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

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

THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202/775-3664

Howard J. Symons
Christopher J. Harvie
Sara F. Seidman
Gina M. Spade
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

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PETITION FOR RECONSIDERATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys and pursuant to section 1.429(e) of the Commission's rules, hereby petitions for reconsideration of certain aspects of the First Report and Order ("Order") in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

NCTA commends the Commission for an Order that, in most respects, faithfully interprets both the letter and spirit of Congress's landmark telecommunications legislation. The Order promotes competition by establishing uniform national rules that clearly delineate the respective responsibilities of the Commission and the States under the 1996 Act. In promulgating these rules, the Commission properly recognized the vast disparity in bargaining power between the incumbent local exchange carriers ("ILECs") and competitive LECs ("CLECs") and the absence of ILEC incentives "to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services"

[1/] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. Aug. 8, 1996); 61 Fed. Reg. 45,476 (Aug. 29, 1996).

as required by the Act.[2] As the Commission notes, the Order will serve as a useful guide for negotiations and will minimize "the need for competitors to revisit the same issue in 51 different jurisdictions."[3] The Commission also correctly found that the statute precludes the States from applying ILEC interconnection, unbundling, and resale discount requirements to CLECs, which lack the bottleneck control that necessitated such requirements.[4] To fully accomplish Congress's objectives of creating local exchange competition and promoting network investment and innovation, however, NCTA requests that the Commission reconsider or clarify a number of largely technical issues raised by the Order.

First, while NCTA supports the conclusion that States should be permitted to order bill and keep arrangements, the Commission should revise its determination that such arrangements must be terminated in those instances where traffic exchange is not in balance within six months of service commencement by a CLEC. The six-month "measurement period" does not provide

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[2] Order at ¶ 55. In this regard, NCTA takes issue with the Commission's observation that the ownership of video programming by cable companies somehow confers meaningful negotiating power on cable companies attempting to enter the telephony business. Order at ¶ 153 n.287. Ownership of video programming does not constitute a comparable bottleneck to that of incumbent LECs' control of the local telephone network. Any potential leverage that might be associated with cable company ownership of video programming is wholly nullified by the 1992 Cable Act's program access provisions. 47 U.S.C. § 628. Local telephone companies can purchase programming from many sources or create programming themselves -- and they are doing so. By contrast, a CLEC must be able to interconnect with the incumbent LEC's network in order to exchange traffic with the ILEC's customers. Contrary to the Commission's suggestion, combining a cable company's negotiations for interconnection with the incumbent LEC's facilities with an incumbent LEC's negotiation for acquisition of a cable company's video programming would not "equalize the parties' bargaining power." Id.

[3] Order at ¶ 56.

[4] See id. at ¶¶ 1247-48. NCTA urges the Commission to act expeditiously to preempt States that persist in efforts to impose these requirements on CLECs.

CLECs with a reasonable opportunity under fair competitive conditions to achieve traffic balance. Specifically, the absence of true number portability will inhibit customers from giving CLECs their inbound traffic and thus retard the growth of balanced traffic. The Commission has already recognized the essential role that full number portability plays in the development of local competition. Consistent with that finding, it should permit States to maintain bill and keep until at least one year after ILEC implementation of full number portability in accordance with the Commission's rules.

Second, the Commission's decision to include forward-looking common costs in the rates for transport and termination must be revised. While such costs are appropriately encompassed within the rate-setting standard for unbundled network elements, Congress established a different standard with respect to transport and termination rates. The statutory language expressly requires the Commission to base transport and termination rates upon the "additional costs" of providing such service. Both sound economic principles and the Commission's Order itself hold that additional costs are incremental costs and incremental costs do not include common costs. The Commission's inclusion of common costs within the transport and termination rate-setting standard violates the language of the statute, economic principles, and the logic of its own Order. Given the inability of a facilities-based competitor to reach an ILEC's customer other than through the purchase of transport and termination, there are strong policy reasons for pricing that service differently from unbundled network elements.

Third, the Commission must revise both its resale discount costing methodology and its default rate to conform more closely with the "avoided cost" standard delineated by Congress. Contrary to the approach taken by the Commission, Congress prescribed an "avoided" rather

than "avoidable" cost standard, and did not authorize a wholesale costing methodology and default rate founded on the assumption that ILECs would "cease retail operations." The default discount established by the Commission also is overstated because a number of costs which it assumes to be "avoidable" will not actually be avoided by ILECs, even if one focuses solely on their wholesale service activities. The presumption established by the Commission with respect to the "avoidability" of product advertising and product management costs cannot be justified and should be repealed. Additionally, the Commission should reexamine its formula for determining avoided indirect costs.

Fourth, the Commission should revise the Order to require advance certification by States that seek to regulate access to pole attachments by CLECs and other competing telecommunications carriers. Absent certification, there may be uncertainty and conflict over whether some States actually have in place appropriate rules that regulate access to pole attachments in accordance with the 1996 Act. Such uncertainty can yield protracted and unnecessary procedural conflicts over the proper forum for resolving the underlying access dispute. These disputes would be particularly counterproductive since they would likely delay consummation of access and interconnection agreements sought by competitors. Requiring certification will not disturb the "reverse preemptive" authority accorded to States that establish rules regulating access to pole attachments, but it will eliminate uncertainty and reduce delay, and thereby promote the Act's objective of expediting local competition.

Fifth, the Commission must take steps to ensure that CLEC efforts to distinguish themselves in the marketplace by establishing new local calling scopes are not thwarted by ILEC practices designed to discourage such offerings. CLEC establishment of alternative local calling

scopes represents precisely the type of competitive choice Congress sought to promote. Accordingly, ILECs should be precluded from imposing unnecessary toll charges on calls bound for competing networks with different calling scopes or from taking other steps that have the purpose or effect of undermining efforts by CLECs to distinguish their services through the establishment of wide area calling plans.

I. FOR PURPOSES OF DETERMINING THE CONTINUED APPROPRIATENESS OF BILL AND KEEP, THE EXCHANGE OF TRAFFIC SHOULD NOT BE MEASURED UNTIL ONE YEAR FOLLOWING THE DEPLOYMENT OF FULL NUMBER PORTABILITY

NCTA agrees with the Commission's conclusion that States should be permitted to order bill and keep compensation arrangements for transport and termination.[5] As the Commission recognizes, bill and keep is an efficient means of compensation when traffic is in or near balance. The Commission also recognized that there should be an interim "measurement period" during which bill and keep could be required whether or not traffic is in balance or near balance.[6]

The Commission errs, however, in requiring States that have ordered bill and keep to terminate those arrangements if traffic is not in or near balance within six months after a CLEC begins providing service.[7] It would be premature to measure a CLEC's traffic until the CLEC has had a reasonable opportunity under fair competitive conditions to establish a traffic exchange with the incumbent LEC. While the Commission appears to recognize the appropriateness of

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[5] Order at ¶ 1111.

[6] Id. at ¶ 1114.

[7] Id.

such a policy, traffic measurement after only six months would not necessarily provide an accurate long-term picture of the exchange of traffic between two carriers. Even where traffic is out of balance, bill and keep will remain the most cost-efficient means of compensation for traffic exchange during the critical start-up phase of competition, which will most certainly last longer than six months from the commencement of service.[8/]

To encourage the development of competition, NCTA asks the Commission to authorize the States to order bill and keep arrangements between an ILEC and a CLEC, regardless of the balance of traffic, for a period ending one year after the ILEC has deployed full number portability consistent with the FCC's final rules.[9/] As the Commission has recognized, full number portability is "essential to meaningful [local] competition."[10/] This proposal, if adopted, would provide a powerful incentive for ILECs to move quickly to implement the Commission's number portability requirements.[11/]

Until end users are able to move freely from carrier to carrier without relinquishing telephone numbers, CLECs will face competitive obstacles in attempting to capture inbound

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[8/] Comments of the National Cable Television Association, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, May 16, 1996 ("NCTA Comments), at 54-56.

[9/] See In the Matter of Telephone Number Portability, First Report and Order, CC Docket No. 95-1160 (rel. July 2, 1996) ("Number Portability Order").

[10/] See e.g. id. at ¶ 28 (noting that "the record developed in this proceeding confirms the congressional findings that number portability is essential to meaningful competition in the provision of local exchange services"). See also id. at ¶¶ 30-31.

[11/] NCTA's proposal is similar to the analogous provision in the recent Teleport/Pacific Bell agreement, which calls for no traffic measurement until one year after the implementation of full number portability. See "TCG Reaches Two Deals, Seeks Arbitration with Others," Telecommunications Reports, July 22, 1996, at 5.

traffic from ILECs. Traffic between CLECs and ILECs will likely not be balanced as long as CLECs are operating pursuant to the cost and technology handicaps associated with ILEC interim number portability measures.[12]

II. COMMON COSTS SHOULD BE EXCLUDED FROM THE RATES FOR TRANSPORT AND TERMINATION

The Commission's decision to include joint and common costs in the rates for transport and termination[13] violates the plain language of the 1996 Act, as well as sound economic reasoning and pro-competitive policy. The pricing standard applicable to transport and termination, specified as the "additional costs" associated with terminating calls on competing networks, differs materially from the standard for the pricing of unbundled elements. Ignoring this distinction and its economic and policy underpinnings, the Commission applies the latter pricing standard both to transport and termination as well as unbundled elements. Consistent with the statute and the Order's own definition of "additional costs," the Commission must limit the price for transport and termination to the incremental costs of providing those services.

A. The Act Properly Establishes a Distinct Pricing Standard for Transport and Termination that Precludes the Inclusion of Common Costs

Congress clearly established two distinct standards for the pricing of unbundled network elements and transport and termination. The Order errs by applying to the pricing of transport

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[12] Cf. Number Portability Order at ¶ 115 (agreeing "that the technical limitations . . . that handicap all currently available measures for providing number portability render them unacceptable as long-term solutions").

[13] See Order at ¶ 1058 ("a rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present").

and termination the same standard that it developed for the pricing of unbundled network elements.[14]

The 1996 Act provides that charges for unbundled network elements must be "just, reasonable, and nondiscriminatory,"[15] based on "the cost" of the network element,[16] and "may include a reasonable profit.[17] For transport and termination, compensation must be "just and reasonable" and also must provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of the other carrier's calls. Significantly, the Act specifies that such costs must be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls."[18]

These two standards differ in a critical respect. An unbundled network element must be priced "based on the cost" of providing such element, while transport and termination compensation must reasonably approximate "the additional costs" of terminating calls originating on competing networks.[19] The plain language of the statute indicates a pricing standard for transport and termination based solely upon incremental costs and with no loadings for common

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[14] See Order at ¶¶ 628, 629 and 1054. ILECs should be allowed to recover forward-looking common costs associated with the offering of unbundled network elements to CLECs, together with the total element long run incremental cost ("TELRIC") of each element. NCTA Comments at 49-50.

[15] 47 U.S.C. § 251(c)(2)(D)

[16] Id. § 252(d)(1)(A)(i).

[17] Id. § 252(d)(1)(B).

[18] Id. § 252(d)(2)(A)(ii) (emphasis added).

[19] Likewise, while unbundled network element prices may "include a reasonable profit," such authorization is not specified for transport and termination.

costs. This conclusion is reinforced by the Order itself, which elsewhere equates "additional costs" and "incremental costs."[20] If "additional costs" are "incremental costs," then the additional costs of providing transport and termination cannot be incremental costs plus something else. The Commission's finding that the "additional cost" standard permits the inclusion of forward-looking joint and common costs in the price for transport and termination[21] is not supported by the statute.

Congress used different words to establish the pricing standards for transport and termination and unbundled network elements because it intended two different standards, not because it was trying to express the same rate-setting methodology in two different ways.[22] As described below,[23] the establishment of the "additional cost" standard for transport and termination is supported by sound economic and policy principles. The Commission's decision nonetheless to apply the same standard to both unbundled network element pricing and transport and termination rates must be revised since it ignores the distinctive language carefully chosen by Congress to delineate that standard.[24]

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[20] Order at ¶ 675 (incremental costs are "the additional costs (usually expressed as a cost per unit) that a firm will incur as a result of expanding the output of a good or service by producing an additional quantity of the good or service") (emphasis added).

[21] Id. at ¶ 1054.

[22] Cf. United States v. Nordic Village, 503 U.S. 30 (1992) (statutes may not be construed to render terms or provisions superfluous); United States v. Menasche, 348 U.S. 528, 538-39 (1955) (same).

[23] See Section II.B., infra.

[24] See id.

B. The Inclusion of Common Costs in the Price for Transport and Termination is Inconsistent with Sound Economic Reasoning and the Encouragement of Competition

Notwithstanding the clear statutory language to the contrary, the Commission concludes that the price of transport should be the same whether purchased as an unbundled element or as part of transport and termination because in both cases the same facilities are used.[25] From this analysis of transport, the Commission makes the unfounded jump to the conclusion that the additional cost standard for termination permits use of the same cost methodology developed for interconnection and unbundled network elements.[26] Even assuming arguendo that the use of the same facilities supports a consistent pricing policy for unbundled elements and transport and termination, however, consistent pricing is not the same as identical pricing. Sound economic reasoning and pro-competitive policy principles underlie the Congressional decision to establish separate rate-setting methodologies for transport and termination.

First, network elements generally are facilities; by contrast, transport and termination are services. The Order itself stresses the distinction between network elements and services,[27] underscoring that distinction by articulating a new cost concept based on the incremental cost of elements rather than services. One of the Commission's stated reasons for focusing on this distinction is that the magnitude of common costs and the inevitable problems of allocating them are likely to be much smaller for elements -- which correspond to distinct network facilities --

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[25] Order at ¶ 1054.

[26] Id.

[27] See e.g. Order at ¶ 678.

than for services.[28] Conversely, with respect to services, there are more common costs and thus a greater opportunity for the misallocation of those costs.[29] Including common costs in the charges for termination services thus poses a much greater threat to efficient competition than does their inclusion in charges for unbundled network elements.

Second, the availability of efficiently priced termination services is critical to CLEC survival, particularly if traffic is not balanced during the nascent stages of competition because of the absence of full number portability.[30] Even as a CLEC's market share grows and its traffic comes into balance, it will still depend completely on the ILEC to reach the ILEC's customers. From the point of view of an ILEC seeking to preserve its market power, overpricing termination services could serve as a means to hamper the full competitive viability of new entrants during their start-up phase and beyond. The problem is made worse by the fact that termination is a service, rather than an element, and thus the dangers of common cost misallocation are likely to be significant.[31] Indeed, Commission officials themselves have recognized that overly high reciprocal termination charges may weaken competition, reducing economic efficiency and consumer welfare:

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[28] Id. at ¶ 678.

[29] See e.g. id. (noting greater prevalence of joint and common costs in connection with the provision of services and that "it is difficult for regulators to determine an economically-optimal allocation of any such joint and common costs").

[30] See supra at Section I.

[31] See Order at ¶ 678.

> [T]wo local exchange providers might well set high per-minute charges for terminating traffic on one another's networks as a means of giving each incentives to charge customers relatively high rates for local exchange services.[32]

Third, there are important differences between network elements and transport and termination from the perspective of fairness as well as efficiency. Transport and termination are reciprocal services that benefit both the originating and terminating networks.[33] There is a balance of benefits and less reason to rely on monetary compensation than in the purchase of unbundled elements. In light of the strong potential efficiency and competitive concerns from overly high termination charges, it is better to rely on the reciprocal in-kind payments to the greatest extent practical, rather than to include ill-conceived and arbitrary common cost allocations.

C. Including Common Costs in the Rates for Transport and Termination Conflicts with the Order

The Commission's decision that common costs may be included within the additional cost standard for transport and termination also conflicts with the Order.[34] The proper means of assessing the additional costs of a particular service is to examine what costs are triggered or caused by offering that service. By the Commission's own definition of the term, common costs do not fall under this heading since such costs "remain[] unchanged as the relative proportion

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[32] M. Katz, G. Rosston and J. Anspacher, "Interconnecting Interoperable Systems: The Regulator's Perspective," Information, Infrastructure and Policy (1995) at 332.

[33] NCTA Comments at 54.

[34] As noted above, the Order's definition of incremental costs suggests that the "additional cost" pricing standard mandates an incremental cost basis for rate setting with no common costs. See pp. 8-9, supra.

of those products or services varies."[35] As the Commission explains, "[i]f a cost is common with respect to a subset of services or elements, for example, a firm avoids that cost only by not providing each and every service or element in the subset."[36]

Any common costs associated with termination services are common with originating local exchange service as well as exchange access services. Under the logic of the Commission's own definition, a carrier will not avoid any of these common costs by cutting back on the provision of termination services alone. Accordingly, such common costs cannot be considered to be a component of the additional costs of providing termination service because they would be incurred regardless of whether or not such termination services are provided.[37]

The inclusion of common costs in transport and termination rates also conflicts with the Commission's approach for determining the additional costs of terminating a call that originates on another carrier's network. The Commission has explained that transport and termination costs "primarily consist[] of the traffic-sensitive component of local switching" and do not, for example, include non-traffic sensitive costs, such as local loops and line ports.[38] Indeed, the Commission states that

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[35] Id. at ¶ 676 (emphasis added).

[36] Id.

[37] This same logic applies to an expansion of termination services. ILECs already are providing the other services or elements to which the cost is common. Hence, the common cost with respect to this subset of services or elements will already have been triggered even before an ILEC has begun providing termination services. It follows that there is no sense in which such common costs can logically be considered to be additional costs of providing termination to CLECs.

[38] Order at ¶ 1057.

> [f]or the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges.[39]

The economic logic of excluding non-traffic-sensitive costs is entirely appropriate: because an increase in termination traffic will not trigger any additional non-traffic-sensitive costs, such costs do not represent "additional costs" of termination.

A carrier continues to incur the common costs of a subset of services even if the volume of terminating traffic from a competing carrier is cut back entirely.[40] Under this economic principle, common costs must be treated as non-traffic-sensitive.[41] Having defined common costs to be non-traffic-sensitive, the Commission's own logic compels the conclusion that such costs should not be included in transport and termination rates.

III. THE STANDARD FOR DETERMINING ILEC RESALE RATES MUST BE REVISED TO CONFORM TO THE TELECOMMUNICATIONS ACT OF 1996

In defining wholesale prices for purposes of establishing an ILEC's resale discount, Congress expressly rejected the prescriptive pricing standard adopted by the Commission in the Order. Rather than adopt the House Commerce Committee's requirement for wholesale rates

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[39] Id.

[40] See Order at ¶ 676. The same logic applies to expansion of an individual service. For example, if cutting termination traffic back to zero does not trigger common cost savings, then increasing termination traffic from a level near zero does not trigger additional common costs.

[41] Stated another way, if cost changes are triggered by changes (either decreases or increases) in the traffic volume of a single service, then these costs can be assigned to that particular service based on the principle of cost causation and they are not common costs as the Commission has defined the term.

that are "economically feasible" to the reseller,[42] Congress enacted a more limited approach that required wholesale rates to be established on the basis of the retail rate, "excluding costs that will be avoided by the incumbent carrier."[43]

The broad standard utilized by the Commission is closer to the approach expressly rejected by Congress than to the specific criteria mandated by the Act. The Order does not embrace the notion that resale discount rates should be based upon costs that are actually avoided by virtue of an ILEC's provision of service to a wholesale, rather than retail, customer.[44] Instead, it adopts a "reasonably avoidable" standard that focuses on the costs that an ILEC "would no longer incur if it were to cease retail operations and instead provide all of its services through resellers."[45] In addition, because they are based on the flawed assumption that certain costs which will not be avoided are "reasonably avoidable," the default rates established in the Order overstate the appropriate size of the resale discount.[46]

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[42] H.R. 1555, 104th Cong., 1st Sess. § 101 (July 24, 1995). See also H.R. Rep. No. 204, 104th Cong., 1st Sess. 72 (1995) ("House Report").

[43] H.R. Rep. No. 458, 104th Cong., 2d Sess. 126 ("Conference Report") (emphasis added). See also 47 U.S.C. § 252(d)(3).

[44] See Order at ¶ 911 ("[W]e reject the arguments of incumbent LECs and others who maintain that the LEC must actually experience a reduction in its operating expenses for a cost to be considered 'avoided' for purposes of section 252(d)(3)").

[45] See id.

[46] See id. While it is true that ILECs will be permitted to rebut Commission-established presumptions regarding the avoidability of certain categories of costs, see Order at ¶ 917, these presumptions are embedded in the discount rate established by the Commission, id. at ¶ 928, 930, which is likely to be the basis for resale rates for the near and medium term. Moreover, some commenters in this proceeding have argued that they would incur new costs in connection with furnishing wholesale services. See e.g. BellSouth Comments at 67 ("resale activities cause new costs to be incurred by the LECs").

As a threshold matter, there is no statutory basis underlying the "reasonably avoidable" standard adopted by the Commission. Congress did not prescribe a wholesale pricing standard premised upon the notion that an ILEC would "cease retail operations" altogether and provide service only through resellers. The 1996 Act presupposes that ILECs will remain in the retail telecommunications market, and this is implicitly reflected in the decision to have wholesale rates based upon costs "that will be avoided" in actuality, since that approach precludes granting a competitive advantage to resellers by ensuring that their retail prices approximate cost-based rates.

By contrast, the approach adopted by the Commission grants resellers retail pricing advantages over ILECs and all other facilities-based competitors that must charge cost-based retail rates, by setting wholesale rates based upon costs that are "reasonably avoidable," even though such costs may not be actually avoided by the ILEC.[47] For example, the Commission has established a presumption that 90 percent of an ILEC's product management and product advertising expenses are avoided when selling at wholesale, even though "selling through wholesalers is unlikely to enable a LEC to avoid a significant fraction of these expenses."[48] Product management expenses include competitive analyses, demand forecasting, and product and service identification.[49] These are proprietary functions that will not be assumed by

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[47] See generally Declaration of Bruce M. Owen, attached as Appendix A ("Owen Declaration").

[48] Owen Declaration at 3.

[49] See 47 C.F.R. § 32.6611.

resellers for ILECs, and would still be necessary for the ILEC to undertake even if it were acting principally as a wholesale service provider.[50]

Likewise, the Commission's unfounded assumption that 90 percent of product advertising costs are avoidable ignores the fact that providers of consumer goods and services typically incur substantial product advertising expenses, even when they do not sell at retail.[51] Of course, in this instance ILEC product advertising expenses may actually rise due to increased competition from resale competitors.[52] In the absence of any justification for the presumptions established by the Commission with respect to the "avoidability" of product advertising and product management costs, these presumptions should be eliminated.[53]

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[50] Owen Declaration at 4. Even with respect to those product management expenses that might actually be affected if an ILEC's focus did shift from being a retail seller to a wholesale provider, such as the costs of establishing distribution channels, there is no basis for the Commission's determination that 90 percent of such costs would be avoided. An ILEC wholesaler "still must establish and maintain its relationship with wholesalers, who will be its direct customers." Id. at 4.

[51] See id. at 4-5.

[52] Owen Declaration at 4 ("The major determinant of a firm's advertising expenditures is its competitive environment, not whether or not it sells directly to consumers."). Indeed, this illustrates the fallacy inherent in the "reasonably avoidable" standard adopted by the Commission: since ILECs are not going to cease retail operations, "avoidable" costs are not actually avoided. Moreover, an ILEC's ability to rebut the presumption attached to "avoidable" costs is of limited utility, since the presumption can only be rebutted by showing that "specific costs in these accounts will be incurred with respect to services sold at wholesale. . .". Id. at ¶ 917 (emphasis added). Thus, even if an ILEC proves that its retail product advertising costs remain the same notwithstanding its wholesale transactions with resellers, it cannot rebut the presumption of avoidability unless it shows that the advertising costs are incurred in connection with such wholesale transactions.

[53] See Owen Declaration at 5.

The Commission's resale pricing methodology also errs by overstating indirect avoided costs.[54] In setting its default rate, the Commission calculated indirect avoided expenses by applying to "each indirect expense category the ratio of avoided direct expense to total expenses."[55] While some measure of indirect costs may vary when service is provisioned at wholesale rather than retail, the reliance upon a general allocator based upon the ratio of avoided direct expenses to total direct expenses guarantees that the amount will be significantly overstated, because indirect costs do not march in lockstep with direct costs.[56]

The flaws in this approach are illustrated in the Order itself. Indirect costs include common costs,[57] which the Commission defines earlier in the Order as costs that are avoided only upon cessation of all services that cause them to be incurred.[58] In the context of developing TELRIC pricing standards the Commission recognizes that one form of indirect costs -- common costs -- does not vary and cannot be avoided if an ILEC continues to perform any of the functions that trigger such costs.[59] Yet in the context of developing a resale pricing

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[54] See Owen Declaration at 7-8.

[55] Order at ¶ 929. In its cost study discussion of this issue, the Commission stated that indirect expenses "are presumed to be avoided in proportion to the avoided direct expenses" identified in certain account categories. Id. at ¶ 918. This formulation is far more vague and imprecise than the formulation set forth in ¶ 929. See Owen Declaration at n.5.

[56] See Owen Declaration at 7-8.

[57] Owen Declaration at 8.

[58] See Order at ¶ 676. See also supra at Section II.

[59] Id. The Commission stated that "common costs" means costs "incurred in connection with the production of multiple products or services" that "remain[] unchanged as the relative proportion of those products or services varies." Id. The Order goes on to say that "[i]f a cost is common with respect to a subset of services or elements, for example, a firm avoids that cost only by not providing each and every service or element in the subset." Id.

standard, the Order concludes that such common costs do vary and can be avoided even though, at best, only a portion of the functions engendering such costs would be transferred to resellers.[60] Accordingly, the Commission should remedy the defects inherent in its formula for estimating avoided indirect costs, and recalculate its default rate based upon more realistic assumptions regarding the avoidability of indirect costs.

In response to contentions that a steep resale discount could undermine the Congressional preference for facilities-based competition, the Commission contends that the language of the Act precludes consideration of "policy arguments" in conjunction with the calculation of resale rates.[61] The Commission states that "the language of section 252(d)(3) makes no provision for selecting a wholesale discount based on policy grounds."[62] In fact, unlike the rejected House Commerce Committee formulation, the language of section 252(d)(3) embodies the express Congressional preference for facilities-based competition, since it focuses on costs that will actually be avoided by the ILEC rather than on the "economic feasibility" of the reseller.[63] A wholesale discount calculated with that preference in mind is wholly consistent with the language of section 252(d)(3). Ironically, the Commission's own standard is itself

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[60] See Owen Declaration at 7-8.

[61] See Order at ¶ 914 (An avoided cost study may not calculate avoided costs based on non-cost factors or policy arguments, nor may it make disallowances for reasons not provided for in section 252(d)(3)).

[62] Id.

[63] See supra, pp. 14-15.

imbued with policy judgments.[64] Because those judgments would undermine facilities-based competition, however, they contravene the Act and must be reconsidered.

IV. THE COMMISSION SHOULD REQUIRE SEPARATE CERTIFICATION AS A PRECONDITION TO STATE REGULATION OVER ACCESS TO POLES

The 1996 Act added an express right of non-discriminatory access to poles, conduits and rights of way for cable systems and telecommunications carriers.[65] The Act also added language to the pole attachment statute's "reverse preemption" provision ceding Federal jurisdiction over access to the States in any case where "access to poles, ducts, conduits and rights-of-way" is regulated by a State.[66] Thus, a State's authority to assume regulatory jurisdiction over access to poles parallels its authority to assume jurisdiction over the rates, terms and conditions of attachments.

The Commission declined, however, to require States to utilize the same procedural mechanism for assuming jurisdiction over access that they must utilize to assume jurisdiction over pole attachment rates, terms and conditions.[67] Under section 224(c)(2), a State must expressly certify to the Commission that it has effectuated regulations governing the rates, terms or conditions for pole attachments before it may displace Federal rules governing such matters.[68] The Commission's ruling that a State need not engage in such certification in order

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[64] See Owen Declaration at 2.

[65] 47 U.S.C. § 224(f)(1).

[66] Id. § 224(c)(1).

[67] Order at ¶ 1240.

[68] 47 U.S.C. § 224(c)(2)-(3); 47 C.F.R. § 1.1414.

to assume jurisdiction over the regulation of access contravenes the language and intent of the 1996 amendments to section 224.

The 1996 Act implements a national policy to promote competition in local telecommunications markets as expeditiously as possible.[69] The amendments made to the Pole Attachment Act by the 1996 Act further that goal by establishing a right of access to poles, ducts, conduits, and rights-of-way by telecommunications carriers and cable operators. Nondiscriminatory access to poles was also made an obligation of local exchange carriers under section 251(b)[70] and part of the Bell operating companies' competitive checklist.[71] While the importance of the right of access is also reflected in the Commission's own finding that "time is of the essence" in resolving access disputes,[72] its ruling on certification will inevitably prolong and complicate pole attachment disputes.

For example, while the Order appropriately gives parties denied pole access the choice of seeking relief under section 224 or section 252,[73] the failure to require a State to seek certification of its access regulations in advance of a complaint will create uncertainty regarding the proper forum in which such a complaint should be filed. In the absence of certification, a complaining party can only guess whether or not a State actually regulates access before deciding whether to file the complaint at the FCC or with the State commission. The regulation of access

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[69] See, e.g., Conference Report at 113.

[70] 47 U.S.C. § 251(b)(4).

[71] Id. § 271(c)(2)(B)(iii).

[72] Order at ¶ 1224.

[73] Id. at ¶ 1229.

cannot be presupposed simply because of the existence of rules governing rates, terms and conditions of pole attachments; if that were the case, there would have been no need to add sections 224(f) and 251(b)(4) to the Communications Act. Nonetheless, there is a strong possibility that some States or utilities will assume or assert that the access rules are encompassed by the pre-existing State regulation of rates. Inevitably, there will be procedural disputes regarding the proper forum for resolving the underlying substantive access dispute.

The absence of certification also could have the effect of undermining the choice granted to potential attaching parties to vindicate their rights either as part of an overall section 252 arbitration or via an independent complaint brought under section 224. In the absence of certification, a party may opt to vindicate its access rights under section 224, based upon a mistaken belief that the Federal regime controls. If the Commission determines that the State's pole regulations do encompass access rights, then the party opting to proceed under section 224 has, through no fault of its own, wasted critical time. If the complainant had known at the outset that the State was qualified to resolve the dispute, it would have been much better off opting to vindicate its rights under section 252. In effect, the uncertainty created by the absence of certification vitiates a potential complainant's choice to proceed under section 224 in any State where some kind of pole attachment regulatory regime exists, regardless of whether such regime actually regulates access in conformity with Federal law.

The need for an access certification requirement is further demonstrated by the fact that the Act and the Commission's rules make clear that "denial of access . . . is an exception to the general mandate of section 224(f)."[74] Even though some States may actually have rules

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[74] Id. at ¶ 1222.

regulating access to poles, those rules may not be in conformity with the strong presumption in favor of access mandated by Federal law. Since the Commission has already determined that a State's pole attachment access rules ultimately could be subject to preemption under section 253(a),[75] it should reduce uncertainty, transaction costs and litigation prospects by requiring States to affirmatively declare through certification that they have actually adopted access rules and the substance of those rules is in conformity with the strong Federal presumption favoring access and the access guidelines adopted by the Commission in the Order.[76]

The imposition of a certification requirement would in no way affect or alter the "reverse preemptive" authority granted to States that have established rules that regulate access to poles in accordance with the Act. In those States where such rules are already in place, certification could be accomplished swiftly and with minimal burdens, and thereby provide CLECs and other new entrants with clear guidance regarding the proper forum for resolving access disputes. Absent such a requirement, by contrast, CLECs and other potential competitors may be forced to litigate these jurisdictional issues in the context of an ongoing pole attachment dispute, where "time is of the essence." Indeed, these procedural issues would have to be resolved before complaining parties could even begin to contest the merits of their pole attachment dispute. Such an outcome directly contravenes the Act's purposes, and can be avoided by requiring explicit State certification as a precondition of their assumption of jurisdiction over access.

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[75] See Order at ¶ 1236 n.3040 ("As in other circumstances, and subject to certain limitations, the Commission may preempt an otherwise valid state or local access requirement that 'prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service'").

[76] Order at ¶¶ 1151-1164.