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May 30, 1996

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Mr. William F. Caton
Secretary
Federal Communications Commission
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Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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**Re: Implementation of the Local Competition Provisions
in the Telecommunications Act of 1996
(CC Docket No. 96-98)**

Dear Mr. Caton:

Enclosed for filing are the original and sixteen copies (plus two additional copies which have been annotated "Extra Public Copy") of the reply comments of WorldCom, Inc. d/b/a/ LDDS WorldCom in the referenced proceeding. In addition, a diskette in WordPerfect 5.1 format has been submitted to Janice Myles, Common Carrier Bureau.

Please return a date-stamped copy of the enclosed (copy provided).

Respectfully submitted,

Peter A. Rohrbach/KDD

Peter A. Rohrbach
Counsel for
LDDS WorldCom

Enclosures

cc: Janice Myles, Common Carrier Bureau
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
CC Docket No. 96-98

To: The Commission

REPLY COMMENTS OF LDDS WORLDCOM

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May 30, 1996

EXECUTIVE SUMMARY

The ILEC comments demonstrate how complicated and difficult it will be to transform the local telecommunications market from monopoly to competition. LDDS WorldCom replies to the ILECs here on some of the many important issues raised in this proceeding. However, we urge the Commission also to read with care the comments of other competing carriers, especially those companies that are today called "IXCs." Complete implementation of Sections 251 and 252 is necessary in order for such companies to become full service companies, and defend and grow their geographically diverse customers in the one stop shopping market to come.

ILECs Raise "Red Herrings" in Opposition to Strong National Rules. The ILEC comments in this proceeding demonstrate why strong, clear national rules are so necessary to implement Sections 251 and 252 of the Act. The ILECs muddy the point that the Act creates an entirely new set of rights for all requesting carriers, and a new set of obligations on the ILECs themselves. They largely disregard the fact that Congress created these legal duties because competing carriers have no meaningful bargaining power when they come to the ILEC table. The ILECs strive to minimize the activity that necessarily will be required of them to comply with Section 251.

The ILECs raise two other red herrings. First, they try to use transitional issues being addressed in the universal service docket as a reason for the Commission to protect them from the permanent requirements of the Act. However, we show that the Act gives the Commission the flexibility to address short-term implementation issues without accepting the ILECs' request that the plain meaning of Section 251 be contaminated permanently. Second, the ILECs suggest that full

implementation of Section 251 could discourage facilities-based competition. In fact, however, the Act is elegantly written to create the maximum opportunity for efficient new investment, recognizing that all competing carriers will be dependent on the ILEC network for many years to come.

ILECs Attempt to Riddle Unbundling Requirements With Unjustified Loopholes. The ILEC comments attempt to build a series of barricades to protect them from having to provide network elements. They argue that an element is not “technically feasible” to offer if it is not available today. ILECs contend that requesting carriers lose their rights to obtain elements if the elements could be constructed or obtained from another source. ILECs also indicate that they intend to hide behind claims that they have no “excess capacity” to share, and other baseless excuses. None of these theories is supported by the Act; collectively they would gut the statutory right of other carriers to obtain critical ILEC network inputs.

ILECs Raise No Valid Arguments Against the Commission’s Unbundled Switching Proposal. Unbundled local switching is the missing link between unbundled loops and transport. Competing carriers agree that it is the key to the ILECs’ lock on local competition. Not surprisingly, then, ILECs try to build a special wall around their switching capacity. Arguing that they cannot satisfy the Act’s clear requirement, ILECs offer in its place “port” proposals that are nothing more than their own retail switching and usage services. ILECs also try to manufacture restrictions on the ability of competitors to combine loops, switching and other elements to create their own local products. But the Act expressly recognizes that such combinations are critical for competition to roll out across the country.

The Act Requires Non-Discriminatory Interconnection For All Carriers, But Permits a Transition Pending Universal Service Reform. Section 251 could not be more clear that all “telecommunications carriers” are to be treated equally. ILEC attempts to draw distinctions between carriers, and to deny Section 251 rights to some carriers or some kinds of traffic, are not supported by the Act and, even the ILECs agree, are not economically sustainable. WorldCom presents a transition plan to address universal service issues arising because the existing subsidy structure will not be reformed until next year. But the Commission must disregard ILEC arguments for financial protection from competition on a permanent basis.

Pricing at TSLRIC is Essential to Competition. The ILECs’ ultimate barricade to competition is their attempt to resist the Act’s cost-based pricing requirement. Competing carriers and the Justice Department explain well why local competition will fail if ILEC competitors cannot use the ILEC network input at economic cost. In particular, the Commission should forbid non-cost-based volume and term discounts that would defeat the Act’s goals.

The Commission Must Reject ILEC-Created Loopholes in Service Resale. ILEC barricade-building continues with an effort to undercut the rights of competing carriers to resell ILEC retail services. The ILECs claim exemptions from the Act that in practice would swallow the rule. They also propose pricing rules that would make service resale impractical in the market.

The intention to frustrate the development of local competition that pervades the ILEC comments conclusively demonstrates that the Commission must step forward with strong, uniform and thorough national rules.

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

To: The Commission

REPLY COMMENTS OF LDDS WORLDCOM

WorldCom, Inc., d/b/a LDDS WorldCom (“LDDS WorldCom” or “WorldCom”), hereby submits its reply to the comments of other parties in response to the Commission’s Notice of Proposed Rulemaking (“Notice”), FCC 96-182, released in the above-captioned proceeding on April 19, 1996.

INTRODUCTION

The Commission is well aware that the logistical constraints of this docket permit parties to focus their reply comments on only on a few critical issues. This is unfortunate, for the initial filings demonstrate how complicated and difficult it will be to transform the local telecommunications market from monopoly to competition. LDDS WorldCom, however, fully appreciates the reasons for the deadlines and page limitations here.

We will respond to the ILECs on five issues of particular importance to us: the need for (1) strong and explicit national rules; (2) adequate network unbundling -- and in particular unbundling of local switching capacity; (3) pricing

at TSLRIC; (4) cost-based interconnection rules equally applicable to all network uses; and (5) loophole-free local service resale options.

Our silence on any given issue, or our lack of a specific response to any particular party, does not signal indifference. We have attempted to coordinate with others who share our pro-competitive position with respect to the 1996 Act. In particular, as a member of the Telecommunications Carriers for Competition ("TCC"), we endorse the draft rules submitted by that coalition today, as further elaborated below. We also have deliberately limited our own discussion of certain matters such as pricing that will be addressed by one or more TCC members. ^{1/}

At the end of the day, the 1996 Act will succeed only if consumers enjoy competitive choices in the "one stop shopping" market that the Act creates. In particular, WorldCom and other members of what is today known as the "long distance industry" must be able to offer local services to their geographically dispersed customer bases across the country as easily as an ILEC can expand its own existing toll services to include interLATA. The Act establishes the framework for such "full service" competition. But consumer choice ultimately depends on the adequacy of the rules adopted here, and the adequacy of their enforcement.

I. THE COMMISSION SHOULD DISREGARD ILEC "RED HERRINGS" OFFERED IN OPPOSITION TO CLEAR NATIONAL RULES.

[Notice; Section II.A., ¶¶ 25-36.]

A. The ILECs Are Wrong When They Minimize the Statutory Rights Given to Requesting Carriers.

^{1/} The TCC members include (in addition to WorldCom) AT&T, MCI, CompTel, LCI and GCI. We will refer to initial comments by citation to the filing party and the relevant page number (e.g., WorldCom at 1).

One consistent theme runs through the ILEC comments -- an attempt to muddy the fact that Section 251 creates new *rights* for requesting carriers, and new *obligations* on the ILECs to satisfy those rights. The ILECs repeatedly suggest that they need not comply with Section 251 if doing so would require them to develop new systems or procedures, expand their networks, or incur costs. As only one example, many ILECs argue that if they do not provide a network element today, then doing so is not "technically feasible" and provisioning is not required at all. ^{2/}

But such a de minimus interpretation of Section 251 ignores the revolutionary changes wrought by the Act. In particular, it ignores the new rights granted to all "requesting carriers" (itself a new term) under Section 251(c). As the Commission and dozens of parties in this proceeding recognize, ILECs have no market incentive to bargain fairly with other carriers. ^{3/} ILECs need nothing from their potential rivals. In keeping with this entrenched market position, ILECs to date have not taken any material steps to make their local networks generally available on cost-based, nondiscriminatory terms.

The Act creates new statutory rights for ILEC competitors to substitute for their lack of bargaining leverage. Requesting carriers now may ask for interconnection options that they have never received before, at prices that have not yet been developed. ILECs cannot turn these requests down. They have an obligation to meet requesting carrier needs.

Inevitably ILECs will have to undertake substantial work to comply with Section 251. The divestiture of the Bell System took two years, and the subsequent implementation of equal access for interLATA services took over three years.

^{2/} This issue is discussed further in Section II.A.2 below.

^{3/} See Transcript, Economics of Interconnection Panel Discussion Forum (hereafter "Interconnection Forum Transcript"), at 42 (May 20, 1996) (G. Brock - "pure negotiation between one party with a great deal of market power and another party that is absolutely dependent on making those arrangements work is not really the equivalent of ordinary economic negotiation among many similarly situated parties"); accord, id. at 81.

Motivated ILECs could move much more quickly than that to establish the local network processes and facilities to meet the Act's new mandate. But compliance will not come overnight either, and may not come willingly.

As the Commission develops its rules here, it should resist ILEC arguments that if they cannot comply quickly with the requirements of the Act, then those requirements should not be reflected in national rules. There is no connection between what the ILEC has done in the past (in the absence of a legal requirement or a market incentive) and what the ILEC is obliged to do now. Strong, clear national rules are needed so that requesting carriers can enforce their new statutory rights in an environment in which ILECs continue to have no market incentive to satisfy the Act's terms.

B. The ILECs Are Wrong When They Argue That Short-Term Transitional Concerns Should Drive Long-Term Implementation of Section 251.

The ILECs also promote a second red herring in their comments: the notion that the Act cannot mean what its words plainly say because it could cause transitional ILEC revenue losses. ^{4/} A related corollary advanced by some ILECs is to warn that Section 251 will result in substantial local rate increases. ^{5/} These comments arise most often in the context of arguments that Section 251(c) interconnection and unbundling may not be used in place of ILEC carrier access services developed in a pre-Act environment.

^{4/} E.g., Pacific at 65-67; SBC at 88-90. These ILEC arguments sometimes are stated even more baldly in the states. For example, Centel has argued in Illinois that the idea "that LECs must lose market share and profits in order to achieve a competitive local exchange market is uninformed, incorrect and should be rejected." Brief on Exceptions of Central Telephone Company of Illinois, Docket No. 95-0458, Illinois Commerce Commission, at 4 (filed May 24, 1996).

^{5/} E.g., BellSouth at 53; Ameritech at 72.

The ILECs are trying to exploit short-term timing issues for their long-term gain. They hope to convince the Commission to adopt permanent statutory interpretations to provide them long lasting protection from meaningful competition. They disregard the fact that the Act gives the Commission the flexibility to address transitional issues by delaying full implementation of Section 251 until action on related issues (most particularly universal service) is completed less than a year from now. The ILECs hope that they can contaminate the long-term rules and related statutory construction through appeals to transitional "impacts" issues.

LDDS WorldCom applauds the Commission's plan to conduct an expedited proceeding to reconcile pre-Act carrier access prices with the new cost-based carrier's carrier system mandated in Section 251. There is no question that the existing system cannot be sustained in an environment where Congress has mandated an entirely new carrier-to-carrier interconnection paradigm and old-fashioned regulatory lines between local and toll services (and between communications services and Internet services) are giving way to market forces and new technology.

The starting point for any such proceeding must be the 1996 Act, and not old frameworks based on jurisdictional separations and other non-market-based distinctions. WorldCom has noted that the Act establishes a revolutionary new structure in which the concept of interexchange access is replaced by a new set of rights and obligations among all interconnecting carriers. The beauty of this system is that it is neutral to the identity of the carrier interconnecting with an ILEC, the technology that the interconnector uses, or the service that the interconnector is offering to end users. The Act leapfrogs problems of "arbitrage," "discrimination" and jurisdictional cost allocation by treating all carriers using the ILEC network in the same way -- a goal reflected in the broad undifferentiated

definition of “telecommunications carriers” who may request interconnection with the ILEC. See WorldCom at 13.

The ILECs do not appear to disagree with this cost-based and non-discriminatory outcome. As USTA clearly states: “Ultimately, the 1996 Act contemplates a competitive endpoint where the pricing of local interconnection is not dependent on the identity of the interconnecting entity.” USTA at i. However, ILECs argue that the Act requires restrictions on the use of Section 251 interconnection today, because otherwise carriers will essentially reform access for themselves by using interconnection rates, and do so before universal service subsidy issues inherent in current access pricing are addressed through the fund now under development by the Joint Board. See, e.g., US West at 19-23, 61-62; SBC at 77-78.

But the Act reconciles such transitional policy interests with its permanent interconnection mandates. The Act specifically allows the Commission to adopt permanent rules that meet the Act’s long-term requirements, while at the same time protecting against short-term dislocations. Section 251(g), for example, allows the Commission to waive the obligation of an ILEC to provide Section 251 interconnection for toll traffic for an interval while the Commission completes the pending universal service proceeding. Then, when LEC revenue and universal service issues are resolved, the Commission can eliminate restrictions on the ability of a requesting carrier to use interconnection for pure exchange access purposes -- as required by the plain meaning of the Act.

In Section III.B below LDDS WorldCom presents a transition plan to take the Commission through the period between promulgation of national rules in August, and completion of universal service reform next year. Our purpose here is to emphasize that the Commission should reject invitations by the ILECs to permanently read Section 251 narrowly based on transitional implementation

concerns that will be addressed over the next year. This proceeding must establish the correct long term rules for a new competitive environment in which regulators need not *and should not* regress into a pre-Act mindset of old labels and regulatory distinctions. We are all "telecommunications carriers" now.

C. The ILECs Are Wrong When They Claim That Implementation Of The Act Would Deter Facilities-Based Competition.

The Commission also should reject a third red herring that appears often in the ILECs' comments: the suggestion that complete implementation of the plain meaning of the Act could deter facilities-based competition. Some RBOCs argue that pricing of network elements at economic cost should be rejected, notwithstanding the terms of the Act, because that would discourage network construction. See, e.g., NYNEX at 54; Pacific at 7; Bell Atlantic at 38. Some use this theme to justify restrictions on the ability of requesting carriers to combine network elements, or to support excessive wholesale prices for ILEC retail products. See, e.g., Bell Atlantic at 14; NYNEX at 30, 38. 6/

Inconsistent With A "Network of Networks". The Commission should strongly resist these suggestions, which find no support in the Act. First of all, the overall purpose of Section 251 is to establish a system that encourages deployment of a variety of interconnected network and service configurations (sometimes referred to as a "network of networks"). 7/ In this "network of networks"

6/ This argument also is sometimes echoed by cable companies and "CAPs" who contend that they should receive preferential treatment under the Act because their use of the ILEC network will "better" promote facilities-based competition. See, e.g., MFS at 37-39; Time Warner at 69-70; NCTA at 28. We discuss the fallacies in these self-serving arguments in Section II.C.2 below.

7/ It is relevant that Section 251 is labeled "interconnection," and not "development of new networks." All interests hope to see network alternatives to the ILECs where such an outcome is efficient, and development of such networks is one issue in considering RBOC petitions under Section 271. But the provisions of Section 251 do not express preferences for particular business strategies.

environment, old terms such as "facilities-based carrier" lose most of whatever loose meaning they once had. 8/ Every participant in a world of full service providers will bring its own advantages -- and its own network needs -- to the table. Some will have a regional or national wireline network. Others may operate wireless systems. Still others may have clustered cable networks they can upgrade. Satellite providers are preparing to enter the voice market. All will need access to ILEC network elements and services in order to be full service participants -- just as the ILECs themselves will need interexchange capacity outside their territories. 9/

LDDS WorldCom can speak to this question with special authority. We own one of the four national interexchange fiber networks. We provide "carrier's carrier" capacity (including capacity to three major ILECs), and retail services to end users. To augment its network WorldCom also leases capacity and services from other carriers including, of necessity, local exchange access from every ILEC. We make "build vs. buy" decisions every day as part of our interexchange operations. As the Act recognizes, this same "build vs. buy" dynamic will be central to the development of local exchange competition. However, we do not have a competitive market to give us appropriate price signals for these decisions. The Act therefore substitutes a general obligation on ILECs to establish their own "carrier's carrier" prices.

8/ Similarly, as WorldCom has explained previously, labels like "local exchange carrier" and "interexchange carrier" will lose meaning. As a facilities matter, parts of the same networks can be used for both. And as a market definition matter, lines between local and toll will fall as competing carriers design their own retail product options with different calling areas and different mixes of flat-rate, low per-minute and higher per-minute service plans. See WorldCom at 13-15.

9/ Notice at ¶ 12; see also id. at ¶ 9 ("Different entrants may be expected to pursue different strategies that reflect their competitive advantages in the markets they seek to target.") The Act encourages the sharing of the economies of scale and scope that exist in the ubiquitous ILEC network, as well as the efficient deployment of new facilities.

Inconsistent With Practical Limitations of New Network Construction. There is a second reason why the Commission should reject RBOC appeals to facilities-based competition as an excuse to avoid their Section 251 obligations. Such appeals are not motivated by a true desire to see construction of competitive networks, for ILECs have no business incentive to see such networks develop. Rather, these appeals reflect ILEC confidence that even if they price their networks above cost, they will be able to continue to earn monopoly rents from their competitors for an extended period because competing local networks will not be available, as a practical matter, for some time.

The reality is that IXCs cannot possibly make the investments that would be necessary to construct new facilities immediately in all of the markets across the country where we currently serve customers. The Commission itself recognizes the magnitude of the capital budget that local exchange competition requires, noting that it would cost AT&T approximately \$29 billion to construct facilities to just 20% of its customer base. Notice at ¶7. By way of comparison, WorldCom also offers service throughout the nation. We are committed to expanding our network and remaining on the cutting edge of transmission technology. But even if we redirected our capital budget for the remainder of this century entirely to local exchange construction, we still would remain largely dependent upon the ILECs everywhere.

The 1996 Act gives competitors the tools they need to grow into the local market through a combination of new construction, leasing of network elements, and resale of retail ILEC services. Capital constraints necessitate heavy reliance on the latter two options, initially in all markets, and indefinitely in many. But WorldCom and other carriers will never get to the point of competing in the local market in the first place if ILECs are excused from their obligations to offer cost-based and nondiscriminatory use of their ubiquitous local networks.

II. ACCESS TO UNBUNDLED NETWORK ELEMENTS IS THE CENTERPIECE OF THE ACT'S PRO-COMPETITIVE PROVISIONS.

A. The Commission Must Reject the ILEC Attempts to Riddle Section 251(c)(3) With Loopholes.

[Notice, Section II.B.2, ¶¶ 74-103]

1. The Rules Must Prescribe a Core List of Elements that ILECs Must Make Available Upon Request.

The network unbundling obligation is the linchpin of the Act's provisions that pave the way for head-to-head competition with the ILEC. Congress understood that competition could not depend solely upon resale of ILEC retail services, on the one hand, or duplication of the ILEC network on the other. ^{10/}

Given the critical role of network elements in the statutory scheme, it is disheartening -- though predictable -- to observe the ILECs' attempt to dilute the right of competitors to make practical use of this important tool. As discussed above, the ILECs have strong incentives to impede the unbundling process and to limit the scope of the network elements they must provide. ILEC comments here continue the effort they have made over the past several years before state commissions and elsewhere to block access to unbundled elements, as well as their resistance to collocation at the interstate level.

ILECs begin by urging the Commission to adopt the narrowest possible list of network elements. They oppose any definition of an unbundled switching element that would provide requesting carriers the full use of their switches. Some go so far

^{10/} Purchase of unbundled network elements -- alone or in combination -- enables a competitor to approach business parity with the ILEC: to provide the same range of local exchange and exchange access services as the ILEC, to design innovative new retail services, to make decisions about pricing of those services, to configure networks in the most efficient manner, and to gradually substitute alternative network elements at the competitor's option. Congress recognized that without this ability to employ the ILEC network, competitors would be unable seriously to challenge the ILEC's overall market position.

as to argue that the FCC should not adopt any list of unbundled network elements, relying exclusively on negotiations. See BellSouth at 28.

Many ILECs also contend that even if the Commission prescribes unbundling of an element, carriers still should be obliged to go through a "bona fide request" process to establish that they actually need the element. 11/ But nothing in the Act gives the ILECs such authority to pass judgment on the business needs of their competitors. 12/ As a practical matter, a bona fide request process would substantially delay provision of unbundled elements. Bell Atlantic, which proposed a similar process before the Pennsylvania Commission, even cited delay as an advantage, observing that "[i]n some cases, the co-carrier will come to realize that it does not want an unbundled element..." 13/ Such a process, moreover, is inconsistent with the Act, because it suggests that the burden is on the requesting carrier to show that it is entitled to the element. The Act instead established a basic right to elements, and the FCC must place the burden squarely on the ILEC to show why a particular element cannot be made available.

The RBOCs have an added incentive to make the Commission's list of core elements short: they could obtain interLATA authority more quickly if the list is minimal. NYNEX even admits that "additional unbundling requirements . . . will only serve to impose unnecessary obligations on incumbent LECs, slow down competition in the local exchange market, and delay BOC entry into the long-distance market." NYNEX at 63.

11/ See, e.g., Bell Atlantic at 17-20; USTA at 14.

12/ SBC argues, for example, that a requesting carrier must show "measurable market demand" for an element. SBC at 98.

13/ Bell Atlantic Statement No. 2, Direct Testimony of Donald Albert, at 16 in Docket Nos. A-310203F0002 et al. (emphasis added). Just so. With enough delay, a requesting carrier may simply give up.

The Commission should see the RBOC comments for what they are -- the opening bid in the negotiations over the terms of interLATA entry -- and refuse their request to dilute the clear terms of the statute. ^{14/} Given the ILEC incentives to stonewall and delay, the Commission must prescribe a core list of mandatory unbundled elements, and a confirm that additional unbundling upon request will be required in the future.

2. The Commission Should Reject the ILECs' Overbroad Claims of Technical Infeasibility.

Most of the ILECs hide behind claims of "technical infeasibility" to limit the scope of their unbundling duties. ^{15/} The Commission must adopt rules that strictly confine any ILEC's ability to deny access to an unbundled element on this ground. Technical infeasibility can cover a multitude of excuses for inaction. This claim also can turn denial into a self-fulfilling prophesy.

The Commission, for example, should firmly reject the claim that if an element has never been provided, then it is by definition technically infeasible. ^{16/} The Act imposes entirely new obligations on the ILECs. As the Commission knows, unbundling of the local network has barely begun, even in the few states that have been leaders in this area. Yet astonishingly, some RBOCs argue that this inexperience alone justifies a refusal to provide an element. Bell Atlantic argues, for example, that:

^{14/} It goes without saying that the FCC needs to leverage the sole "carrot" that it holds -- interLATA entry -- and use it to obtain the RBOCs' willing cooperation in making unbundling a success. Once interLATA entry is granted, the RBOCs lose any incentive to make unbundling work.

^{15/} See, e.g., US West at 50-52; Bell Atlantic at 16-17; GTE at 25; USTA at 31-32.

^{16/} E.g., Bell Atlantic at 16 ("If . . . systems must be developed and deployed before an interconnection point will work, it is not currently technically feasible.")

[a] point of interconnection is 'technically feasible' today, therefore, if it can be successfully ordered, installed, operated, tested, maintained, administered and billed without additional development of hardware or software. If, on the other hand, new software, hardware, or operating systems must be developed and deployed before an interconnection point will work, it is not currently technically feasible. Similarly, if an unbundled network element cannot be tested or maintained, it is not feasible because it could not be operated at a level of service that would either meet customers' or the Commission's expectations. 17/

Bell Atlantic therefore would have the FCC limit its initial set of unbundled elements to those that "have been proven in the marketplace to be technically feasible today." Bell Atlantic at 16. See also, e.g., SBC at 82. Bell Atlantic is saying that if an ILEC is recalcitrant and is willing to do (or has done) nothing to make it possible to obtain access to unbundled elements, it will be rewarded by not having to provide them at all. Congress hardly intended this circular result.

The FCC must define network elements not in terms of what the ILECs have been willing to do thus far (in the absence of a statutory obligation), but rather in terms of the prospective intent of the new Act. The ILECs cannot be given the choice whether to provision a core set of network elements -- they simply must be ordered to do so. That is what the Act requires. All of the core elements identified by the TCC are technically feasible (if an ILEC applies itself to providing them). See TCC at 35-40. All of them are necessary to competition. ILEC stonewalling cannot be allowed.

Similarly, in the future technical infeasibility should provide only a narrow excuse for an ILEC refusal to engage in additional unbundling. The FCC should place the burden of proof on the denying ILEC, and should create a presumption

17/ Bell Atlantic at 16. Similarly, automated operational support systems are still in the developmental stage even in states where loop unbundling has been ordered. Yet ILECs such as Bell Atlantic actually claim that the *absence* of ordering systems make the element technically infeasible to provide. Id. There is an obvious chicken and egg problem associated with this claim.

that if another ILEC has made an element available, it is technically feasible for any other ILEC to do so. ILECs also should not be allowed to claim technical infeasibility before making an effort to provision the element first, and such a claim should only be accepted on a showing of technical failure. Any issues regarding provisioning costs are, if anything, pricing issues, not feasibility issues. 18/

3. Requesting Carriers Need Not Prove that They Are Unable to Obtain the Network Element From Any Other Source.

Some ILECs argue that the broad unbundling requirement of Section 251(c)(3) is limited, in effect, only to those elements that a requesting carrier cannot self-provision or obtain from another source, citing Section 251(d)(2). See US West at 46. The Commission must flatly reject this narrow interpretation. It has no foundation in the Act, and it flies in the face of the plain language of Section 251(c)(3) and the definition of “network element” in Section 3(a)(45).

Indeed, this interpretation would effectively read Section 251(c)(3) out of the Act because, under this standard, no ILEC would ever have an unbundling obligation. Obviously, in the absence of legal barriers to local entry (barriers that the Act has struck down), there is no physical impediment to duplication of the ILEC network, particularly because ILECs must make rights-of-way, conduit, and pole attachments available to competitors. Thus, every competitor has the theoretical ability to provide its own network elements. But Congress recognized that the cost of duplicating the ubiquitous ILEC network is prohibitive, and that construction, even where economically efficient, takes considerable time. See Department of Justice at 6; TCC at 3-4.

18/ An ILEC also has an affirmative obligation to create the ordering, provisioning, billing, and other operational systems necessary to offer these additional unbundled elements.

The ILEC argument rests on a claim that Section 251(d)(2) *limits* their unbundling obligation. They claim that they only need to provide elements if their failure to do so would “impair the ability of” a requesting carrier to provide service, and they argue that no impairment would occur if the carrier has an alternative source of supply. ^{19/} In fact, however, this subsection is correctly read to *expand* the unbundling obligation. Section 251(d)(2) requires ILECs even to provide requesting carriers “access to such network elements as are proprietary” if such access is “necessary” and “failure to provide access to such network elements” (ie. proprietary ones) would impair the requesting carrier’s ability to provide service. ^{20/} ILECs cannot twist this language to undermine the fundamental purpose of the unbundling requirement itself.

4. ILECs Cannot Deny Network Elements Based on Allegations of Insufficient Facilities.

Another pernicious attack on unbundling runs through some of the ILEC comments: the suggestion that they can escape their obligations through claims that they lack capacity. This argument is sometimes accompanied by the claim that if the ILEC needs a given element to meet its own growth projections, it is entitled to deny requesting carriers access to it. ILECs claim they need not expand capacity to meet demand from other carriers. ^{21/}

^{19/} Ameritech also relies on Section 251(d)(2) to argue that requesting carriers may not combine network elements, instead being restricted to service resale under Section 251(c)(4). *See* Ameritech at 28-29. We address this argument in the next section.

^{20/} 47 U.S.C. § 251(d)(2). Even if “such network elements” is read more broadly, this clause still does not justify ILEC refusals to provide basic elements. The standard is “impair,” not prevent. If it costs substantially more to obtain a network element from a competing ILEC (if there are any), or to self-provision the element, then by definition the ability of the competing carrier to provide service is impaired.

^{21/} *See, e.g.*, US West at 33-34 (“[T]he Commission cannot require incumbent ILECs to assume the cost of . . . constructing new facilities for their competitors without having effectuated a taking of ILEC property.”); NYNEX at 44-45. However, there is no takings issue here. ILECs will be compensated for the cost of unbundled network elements under Section 251(d)(2). There is no

The Commission should strongly reject these claims lest the ILECs create a loophole in subsection (c)(3) large enough to drive a fleet of their trucks through. Undoubtedly every ILEC will take the position that its current network is perfectly sized for its current demand and near-term growth. To do otherwise would be to admit to imprudent excess capacity. They could use this excuse to deny requests for virtually all unbundled elements.

The Act does not give ILECs this easy out from their statutory obligations. The Act contemplates that all carriers will routinely offer services and facilities to each other as part of their obligations as common carriers. Section 251(c), however, establishes special obligations on the ILECs expressly because those carriers alone control networks that must be used by others. Thus, while a carrier like WorldCom has an economic incentive to expand its network to sell more facilities to other carriers (or risk those carrier customers going elsewhere), ILECs have the reverse incentive. They have a competitive advantage if they can limit capacity and deny use of their network by their rivals. Section 251(c)(3) is specifically aimed at that market failure. ILECs have an absolute obligation to meet demand for elements. Any other issue goes to pricing. 22/

takings issue here. Moreover, if US West does not provide unbundled network elements, it cannot be granted interLATA authority under Section 271(c)(2)(B).

22/ Thus, under the Act ILECs have an obligation to plan their network growth to meet both their own future needs and those of carrier customers, just as WorldCom and other competitive companies do. Indeed, if the Act is a success, ILECs will predictably need to install additional switch and transport capacity to meet what is expected to be explosive growth in end user telecommunications demand.

SBC attempts to illustrate this issue through the example of its responsibility to provide additional loops to a premise where the single existing loop is in use. If there are no unused lines, and a competitor wishes to obtain another unbundled loop from the LEC, it may be possible for the ILEC to justify cost-based special construction charges for that function -- just as it would levy on an end user for construction of an additional line (though set at TSLRIC). Allegations of facility limitations, like technical infeasibility, must be carefully scrutinized or the unbundling mandate will be gutted.

B. The Commission Should Adopt Its Unbundled Switching Proposal

[Notice, Section II.B.2.C.(3)(b), ¶¶ 98-103]

1. Unbundled Switching Functionality is Required By the Act and Endorsed by ILEC Competitors as a Necessary Element.

LDDS WorldCom expects that other parties will be addressing a variety of specific network elements. We focus here on switch unbundling. As we explained in our opening comments, we have recognized for some time that unbundled switching is critical to local competition. WorldCom at 43-46. In particular, it is critical to the ability of a long distance company to provide local exchange and exchange access services quickly to its geographically dispersed customer base. Unbundled local switching, properly designed, will permit a carrier to participate in the local market fully by combining loops and transport to provide services to end users and carriers. The competitor can then substitute one or more of these elements as alternative vendors appear in the market or its own construction plans proceed. But none of this is possible if the switch is not unbundled correctly in the first place.

LDDS WorldCom has advocated switch unbundling in the states, including filing a petition before the Illinois Commerce Commission that, with critical input from the Illinois staff, 23/ evolved into the switching proposal described by the Commission in the Notice. Our support for the 1996 Act ultimately turned on the Act's making unbundled switching national policy, with an explicit ability to combine elements to provide service. More recently the Justice Department and

23/ See Rebuttal Testimony of Jake Jennings, Office of Policy & Planning, Illinois Commerce Commission, Docket 95-0458 at 7.

other potential ILEC competitors have expressed a similar view that an unbundled switching platform is critical to local competition. 24/

Since the filing of our opening comments here, the Hearing Examiner in Illinois has adopted a proposed order granting the WorldCom petition and requiring the provision of a local switching element. 25/ The Illinois Hearing Officer concluded that the provision of an unbundled switching element and the ability to combine elements are mandated by the Act. 26/ The Hearing Officer relied on the plain language of Section 251(c)(3) and on the Act's broad definition of "network element." Illinois Proposed Order at 65-66. The Hearing Officer found that the unbundled switching element would further the goal of competition because:

[p]otential entrants to the local exchange marketplace would be provided the flexibility to design their own operational and marketing strategy to compete with the incumbent LEC and other carriers for end users of local exchange and other telecommunications services. Purchasers of the network element would compensate the incumbent LEC for the lease of the network facility or equipment, enabling the requesting carriers to utilize strategies as they deemed best to recover their costs and to compete in the marketplace. Id. at 66.

The Commission should reach the same conclusion here. The unbundled switch element is the missing link between unbundled loops and unbundled transport, and provides the functionality that is most critical to the future of local competition.

2. The Unbundled Switch Platform is Technically Feasible.

24/ Department of Justice at 21; CompTel at 33-35; TCC at 37-38; ALTS at 29; ACSI at 40-41.

25/ AT&T Communications of Illinois, Inc. and LDDS Communications, Inc., Case Nos. 95-0458 and 0531 (consol.), Hearing Examiner's Proposed Order, released May 16, 1996, at 64-67 ("Illinois Proposed Order"). A copy of the Hearing Examiner's Proposed Order is being provided to the FCC in response to a staff request for inclusion in the record in this proceeding. The Illinois Commission is scheduled to issue a final order by June 26.

26/ The Hearing Officer concluded that unbundled network elements must be made available to any carrier, regardless of whether the carrier owns local facilities. Illinois Proposed Order at 65.