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

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

REPLY COMMENTS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

I. Introduction

Of the initial comments reviewed by the Pennsylvania Public Utility Commission (PaPUC), many parties oppose the Commission's proposal to adopt highly detailed national mandates to implement the interconnection and unbundling provisions of § 251 of the Act.[1] Many parties also oppose the Commission's proposal to establish uniform detailed costing and pricing standards, for states to use when fulfilling their responsibilities under § 252(d).

Most parties agree that the preemptive approach favored by the Commission at this time would be impractical from a timing perspective, would exceed the Commission's authority under inter alia, §§ 251(d) and 252(d) of the Act, and would actually work to hinder rather than facilitate the development of effective competition. Even parties who support the Commission's

[1]Comments were filed by at least 170 parties in this proceeding. Given the abbreviated time frame for replies (effectively a week by the time the initial comments of others were secured), the PaPUC could not possibly review all of the comments filed by parties in this docket. Consequently, PaPUC reviewed what it believed to be a representative sampling, including comments filed from most main industry segments and bases these reply Comments upon this sampling of comments.

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preemptive approach in theory, recognize that in light of the 6 month statutory deadline for FCC action in this docket, the Commission's overly ambitious proposals are impractical and would likely fail.[2]

As we noted in our initial Comments, the FCC's highly preemptive approach appears to be based in part upon an inaccurate assumption that most states have not taken any action in furtherance of the Act's objectives to promote competition in the local exchange market. The FCC should not attempt to "micromanage" interconnection policies at the state level under the guise of necessity due to alleged state inaction, since in reality, many states in addition to those named in the NOPR including Pennsylvania, have taken actions to open the local exchange market to competition.[3]

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[2]See Comments of Sprint Corporation, p. 21.

[3]Accord Wyoming Public Service Commission at p. 11 ("Second, the NPRM errs, at footnote 10, in not listing Wyoming among the 19 states which are making rules governing local competition. Wyoming is, in fact, among the most advanced states in this regard."); Idaho Public Utilities Commission at p. 4 ("The FCC observes that at least '19 states had in place some rules opening local exchange markets to competition.' Idaho is not among the listed states. It is unfortunate that the FCC overlooked Idaho. Since 1988 Idaho has permitted competitors to provide local exchange service to business customers with more than five access lines in Idaho's largest LATA..."); Comments of the Arizona Corporation Commission at p. 2 ("Arizona is one of the states that has been very active in promoting competition in our local telecommunications markets. The Arizona Commission has been actively and aggressively pursuing a thoroughly considered plan, intended to provide an orderly transition from a non-competitive environment to a fully competitive environment in local telecommunications."); Comments of the Alabama Public Service Commission at pp. 1-2 ("The Alabama PSC asserts that the report on which the FCC relied for its evaluation of the activities of the states in opening local exchange markets to competition is incomplete and does not present an accurate representation of state actions. The Commission's conclusion that more that 30 state had not adopted laws or regulations providing for local competition is incorrect. We know there are a number of states, including Alabama, that have taken action to open the local market to competition and others that have proceedings in progress to finalize rules to implement competition that were not included in the commission's representations regarding state actions to promote local competition."); Comments of the Oregon Public Utility Commission at p. iv ("About eighty percent - or more- of the population of the United States live in a state where

Instead of the highly preemptive, overly complex and detailed approach proposed by the Commission, the Act contemplates a broad procompetitive, deregulatory national framework which leaves the details to carrier negotiations and state commissions. Indeed, in place of the Commission's tentative plan, a large number of commenters recommend a federal framework which incorporates maximum flexibility at the state level to adapt federal standards where necessary to accommodate local market conditions and concerns. The PaPUC agrees with many commenters that this was the framework envisioned by Congress in the 1996 Act and that the FCC's proposed one-size-fits-all approach, while contained in earlier versions of both the House and Senate bills, was ultimately rejected by Congress. In rejecting the one-size-fits-all approach, Congress recognized the invaluable work and contributions of state commissions, their proximity and expertise in these areas, and, the counterproductiveness of setting state procompetitive initiatives aside in favor of hastily devised national requirements which are untested and unlikely to address the unique and varied concerns of many local markets.

II. The Plain Language of § 251 Can Not Be Reasonably Interpreted To Effect a Fundamental Shift of State Authority Over Intrastate Interconnection and Access Policies To The FCC As A Few Parties Argue.

Several parties argue that "the 1996 Act effects a major change in the division of jurisdictional responsibilities between the states and the Commission." Id. at p. 4.[4] They contend that the "...1996 Act creates a more vertical division of responsibilities" and that Section 251(d) accords the Commission a broad policy-making role over carrier-to-carrier

competition is actively encouraged.").

[4]Accord Comments of MFS; CompTel Comments, p. 17 ("These provisions repudiate any interpretation of the 1996 Act as limiting the FCC's jurisdiction over co-carrier arrangements to interstate services."); Comments of LDDS WorldCom, p. 22.

interconnections, regardless of whether the interconnected traffic is "interstate" or "intrastate" under the 1934 Act.[5]

This interpretation is not supportable for a number of reasons. As discussed in detail in the sections that follow, such an interpretation ignores the plain language of the statute, well established principles of statutory construction and the impact of § 152(b) which preserves state authority over intrastate interconnection matters. In the words of one commenter:

> "Nor does it [the NPRM] offer even anecdotal evidence that Congress intended to create the 'super agency' envisioned by the NPRM, which would sacrifice flexible negotiations and public utility commission (PUC) discretion on the altar of national uniformity. As discussed below, the approach in the NPRM is so flawed, in numerous critical respects, that its adoption would be inconsistent with congressional intent to 'provide for a pro-competitive, deregulatory national policy framework...,"[6]

A far more reasonable interpretation of statutory framework contained in §§ 251 and 252 of the Act was advanced by the Rural Telephone Coalition and many other commenters, including the PaPUC. In contrast to the highly detailed prescriptive federal mandates proposed by the FCC which would result in predetermined outcomes in both the negotiation and state arbitration phases of the proceeding, the statute calls for a highly flexible federal overlay which relies upon FCC leadership in selected areas, but which for the most part promotes the resolution of interconnection issues at the state level through the recognition and incorporation of state procompetitive initiatives consistent with the requirements of the Act. In contrast to the highly prescriptive approach proposed by the FCC, which is not supported by the statute, and

[5]See inter alia, Sprint Comments at p. 4.

[6]Comments of GTE Service Corporation, p. 2.

except for the areas specified in § 251 which recognize that FCC leadership and some degree of uniformity may be required on certain issues (i.e., number administration, etc.), §§ 251 and 252 do not contemplate additional FCC action until both the negotiation process and state arbitration process fail. One party aptly summarizes the Commission's role vis a vis the states and industry as follows:

> The 1996 Act establishes a new framework and division of state and federal authority with respect to interconnection to provide exchange and exchange access services. As the NPRM recognizes (para. 37), the new law combines interstate and intrastate interconnection under a single regime. However, contrary to the NPRM's suggestion (para. 26), that new regime is placed almost entirely under state responsibility. Even state jurisdiction is limited, however, by the initial reliance on (a) largely deregulated negotiations to reach individualized interconnection agreements in general and (b) broad rural exceptions.

Comments of the Rural Telephone Coalition at p. 2.

In summary, a highly prescriptive federal approach to issues arising under §§ 251 and 252 of the Act would undermine the procompetitive, deregulatory framework established by Congress. Additionally, as discussed in section II(B) of these Comments, even if the Act conferred this type of broad authority upon the FCC, which it does not, important policy considerations also weigh against the adoption of a highly prescriptive approach which attempts to inappropriately predetermine and straight-jacket the outcome of the carrier negotiation and state arbitration process.

A. Many Parties Agree That The Commission's Proposal for A Highly Detailed Preemptive Federal Interconnection and Unbundling Policy Would Undermine The Regulatory Framework Established by Congress in § 251 of The Act. of Statutory Construction.

The Commission's tentative conclusion to adopt a set of detailed and complex nationwide

interconnection and unbundling requirements which would effectively preempt existing and future state policies or regulations, even though consistent with the Act, would undermine the regulatory framework set out in § 251 of the Act.[7] A highly prescriptive centralized regulatory paradigm is simply not supported by the plain language of the statute or well established rules of statutory construction.

As many parties observe, Section 251 identifies only a few interconnection requirements which Congress expressly recognized would require immediate Commission oversight and some degree of uniformity. Those include: number portability requirements (§ 251(b)(2)); standards for states to follow in imposing resale limitations pursuant to Section 251(c)(4); administration of the nation's numbering system (Section 252(e)); and enforcing existing exchange access and interconnection requirements under subsection (g).[8]

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[7]Accord Comments of Bell Atlantic, p. 2 ("To the extent the Commission proposes here to adopt detailed 'national' rules to implement these provisions – for example, by requiring LECs to unbundle elements of their local networks in ways that have never been required by state commissions and that never even have been tried, or by setting prices for intrastate arrangements -- its proposals are contrary to the Act in two separate respects.").

[8]Comments of GTE Service Corporation, p. 4 ("....Congress's failure to modify § 2(b) to exclude §§ 251 and 252...reflects the fact that §§ 251 and 252 give the FCC authority to regulate intrastate communications only as a backstop, with the exception of a handful of specific matters discussed below."); Comments of the Wyoming Public Service Commission; Comments of the Oregon Public Utility Commission at p. 18; Comments of the Arizona Corporation Commission at p. 17 ("A reasonable interpretation of § 251, when read in conjunction with §§ 601 and 152(b), is that the states continue to have exclusive jurisdiction over intrastate concerns, unless there is a clear delegation of authority to the FCC in the language of the 1996 Act. The FCC has been delegated such authority in those circumstances where it may not be technically feasible or effective to implement on a state-specific basis because of the effect on the nation network. Examples of these circumstances are number portability, § 251(b)(2) and numbering administration, § 252(e)."); See also Comments of the Rural Telephone Coalition at p. 9 ("..[E]ven where the 1996 Act authorizes Commission interconnection rules -- with respect to number portability, numbering administration, designating additional carriers as incumbent LECs, identifying elements to be unbundled and guidance as to permissible state resale limitations – the Commission should adopt only general, minimally intrusive rules. Such

In each of these provisions, Congress included language which expressly provided for "requirements prescribed by the Commission". It is well recognized that where Congress includes particular language in one section of the statute but omits it in another section of the same act, it is generally presumed that the disparate inclusion and exclusion was done intentionally and purposely. U.S. v. Lamere, 980 F.2d 506 (8th Cir. 1992). Consequently, it must be presumed that had Congress intended for state rules to conform to the FCC's requirements in all cases, it would simply have stated this and would not have perceived a need to incorporate references to "Commission requirements" for select issues as it did in the limited instances discussed above.

The Commission cannot ignore or dismiss these express, albeit limited, directives which Congress saw fit to set out in § 251. Courts have consistently warned against discarding words employed in a statute as being mere surplusage or being meaningless particularly where the terms are included in some sections and excluded in other sections of the same Act as here. U.S. v. Lamere, 980 F.2d 506 (8th Cir. 1992). Additionally, Congress is presumed to act with knowledge of this basic rule of statutory construction, as well as all others. Haynes v. Shoney's Inc., 803 F.Supp. 393 (N.D. Fla. 1992). Other well established principles of statutory construction also support the interpretation that Congress did not intend for FCC rules to displace state requirements in the vast majority of cases.

For instance, a regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's origin and purpose. Miller v. U.S., 841 F. Supp. 305 (D.N.D. 1993). The

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regulatory restraint would be in keeping with the deregulatory and pro-competitive philosophy of the Act and the statutory framework.").

FCC's proposal to adopt highly detailed, preemptive federal rules governing interconnection and unbundling is not consistent with the overall deregulatory, procompetitive objectives of the Act. Indeed, only in certain areas of the interconnection process, where negotiated outcomes or the state arbitration process may not achieve the Act's goals, does the Act carve out a primary role for the FCC.[9]

Moreover, when a court looks to the plain language of the statute in order to interpret its meaning, it does more than view words or subsections in isolation; rather a court derives meaning from the whole context of the provisions which requires reading the relevant statutory provisions as a whole. In re Rufener Const., Inc., 53 F.3d 1064 (9th Cir. 1995). As discussed in more detail below, the FCC's expansive interpretation of its own authority under § 251 can only sustained if one completely ignores or discounts other equally important provisions of the Act, and the dual regulatory scheme provided for in § 152(b) of the Act, reducing them to nothing more than mere surplusage. A basic tenet of statutory construction is that effect is given to all of a law's provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error. Silverman v. Eastrich Multiple Investor Fund, 51 F. 3d 28 (3rd Cir. 1995).

The expansive interpretation advanced by the FCC would also violate the well established principle of statutory construction which requires the courts to interpret a statute so as not to be internally inconsistent. An overly expansive interpretation of FCC authority under § 251 to preempt state policies and rules creates irreconcilable internal inconsistencies with at least three

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[9]Accord, Comments of Pacific Telesis Group, p. 10.

other provisions of the statute, i.e., § 251(d), § 261(b) and 152(b) of the Act. A court must attempt to reconcile two seemingly conflicting statutory provisions whenever possible, instead of allowing one provision effectively to nullify other provisions. U.S. v. Gordon, 961 F.2d 125 (2nd Cir. 1992).

Finally, the FCC's expansive interpretation does not comport with the presumption against preemption of State law in areas traditionally regulated by the States."[10] As NARUC notes "[s]tates have regulated all aspects of local telephone service since 1910." Id. at p. 20.

In summary, one can only reconcile the FCC's highly prescriptive approach with the framework established by Congress in §§ 251 and 252 if one completely ignores at least three sections of the statute, violates most well established principles of statutory construction, and forgets about § 152(b) altogether.

1. Those Advocating Preemptive Federal Policies Ignore § 251(d)'s and § 261's Directives Which Require The Commission To Recognize State Procompetitive Initiatives That Are Consistent with The Act.

Those who argue that the Commission has the authority to preempt state access and interconnection policies ignore the provisions of Section 251(d)(3) which expressly preserves state access and interconnection policies, orders or rules unless they are inconsistent with the requirements of Section 251 and substantially prevent implementation of the requirements of § 251 and the purpose of Part II. Most of these parties make little to no attempt to even reconcile the FCC's expansive interpretation with the express limitation on the FCC's authority contained in §§ 251(d)(3) and 261(b).

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[10]See California v. ARC America Corp., 490 U.S. 91, 101 (1989).

The limitations imposed by § 251(d)(3) upon the FCC's authority must necessarily govern to a very large extent the nature of the rules ultimately adopted by the FCC. "The enforcement by the Commission of detailed, prescriptive national rules, unless the rules mirror the regulations, orders, and policies of all the state commissions, would violate the prohibition in § 251(d)(3)." Iowa Utilities Board at p. 5. "[R]ather than demanding a rigid national uniformity, the Act contemplates a variety of approaches, since all the states' schemes to address interconnection access and competition are not identical..."[11]

Recognition by the FCC of state interconnection requirements is also consistent with the provisions of § 261(b) which states:

> ...Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

Both §§ 251(d) and 261(b) require that the express authority of States to adopt their own interconnection and unbundling regulations be a controlling influence on the type of rules to be adopted by the Commission.[12]

Finally, many parties agree with the PaPUC that the Commission's repeated inquiries regarding the consistency of existing state policies under § 251(d)(3) of the Act also exceed the

[11]Comments of the Washington Utilities and Transportation Commission, p. 7.

[12]Colorado Public Utilities Commission Comments at p. 6.

boundaries of its authority.[13] The proper tribunal for review of the "consistency" of state actions is not the Commission, but federal court.[14]

2. § 152(b) Also Prohibits the Prescriptive Approach Favored By The Commission and Supported By Some Parties.

Several parties agree with the FCC's tentative conclusion that "Congress must have intended § 251 to take precedence over any contrary implication based on § 2(b), notwithstanding that the 1996 Act left § 2(b) unchanged."[15] They also support the Commission's interpretation that "[t]he only way to read these provisions together with § 2(b) jurisdictional boundaries to remain in effect for "retail" services offered to end user customers, the detailed scheme for intercarrier relationships in Part II of Title II supersedes § 2(b).[16]

Once again, this position is not supportable for the following reasons. As noted by the Iowa Utilities Board (p. 6) it was probably no mere oversight that the Commission cited no statutory authority for its tentative conclusion that Congress intended § 251 to take precedence over any contrary implications in § 152(b) of the 1934 Act, since there is no legal basis for the

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[13]Accord Initial Comments of the New York State Department of Public Service, p. 14 ("Since Congress intended to permit very limited intrusion on state sovereignty, the Commission's questioning of existing state policies is at best premature. For in fact, only if a state fails to act may the Commission intercede.").

[14]Accord Initial Comments of the New York State Department of Public Service, p. 14.

[15]Comments of Sprint, p. 6; Comments of MFS; Comments of CompTel, p. 17 ("CompTel agrees with the FCC's tentative conclusion...that Congress did not see the need to amend Section 2(b) because Section 251 established a new co-carrier regime in addition to , not in place of, the existing regime of jurisdictionally separated intrastate and interstate services and facilities provided on a carrier-to-customer basis."); Comments of LDDS Worldcom at pp. 22-23.

[16]Comments of Sprint at p. 7.

Commission's tentative conclusions in this regard.

Section 152(b) expressly reserves state jurisdiction over intrastate wire or radio communications. It states that "Except as provided in sections 223 through 227 of this title inclusive, and section 332..., nothing..shall be construed to apply or to given the Commission jurisdiction with respect to ...charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications service by wire or radio of any carrier..." (Emphasis added).

Under the landmark case interpreting § 152(b), Louisiana Public Service Commission v. FCC[17], the Supreme Court stated that § 152(b) not only "impose[s] jurisdictional limits on the power of" the FCC, but also "provides its own rule of statutory construction" for interpreting the Act.

Equally important, as Bell Atlantic points out, Louisiana also instructs that section 2(b) must take precedence over any contrary implications that theoretically might be gleaned from section 251, which is the exact opposite of the interpretation advanced by the FCC in its NOPR.[18]

As in Louisiana, it is once again the FCC's cursory dismissal of § 152(b) which permits it "[t]o...expand its power in the face of a congressional limitation on its jurisdiction" which effectively renders its actions nothing less than regulatory fiat designed to override Congress' clear directives. Id. at 374-75. The Supreme Court struck down the FCC's flagrant dismissal of § 152(b) in Louisiana and will certainly do so again given the plain language of the 1996 Act

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[17]106 S Ct at 1899, 1902, n.5.

[18]Bell Atlantic Comments at p. 4.

and other factors discussed below.

As we pointed out in our initial Comments, the continued applicability of § 152(b) is also clearly supported by the fact that in the past, when Congress has intended that federal laws preempt state laws, it has made its intent clear through the adoption of express exceptions to § 152(b). For instance, when Congress preempted state rate and entry regulation of CMRS providers in 1993, it expressly exempted § 332 from § 152(b)'s application. Where Congress has provided for such express exemptions in the past, it would be inappropriate to imply a similar exemption in the absence of an express Congressional exemption.[19] Moreover, in this instance such implied preemption is specifically prohibited by both § 601(b) and § 251(d)(3) of the Act discussed in an earlier section of these Comments.

In promulgating the Telecommunications Act of 1996, Congress had the opportunity to exempt §§ 251 and 252 of the Act from § 152(b)'s application but specifically chose not to do so. Significantly, earlier versions of both the draft Senate and House bills originally exempted Part II of Title II from § 152(b)'s application altogether. However, the final law restored § 152(b)'s applicability without limitation. This demonstrates an unmistakable intent on the part of Congress that § 152(b) remain in full force and effect.[20] As GTE notes, repeal by

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[19]See Also Comments of GTE Service Corporation, p. 4 ("It is well established that repeal by implication is disfavored: "[T]he legislature is presumed to envision the whole body of the law when it enacts new legislation. Therefore, the drafters should expressly designate the offending provisions rather than leave the repeal to arise by implications from the later enactment.").

[20]See Comments of Bell Atlantic, p. 4 ("By its [47 U.S.C. § 152(b)] plain terms, this provisions -- left undisturbed by the 1996 Act -- flatly contradicts the Commission's apparent operating assumption here. It precludes any inference that Congress intended the Commission to promulgate "national rules" displacing exclusive state regulatory jurisdiction over intrastate services.").

implication is disfavored. Thus it is presumed that the drafters envision the whole body of law when enacting new legislation and that they would expressly designate the offending provision rather than permit a repeal to arise by implication.

The FCC's flawed analysis conflicts with another well established principle of statutory construction. Courts will refrain from interpreting a statute in a way that creates a conflict or where provisions of the Act would be internally inconsistent. A more reasonable interpretation and one that does not render provisions of the statute internally inconsistent or superfluous, is that Congress intended that the FCC continue to oversee any interstate aspects of interconnection, and the States (except for specific items such as number administration) continue to oversee the intrastate aspects -- including, most notably, costs and prices.[21]

In summary, both §§ 152(b) and 251(d)(3)[22] support the adoption of flexible federal guidelines that would accommodate and incorporate differing state interconnection and unbundling approaches. A rule which severely limits variation among the states would clearly violate the letter and intent of the 1996 Act.

B. Not Only Do The Statutory Provisions Themselves Require Deference to State Policies, But The Record Is Replete with Sound Policy Reasons Which Support Commission Recognition of State Policies.

In addition to the legal arguments which require the FCC to defer to state interconnection

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[21]Comments of Pacific Telesis Group, p. 12.

[22]See Comments of Bell Atlantic, p. 5 ("Congress made plain in the 1996 Act that it envisioned a far broader role for the states in regulating intrastate interconnection and related issues than the notice contemplates. In section 251 itself, Congress specifically instructed the commission that its rules mush 'not preclude the enforcement of any regulation, order, or policy of a State commission' so long as it is consistent with section 251 and 'does not substantially prevent implementation' of the requirements of section 251 or the purposes of sections 251-261.").

policies, the record is also replete with sound policy reasons which support Commission recognition of state interconnection and unbundling policies.

First, in many respects states are well ahead of the Commission in developing pro-competitive policies.[23] Industry, local regulators, and carriers are all better versed than the FCC in what local networks can do and what the necessary parameters under the Act should be.[24]

Second, state policies are oftentimes varied in approach and tailored to address different local market conditions and concerns. Pacific Telesis Comments at p. 9. "Each local market is different some are flat, others are hilly or mountainous; some are densely populated, others are suburban or rural; some have state-of-the-art technology, others retain older facilities; some possess a temperate climate, others suffer harsh storms; some are wealthy, others are poor; some have a high proportion of business customers, others are predominantly residential."[25] State policies are developed using procedures that involve comprehensive fact-finding examining the unique local market conditions and concerns and needs of all of the various local market participants in the particular jurisdiction.

Third, other parties point out that the agreements reached so far discredit the "one-size fits-all" approach of national uniform standards. Competitive LECs have negotiated different interconnection arrangements because they have, inter alia, different market strategies, infrastructure and traffic volumes. Detailed one-size-fits-all rules appear destined to fail for

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[23]Sprint Comments at p. 5.

[24]Comments of Pacific Telesis Group at p. 46.

[25]Comments of GTE Service Corporation, p. 8.

other reasons. Such rules do not appropriately recognize the complexity of the issues presented.[26] "Variations in market characteristics would foreclose viable uniform national standards even if technology and operating systems were identical.[27] The need for maximum flexibility, a concern reiterated by virtually commenters is discussed in more detail in the following sections of these Comments.

Third, there is not sufficient evidence at this time for the FCC to pick and choose among state policies for nationwide application nor any evidence which would indicate that nationwide rules are necessary or desirable.[28] There are vast differences among and within states, and the approach that works well in New York or Illinois could be devastating in New Mexico. See Comments of the Rural Telephone Coalition, p. 10. Additionally "...choosing one state's rules to implement one part of the 1996 Act and another state's rules to implement another part of the 1996 Act could lead to a set of rules that are internally inconsistent and economically inefficient results."[29]

Fourth, for many states, competition will most likely be primarily a local phenomenon, with an emphasis on smaller firms willing to provide service to particular niche markets.[30] The FCC's references to the likelihood of "regional and national markets" developing is pure speculation at this time. Smaller states in particular have markets and telecommunications

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[26]Oregon PUC Comments at p. iv.

[27]Comments of GTE Service Corporation at p. 9.

[28]Accord Comments of the New York State Department of Public Service, p. 19.

[29]Comments of the Oregon Public Utility Commission, p. 21.

[30]See Comments of the Idaho Public Utilities Commission at p. .

providers that are so small as to require close attention to individual circumstances.[31] What all of these comments make clear is that what is feasible or reasonable under widely differing circumstances are not easily susceptible to federal rulemaking.[32]

Fifth, it was not the intent of Congress to have states and competitors that have made progress in this area halt their efforts, nor for the Commission to implement a nationwide policy that could stall the competition that is already underway.[33] Pacific Telesis notes that one reason the Act defers so much authority over interconnection arrangements to the states is that some state PUCs have already made much progress toward resolving interconnection issues. The lack of deference to state policies would be "both unwise and wasteful."[34] States are much closer to the needs of consumers and overall are better equipped to assure that the transition to local competition occurs in a reasonable manners that accommodates unique local market conditions and concerns.[35]

Finally, as GTE Service Corporation notes, enforcement of mandatory federal rules would open the doors to a floodgate of filings and enforcement requests that "would swamp its [the FCC's] limited resources and paralyze its processes." While earlier versions of the Senate and House Bills may have contemplated a highly centralized proscriptive framework, the 1996 Act leaves procompetitive state initiatives that are consistent with Section 251's objectives intact

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[31]Comments of the Idaho Public Utilities Commission at p. 7.

[32]Comments of Pacific Telesis Group at p. 10.

[33]See Initial Comments of the New York State Department of Public Service at p. 14.

[34]Comments of GTE Service Corporation at p. 10

[35]Id. at p. 10.

and in so doing ensures that the resources and expertise of state regulatory agencies in this area will be given deference, with the FCC as a backstop in the event that a state fails to carry out its responsibilities under the Act.

1. Almost All Commenters Recognized a Need for Flexibility At the State Level and That Detailed Standards Would Be Unworkable.

Most parties identified a critical need for flexibility at the state level to address local concerns and conditions. Without a doubt, the need for flexibility in determining interconnection points and unbundled network elements at the state level was the number one concern expressed in all of the comments reviewed by the PaPUC.[36]

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[36]Comments of the Michigan Public Service Commission Staff at p. 5 ("A maximum degree of flexibility will have the greatest potential for furthering competition while allowing the ability to recognize public interest considerations that must be taken into account."); Alabama Public Service Commission Comments at p. 10 ("State commission need flexible, broad implementation regulations from the FCC so that they can establish rates and monitor conditions in a way that allows them to act efficiently as they facilitate the development of competitive markets."); Initial Comments of the NYDPS, p. 3 ("As a matter of policy, the Commission should recognize that the most effective rules to promote competition will evolve over time, and therefore it must recognize the importance of flexibility."); NYNEX Comments at p. 3 ("While Section 251(d) requires the Commission to establish regulations necessary to implement the requirements of Section 251, promulgating overly detailed rules would be inconsistent with Congress' intent that voluntary negotiations, not mandatory regulations, be the primary vehicle for achieving interconnection agreements between carriers. It would also hamper a State commission's ability to consider other approaches that better reflect unique State circumstances or policies which are nevertheless consistent with the Act."); Initial Comments of the Maryland Public Service Commission at p. 3 ("The MDPSC firmly believes that the better choice would be for the FCC to modify its NPRM to establish flexible guidelines which promote the cooperative regulatory paradigms envisioned by Congress when it passed the 1996 Act."); Illinois Commerce Commission Comments at p. 12 ("...Further, the FCC should recognize that there may be some situations where it is not in the public interest to apply the FCC's minimum standards. Further, the FCC should recognize that there may be some situations where it is not in the public interest to apply the FCC's minimum standards. Realistically, even with the FCC setting only minimum standards, the FCC will not be able to anticipate the full repercussions of its rules.")); Initial Comments of the Wyoming Public Service Commission at p. 13 ("The Act, we believe, neither mandates nor desires an outcome which would result in over-

Many parties pointed out that proceedings at the state level are specifically tailored to fit the players, regulatory climate, history, geography and economy of the particular jurisdiction in question.[37] Similarly other commenters identified a need for state flexibility to permit variation in standards based on technical[38], demographic[39], or geographic reasons[40], or to

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prescription tot the states and a loss of state flexibility to apply their expertise to implementation of the Act.") Comments of the Colorado Public Utilities Commission, p. 17 ("Colorado also still has a number of geographic areas that are not served by any telephone company. Provision of service to these areas may require some unique interconnection arrangements.").

[37]Initial Comments of the Iowa Utilities Board at p. 10; See also Comments of the State of Maine Public Utilities Commission et al. at p. 6 ("Montana is one of the largest sates in the nation, but with one of the smallest populations. There are enormous geographic, demographic and economic differences among various parts of Montana. There is 'lots of dirt between phones.' Much of that dirt is the Rocky Mountains. To meet these conditions, the Commission works intensively with local communities and providers to improve both basic and advanced services.").

[38]Oregon Public Utility Commission at p. 26 ("A static definition of allowable interconnection points might not allow interconnecting companies to take advantage of newer, more efficient technologies as they are developed.").

[39]Alaska Public Utilities Commission at p. 2 ("The APUC is concerned that explicit national interconnection rules may not adequately address the particular policy concerns presented by Alaska's unique geography and demographics. Eighty-eight percent of all cities and villages in Alaska are in isolated, rural areas that have extremely low populations (under 1000 people). Over 90 percent of all communities in Alaska, including the state capital, are not accessible by road and are considered high cost and rural under national standards.").

[40]Comments of the Colorado Public Utilities Commission at p. 27 ("In the area of provisioning of outside plant, the terrain of Colorado is varied. The eastern plains have sandy soils and installation is relatively straightforward. However, much of the mountain areas require special construction to bury cable or support poles. In fact, in some areas the ground is so rocky that burying cable is impossible and USWC uses sections of submarine cable placed on top of the ground with a marginal covering over it. It would be impossible to develop a standard set of terms and conditions for laying submarine cable in the Rocky Mountains. Specific national standards, that will address every situation in each of the fifty states, is impossible and unnecessary.").

promote efficient competition in the local exchange market.[41]

Still others identified a need for "the Commission's rules....to cope with the dynamic nature of the telecommunications industry, particularly (but not solely) when addressing technical issues."[42] MFS pointed out that the pace of technical change in this industry is breathtaking, and it "would be foolhardy for anyone to imagine that a list of network elements or forms of interconnection compiled today could remain accurate for more than a few months." Id. at pps. 4-5.

Even those parties that argue for the imposition of national detailed rules recognize the impossibility of developing meaningful mandates at the national level, particularly within the timeframe under which the Commission must act.[43] Without needed flexibility at the local level, the development of effective competition will not occur.

a. **A Critical Need for Flexibility In Setting Unbundled Network Elements Was Identified by Virtually All Commenters.**

Most parties urge that if the FCC establishes national rules for unbundled network

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[41]Accord Comments of the Florida Public Service Commission, p. 17 ("However, we believe that the identification of specific network unbundled elements should be handled by the state commissions and the carriers within the state. While the FPSC believes the FCC should allow the states to establish the specific network elements, we believe the FCC should identify the categories that should be required. ...We advocate generic categories because we do not want the FCC to order specific elements that some LECs in Florida may not be able to offer.").

[42]MFS Comments at pp. 4-5.

[43]Comments of Sprint, p. 1 ("Given the time constraints for the promulgation of initial rules, the Commission should initially establish a presumption that interconnection at local and tandem switching points is technically feasible, and allow the states to resolve disputes regarding any additional requested points of interconnection, pursuant to the following guidelines...").

elements, they should allow for variation among states.[44] Additionally, any requirements established should be minimum obligations for unbundled network elements and interconnection standards.[45] A more exhaustive list would erroneously assume a nonexistent high degree of similarity among the various local network architectures in place across the country.[46] Given the variations in terrain, population density and even customer demand, the rapid changes now occurring in technology cannot be deployed throughout the country at the same rate. State flexibility to require unbundling that best reflects the situation each state faces rather than a rigid approach is called for.[47] Minimum standards would accommodate the different technologies used, inter alia, digital, optical, ATM, etc.[48]

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[44]See Comments of the Florida Public Service Commission at p. 17; Comments of the Colorado Public Utilities Commission at p. 18; Initial Comments of the State of Maine Public Utilities Commission et al. at p. 3 ("Given the variations in terrain, population density and even customer demand, the rapid changes now occurring in technology cannot be deployed throughout the country at the same rate. The states must therefore have the flexibility to require unbundling that best reflects the situation each state faces rather than be bound by a rigid approach").

[45]Accord Initial Comments of the New York State Department of Public Service, p. 4 ("Finally, the Commission may set minimum requirements for unbundled network elements and minimum interconnection standards."); Comments of Cincinnati Bell Telephone Company at p. 15 ("CBT concurs with the Commission's tentative conclusion that the Commission should identify a minimum set of network elements that incumbent LECs must unbundle."); Comments of the Illinois Commerce Commission at p. i ("As developed in these comments, the ICC supports the adoption of national minimum rules, within the bounds of the FCC's authority, to assist the development of competition."); Comments of the Idaho Public Utilities Commission at p. 8 ("The only answer lies with a minimum set of national guidelines that provide general guidance and perhaps a set of minimum technical standards.").

[46]Comments of the Wyoming Public Service Commission at p. 3.

[47]Initial Comments of the State of Maine Public Utilities Commission et al. at p. 3.

[48]See Comments of the Washington Utilities and Transportation Commission, p. 13 ("While the industry is moving towards digital to optical (SONET) conversions, and will likely see SONET to ATM conversions shortly, the specific technology used (or not available) should not be a barrier to interconnection."); Comments of the Florida Public Service Commission at

Even where technically feasible, the cost of unbundling may differ dramatically from carrier to carrier because of differences in technology, support systems, and demand.[49] All of these variations weigh heavily in favor of rules which incorporate a large degree of variability to best address circumstances within the different jurisdictions.

Finally, given the abbreviated time allowed for this proceeding, it would be impossible for the Commission to establish anything more than minimum standards.[50] Further unbundling should be left to the negotiation or arbitration processes where incumbent LECs and/or states can address the unique needs of specific new entrants and other local market concerns and conditions.[51]

b. A Critical Need for Flexibility at the State Level to Determine Technically Feasible Interconnection Points Was Identified By Almost All Parties.

Any national policy on interconnection and technically feasible points should also be broad in scope in order to maximize the benefits to consumers where unique circumstances may require unique solutions and may preclude numerous types of interconnection that are employed

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p. 17 ("We believe that states need the flexibility to address specific requests for unbundled elements and thus should be granted such flexibility.").

[49]Comments of Pacific Telesis Group, p. 47.

[50]Comments of Sprint Corporation at p. 21; Accord Comments of LDDS Worldcom at p. 28 ("The FCC should make it clear that any set of unbundling guidelines would operate only as minimums, with state commission, private parties in negotiations, and the FCC itself free to add additional elements or to develop the concept or content of the elements further. We therefore strongly support the FCC's tentative conclusion that state commission are free to require additional unbundling.").

[51]Accord Comments of the Illinois Commerce Commission at p. 36 ("With respect to unbundling, the FCC should set a minimum level with the states allowed to require additional unbundling where necessary or based on a bona fide request.").

today.[52] Similarly, the Oregon Public Utility Commission noted that "prescriptive FCC rules about where interconnection must take place would not effectively deal with all the combinations and permutations that might occur. This type of analysis is best left to the states when negotiations fail, because each situation must be evaluated separately." Id. at p. 25. The Iowa Utilities Board pointed out at p. 9 of their Comments that there is no way that the Commission...can foresee which one of the many possibilities will work best for diverse potential entrants and incumbent carriers. Any national minimum standards for interconnection should not be bound to a single method of interconnection. There are several different methods of interconnection, including meet point arrangements, virtual collocation, physical collocations and direct transport via entrance facilities. Each new LEC may wish to configure its network differently.[53] Therefore, national rules should not cut off modes of interconnection that may be potentially superior for certain interconnecting carriers.

Other parties note further concerns with rigid federal rules including that "[c]ommission specifications of what is technically feasible will serve to limit creative applications of the technology and retard development of new services." "...Rigid rules for interconnection and the unbundling of network elements would not be capable of keeping up with changes in technology and would not accommodate differences among carriers operations."[54] Along these same lines, GTE states that "[t]echnical feasibility must be determined on an individual basis and, in reality, depends on what particular operating area of the ILEC is affected." Id. at p. 19. Sprint also

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[52]Comments of the Colorado Public Utilities Commission at p. 18.

[53]Comments of the Illinois Commerce Commission at p. 25.

[54]See Comments of Rural Telephone Coalition, p. 31.

notes that "...[w]hether interconnection and access to requested network elements are technically feasible might depend in part on whether it is possible to accommodate the necessary equipment of the requesting carrier at such points." Id. at p. 20.

It is also pointed out that many new entrants will serve only limited geographic areas and thus will not benefit from "standard" forms of interconnection and may be unable to implement their proposed services without the flexibility that a negotiated solution may provide.[55] Colorado Public Utilities Commission points out that "interconnection between competing local exchange providers should be determined on a case-by-case basis because 'technically feasible' points are possible in a number of locations." Id. at p. 16.

Additionally, a flexible policy could take into account geographic differences in availability, capacity limitations, harm to the network or LEC customers, the proprietary interest of the LEC and the LEC's ability to maintain service consistent with industry standards and other consideration s that do not lend themselves to detailed nationwide rules.[56]

MFS points out in its Comments that while the Commission should focus on setting minimum acceptable standards for interconnection and related arrangements, it should allow flexibility both to permit arrangements that exceed the minimum and to recognize that the minimum itself will have to change over time. Id. at p. 28. If States are not allowed to implement additional interconnection standards to accommodate any situation, a carrier may be precluded from making a business decision to select one method of interconnection over other

[55]Pacific Telesis Group Comments at p. 59.

[56]Comments of Pacific Telesis Group at p. 27.

less desirable ones for the particular state.[57] PaPUC supports guidelines that are broad enough to encompass the variety of approaches taken by pro-competitive states.[58] We also agree that "[p]ossibly more important than pre-determined and pre-specified variations allowed among states, the FCC should craft its minimum rules, wherever possible, to allow market-driven options to develop through the use of bona fide requests and, for incumbent LECs, the negotiation process in section 252."[59]

Interconnection and collocation points should also be set in a flexible manner to recognize "real differences between small and large operations, high-volume and low-volume local networks, and urban and rural carriers and networks. These differences involve: (a) digital switch size, type, and manufacturer, (b) differences in the ability to subdivide the local loop, specifically with respect to interconnection at intermediate, connection points, (c) space availability in buildings of different sizes, (d) trunking capacity cost increments at different absolute values, (e) degree of large computer network administration, (f) personnel deployment, (g) operations interfaces." Rural Telephone Coalition at p. 32.

Finally, even those parties who support the Commission's nationalized framework, appear to recognize the impossibility of developing a uniform set of federal standards applicable in all situations particularly within the timeframe under which the Commission must act under the

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[57]Comments of the Illinois Commerce Commission at p. 26.

[58]Initial Comments of the New York State Department of Public Service, p. 25; Comments of the Washington Utilities and Transportation Commission, p. 2; Pacific Telesis Group Comments at p. 11 ("National rules should not foreclose workable state alternatives that are consistent with the procompetitive intent of the Act.").

[59]Comments of the Illinois Commerce Commission at p. 13.