Several ILECs suggest that it might be technically infeasible to unbundle local switching capability, or that there might be limitations on switching capacity, offering only vague assertions of possible problems, without naming any real ones. 27/ For instance, US West apparently implies that any unbundling other than its proposal to provide a "port" necessarily requires partitioning of its switch. 28/

The concerns expressed by US West do not arise with the unbundled switching element endorsed by WorldCom and being developed in Illinois. Actual partitioning of the switch is neither a necessary nor desirable characteristic of unbundled local switching. Unbundled local switching requires that its purchaser *designate* the features associated with its lines and the routing of its customer's calls, but it does not require direct access to the switching fabric itself. To the contrary, what is required is for the ILEC to establish the systems needed to implement the requesting carrier's choices on an efficient basis.

The technical impediments listed by US West do not follow from the Illinois switch platform approach, or from any other unbundling proposal of which WorldCom is aware. The Illinois switch platform simply permits multiple carriers to purchase line connections to the switch, to define the particular features on those lines (subject to the inherent ability of the facility), to direct the routing of calls from those lines, and to provide access to those lines to other service providers. In short, it allows its purchaser the ability to become a LEC. It is this outcome that drives the ILEC's vague claims of technical infeasibility and nothing more.

27/ Several ILECs attempt to dismiss the Commission's unbundled switching proposal as "undefined" or "technically unfeasible." See, e.g., US West at 56-57; Pacific at 56; BellSouth at 41. These claims are meritless. The Notice clearly explained this element, which is drawn from the Act itself. Further, the pioneering work of the Illinois Commission staff conclusively demonstrates the feasibility of unbundled switching.

28/ US West at 56.

3. Unbundled Switching Capacity Should Generally Be Priced on a Flat-Rate Basis.

[Notice at ¶¶98-103; 153]

In our opening comments, we described the unbundled switching element at length and offered a rate structure that would reflect the cost causation principles underlying use of unbundled switching capability. 29/ Briefly, we supported flat-rate pricing as suggested by the Illinois staff and discussed in the Notice. This rate structure reflects the dominant role of line connections on switch costs, and would be easy to administer. The cost of vertical functions would be included and carriers would have the ability to activate these features without paying additional charges. If other cost factors are shown to warrant a separate charge, then it may be reasonable to modify this approach to adopt a combination of per-line and usage based charges. 30/ CompTel and the TCC also proposed a similar rate structure. See CompTel at 35-36; TCC at 32-33.

The comments raised two issues concerning the rate structure for local switching. Time Warner seemed to favor a usage-based pricing system, without ever arguing that it would be more cost-based. 31/ Rather, it made a vague argument about the need to impose the risk of investment on purchasers of unbundled elements. We note in this regard that the Illinois Commerce

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29/ The Commission asked for comment on pricing of shared facilities, such as switching. Notice at ¶153. See WorldCom at 44-46 (defining unbundled switching element); at 57 (describing rate structure for unbundled switching element); see also CompTel at 33-36; TCC at 30-33.

30/ The specificity of our discussion in our opening comments, and the work that has been done on the unbundled local switching platform at the Illinois Commerce Commission and elsewhere, should be sufficient to dispel the concerns voiced by Sprint and others about the lack of specificity of the unbundled switching element proposal. See, e.g., Sprint at 38.

31/ Time Warner says that "[n]othing in the 1996 Act suggests that this capability should not be priced on a per use basis..." Time Warner at 59. But Time Warner ignores the requirement of Section 252(d)(1) that rates for unbundled elements be based on cost. That provision therefore *does* mandate flat-rate pricing of switching capacity, because that is the cost-based rate structure, as discussed above and in our opening comments. LDDS WorldCom at 57; CompTel at 36-37.

Commission staff developed the per-line pricing proposal advocated here precisely because it involved a sharing of the risk of facilities investment. 32/

A second issue concerns the appropriate standard for pricing the functionality in the local switch used to provide optional, or vertical features. On this issue, Time Warner and Sprint not only disagreed with the flat-rate proposal in the Notice, but with each other. Time Warner objects to including these functionalities in the per-line capacity charge, stating:

> [n]or does the 1996 Act suggest that individual features, including, for example, Custom Calling Services or Class Features, may not be considered to be unbundled network elements. 33/

Time Warner's apparent concern is that each feature is not individually priced as a separate network element Of course, this concern would appear to fly in the face of Time Warner's prior objection that a provider "... purchasing switching capacity based only on the portion of the ILEC's switch it will use..." would avoid the risk of underutilized capacity. 34/ However contradictory, Time Warner at least recognizes that the functionality underlying Class Features and Custom Calling Services are network elements under the 1996 Act.

Sprint, on the other hand, asserts that any function which is also a retail service is exempt from the network element pricing standards that would otherwise apply. In Sprint's view, any network element which an ILEC chooses to offer as a retail service would only be available under the Act's resale provisions. 35/ Sprint itself acknowledges that these features are themselves network elements, but claims that the resale provisions override the ILEC's unbundling obligations:

32/ See Notice at ¶100.

33/ Time Warner at 59.

34/ Time Warner at 59.

35/ Sprint at 38.

> Even though custom calling and CLASS features are advanced switch functionalities and features, they are also telecommunications services that are already unbundled and provided at retail. As telecommunications services, they should be offered to other carriers according to the Act's wholesale pricing standard for telecommunications services (retail rate less avoided costs). 36/

Sprint/Centel's interpretation can be found nowhere in the Act. An ILEC's obligation to price network elements in accordance with Section 252(d)(1)'s cost-based standard is unaffected by whatever the ILEC chooses to provide as a retail service. If Sprint's approach were accepted, then the ILECs could avoid the entire unbundling scheme simply by offering each network element as a retail service.

Those parties who challenge the unbundled switching element simply because it is a shared facility also have no legitimate argument under the Act. E.g., SBC at 41-43; US West at 55-56. Much of the ILEC network is shared. Even unbundled loops are in some measure shared -- for example, when they are concentrated. The only question under the Act is one of how to price shared facilities. We have put forth a reasonable, cost-based, administratively straightforward rate structure for unbundled switching capacity developed by the Illinois staff. The FCC should adopt this in its rules.

4. The ILEC "Port" Proposals Do Not Satisfy the Act.

Despite the obligation and ability to provide an unbundled switching element, the ILEC parties uniformly oppose the FCC's proposal. Instead, they offer to make available, at most, an unbundled switch port or its equivalent. See, e.g., USTA at 32; Bell Atlantic at 25-26; US West at 54-55; BellSouth at 40-42. But as we explained in our opening comments, the switch port does not provide

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36/ Brief on Exceptions, Sprint/Centel, Docket Nos. 95-0458 and 95-0531, Illinois Commerce Commission, at 7-8.

competitors switching capacity, as required by Sections 251(c)(3) and 3(a)(44). See LDDS WorldCom at 43-46, 52-55. A switch port also fails to satisfy the specific requirement of Section 271(c)(2)(B)(vi) that "local switching [be] unbundled from transport, local loop transmission, or other services." See also 47 U.S.C. § 271(c)(2)(B)(iv), (v). Without access to unbundled switching capacity, ILEC competitors will be constrained merely to reselling ILEC retail services, rather than being able to design their own services (within, of course, the latent ability of the switch). Finally, ILEC competitors will be denied the ability to offer the full range of local exchange and exchange access service, like any other local carrier.

These defects are reflected in the specific "port" proposals of the ILECs here. For example, BellSouth's switching port proposal would provide "connectivity," but apparently only to services provided by BellSouth. See BellSouth at 40-42. It also would not give competitors access to the full switch capability, and would not recognize the purchaser as the provider of local exchange and exchange access service. The requesting carriers would be limited to the simple connection of phone calls. 37/

The other ILECs offer similarly cramped proposals. 38/ NYNEX describes its unbundled switch port as providing access to basic switching features and capabilities, but acknowledges that "[a] port by itself, however, has no utility." NYNEX at 69-70. Pacific Telesis, which also proposes only to provide a switching port, admits that access to a switching port is "effectively equivalent to the LEC's bundled retail local service offering minus the loop." See Pacific Telesis at 55

37/ Not surprisingly, BellSouth prefers to explore any further needs for switching functions in negotiations, rather than being required up front to satisfy the needs of competitors by providing a true unbundled switching element. See BellSouth at 41 ("In time, it may be that some carriers may want switching functionalities limited to specific offices and interconnected directly to their networks using their trunks. Negotiations would enable the LECs to explore developing these functionalities.")

38/ See, e.g., USTA at 32; Bell Atlantic at 25-26; US West at 54-55.

(quoting Notice at ¶ 101). The ILECs' switch port proposals are, in effect, an offering of "loopless local exchange service," which provides access to the LEC's retail offerings, but do not permit its purchasers the ability to use the switch functionality to provide their own local exchange and exchange access services.

ILECs do not dispute the limitations of their "port" proposals: they simply ignore the clear conflict between these proposals and their obligations under the Act. First, the Act guarantees competitors the ability to employ ILEC network elements at cost. Second, purchasing unbundled elements is totally different from buying and reselling ILEC retail offerings. 39/ Most importantly, the ILEC's proposals inherently link (read bundle) the switching function to their retail local service and their continued role as sole access provider. The ILECs' staunch opposition to unbundling switch capacity is the best possible demonstration of how important this element is to local competition -- and how critical it is that the FCC mandate this element in its national rules. 40/

The switch port proposal also does not satisfy the interLATA entry requirement of Section 271(c)(2)(B). That provision separately mandates the unbundling of switching from transport and other services. In contrast, the switch port proposal forces a requesting carrier to buy the ILEC's retail service from the port on. 41/

39/ LDDS WorldCom discussed this point at length in its opening comments, and we discuss it in the next section as well. See WorldCom at 43-52.

40/ GTE and others claim that carriers desiring access to the unbundled switching element are merely trying to avoid paying the wholesale rates for service resale under Section 251(c)(4), preferring instead to pay cost-based rates for unbundled elements. See GTE at 38; Bell Atlantic at 26. This is nothing but smoke. First of all, it should be noted that cost-based (c)(3) rates for elements generally will be higher than (c)(4) rates for a single service. Second, the unbundled switching element is not a service, it is effectively a leased facility. The facility has no jurisdictional character, and is used for provision of a full range of services, including basic local exchange, vertical services, and interstate and intrastate exchange access. In contrast, service resale involves purchases of a jurisdictionally distinct retail service for resale. See LDDS WorldCom at 30-36.

41/ Ameritech at 44-45. Ameritech has agreed to provide unbundled local switching in Illinois in the AT&T/LDDS WorldCom case now before the Illinois Commission for decision, although it is unclear what this entails. Ameritech has separately indicated that it intends to offer a service to

As a practical matter, a decision not to require unbundled local switching is a decision to limit consumers in most geographic areas to the more narrowly constrained competition permitted by service-resale. As we explained in our opening comments, unbundled loops do not by themselves provide a viable means of serving a mass market. 42/ Competitors therefore must have the ability to employ ILEC switches to provide services of their own design, paying the ILEC's cost for switching capacity. Competitors' ability to provide service clearly would be "impaired" within the meaning of Section 251(d)(2) if we did not have access to ILEC unbundled switching capability. ILECs who suggest otherwise are plainly wrong.

C. Local Facilities Ownership Is Not a Prerequisite for Purchase of Unbundled Elements.

[Notice, ¶¶ 85, 90]

1. The Act Allows Carriers to Combine Network Elements.

In its opening comments, LDDS WorldCom described the importance of the ability to purchase unbundled network elements (including unbundled local switching) in a combination. WorldCom has described this approach in recent state proceedings as a basic exchange platform. See WorldCom at 39-55. Such a configuration is expressly permitted by the last sentence of Section 251, which requires ILECs to provide "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

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route calls through its switches, but has not provided any detail concerning its treatment of access or the availability of the functionality needed to offer vertical services, nor even indicated whether this service will comply with the Hearing Examiner's Order.

42/ See WorldCom at 46-52.

A number of parties nevertheless have attempted to graft a new clause onto Section 251(c)(3) -- one that would restrict the availability of unbundled network elements to those requesting carriers that also own some local exchange facilities, 43/ relegating all others to service resale under Section 251(c)(4). See, e.g., BellSouth at 33; NYNEX at 31. Put differently, these parties would impose a litmus test of local facilities ownership on any carrier wishing to purchase and combine unbundled network elements.

That test appears nowhere in the Act and is flatly contrary to the plain language of Section 251(c)(3). 44/ This reading also would be contrary to the public interest -- because it would severely curtail on competition, innovation, and customer choice. Finally, this interpretation of the Act would negate the elegantly neutral approach of the Act, which provides several avenues for competition in the local exchange, with a preference for none. See Section I.B, above.

Nothing in Section 251(c)(3) or anywhere else in the Act suggests that a "requesting telecommunications carrier" should be defined as "a carrier that already owns some local exchange facilities." The language of Section 251(c)(3) is unrestricted: the ILECs have a duty to provide network elements, "to any requesting telecommunications carrier for the provision of a telecommunications service." The Act defines both "telecommunications carrier" and

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43/ The advocates of this view do not describe with any particularity, however, what they would consider a "local" facility.

44/ It is also contrary to the Act's legislative history. The resale provisions of both the original Senate bill (S. 652) and the House amendment (H.R 1555) contemplated that telecommunications carriers would be able to obtain ILEC network elements as well as ILEC services. Compare Telecommunications and Competition and Deregulation Act of 1995, S. 652, , Sec. 101 (a), § 251(b)(7), 104th Cong., 1st Sess. (1995) with Communications Act of 1995, H.R. 1555, 104th Cong., 1st Sess. (1995), Sec. 101(a), § 242(a)(3)(A). The Conference Committee reconciled the pricing standards in the two bills, using the House's "wholesale" standard for ILEC services, and the Senate's "cost" standard for network elements. Importantly, nowhere in the legislative history is there a suggestion that a requesting carrier might be foreclosed from buying network elements in combination.

"telecommunications service" broadly and without regard to facilities ownership of any kind. See 47 U.S.C. § 153(a)(48), (49), (51).

A number of parties nevertheless argue that Congress implicitly prohibited carriers from buying network elements if they do not own local facilities, because it provided a service resale option in Section 251(c)(4). The answer to this argument, in addition to the obvious plain language of Section 251(c)(3), is that service resale, and unbundled network elements are two entirely different things, each with certain advantages and disadvantages. We refer the Commission to our opening comments for a full discussion of those differences, and do not repeat them here. 45/

Significantly, in the period since our comments were filed, the state with the most experience with this issue has released a proposed order which addresses this question head on. As the Hearing Examiner in Illinois put it:

> Ameritech and MFS' argument that Section 251(c)(3) of the federal Act requires carriers to combine their own facilities with network elements purchased from incumbent LECs in order to provide telecommunications service is without merit. Acceptance of these arguments would render the language meaningless. An unbundled network element, by the very nature of unbundling, is subject to being combined with another carrier's network elements. There would be no purpose to the latter sentence of section 251(c)(3) mandating that incumbent LECs allow the combination of network elements if this were the interpretation. Furthermore, the section expressly requires that the unbundled network elements be made available to any telecommunications carrier. This is also directly contrary to the limitation offered by Ameritech and MFS that network elements are available only to those telecommunication carriers which provide other network elements. [Illinois Proposed Order at 65.]

Further, the Department of Justice agrees that Congress guaranteed the ability of

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45/ See WorldCom at 30-36.

> the requesting carrier to 'combine' requested network elements to create exchange and exchange access services regardless of whether any of its own facilities are used in providing the service. Such a reading of the statute comports with Congress' desire to offer new entrants a variety of ways to enter local markets and does not eliminate the usefulness of the resale provisions of section 251(c)(4). [Department of Justice at 48-50.]

The Department also agrees that purchase of a package of unbundled elements under Section 251(c)(3) is different from resale of ILEC retail offerings under Section 251(c)(4). The Department points out that a reseller under Section 251(c)(4) cannot participate in the provision of exchange access services, and it "would have little opportunity to differentiate the service offering from that provided by the ILEC or demand that the ILEC create new services that it does not or has not offered to its customers." Department of Justice at 50.

2. The Commission Should Reject Attempts by ILECs, Cable Companies and CAPs To Restrict the Availability of Network Elements to Others.

It is important to note the identity of the parties who have urged the FCC to block requesting carriers from combining unbundled network elements if they do not own local facilities. The ILECs of course oppose the ability to combine network elements, 46/ because such combinations enable a carrier to compete with the ILEC across the full range of services that the ILEC provides, including exchange access. 47/

46/ Bell Atlantic at 12-15; USTA at 76.

47/ Ameritech also argues that if requesting carriers are able to combine network elements, they will be able to circumvent the joint marketing restriction contained in Section 271(e)(1) of the Act. See Ameritech at 29. But that restriction by its terms only applies to joint marketing of resold local retail services (under Section 251(c)(4)) with long distance services. Congress chose to create a temporary ban on a certain type of joint marketing activity for certain carriers (the ban only applies to interexchange carriers with a greater than five percent share of presubscribed lines) partly in recognition that service resale is less complicated and priced according to a standard that does not consider the direct cost of the service. When a carrier buys network elements, however, it commits to pay the ILEC's full cost, and bears the risk that it will not cover those costs from a combination of revenue streams, including exchange access.

But other parties also have pushed to limit the availability of network elements. Not surprisingly, these parties either have limited facilities of their own, and therefore could use the restriction as an entry barrier against other providers, or have already entered the market as full service providers. Both cable companies and CAPs will have a significant need for LEC network elements themselves. 48/ However, neither serve broadly dispersed customer bases across the nation such as those of WorldCom and other long distance companies, and hence neither need to buy as many network elements (frequently in predictable combinations) in as many markets. Focused on their own narrowly-targeted business plans, they apparently have no concern that the Act be enforced uniformly and consistently. They instead seek competitive advantage by reading into the Act a limitation on the use of network elements that is not there.

MFS, for example, would deny the ability to use unbundled network elements to so-called "non-facilities-based" carriers, forcing them alone to pay rates for use of the network that it concedes include "the contribution inherent in the incumbent's retail rates." MFS at 38. Significantly, MFS defines "facilities-based" carefully to cloak itself and exclude others. Mere ownership of a local switch is all that separates a "facilities-based carrier" from a "non-facilities-based carrier" in MFS's world view. The potential for creating incentives for token local facilities is obvious, as is the potential for creating detailed and complex regulatory rules that draw lines between local and non-local facilities, owned and leased facilities, and so on.

But as we discussed in Section I above, the line between "facilities-based carriers" and "non-facilities-based carriers" does not exist in the Act and is not a distinction in the real world either. Congress wisely did not limit Section 251(c)(3)

48/ See e.g., MFS at 38. It is interesting that MFS appears to support mandatory provision of an unbundled switching element; MFS just does not want anyone with a different business plan to be able to use it. See MFS at 46-47.

to a favored class of carriers. The language in the first sentence is clear: "the duty to provide to *any* requesting telecommunications carrier..." The language in the last sentence is just as plain: requesting carriers may "combine such elements." The FCC must resist the arguments of parties who would favor their own business plans at the expense of greater competition and consumer choice for others.

III. SECTION 251 REQUIRES PRICING OF EXCHANGE ACCESS AT COST.

A. Interexchange Access is Interconnection Within the Meaning of Section 251(c)(2)

[Notice, ¶¶159-165, 260, 262]

In its opening comments, LDDS WorldCom urged the Commission to recognize that: (1) Section 251(c)(2) of the Act does not distinguish between interconnection for local calls and interconnection for all other calls, and (2) the service today called interexchange access is interconnection within the meaning of that section and therefore must be priced at cost, as required by Section 252(d)(1). See WorldCom at 65-80. We pointed out that call termination is the same function regardless of where a call originates, and that distinctions between local and toll calls will be impossible to make in the new environment created by the Act.

The ILECs in fact recognize that access and interconnection are one and the same. As US West states:

> Because the Commission's goal is a competitive marketplace, it should not create pricing anomalies between interconnection pricing and costing and the pricing and costing of access charges. . . . In the long term, interstate access and Section 251 interconnection must be totally harmonized, if not merged. 49/

49/ US West at 60-61. US West and the other ILECs of course have as their goal charging existing access rates for local call termination, and not, as LDDS WorldCom proposes, that all interconnection rates be set at economic cost, which is well below the existing rates for interexchange access.

Other ILECs also acknowledge that local call termination and interexchange access are equivalent, reflecting retail pricing decisions and not technical differences. These parties nevertheless argue that the Act is about "local competition," and that access charges therefore may remain well above cost without violating its terms. See, e.g., NYNEX at 85; Pacific Telesis at 78; US West at 60. But the Act is about far more than local competition. It is about eliminating artificial boundaries that constrain consumer choices; it is about "full-service," one stop shopping; and about establishing the basis for RBOC entry into the interLATA business.

Even the provisions of Section 251 are not just about local competition. As the FCC itself recognized, there is no jurisdictional character to unbundled network elements -- they may be used to provide local service and to originate and terminate all other calls. See Notice at ¶120. The FCC also recognized that the rules it establishes for Sections 251 and 252 will apply to both interstate and intrastate calls, because the exchange network is used for both and the same policies and principles (including pricing principles) must apply to both. Id. at ¶¶163-164. As we discussed at length in our initial comments, the distinction between local and toll calls is an artificial one, in any case, and one that cannot be sustained as the basis for price discrimination. See WorldCom at 65-74.

The ILECs are bold in their admissions that interexchange access charges are loaded with subsidies and contribution that are unrelated to the access service provided. See, eg., Bell Atlantic at 10; GTE at 72-73; US West at 60 n.128. That is in fact the reason for their pleas to build a fence around interexchange access so that the major provisions of the Act -- which are designed to root out discrimination and inefficient pricing -- will pass over the access charge scheme, leaving its heavy subsidy system untouched.

But, for the most part, the parties that claim that Section 251(c)(2) of the Act does not encompass exchange access do not confront its plain language. On its face

that section permits any telecommunications service provider to obtain interconnection with the ILEC network for all purposes, including exchange access for terminating and originating calls. See WorldCom at 68-74; see also TCC at 47-51. Given this text, ILECs must point to other sections of the Act and claim that Congress did not actually intend what the plain words of Section 251(c)(2) otherwise provide.

However, those other sections -- Section 251(g) and 251(i) -- say nothing about permanently exempting some forms of interconnection from the provisions of 251 and 252. 50/ The first section maintains the MFJ's equal access and nondiscrimination provisions, including the existing compensation mechanism, but only pending further FCC action, 51/ and the second section preserves the FCC's preexisting Section 201 authority. Significantly, Congress refused to incorporate in the final bill a provision in the Senate bill -- Section 251(k) -- that *would* have excluded the existing interexchange access rules from coverage by Section 251. 52/

The bottom line is that the FCC cannot prop up the ILEC's access revenues in the face of a Congressional policy mandating cost-based carrier-to-carrier interconnection. There is no defensible reason why interconnection rates should be at cost for one set of services and service providers and at another rate for others.

50/ We discussed these sections and their legislative history in detail in our opening comments. WorldCom at 74-76.

51/ Section 251(g) was intended only to maintain in place the "restrictions and obligations" of the existing MFJ spawned access regime while the FCC takes action to implement the Act. That section cannot be read to freeze the access charge scheme and perpetually isolate it from the effects of the 1996 Act. If Congress intended the section to have such an effect, it need not have added the following clause to Section 251(g): "until such restrictions and obligations are explicitly superseded by regulations presented by the Commission after such dates of enactment."

52/ SBC points to the legislative history of the Act in an attempt to prove that Congress intended to carve interexchange access out from coverage under the Act. But SBC's own argument proves our point: SBC relies on a provision that was in the Senate bill but was excluded from the final bill: Section 251(k), which would have expressly left access untouched by the new Act. SBC at 80-82. Section 251(k) of S.652 provided that "[n]othing in this section shall affect the Commission's interexchange-to-local-exchange access charge rules for local exchange carriers or interexchange carriers in effect on the date of enactment." See LDDS WorldCom at 75.

Such discriminatory pricing not only violates the Act but also will distort investment and create artificial benefits for one class of competitors over another. See WorldCom at 65-80. The point is that all ILEC competitors require access to the ILEC network to survive, and they must all pay cost -- economic cost -- if they are to have a realistic chance to compete. The Commission should not give in to demands that its interpretation of the Act be permanently contaminated to protect a distorted access charge regime that pours large undefined subsidies into the coffers of the ILECs -- subsidies themselves prohibited by Section 254 of the Act.

B. The Commission May Permit Subsidies in Access To Remain in Place Pending Universal Service Implementation, But May Not Grant InterLATA Entry Until Restrictions On Cost-Based Interconnection Are Removed.

Many of the commenters in this proceeding, including the Department of Justice and the FCC itself in the Notice, appear to assume that if access were deemed interconnection under Section 251(c)(2), the FCC would have to instantly reform access charges in order to reconcile them with the requirement for cost-based charges for interconnection under the Act. See, e.g., Department of Justice at 42-43; Notice at ¶65.

It is true that unrestricted interconnection (including stand-alone access) is tied up with resolution of universal service questions. But those considerations do not justify a conclusion that the Act's interconnection provisions should permanently exclude interexchange access. As discussed in Section I and in our opening comments, see also WorldCom at 6-9, the Act does not mandate a flash-cut reduction to economic cost. Rather, Section 251 requires the FCC, state commissions, and the affected carriers to act promptly to implement the Act. For example, LDDS WorldCom has encouraged state commissions to order ILECs to

conduct TSLRIC studies now so that they will be in a position to establish cost-based interconnection and network element rates when the FCC issues its rules.

Similarly, because of the thorny issues raised by reducing access charges to economic cost overnight, the Commission may waive applicability of Section 251(c)(2) to stand-alone access during the transition period before completion of the universal service docket and to prepare for an orderly transition to the regulatory and pricing framework required by the Act. 53/ Under Section 251(g), the current access charge system -- with its "restrictions and obligations" -- remains in place as a default mechanism until superseded by action of the FCC. Although charging interstate access for toll termination is discriminatory as compared with cost-based rates for local call termination, see 47 U.S.C. § 251(c)(2)(D); 202(a), such discrimination can continue for a short period of time pending completion of universal service proceedings required by Section 254 and the establishment of industry-wide mechanisms to protect public policy interests. 54/

Such discrimination would not be reasonable, however, if a BOC were permitted to offer interLATA services in-region before its access rates are brought to cost. The critical point here is that Section 251 cannot be deemed to be satisfied, for purposes of the competitive checklist, until all the requirements are fully implemented -- *including cost-based interconnection rates* for all purposes. If an RBOC does not want to wait until completion of universal service proceedings to obtain interLATA entry, it may propose and obtain approval of cost-based and nondiscriminatory interconnection as a replacement for current access rates, and thereby satisfy that part of the checklist. But the FCC cannot, consistent with the

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53/ This transition includes not only the reform of access prices, but the implementation of rules reflecting the state's role in pricing access like any other network element or interconnection arrangement.

54/ WorldCom notes, however, that this is not the same as establishing industry-wide mechanisms to assure that ILECs are financially protected from to competition.

requirements of Section 271(c), grant interLATA relief until all the Section 251 checklist requirements are met -- whether they involve unbundled element pricing, number portability, or pricing interconnection at cost. If this were not the case, the checklist would be meaningless.

With this in mind, we propose that the FCC take the following steps to put the framework of the Act in motion:

(1) The Commission should conclude as a matter of law that "interconnection" in Section 251(c)(2) includes interexchange access provided directly by ILECs to interexchange carriers, and that Section 252(d)(2) requires such interconnection to be priced on the basis of cost.

(2) The Commission should adopt rules requiring rates for interconnection and unbundled elements to be set at economic cost (TSLRIC).

(3) State commissions should set interconnection and unbundled element rates based on TSLRIC pricing principles. The interconnection rates would apply at least to local call termination, and, at the option of the ILEC (pending completion of the universal service proceeding) to interexchange access as well.

(4) State commissions could also order TSLRIC pricing of interconnection for purposes of terminating all intrastate calls, if they choose, or they can await completion of the FCC's universal service proceeding.

(5) The FCC would move expeditiously to complete its universal service proceeding and to create a universal service fund or other mechanism to recover revenues above TSLRIC that must be recovered other than through the ILEC's retail rates for its own services.

(6) Once the universal service mechanism has been created and implemented, carriers would be free to use Section 251(c)(2) interconnection for any purpose.

(7) Until then, Section 251(c) would not be deemed to have been met, and therefore the Section 271(c)(2)(B) competitive checklist for RBOC entry also could not be deemed to have been met.

(8) If an RBOC wished to provide in-region interLATA services before completion of the above steps, it could propose to charge the same cost-based interconnection rates for interexchange access that it charges for local interconnection. (See item (3) above.) Assuming those rates otherwise

satisfy the requirements of the Act, the FCC could conclude that Section 251(c)(2) had been satisfied for checklist purposes.

We set forth the outline of this transition plan in order to dispel the concerns of those who believe that immediate and precipitous changes in interexchange access charges are unwise. As a first priority, however, we urge the Commission to interpret the interconnection provisions of the Act correctly -- to encompass *all* uses of the ILEC network -- and then to use the flexibility inherent in the Act to create a reasonable transition to a world of uniform, nondiscriminatory interconnection rates. 55/

C. Unbundled Elements May Be Used For Any Purpose, Including The Provision of Local Exchange and Exchange Access.

[Notice, ¶¶104-106, 163-165]

LDDS WorldCom agrees with the Commission's tentative conclusion that carriers purchasing unbundled network elements may use them for any purpose, including providing interexchange access to themselves and to other carriers. 56/ We also support the Commission's tentative view that ILECs may not levy Part 69 access charges on carriers providing local exchange and exchange access services using unbundled elements.

These conclusions are required given the nature of unbundled elements: carriers are purchasing the ability to use elements of the LEC network for all purposes, without regard to the services that the requesting carrier may choose to provide and without regard to the jurisdictional nature of those services. The requesting carrier pays the full, unseparated cost of the facility and therefore is entitled to provide the full range of services over those facilities.

55/ CompTel proposed a similar transition plan in its initial comments. See CompTel at 81-87.

56/ See Notice at ¶¶ 163, 165, 120.

Several ILECs nevertheless argue that the Commission should impose a restriction on use of unbundled elements that can be found nowhere in the Act: they would restrict a purchasing carrier's ability to use unbundled elements to provide exchange access. See, e.g., BellSouth at 62. The Act contains no such limitation, however. 57/ Bell Atlantic argues that it should be permitted to continue to impose access charges for completion of any toll call on its network, even if the carrier has purchased unbundled network elements. See Bell Atlantic at 11-12.

The Department of Justice endorses the Commission's tentative interpretation of Section 251(c)(3): "[W]e interpret Section 251(c)(3) to require ILECs to provide requesting carriers (including interexchange carriers) with access to unbundled elements without regard to the nature of the services or the jurisdiction of the services to be offered by the requesting carrier." 58/ The Department adopts this view because "as a practical matter, an interexchange carrier would also have to become an exchange service provider in order to obtain access to the network elements needed to provide switched exchange access under section 251(c)(3)." Id. at 47. LDDS WorldCom agrees.

IV. PRICING AT ECONOMIC COST (TSLRIC) IS WIDELY SUPPORTED AND IS ESSENTIAL IF COMPETITION IS TO FLOURISH.

[Notice at ¶¶ 117-133]

In its opening comments, LDDS WorldCom urged the Commission to require interconnection and unbundled network elements to be priced at economic cost, or

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57/ We address the ILECs' misplaced reliance on Sections 251(g) and 251(i) in the previous section of these reply comments. See also WorldCom at 74-76.

58/ Department of Justice at 46. The Hearing Officer in the Illinois case involving the local switching platform also agreed with this view, "rejecting Ameritech's position that the purchasing carrier would not retain the revenues for exchange access provided through the leased network elements." Illinois Proposed Order at 67.

TSLRIC. See WorldCom at 59-63. See also TCC at 20-22. This view reflects the consensus view of economists regarding input prices. 59/

Similarly, most of the companies seeking to compete with the ILECs, 60/ as well as the Department of Justice, similarly urge the Commission to adopt a national rule under Section 252(d)(1) that would require economic cost pricing. The Department argues that TSLRIC pricing is both consistent with the 1996 Act, and "necessary to effect the Act's primary goal of securing effective and efficient competition." See Department of Justice at 28-29. It also observes that use of TSLRIC is particularly critical where, as here, it is possible "that there will not be facilities-based competition for all elements, in all areas, in the immediate future." Id. at 29-30. The Department and others also correctly point out that TSLRIC pricing will create correct investment signals and will lead to lower prices for consumers. Id. at 29; CompTel at 70-72; TCC at 13-17, 20-22.

Finally, and critically, the Department supports a key point made by LDDS WorldCom in its opening comments: that it is essential to use TSLRIC to price inputs upon which competitors depend if competition is to be meaningful. See WorldCom at 61-64. As the Department of Justice cogently notes:

> In competing against entrants to sell services to end users, the real cost of an input (i.e. a network element) for the ILEC will be its forward looking economic cost, and it can set its prices to the consumer accordingly. But for the entrant against whom the ILEC competes, the

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59/ See, e.g., Interconnection Forum Transcript, Remarks of J. Ordover, supra, at 22 ("there is at this point a fair amount of agreement that TSLRIC is the appropriate at least starting point for pricing network elements").

60/ See, e.g., AT&T at 46-55; TCC at 13-14; ALTS at ____; CompTel at 69-71; MCI at 61-68; LCI at 5; Cable & Wireless at 32-35; Telecommunications Resellers Association at 37-42 (all supporting TSLRIC pricing). Several other new entrant parties suggest that interconnection or unbundled elements can be priced above economic cost to some degree. E.g., NCTA at 49; Cox at 26, 30; Time Warner at 52. These commenting parties would appear, however, to have relatively less use under their particular entry strategies for unbundled elements. Significantly, those companies are able to rely on the reciprocal compensation provision of Section 251(d)(2) to obtain incremental-cost pricing for their call termination.

> cost of the element will be the price charged for it by the ILEC. If this price is above economic cost, the entrant is placed at an artificial competitive disadvantage arising from its dependence on, and the ILEC's exploitation of, the incumbent's market power. Department of Justice at 31

Not surprisingly, the ILECs argue vigorously against economic cost pricing of interconnection and unbundled elements. They argue, first, that the FCC need not establish a national pricing rule, rather leaving it to the negotiation and arbitration process. 61/ Second, they argue that any pricing standard should allow them to charge their competitors for historical, embedded costs and to allocate joint and common and overhead costs to network elements and interconnection. 62/ Third, they urge the Commission to allow them pricing flexibility within that framework by adopting price floors and ceilings or zones of reasonableness. 63/

The Commission must reject all of these efforts to dilute the force of the Act's pricing requirements. The FCC must establish a national pricing standard. 64/ This is essential to address the inequality of bargaining power and the delay that would come from lack of a national standard.

Second, the Commission must reject the ILECs' pleas for a return to inefficient pricing principles. The ILECs ignore the statutory language that

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61/ See, e.g., NYNEX at 40-42; GTE at 12-13; Bell Atlantic at 35; BellSouth at 49.

62/ See, e.g., NYNEX at 43-48; US West at 42; Ameritech at 71-72; Pacific Telesis at 64-69.

63/ See, e.g., SBC at 93-94; BellSouth at 55-56; Pacific Telesis at 69-73 (arguing for the efficient component pricing rule); GTE at 63-64 (advocating Ramsey pricing).

64/ Department of Justice at 24-26; 27-33. See Notice at ¶ 119, 124. In supporting a nationwide pricing rule, the Department correctly observes that the Commission's

> articulation of pricing principles and/or parameters would lower barriers to entry by increasing the predictability of rates and thereby facilitate negotiation, arbitration and review of agreements between ILECs and new entrants. The history of telecommunications over the last thirty years has been marked by long, contentious negotiations in which incumbent dominant providers used a variety of delaying tactics at the negotiating table to impede entry or hobble potential rivals. Department of Justice at 25-26.

precludes reliance on "rate-of-return or other rate-based" methodologies, and continue to demand that they be allowed to recover many costs that are not properly considered network costs. The Telecommunications Carriers for Competition, the Department of Justice, and others in their opening comments presented detailed analyses of the different approaches to pricing and why economic cost (TSLRIC) is correct. Rather than engage in an exhaustive analysis of the ILEC comments on this point here, we rely on the Department of Justice and TCC opening comments and on the reply comments of such parties as MCI and AT&T for this purpose. 65/

The Commission also must reject any proposals that would give the ILECs flexibility in pricing interconnection and unbundled elements. For example, SBC urges the FCC to allow prices to be set through the negotiation process, with price floors and ceilings set to define a "zone of reasonableness." See SBC at 93-94. Others urge the Commission to permit application of the efficient component pricing rule or "Ramsey pricing" to unbundled elements or interconnection. 66/ The ILECs cannot be permitted any such pricing flexibility. Such an approach would violate both the letter and the spirit of the Act, because it would depart from the statutory pricing requirements and would make it easy for ILECs to engage in anticompetitive pricing.

The Commission also must make it clear, through an express rule provision, that non-cost-based volume discounts or other arrangements violate the pricing requirements of the Act, whether for interconnection, unbundled network elements, or service resale. Any non-cost-based volume discount, arrived at through

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65/ We also rely on these comments to refute the argument of some ILECs that TSLRIC pricing constitutes an unconstitutional taking. Generally, in evaluating any takings claim, the Commission must consider the ILECs' overall opportunities for compensation, and not just the revenues they receive for interconnection and unbundled elements.

66/ GTE at 63 n.92; Pacific Telesis at 69-71 (efficient component pricing rule); GTE at 63-64 (Ramsey pricing).

negotiation or otherwise, is discriminatory by definition and violative of the requirement of Section 252(d)(1). 67/ Non-cost-based volume discounts distort competition and can be used to favor the ILEC itself or its affiliates, large ILEC customers, or ILEC strategic partners. The FCC must prohibit such discounts -- especially during the early years of the Act when local competition is in its infancy.

V. THE COMMISSION SHOULD REJECT ILEC ARGUMENTS FOR MULTIPLE LOOPHOLES IN THE SERVICE RESALE PROVISIONS OF THE ACT.

[Notice, ¶¶ 172-177]

As WorldCom explained in its comments, the service resale provisions of Section 251(c)(4) of the Act provide an important option by which a carrier can offer local exchange service -- assuming that the ILECs cooperate in meeting their obligations under the Act. Unfortunately, here too the ILECs are demonstrating their unwillingness to cooperate with local competition.

ILECs raise a number of specific arguments in an attempt to limit the availability and utility of service resale. The Commission should reject these imaginary, unjustified loopholes, most of them so broad that they would gut subsection (c)(4) entirely. LDDS WorldCom addresses some of the most egregious ILEC claims here.

A. Commission Rules Should Make Clear that All Retail Services Must Be Available for Resale.

The ILECs begin their attack on service resale by arguing that the Commission should permit various exceptions. Some of them would swallow the rule. None of them are supported by the Act.

67/ Congress prohibited such discrimination by providing that all negotiated arrangements must be made available to other carriers. 47 U.S.C. § 252(i)

All Services Must Be Available for Resale, Including Those That Are Subsidized. Several ILECs argue that they should not be required to allow resale of services that are priced below cost. See NYNEX at 80; GTE at 44; see also SBC at 71-72; Ameritech at 54. This is patently wrong. The Act contains no such restriction, and for good reason. First, even if an ILEC is offering a service at below cost retail rates in any given case, it is no worse off if that service is marketed by another carrier instead of itself. Second, and equally important, the ILEC still will be receiving the access revenue streams that are associated with service to that customer. As we show in the final section of these comments, this treatment of access seriously diminishes the viability of resale, and refutes the ILECs' claim that they should not be required to permit resale of local services.

The Act Provides Only One Specific Resale Restriction. The Act allows the Commission to promulgate rules that would permit a state to limit resale of services offered by the ILEC to a single category of subscriber. This option was intended to address a single legitimate concern -- that the reseller might make services that were preferentially priced available to subscribers who were not eligible to receive them directly from the ILEC. As WorldCom noted in its comments, we would not oppose such limitations with respect to retail offerings intended for residential, governmental or non-profit customers. However, absolute resale prohibitions would violate the Act.

Several ILECs nevertheless ask the Commission to grant resale restrictions, none of which are within the scope of the Act. For example, SBC seeks consent to restrict the resale of Centrex, even though it does not claim that the service is below-cost or provide any other legitimate explanation. SBC at 76. SBC also makes the astonishing claim that the Act does not authorize the Commission to prescribe rules regarding resale of intrastate services, raising the question what

services it thinks the Commission's authority under the Act does reach. SBC at 70-71. 68/

ILECs must allow resale of contract and discount plans. BellSouth argues that it should not be required to make available wholesale versions of its retail services offered under contract, and other ILECs make a similar claim with regard to regular retail discount plans. BellSouth at [66]; GTE at [47+]; Bell Atlantic at 45-46. These arguments have no basis in the statute, and would have the effect of blowing up the service resale obligation before it ever was implemented. It is obvious that ILECs would then simply set a "standard" price list for their retail services, and do all their serious marketing at discounts off that list.

ILECs must allow resale of promotions. Virtually every ILEC argues that their promotional offerings should be excused from the resale obligation. 69/ Again, they can point to no exception for these offerings in the statute. That should end the discussion. In any event, as a policy matter the Commission should be wary of granting an exception that could quickly swallow the rule.

ILECs must not evade resale through allegations of "capacity limits." GTE makes the peculiar claim that it should not be required to construct new facilities to meet a resale request. See GTE at 51. It is unclear what GTE means by this argument; as a common carrier it is obliged to offer service to any customer. If GTE's point is that it may impose special construction charges on certain retail services, then similar charges would apply if a reseller ordered service on the customer's behalf. Particularly given the ILECs' claims that they can deny network elements based on alleged capacity limits, see Section II.A.4. supra, it is important that the Commission reject GTE's suggestion expressly.

68/ Several ILECs argue that they should not be required to allow resale of access, even though they sell access services directly to end users today. NYNEX at 74; SBC at 69. None of these proposed restrictions has merit.

69/ See, e.g., Ameritech at 56-57; BellSouth at 66; Pacific at 87-88.