

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

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In the Matter of )

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

CC Docket No. 96-98

REPLY COMMENTS OF  
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

THE NATIONAL CABLE TELEVISION  
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## SUMMARY

As NCTA demonstrated in its initial comments, the Telecommunications Act of 1996 ("1996 Act") compels the adoption of uniform national rules to fulfill the statutory goal of opening all telecommunications markets to competition. Virtually all actual and potential providers of competitive local exchange service concur. Arguments to the contrary from incumbent local exchange carriers ("ILECs") and State commissions ignore specific statutory language conferring authority on the Commission to open up local markets to competition and to preempt State and local barriers to the provision of intrastate telecommunications services.

At bottom, efforts to circumscribe the Commission's authority reflect nothing less than resistance to the fundamental achievement of the 1996 Act: the establishment of competition in all telecommunications markets as an element of national policy. To argue that the 1996 Act preserves intact the piecemeal approach to local competition that existed prior to enactment -- with its exclusive reliance on private negotiations between parties with grossly disparate bargaining power, overseen by States acting under inconsistent regulatory regimes -- is tantamount to asserting that the 1996 Act did nothing to change the status quo. There is no legal or policy basis for the rear-guard action advocated by these commenters.

The States' concerns notwithstanding, the adoption of explicit national requirements will not unduly constrain their ability to fashion regulations designed to respond to unique circumstances within their jurisdictions. The 1996 Act preserves all State regulations that are not inconsistent with the regulations established by the Commission to implement the requirements of Section 251. However, State regulations that are inconsistent with the requirements of Section 251 -- including regulations that contravene the Act's requirements by imposing ILEC requirements on competitive local exchange carriers ("CLECs") -- must be precluded.

NCTA also takes issue with the telephone monopolists that advocate virtually no role for the Commission in interconnection matters and contend that State commissions may step in only if carrier-to-carrier negotiations break down. While the 1996 Act indisputably places significant reliance on the negotiation process, Congress understood that negotiations without clear national standards will not produce a competitive marketplace. This is borne out by a review of the publicly-reported agreements between ILECs and CLECs. Only two of these agreements purport to meet the competitive checklist; many of them fail to address critical items such as compensation, points of interconnection, resale, and unbundling. The complaint-driven process proposed by the ILECs would, conveniently for the monopolist, regularly leave new entrants in the position of commencing costly litigation or accepting less than satisfactory arrangements. In either case, competitive service to the public would be substantially delayed, if not halted altogether.

The national rules adopted by the Commission should promote facilities-based competition:

- Agreements between adjacent, non-competing ILECs provide the best evidence of what is technically feasible. Since ILECs routinely interconnect with one another at agreed-upon "meet points," despite the protestation of the incumbents in this proceeding, such an arrangement should be deemed technically feasible for interconnection between an ILEC and a CLEC.
- The Commission should also require bill and keep arrangements for the transport and termination of traffic between networks, at least as an interim measure. Contrary to the arguments of the incumbent carriers, the Commission's authority to order such arrangements is clear and poses no constitutional issues. Bill and keep arrangements reflect the mutual benefit that each interconnecting carrier derives from the ability to terminate calls on the other's network.
- Unbundled elements and interconnection should be priced on an incremental basis, with an allocation of forward-looking joint and common costs. Prices should not include embedded costs, as the ILECs argue. The use of embedded costs will lead to inefficiently high prices that distort investment decisions. Permitting ILECs to collect

these costs from competitors is tantamount to guaranteeing them a return on past investment. Competitive markets do not provide such a guarantee and neither should regulation.

- Requests for unbundled elements in addition to the minimums established by the Commission should be presumed reasonable. The Commission should reject proposals to allow ILECs to impose bonds or liquidated damages on requesting carriers or require the first requester to pay the full set-up costs for a new element. These proposals would only impose barriers to competition. Nor should the Commission impose a reciprocal unbundling requirement on a CLEC requesting unbundled elements. As the Department of Justice noted, there is neither a statutory support nor a sound economic rationale for such a requirement.
- Congress established a wholesale rate for the resale of ILECs' retail services -- the retail rate minus "avoided costs" -- that appropriately balance the goal of facilities-based competition and the benefits of resale. The Commission should reject proposals put forward in this proceeding that would deviate from this standard.

Finally, contrary to the suggestion of some commenters, national standards to govern requests for modifications and suspensions of the interconnection requirements is permitted under the 1996 Act and would reduce disputes, increase efficiency, and promote uniform opportunities for new entry in rural areas across the nation. The 1996 Act was not intended to shield rural or small ILECs from competition, and requests for interconnection with rural carriers should be presumed to be bona fide. Widespread suspensions of or exceptions to the competitive checklist would contravene Congress's intent to ensure the benefits of competition to consumers in rural areas.

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The National Cable Television Association, Inc., by its attorneys, hereby submits these reply comments in the above-captioned proceeding.

**I. THE ACT CONFERS AUTHORITY ON THE FCC TO ADOPT UNIFORM NATIONAL RULES TO IMPLEMENT SECTION 251**

Notwithstanding the 1996 Act's clear directive to the Commission to establish the "regulations to implement the requirements" of Section 251, numerous incumbent local exchange carriers ("ILECs") and State commissions argue that the Commission's authority under that provision is constrained by Section 2(b) of the Communications Act of 1934. Their arguments ignore the specific language of Sections 251 and 253 conferring authority on the Commission to open up local markets to competition and to preempt State and local barriers to the provision of intrastate telecommunications services. In light of this specific language, a new exemption to Section 2(b) was unnecessary and its absence from the 1996 Act carries no weight.

At bottom, efforts to circumscribe the Commission's authority under Section 251 reflect nothing less than resistance to the fundamental achievement of the 1996 Act: the establishment

of competition in all telecommunications markets as an element of national policy.<sup>1/</sup> To argue that the 1996 Act preserves intact the piecemeal approach to local competition that existed prior to enactment -- with its reliance on private negotiations between parties with grossly disparate bargaining power, overseen by States acting under inconsistent regulatory regimes -- is tantamount to asserting that the 1996 Act did nothing to change the status quo.

Contrary to the aspirations and arguments set forth by ILECs and State commenters, Congress substantially revised this pre-enactment legal and policy framework and replaced it with a mandate for uniform national standards adopted by the Commission and applied by the States. There is no legal or policy basis for the rear-guard action advocated by these commenters. The Commission should resist their entreaties and instead establish explicit, national rules that will govern the nationwide transition from monopoly to competitive provision of telecommunications services as mandated by the Act

**A. Specific Provisions in Sections 251 and 253 Evidence Congress's Intent to Give the FCC Authority Over Intrastate Matters, Notwithstanding Section 2(b)**

Contrary to the claims of ILECs and State commissions, Section 2(b) of the Communications Act<sup>2/</sup> does not limit the Commission's authority to adopt explicit national rules.<sup>3/</sup> Congress expressly empowered the Commission to supervise the intrastate aspects of

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<sup>1/</sup> Bell Atlantic's objectives are particularly transparent. Bell Atlantic asserts that the Commission's rules under Section 251 would only govern agreements that "cover wholly interstate matters." See Bell Atlantic Comments at 7. On the very next page of its comments, however, Bell Atlantic also asserts that Section 251 does not apply to interconnection for the purpose of transmitting interexchange traffic. See id. at 8. Thus, under Bell Atlantic's reading, Section 251 provides the Commission with virtually no authority whatsoever, since the States address intrastate issues arising under Section 251 and no interexchange issues are encompassed within Section 251

<sup>2/</sup> 47 U.S.C. § 152(b).

<sup>3/</sup> See generally National Cable Television Association, Inc. Comments at 10-12 ("NCTA Comments"). Some ILECs and State commenters agree with the Commission's tentative conclusion that the adoption of explicit, national rules is consistent with both the language and policies of the Act. See Frontier

interconnection, and to preempt State and local barriers to competition in the provision of intrastate telecommunications services. These specific grants of authority over intrastate matters distinguish this proceeding from the one overruled by the Supreme Court in Louisiana Public Service Commission v. FCC,<sup>4/</sup> in which the Commission was found to have lacked such specific authority. In light of this explicit authority over intrastate communications conferred in Part II of Title II, a specific limitation on Section 2(b)'s rule of construction was unnecessary.

First, Section 251 expressly addresses an ILEC's duty to provide interconnection for "the transmission and routing of telephone exchange service," an intrastate service,<sup>5/</sup> and orders ILECs to do so "in accordance with the requirements of [Section 251]."<sup>6/</sup> The Commission, in turn, is charged with adopting "regulations to implement the requirements" of Section 251.<sup>7/</sup> By its own terms, therefore, the 1996 Act delegates to the Commission responsibility for implementing the intrastate interconnection obligations of ILECs established by the statute. This

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Corporation Comments at 3-7 ("Frontier Comments"). See also Massachusetts Department of Public Utilities Comments ("Massachusetts DPU Comments") at 4.

Notwithstanding its apparent support for national standards governing interconnection and unbundling, the Massachusetts DPU asserts incorrectly that the Commission lacks the authority to establish national pricing standards and that "states lawfully may disregard such pricing principles" if adopted by the FCC. Id. at 4; see also Colorado Public Utilities Commission Comments at 10-11 ("CoPUC Comments"). But see NCTA Comments at 8-10 (contending that the Act empowers the FCC to set pricing standards). The DPU's pricing rules would permit ILECs to include universal service subsidies as part of charges for interconnection for the next two years. Even after a new universal service scheme is established, ILECs would be able to include joint and common costs in interconnection charges in inverse relation to demand elasticity. These policies would enable ILECs to create a classic price squeeze between interconnection prices and retail rates for services offered by competitors, impeding the development of facilities-based competition. Such a result would be directly contrary to the purposes and policy of the 1996 Act, and illustrates the need for national standards to govern pricing as well as other terms of interconnection.

<sup>4/</sup> Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355 (1986) ("Louisiana Pub. Serv. Comm'n").

<sup>5/</sup> 47 U.S.C. § 251(c)(2)(A).

<sup>6/</sup> Id. § 251(c)(2)(D).

<sup>7/</sup> Id. § 251(d)(1).

reading of the plain language of the 1996 Act accords with both the legislative history<sup>8/</sup> and the overall framework of the law.<sup>9/</sup>

Second, under Section 253 of the 1996 Act, the Commission has authority to preempt State or local rules that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>10/</sup> This provision explicitly evidences Congress' willingness to confer Federal authority over intrastate matters -- even without an exception to Section 2(b) -- in order to effectuate the Act's "pro-competitive, deregulatory national policy framework."<sup>11/</sup> Construing the Act as denying the Commission authority to establish rules to promote competition in the provision of intrastate telecommunications services flatly contravenes the substance and purpose of Section 253.<sup>12/</sup>

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<sup>8/</sup> See generally NCTA Comments at n.32. The Conference Report refers to the Commission's responsibility to "implement new Section 251," H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 122 (1996) ("Conference Report"), without any indication that its implementation responsibility extends only to the interstate aspects of Section 251. Indeed, in elaborating upon the BOC in-region interLATA entry provisions, the Conference Report states that:

[I]t is important that the Commission rules to implement new Section 251 be promulgated within 6 months after the date of enactment, so that potential competitors [to the BOCs] will have the benefit of being informed of the Commission rules in requesting access and interconnection. . .

Id. at 148-49. Thus, the Conference Report recognized that the Section 251 rules promulgated by the Commission would be of central importance to potential local exchange service competitors requesting access and interconnection, further evidencing Congressional intent to have Federal rules govern the access and interconnection sought by competing providers of an intrastate service.

<sup>9/</sup> BellSouth Comments at 8.

<sup>10/</sup> 47 U.S.C. § 253(a), (d) (emphasis added).

<sup>11/</sup> Conference Report at 113.

<sup>12/</sup> Nor does the Commission's proposal violate the Tenth Amendment. Cf. New York State Department of Public Service Comments at 5 n.2 ("NYDPS Comments"). The Tenth Amendment does not insulate States from Federal regulation simply because the regulation affects an area traditionally subject to state control. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550 (1985). The Federal government has broad authority to develop national standards without running afoul of the Tenth Amendment. Pinnock v. International House of Pancakes, 844 F.Supp. 574, 589 (S.D.Cal.

Third, given these express grants of authority over intrastate matters, the reliance by ILECs and State commenters on Louisiana is misplaced. The relevant inquiry is whether the 1996 Act in general and Section 251 in particular evidence a Congressional intention to confer Federal authority over the intrastate aspects of interconnection and unbundling. Louisiana holds that "a federal agency may preempt state law . . . when and if it is acting within the scope of its congressionally delegated authority."<sup>13/</sup> The statutory directives to the Commission set forth in Sections 251 and 253 are sufficiently "unambiguous [and] straightforward as to override the language of Section 152(b) that 'nothing in this chapter shall be construed to apply or give the Commission jurisdiction over intrastate service . . .'"<sup>14/</sup> Unlike Section 220 -- the statutory provision at issue in Louisiana -- Part II of Title II expressly authorizes the Commission's proposed exercise of Federal authority over an intrastate matter.<sup>15/</sup>

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1993) (subjecting State and local authorities to Federal standards under the Americans with Disabilities Act does not intrude upon state sovereignty in violation of the Tenth Amendment) (citing South Carolina v. Baker, 485 U.S. 505, 512 (1988)); New York v. United States, 112 S.Ct. 2408, 2420 (1992) (Federal government may not compel States to regulate, but may adopt Federal standards and preempt contrary state regulations).

<sup>13/</sup> Louisiana Pub. Serv. Comm'n, 476 U.S. at 374.

<sup>14/</sup> See id. at 377.

<sup>15/</sup> See id. at 376-77. The Commission's suggestion that Section 251's failure to disturb "state authority over local end user rates may explain why Congress saw no need to amend Section 2(b) expressly," In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 96-182 (rel. April 19, 1996) at ¶ 40 ("Notice"), is consistent with the tenor of the decision in Louisiana. In that case, the Court did not discuss interstate and intrastate authority in the abstract, but instead made repeated references to the impact on "state rate-making" of the plenary Federal jurisdiction over depreciation sought by the FCC. See, e.g., Louisiana Pub. Serv. Comm'n, 476 U.S. at 364, 370-71, 373, 374, 377, 378, 379. The stringent preemption standard applied by the Court in Louisiana Pub. Serv. Comm'n undoubtedly reflected the broad impact that the asserted Federal jurisdictional interest would have on the core State power to regulate local end user rates for intrastate communications services. By contrast, the Federal authority over interconnection proposed in the Notice does not disturb State authority over end user rates.

As the Court itself noted in Louisiana, "state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>16/</sup> While preemption was not warranted in the case of depreciation,<sup>17/</sup> the Commission here cannot fulfill its statutory obligation to prescribe interconnection and unbundling requirements designed to spur local telephone competition<sup>18/</sup> if the Act is construed as barring CLECs from obtaining interconnection in accordance with those requirements whenever they are providing local exchange service.<sup>19/</sup>

Finally, contrary to the arguments of ILECs and State commissions, the 1996 Act's failure to add Part II of Title II to the list of express exceptions to Section 2(b) does not evidence Congress's intent to limit the Commission's jurisdiction solely to the interstate aspects of interconnection.<sup>20/</sup> It is equally likely that the Conference Committee determined that an express carve-out was unnecessary because the specific provisions of Sections 251 and 253 overrode the general limitation imposed by Section 2(b).<sup>21/</sup> In any event, the efforts by the ILECs and the States to impose a post hoc interpretation on the Conference Committee's decision to drop a particular provision must fail: the deletion or omission of language has

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<sup>16/</sup> Id. at 374, citing Hines v. Davidowitz 312 U.S. 52, 67 (1941).

<sup>17/</sup> Id. at 375.

<sup>18/</sup> See, e.g., House Report at 71-73.

<sup>19/</sup> See Frontier Comments at 6 ("there is clearly a federal interest in promoting local entry because interconnection and unbundled elements are non-severable from intrastate communications and are necessary for the origination and termination of interstate communications").

<sup>20/</sup> See, e.g., Bell Atlantic Comments at 7; National Association of Regulatory Utility Commissioners Comments at 9-10 ("NARUC Comments").

<sup>21/</sup> See AT&T Corp. Comments at 6 ("AT&T Comments").

consistently been held not to be a reliable indication of Congressional intent.<sup>22/</sup> Indeed, in Louisiana, the Court rejected an argument by the FCC that the failure by the Conference Committee to the 1934 Act to adopt a provision "which expressly permitted the States to prescribe their own depreciation practices for the purpose of determining intrastate rates," demonstrated a Congressional intent "to provide the FCC with power to pre-empt state regulation over depreciation practices." The FCC's reliance on the deleted provision, said the Court, "made too much of too little."<sup>23/</sup>

**B. States May Not Prescribe or Enforce Rules that are Inconsistent with the 1996 Act or the Commission's Rules**

Contrary to the assertions of some commenters,<sup>24/</sup> the Commission's adoption of explicit national requirements implementing Section 251 will not unduly constrain the States' ability to fashion regulations designed to respond to unique circumstances prevailing within individual States. Section 251(d)(3) preserves all State regulations that are consistent with the regulations established by the Commission to implement the requirements of Section 251.<sup>25/</sup> States will have ample opportunity to experiment with various approaches to promoting local

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<sup>22/</sup> See, e.g., Taylor v. U.S., 495 U.S. 575, 589-90 (1990) appealed after remand, 932 F.2d 703 (8th Cir. 1991), cert. denied, 502 U.S. 888 (1991); Communications Workers of America v. Beck, 487 U.S. 735, 756-59 (1988); Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 568-70 (1976). See also United States Ex. Rel. Stinson v. Prudential Insurance, 944 F.2d 1149, 1156-57 (3rd Cir. 1991).

<sup>23/</sup> Louisiana Pub. Serv. Comm'n, 476 U.S. at 378, n.6.

<sup>24/</sup> See, e.g., GTE Comments at 7-12; United States Telephone Association Comments at 6-8 ("USTA Comments"); CoPUC Comments at 6, n.12; Oregon Public Utility Commission Comments at 5-7 ("Oregon Comments").

<sup>25/</sup> 47 U.S.C. § 251(d)(3).

competition, so long as they do so in a manner that is consistent with the Act and those regulations.<sup>26/</sup>

Contrary to the assertions of some commenters, however, Section 251(d)(3) does not require the Commission to tailor its rules to be consistent with all existing State access and interconnection requirements.<sup>27/</sup> Such a limitation would effectively prevent the Commission from establishing regulations implementing Section 251, since it would be impossible to devise uniform standards that preserve every aspect of the approaches to interconnection taken by the various States. These commenters ignore the 1996 Act's broad delegation of authority to the Commission to "establish regulations to implement the requirements" of Section 251.<sup>28/</sup> Likewise, they ignore the Act's admonition that both ILEC interconnection and unbundling obligations and State regulatory and enforcement activity must be carried out in accordance with "the requirements" of Section 251.<sup>29/</sup>

The converse of the formulation set forth in Section 251(d)(3) is also true: State regulations that are inconsistent with the requirements of Section 251 -- including the regulations

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<sup>26/</sup> Moreover, the standards prescribed by the Commission will actually be executed pursuant to individual interconnection agreements that can be tailored to the specific needs of the parties and the unique circumstances of their locality. Such a result is wholly consistent with the collaborative Federal-State framework established by the Act. See generally NCTA Comments at 2-8; see also Frontier Comments at 7.

<sup>27/</sup> Cf. Maryland Public Service Commission Comments at 22 ("Maryland PSC Comments"); Arizona Corporation Commission Comments at 6; Virginia State Corporation Commission Staff Comments at 2; Alabama Public Service Commission Comments at 6-7 ("Alabama PSC Comments").

Similarly, Sections 261(b) and (c) of the Act, 47 U.S.C. §§ 261(b), (c), simply "preserve State authority to enforce existing regulations and to prescribe additional requirements, so long as those regulations and requirements are not inconsistent with the Communications Act." Conference Report at 139. Section 261 neither constrains the Commission's rulemaking authority under Section 251, nor authorizes a State commission to establish rules that are inconsistent with the requirements of Section 251 established by the Commission.

<sup>28/</sup> 47 U.S.C. § 251(d)(1).

<sup>29/</sup> See, e.g., id. § 251(c)(2)-(3); see also id. §§ 252(c)(1), (e)(2).

established by the Commission in this proceeding -- and that substantially prevent implementation of those requirements can be precluded by the Commission in the course of "prescribing and enforcing the regulations to implement the requirements" of Section 251.<sup>30/</sup>

In particular, the Commission must exercise this authority to preclude State regulations that contravene the Act's requirements by imposing ILEC requirements on CLECs.<sup>31/</sup> The Act's mandate for "a pro-competitive, de-regulatory national policy framework"<sup>32/</sup> that promotes competition would be frustrated if the States were permitted to establish interconnection and unbundling obligations for local competitors that are inconsistent with the distinctions drawn by the 1996 Act between ILECs and CLECs. As the Massachusetts DPU notes, States cannot disregard the Act's disparate treatment of ILECs and CLECs.<sup>33/</sup>

## **II. NEGOTIATIONS WITHOUT CLEAR REQUIREMENTS WILL NOT PRODUCE A COMPETITIVE MARKETPLACE**

The ILECs uniformly argue that the Commission should refrain from promulgating explicit national rules in favor of voluntary negotiations between the parties. USTA, for instance, argues that Congress's "new model" for interconnection "relies in the first instance on voluntary negotiation and agreement between and among carriers."<sup>34/</sup> USTA sees virtually no role for the Commission in interconnection matters and contends that state commissions may step

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<sup>30/</sup> Id. § 251(d)(3).

<sup>31/</sup> See, e.g., California Public Utility Commission Comments at 13 ("California PUC Comments"); CoPUC Comments at 12-15; Texas Public Utility Commission Comments at 34; Office of Ohio Consumers Counsel Comments at 10, 11; see also Michigan Public Service Commission Staff Comments at 9.

<sup>32/</sup> Conference Report at 113.

<sup>33/</sup> Massachusetts DPU Comments at 6; see also Department of Justice Comments at 23 ("DOJ Comments").

<sup>34/</sup> USTA Comments at 5.

in only if carrier-to-carrier negotiations break down. Bell Atlantic similarly argues that "negotiated agreements between parties invariably will produce results better than anything that can be produced by regulatory fiat."<sup>35/</sup>

As a threshold matter, ILEC fears that detailed FCC rules will deprive parties of the flexibility to negotiate interconnection arrangements tailored to their specific needs are unfounded. Section 252(a) explicitly contemplates that parties may enter into voluntary agreements that do not comply with the statutory requirements or the Commission's implementing regulations.<sup>36/</sup> While such nonconforming agreements must be submitted to the relevant state commission for review, they may only be rejected if they discriminate against a third party or are inconsistent with the public interest.<sup>37/</sup>

Explicit national rules serve as a "threat point" that may be important in the event ILECs attempt to abuse their market power in the negotiation process.<sup>38/</sup> Such abuses are likely in

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<sup>35/</sup> Bell Atlantic Comments at 3.

<sup>36/</sup> 47 U.S.C. § 252(a) ("an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of Section 251").

<sup>37/</sup> Id. § 252(e)(2). See "An Economic Analysis of Interconnection, Unbundled Network Elements, and Transport and Termination Pricing Issues" at Attachment 2, pp. 9-10 (federal guidelines in no way limit private parties' ability to implement anything to which they can agree") ("NCTA Pricing Study Reply").

However, interconnection agreements that do not fully implement the unbundling, interconnection, and pricing requirements, including bill and keep, adopted by the Commission in this proceeding would not satisfy the interLATA checklist requirements for interconnection and reciprocal compensation arrangements. Id. §§ 271(c)(2)(B)(i), (xiii). Moreover, approval of any requests for interLATA entry premised on agreements that do not fully conform with Section 251 and the Commission's regulations would remove the BOC's incentive to respond to requests for a conforming agreement. Such a result would not be "consistent with the public interest, convenience, and necessity." Id. § 271(d)(3)(C).

<sup>38/</sup> A threat point is the position in which each party would find itself if they are unable to come to an agreement. See NCTA Pricing Study Reply at 6. USTA's argument that, because of their relative size, some interexchange carriers and cable companies might have superior bargaining power to non-RBOC ILECs is fundamentally flawed. Id. at 6.

the absence of clearly defined standards. As the Department of Justice ("DOJ") explains, "[t]here is no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent clear legal requirements that they do so."<sup>39/</sup> If the Commission were to rely entirely on private negotiations, ILECs would have the ability and the incentive to exploit every statutory ambiguity to frustrate negotiations and state arbitrations in order to delay entry by competitors.<sup>40/</sup>

USTA's assertion that "more than 50 signed agreements" with companies seeking interconnection proves that "negotiations work without the federal government setting . . . requirements"<sup>41/</sup> does not withstand even minimal scrutiny. Of the publicly-reported agreements between ILECs and CLECs, the vast majority were signed prior to the enactment of the 1996 Act and only two purport to meet the competitive checklist. Some of agreements, including agreements with MCI cited as "evidence" that negotiations are working, omit critical terms, such as compensation<sup>42/</sup> and points of interconnection.<sup>43/</sup> Others do not even address material issues, including resale and unbundling.<sup>44/</sup> Time Warner, another party cited by USTA as having "reached an agreement," has in fact been unable over 18 months to resolve

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<sup>39/</sup> DOJ Comments at 9-10; AT&T Comments at 7; MCI Telecommunications Corporation Comments ("MCI Comments") at 22; LDDS Worldcom Comments at 4; Sprint Corporation Comments ("Sprint Comments") at v.

<sup>40/</sup> "Reply Declaration of Bruce M. Owen" at Attachment 1, pp. 4-5 ("Owen Reply"); NCTA Pricing Study Reply at 7-9.

<sup>41/</sup> *USTA Files Interconnection Comments with the FCC*, United States Telephone Association Press Release, May 16, 1996.

<sup>42/</sup> See Telecommunications Reports, Feb. 26, 1996 (MCI and Ameritech referred compensation issues to the Public Utility Commission of Ohio).

<sup>43/</sup> *Id.*, Apr. 8, 1996 (ICG-Pacific Bell agreements).

<sup>44/</sup> *Id.*, May 20, 1996 (BellSouth-MCI).

pricing and number portability disputes with Ameritech, despite the PUCO's order to negotiate.<sup>45/</sup> It is clear that, in the absence of uniform national rules, negotiations will not produce the competitive marketplace sought by Congress

Likewise, ILEC assertions about the efficacy of the negotiations to date<sup>46/</sup> wholly disregard examples of the incumbents' abuse of the bargaining process to delay or prevent mutually acceptable agreements.<sup>47/</sup> DOJ, which has had abundant experience with entrenched telephone companies that are reluctant to part with their monopoly advantages, has found that complaints against ILECs have multiplied in recent years as the Commission and states have initiated policies aimed at opening up local markets to competition.<sup>48/</sup>

The purpose of the FCC's implementation authority and the competitive checklist is to avoid repeating this history. While the 1996 Act indisputably places significant reliance on the negotiation process, Congress understood that clear national standards would "reduce the ILECs ability to use their superior bargaining position to retard competitive entry."<sup>49/</sup> In contrast, the complaint-driven process proposed by the ILECs would regularly leave new entrants in the position of commencing costly litigation or accepting less than satisfactory arrangements. In either case, competitive service to the public would be substantially delayed, if not halted altogether. This is plainly not the "new paradigm" for telecommunications competition envisioned by Congress.

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<sup>45/</sup> *Time Warner Says Ameritech Deal with MFS Will Not Satisfy Competitive Checklist Requirement*, Time Warner Cable Press Release (May 23, 1996); Time Warner Comments at 9-10.

<sup>46/</sup> See, e.g., Ameritech Comments at 6, n.9, n.10; Bell Atlantic Comments at 47.

<sup>47/</sup> TCG Comments at 18-20.

<sup>48/</sup> DOJ Comments at 10.

<sup>49/</sup> DOJ Comments at 12.

### III. INTERCONNECTION AND UNBUNDLING REQUIREMENTS SHOULD PROMOTE FACILITIES-BASED COMPETITION

#### A. Arrangements Between Non-Competing ILECs Should be Available to CLECs Under Section 252(i)

The Commission should reject arguments that the terms of existing agreements between non-competing ILECs need not be made available to other telecommunications carriers under Section 252(i).<sup>50/</sup> Contrary to the assertions of several ILECs, the Act is not concerned solely with arrangements between competing ILECs. Rather, the duty under Section 251(c)(2) to interconnect encompasses arrangements with "any telecommunications carrier" requesting interconnection "for the transmission and routing of telephone exchange service."<sup>51/</sup> Likewise, the Act requires ILECs to submit for State approval any "binding agreement" for interconnection, services, or network elements, regardless of whether the agreement satisfies the checklist in Section 251.<sup>52/</sup>

Agreements between adjacent ILECs represent the outcome of negotiations between two non-competing carriers with even bargaining power. As such, they provide the best evidence of what is technically feasible. For instance, despite the protestations of ILECs in this proceeding, they routinely interconnect with other ILECs at agreed-upon "meet points."<sup>53/</sup> Notably, adjacent carriers also traditionally use bill and keep. Such an arrangement thus should be deemed technically feasible for interconnection between an ILEC and a CLEC, consistent

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<sup>50/</sup> NYNEX Comments at 25; Bell Atlantic Comments at 9, n.3; Pacific Telesis Comments at 83-84. The Wisconsin Public Service Commission recently ruled that such agreements must be made available to all telecommunications carriers. Investigation of the Implementation of the Telecommunications Act of 1996, Docket 05-TI-140 (May 16, 1996).

<sup>51/</sup> 47 U.S.C. § 251(c)(2)(A) (emphasis added); see also Notice ¶ 171.

<sup>52/</sup> 47 U.S.C. § 252(a).

<sup>53/</sup> NYNEX Comments at 25; USTA Comments at 68, n.60

with the Commission's proposal that an interconnection point is technically feasible if the ILEC currently provides interconnection at a particular point or has provided it in the past.<sup>54/</sup>

The Act itself recognizes the relevance of agreements between ILECs in assessing the reasonableness of interconnection arrangements with other requesting carriers: it directs ILECs to provide interconnection in a manner that is "at least equal in quality to that provided by the [ILEC] to itself or . . . any other party to which the carrier provides interconnection."<sup>55/</sup> Indeed, the Commission has historically looked to arrangements between non-competing ILECs to determine what is reasonable for a competing carrier to expect from an incumbent.<sup>56/</sup>

## **B. Transport and Termination**

### **1. Transport and Termination Includes All Transport and Switching Performed by the Receiving Carrier**

The Commission should not allow inefficient ILEC network design to dictate the definition of transport and termination for purposes of reciprocal compensation.<sup>57/</sup> ILECs and CLECs may use different architectures to transport and terminate the calls they receive from other carriers. Those architectures should be considered equivalent for purposes of compensation arrangements.<sup>58/</sup> ILEC arguments to the contrary notwithstanding, CLEC

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<sup>54/</sup> Notice ¶ 57.

<sup>55/</sup> 47 U.S.C. § 251(c)(2)(C) (emphasis added); see also Conference Report at 120.

<sup>56/</sup> See, e.g., In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 59 RR 2d 1275, 1278 (1986) (discussing interconnection agreements between ILECs and cellular carriers), citing 89 FCC 2d 58, 81-82 (1982) ("Cellular Reconsideration") and 86 FCC 2d 469, 495-96 (1981) ("Cellular Report and Order"); In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910; 2915-16 (1987).

<sup>57/</sup> BellSouth Comments at 71; U.S. West Comments at 11, 69.

<sup>58/</sup> Such an approach also embraces the co-carrier relationship contemplated by Sections 251(b)(5) and 252(d)(2).

networks generally have a single switch (which in the case of cable systems may be located at the cable headend). This switch is not analogous to an ILEC's end office.<sup>59/</sup> Rather, like an ILEC's tandem, it affords access to all of the CLEC's telephony customers and the compensation owed a CLEC for transporting calls from its switch is the same as transporting calls from the ILEC tandem to the end user. In order to accommodate all network designs, the Commission should define transport and termination to include all transport and switching performed by the receiving carrier.

**2. The Commission Can and Should Order Bill-and-Keep Arrangements to Compensate Carriers for Transport and Termination**

The difficulty of devising and implementing methods for billing, collection and audit associated with the use of an exact cost-based pricing methodology argues strongly for the adoption of bill and keep arrangements as a near-term solution to reciprocal compensation.<sup>60/</sup> The Commission's authority to require bill and keep arrangements is clear. Arguments by some ILECs and other parties that bill and keep is available only if carriers voluntarily agree to it misreads the 1996 Act.<sup>61/</sup> As a statement of what carriers may voluntarily agree to, Section 252(d)(2)(B)(i) would be unnecessary, since Section 252(a) explicitly authorizes "binding agreements . . . without regard to the standards set forth in . . . Section 251."<sup>62/</sup> It is a "cardinal rule of statutory construction that no provision should be construed to be entirely

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<sup>59/</sup> Cf. BellSouth Comments at 71.

<sup>60/</sup> Owen Reply at 5.

<sup>61/</sup> USTA Comments at 83.

<sup>62/</sup> 47 U.S.C. § 252(a)(1). Because Section 252(d)(2) contemplates that the pricing standards will be promulgated "[f]or the purposes of [determining] compliance by an incumbent local exchange carrier with Section 251(b)(5)," voluntary agreements also are not required to comply with such pricing standards. 47 U.S.C. § 252(d)(2).

redundant.<sup>63/</sup> Section 252(d)(2)(B)(i) authorizes arrangements, to be established by the Commission,<sup>64/</sup> that forgo the mutual recovery of costs through reciprocal payments; it does not limit bill and keep to situations where the carrier elects to waive mutual recovery.

Section 252(d)(2)(B)(i) must also be interpreted consistently with the general power Congress gave the Commission to set pricing standards for the transport and termination of traffic. The provision simply clarifies that the Commission may implement the reciprocal compensation requirement through "a range of compensation schemes, such as an in-kind exchange of traffic without cash payment (known as bill and keep arrangements)."<sup>65/</sup> There is no indication in the Act or the legislative history that Congress intended to give ILECs the ability to substitute their judgment for that of the Commission in determining the most appropriate compensation arrangements.

Nor is there any basis for the ILECs' argument that bill-and-keep would constitute an unconstitutional taking of property under the Fifth Amendment.<sup>66/</sup> Contrary to Bell Atlantic's assertion, bill and keep is not "physical occupation" of ILEC property and per se takings cases<sup>67/</sup> are thus irrelevant. Bill-and-keep does not authorize an invasion of ILEC property, no more than it authorizes ILECs to "invade" CLECs' property. Moreover, bill-and-keep is also

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<sup>63/</sup> Kungys v. United States, 485 U.S. 759, 778 (1988); South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 510 n.22 (1986); Bailey v. United States, 116 S.Ct. 501, 506-507 (1995); United States v. Menasche, 348 U.S. 528, 538-539 (1955).

<sup>64/</sup> "Reciprocal compensation arrangements" is a requirement of Section 251, and therefore is within the scope of the Commission's implementing regulations 47 U.S.C. §§ 251(b)(5), (d)(1).

<sup>65/</sup> Conference Report at 120.

<sup>66/</sup> See, e.g., Bell Atlantic Comments at 41; NYNEX Comments at 89; Cincinnati Bell Telephone Comments at 39.

<sup>67/</sup> See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); accord Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2893 (1992).

not unconstitutionally confiscatory. Rate regulation does not violate the takings clause unless it is so "unjust as to destroy the value of the property for all purposes for which it was acquired."<sup>68/</sup>

Bill-and-keep does not raise the specter of such grievous harm. To the contrary, adoption of bill and keep arrangements is appropriate and fair to both incumbent LECs and CLECs because the additional costs to each carrier of terminating calls on their networks is at or close to zero.<sup>69/</sup> Bill and keep also reflects the mutual benefit that each interconnecting carrier derives from the ability to terminate calls on the other's network. Connectivity is as valuable for the ILEC's customers as it is for the CLEC's.<sup>70/</sup>

**3. ILECs Should Not be Permitted to Define CLECs' Calling Scopes by Imposing Access Charges on Incoming CLEC Originated "Interexchange" Traffic**

Some ILECs argue that reciprocal compensation arrangements between ILECs and CLECs are only applicable to the termination of ILEC-defined "local" traffic.<sup>71/</sup> The Commission should reject these arguments. A CLEC should not be required to pay toll access charges to terminate its customers' calls within its local calling area. The Act itself does not

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<sup>68/</sup> See Duquesne Light Co. v. Barasch, 109 S.Ct. 609, 615 (1989), citing Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 579 (1896); see also, Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942) (the lowest reasonable rate is one that is not confiscatory).

<sup>69/</sup> NCTA Comments at 55; DOJ Comments at 34. Where the relevant economic costs of terminating traffic are zero for each carrier, then bill and keep is the equivalent of rates based on incremental costs, consistent with the pricing standard established in Section 252(d)(2)(A)(ii). NCTA Pricing Study at 31-32. See also DOJ Comments at 34-35.

<sup>70/</sup> NCTA Pricing Study Reply at 10. Given these equities and the transactional costs of metering transport and termination, bill and keep may also be the most appropriate long-term solution. Owen Reply at 4. see also NCTA Pricing Study Reply at 11-12.

<sup>71/</sup> Pacific Telesis Comments at 92-93; Bell Atlantic Comments at 11-12.

limit reciprocal compensation arrangements to the particular type of call being terminated by a carrier.<sup>72/</sup>

If the Commission permits ILECs to impose toll access charges on CLEC-originated calls that the ILEC classifies as toll, it will in effect impose ILEC geographic calling areas and rate plans on CLECs. Limiting a CLEC to an ILEC's calling scope will undermine competition by preventing the competitor from using calling areas to distinguish itself from the incumbent or other CLECs. In a competitive marketplace, each carrier should be able to exploit its particular advantages and seek customers through the development of alternatives to the traditional standard local service offerings available to consumers today.<sup>73/</sup>

### **C. Pricing of Interconnection and Unbundling**

#### **1. Proxies are an Appropriate Interim Solution for Pricing Unbundled Elements and Interconnection**

Despite the opposition of a number of commenters,<sup>74/</sup> proxies are appropriate as an interim measure for pricing unbundled network elements and interconnection.<sup>75/</sup> Proxies should serve as a ceiling, not a floor,<sup>76/</sup> and should be developed for application on a

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<sup>72/</sup> 47 U.S.C. § 252(d)(2) (1996) (discussing the recovery of the costs associated "with transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier"). An interexchange carrier that provides only interexchange services does not "originate" the call on its network. By contrast, even a toll call from a CLEC customer must be said to originate on the CLEC's network facilities. See also NYNEX Comments at 10, n.16.

<sup>73/</sup> To the extent that the decrease in contribution-laden toll access charges due to competition can be shown to have any effect on universal service, that issue is most appropriately addressed in the universal service proceeding. See Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45, FCC No. 96-93 (rel. March 8, 1996).

<sup>74/</sup> NYNEX Comments at 57-60; Ameritech Comments at 61.

<sup>75/</sup> See NCTA Comments at 49-54; Owen Reply at 2-3; Bell Atlantic Comments at 39.

<sup>76/</sup> Pacific Telesis Comments at 74; see also NCTA Comments, Attachment 1 ("Owen Declaration") at 18-20; Owen Reply at 1-2.

nationwide basis.<sup>77/</sup> National proxies can be developed that allow rates to vary with population density.<sup>78/</sup>

**2. The Long Term Pricing Standard for Interconnection and Unbundled Elements Should be Based on Forward-Looking Costs**

Contrary to the position submitted by several of the ILECs, embedded costs do not provide a more reliable estimate than forward-looking costs.<sup>79/</sup> Embedded costs are not economic costs. The use of embedded costs leads to inefficiently high prices that distort consumption and investment decisions.<sup>80/</sup> Indeed, where similar arguments have been made by ILECs, they have abandoned these arguments, as well as the sought after security of a prescribed allowable rate of return, in exchange for the ability to retain profits rather than have to share excess earnings with ratepayers.<sup>81/</sup> Competitive markets do not guarantee rates of return and neither should regulation.<sup>82/</sup> The Commission should not adopt proposed pricing schemes that would serve to shield ILECs from the effects of competition.<sup>83/</sup> Economic costs

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<sup>77/</sup> Bell Atlantic Comments at 39.

<sup>78/</sup> Owen Declaration at 38-40. Under no circumstances should access charges be used as a proxy to set rates. Owen Declaration at 18-19; Owen Reply at 5-6; see also NYNEX Comments at 58-59 (acknowledging that there is no correlation between access rates and the costs of facilities and equipment). There is no reason to believe access charges bear any relationship to costs. Owen Declaration at 19; Owen Reply at 5. Merely removing the carrier common line charge and transport interconnection charge from access charges will not be sufficient to derive acceptable proxy rates. NCTA Comments, "Unbundling, Interconnection, and Traffic Exchange: The Pricing of Access to Local Exchange Networks" at 35-37 ("NCTA Pricing Study"); Owen Reply at 6. Rather than attempt to develop proxies based on eliminating certain charges from interstate access rates, the Commission should base proxies on other more reliable sources of information. See Owen Declaration at 15-41; Owen Reply at 6.

<sup>79/</sup> Bell Atlantic Comments at "Declaration of Robert W. Crandall," pp. 7-9, 14-17, 20. See also NCTA Pricing Study Reply at 4-5.

<sup>80/</sup> NCTA Pricing Study Reply at 2-4.

<sup>81/</sup> See id.

<sup>82/</sup> Id.

<sup>83/</sup> Id.