALECs to build facilities before purchasing network elements. Section 251(c)(3) requires an ILEC to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."[18] As the Justice Department points out (pp. 49-50), this requirement applies whether or not an ALEC owns facilities.[19] Indeed, permitting carriers without facilities to provide service through such combinations will be "a major factor in lowering the barriers to entry" and is "crucial to the steady development of competitive local markets in the manner envisioned by Congress." Id. at 50.

The ILECs' claim also ignores the intent of the Act to offer entrants "a range of options" and provide "flexible opportunities for entry by a wide variety of firms using a variety of entry strategies."[20] The ILECs would turn this approach on its head. They contend (see, e.g., Bell Atlantic at 14; NYNEX at 31; USTA at 24) that because a service may be available through one vehicle -- § 251(c)(4) resale -- any attempt to provide the service through the alternative vehicle provided by § 251(c)(3) would be an "evasion" of § 251(c)(4), which must "take precedence"

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[18] In this regard, and as demonstrated in AT&T's Comments (p. 27 & n. 34), ILECS must permit requesting carriers to combine such elements in a single consolidated order and coordinate provisioning for any network elements that are ordered in combination.

[19] NYNEX contends (p. 37) that § 251(c)(3)'s reference to combining elements relates only to the combining of ILEC facilities with ALEC facilities. But the statute requires that ALECs be permitted to combine "such elements," and § 251(c)(3) makes clear that the elements to which it refers are those the ILEC has "[t]he duty to provide." Relatedly, Bell Atlantic argues (p. 13) that § 251(c)(3)'s reference to obtaining network elements "at any technically feasible point" means that an ALEC must connect some of its own facilities to the ILEC's facilities. This argument would perversely convert a broad grant of rights to ALECs (to choose points of interconnection) into a sweeping limitation on ILECs' obligations to make elements available. The right to choose "any technically feasible point" obviously applies when ALECs connect their facilities to ILEC facilities, but nothing limits § 251(c)(3) to those circumstances alone.

[20] See DOJ at 6, 36; see also NPRM ¶ 15 (the Act was designed to "enable [] entrants to use interconnection, unbundled elements, and/or resale in the manner that the entrant determines will advance its entry strategy most effectively").

over § 251(c)(3). But Congress obviously did not intend for the rights granted by one subsection of the Act to be canceled out by the immediately following subsection. Rather, Congress provided a range of choices to be available to ALECs simultaneously.

In any event, the claim that offering service through a combination of elements is "the same" as resale is baseless. Carriers purchasing unbundled elements have enhanced competitive opportunities to create different and higher quality services than those offered by the ILECs supplying those elements.[21] Moreover, the purchase of a "platform" of unbundled elements will greatly ease a carrier's transition into facilities-based competition.[22] And contrary to the suggestion of some ILECs (see, e.g., Bell Atlantic at 14), resellers will not simply migrate to purchasing unbundled elements, because, as the Commission notes (¶ 100), the additional competitive opportunities under § 251(c)(3) will be coupled with "added risk."[23]

The Commission should also reject the related argument advanced by two ILECs that

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[21] See AT&T at 28-30; DOJ at 49-50; ACTA at 17; Citizens at 14, CompTel at 24-26, 38-39; Florida PSC at 18; Illinois Comm. at 37-38; LDDS at 30-36; MCI at 27-29; Sprint at 26-28; TCC at 32-34.

[22] See AT&T at 30. The Justice Department has also described (p. 51) the severe administrative and enforcement problems with any requirement that the Commission determine "how much" facilities an ALEC must have in order to purchase elements under § 251(c)(3).

[23] Unlike resale, where the service is simply passed through to the ALEC's customer and the ALEC's margin will be highly predictable, the profit of an ALEC that proceeds under § 251(c)(3) will depend, among other things, upon stimulating the customer's intrastate and interstate usage so as to recover the costs of all the functions and capabilities that the ALEC purchases under § 251(c)(3) (but not under § 251(c)(4)). See NPRM, ¶ 100. That "added risk" also explains why the purchase of a platform of unbundled elements will not "circumvent" (Ameritech at 29) § 271(e)(1)'s joint marketing restriction. The Act properly does not prohibit joint marketing for services provided through § 251(c)(3), because the additional risks ALECs assume under that subsection justify greater marketing flexibility than might be thought necessary for pure resellers. And because an interexchange carrier's ability to offer local service profitably under § 251(c)(3) will often depend in part on using those same elements to provide access and achieving savings in access charges (NPRM, ¶ 165), it would be senseless to prevent an ALEC from achieving those savings by prohibiting it from jointly marketing its interexchange services with its exchange services.

§ 251(d)(2)(B) broadly limits the availability of unbundled network elements in favor of services resale.[24] They argue that if an ALEC would be able to provide a service through any means other than by purchasing network elements -- such as through resale -- then denying that ALEC unbundled network elements is permissible because such denial would not "impair" the ALEC's ability to provide the service.

This argument is baseless. Section 251(d)(2) merely lists two factors that, "at a minimum," the Commission should "consider" when identifying elements to be unbundled. It does not establish either factor as a threshold test -- and neither does the definition of "network element" (§ 153(45)) nor the provision mandating unbundling (§ 251(c)(3)) (as one would expect had Congress intended such a test). Moreover, this ILEC argument would defeat the core purpose of § 251 to provide alternative means of entry so that each ALEC may choose the method that is best for it, and would render § 251(c)(3) meaningless. Because all services offered by ILECs, including basic local exchange service, must be available through resale, this argument would authorize an ILEC to deny an ALEC unbundled elements in virtually every instance -- and, if an ALEC offers a service that the ILEC does not, simply to offer that same service for resale and then withdraw the elements used by that ALEC from the market.[25]

3. **The Commission should reject the ILECs' attempt to deny ALECs "features, functions, and capabilities" of "network elements."** Finally, in several instances, particularly

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[24] Section 251(d)(2)(B) provides that, in determining the network elements that should be unbundled, the Commission shall "consider," among other things, whether the failure to provide particular network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

[25] For the same reason, USTA's claim (p. 28) that § 251(d)(2)(A) authorizes ILECs to develop new "proprietary" network elements or features and withhold them from ALECs should likewise be rejected. The Act requires that ILECs make all of their network facilities available to new entrants; proprietary elements would improperly maintain those facilities as monopolies.

for switching and signaling elements, the ILECs seek unlawfully to deny ALECs the right to use some of the elements' most significant features, functions, and capabilities (such as vertical features). The Act defines "network elements" to include all "features, functions, and capabilities" provided by the facility or equipment being sold. See § 153(45). The Commission must make absolutely clear that ILECs have no more discretion to withhold from ALECs features, functions, and capabilities than to withhold the facility or equipment itself.

B. The Commission Should Mandate A Minimum Set Of Unbundled Network Elements.[26]

The Justice Department agrees (p. 20) that because the "statutory goal" is to "require as much unbundling as is technically feasible," the Commission should "maximize the options of potential entrants to purchase unbundled elements." It should therefore declare now a robust minimum set of elements which the ILECs must tariff. The negotiation and arbitration processes can then be used to identify additional elements to be unbundled, but (1) the initial minimum set should not be determined in those fora and (2) USTA's proposed "bona fide request" process should not be employed even for additional elements.[27] A number of commenters make arguments that are limited to particular elements. Those arguments are addressed below.[28]

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[26] With respect to points of interconnection, the Commission has already identified several such points that NYNEX and USTA agree are technically feasible (see NPRM, ¶ 57; NYNEX at 65; USTA at 13 n.17). AT&T identified several others in its pre-NPRM ex parte. See AT&T letter to R. Keeney, Chief, Common Carrier Bureau, March 21, 1996 at 30-33.

[27] USTA's proposed "bona fide request" process (pp. 14-16) builds in lengthy delays of three months or more to respond to requests and also contains reciprocity and other rules that would needlessly burden new entrants and thus violate the Act. SNET's comments contain in an appendix a more balanced and expeditious procedure to which a wide range of industry participants in Connecticut stipulated. AT&T recommends that any procedure established by the Commission be based on that approach rather than USTA's one-sided proposal. See Unbundling and Resale Stipulation at 5 (App. to SNET Comments).

[28] There does not appear to be any significant opposition to the Commission's proposals for (continued...)

1. Loop elements. There is broad agreement among the commenters that at least the loop should be unbundled. Some commenters recommend that the network interface device be unbundled as a separate element, and AT&T agrees with that recommendation.[29] However, although the Justice Department and several carriers support further subloop unbundling as well, the ILECs contend that it is technically infeasible.[30]

Most of the ILECs' "technical infeasibility" claims amount to arguments that some implementation work and investment will be necessary before subloop elements can be made available. As AT&T has explained, these considerations are irrelevant to technical feasibility. However, if substantial resources would have to be dedicated to make subloop elements available for purchase and interconnection, then it may be appropriate to omit such subloop elements from the initial set of elements that must be unbundled and tariffed immediately, provided that ALECs' right to order these elements is confirmed. The ILECs would then tariff the subloop elements and interconnect the ALEC when orders are received, and there is a clear sign of market demand for those elements and a willingness to pay legitimate implementation costs.

2. Switching element. Although the ILECs purport to agree that switching must be offered as an unbundled element (see, e.g., Bell Atlantic at 25; BellSouth at 40; GTE at 37; Pacific at 54; USTA at 32), their proposed definition of that element would violate the Act by

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[28] (...continued)
unbundling transport (see NPRM ¶¶ 104-106). AT&T likewise supports those proposals, and will not address transport elements further in these Reply Comments.

[29] See ALTS at 28; ACTA at 19; General at 12; LDDS at 41-42; MCI at 16, 19-20; TCC at 36; TRA at 33.

[30] Compare DOJ at 21; Ad Hoc Users at 22-23; ALTS at 28; ACTA at 19; C&W at 20; Citizens at 15; CPI at 16; CompTel at 31; General at 12; Intermedia at 10-12; LCI at 17; LDDS at 41-42; MCI at 16, 29-30; Ohio PUC at 35-36; TIA at 11-12; Wyoming PSC at 21; with Ameritech at 37-42; Bell Atlantic at 23-25; BellSouth at 39; GTE at 33-37; NYNEX at 67-69; Pacific at 52-53; SBC at 38-40; USTA at 30-32.

denying to ALECs some of the switch's most significant capabilities. It is thus critical that the Commission reject their proposal to define the switch as simply a "port."

Bell Atlantic and other ILECs propose to deny ALECs the right to obtain switching functions used not only for vertical features such as caller ID, call forwarding, and other advanced call management capabilities, but even "local usage" (see Pacific at 55). The Act forecloses this anticompetitive tactic, for it broadly defines the "network elements" that must be offered to include the "functions, features, and capabilities" of the purchased equipment. See § 153(45). The CLASS features, AIN triggers, and other switching features used to provide these capabilities fall squarely within that definition.

The Commission has already recognized this fact. The question posed in the NPRM (¶ 99) was not whether switch features were network elements, but whether those features should be made available as part of the switching element or as separate unbundled elements. It never even suggested that such features could be placed outside the ambit of § 251(c)(3) altogether.

The ILECs' claim that these capabilities are "services" that can be purchased only under § 251(c)(4) is nonsense.[31] The hardware and software used to provide these features are not materially different from that used to provide the other switching functions. To enable the switch to provide vertical features, the ILEC loads software onto the switch; builds "mapping tables" used by the switch to determine which vertical features are to be provisioned on a particular customer line; and uses equipment and other capabilities of the switch (such as ringing equipment that can create distinctive rings and routing tables that can guide calls to alternative destinations). The Act provides that ALECs are entitled to all of these "features, functions, and capabilities." § 153(45). As the Commission correctly recognizes (NPRM, ¶ 100), this

[31] See, e.g., Bell Atlantic at 26; GTE at 37 n.56; Pacific, p 55; USTA at 33-35 & n.37; U S West at 55.