B. The Commission's Treatment Of "Grandfathered" Services Is Reasonable

The Commission should disregard the complaint of MFS that treatment of "grandfathered" services in the resale context "falls far short of solving the problem identified in the comments."[53] The First Order properly requires that when an incumbent LEC "grandfathers" its own customers of any withdrawn service, such grandfathering should also extend to the end users of resellers of the service.[54] MFS claims that this holding is not sufficient to protect against other potential abuses by incumbent LECs.[55] MFS fails to recognize, however, that the First Order's discussion of that discrete issue in no way precludes the states from implementing their own, more specific, rules regarding withdrawal of grandfathered services where there still may be demand for the product. What the Commission should not do is inhibit the incumbent LECs' ability to withdraw services when such withdrawal is in the public interest, or to create discriminatory rights in favor of resellers who use a grandfathered service.

After acknowledging in the First Order the concerns now reiterated in MFS's Petition, the Commission declined to issue general rules with regard to the grandfathering and resale of withdrawn services.[56] As the Commission correctly observed, "[m]any state commissions have rules regarding the withdrawal of retail services and have experience regulating such

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[53] MFS Petition at 22.

[54] *See* First Order at para. 968.

[55] *See* MFS Petition at 24-25.

[56] *See* First Order at para. 968.

matters."[57] Contrary to MFS's implication, the First Order's conclusion that the Commission's "general presumption that incumbent LEC restrictions on resale are unreasonable does not apply to incumbent LEC withdrawal of service,"[58] is not the end of the matter. Indeed, in addition to leaving it to the states to address generally issues regarding the resale of withdrawn services, the First Order directs the states to "ensure that procedural mechanisms exist for processing complaints regarding incumbent LEC withdrawal of services."[59] In short, the states, not the Commission, are the proper places for MFS to pursue concerns regarding this issue, if they ever materialize.

IV. EXPANDED UNBUNDLING AND COLLOCATION REQUIREMENTS ARE NOT WARRANTED

A. Dark Fiber Should Not Be Treated As An Unbundled Network Element

The First Order declined to decide whether to treat dark fiber as a network element for purposes of Sections 251(c)(3) and (d)(2). It committed instead to review and revise its rules in this area as necessary.[60] However, some petitioners contend that the Commission should unbundle dark fiber as a network element pursuant to the 1996 Act.[61] The Commission should deny these claims. There is no need for Commission intervention on this point.

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[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] First Order at para. 450.

[61] *See* AT&T Petition at 35-37; MCI Petition at 20-23.

Certainly, no circumstances have changed that would warrant such intervention. Indeed, the First Order expressly established a "minimum set of elements to be unbundled," including interoffice transmission facilities, and acknowledged that the states have the ability to prescribe additional network elements.[62]

Assuming *arguendo* that the Commission feels compelled to address this issue, dark fiber is not a network element as defined in the 1996 Act, because it is not "used"[63] in the provision of a telecommunications service.[64] There is no dispute over the fact that, standing alone, dark fiber is not, and cannot be, used as an interoffice transmission facility. As MCI noted in its petition, dark fiber "is not presently available for use as an interoffice transmission facility, unless it is combined with the necessary electronics."[65] While interoffice transmission facilities support telecommunications services, dark fiber is not used in the provision of any

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[62] First Order at para. 366.

[63] Section 3(29) of the 1996 Act defines the term "network element" to mean

> a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 USC § 153(29).

[64] *See* Testimony of Paul Powers, MCI, *in Petitions by AT&T Communications of the Southern States, Inc, MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. for arbitration of certain terms and conditions of a proposed agreement with GTE Florida Incorporated concerning interconnection and resale under the Telecommunications Act of 1996*, before the Florida Public Service Commission, Docket No. 960847-TP, Docket No. 960980-TP (Oct. 1996), transcript at 1005 (agreeing that dark fiber is not used to provide telecommunications services "as it sits dark").

[65] MCI Petition at 21.

such services.[66] Dark fiber is inactivated fiber that the incumbent LEC stores in rights-of-way. As such, it is incapable of supporting telecommunications services, and thus cannot reasonably be considered a network element.

AT&T claims that this reasonable application of the statutory definition "proves too much," because there are many facilities and equipment in incumbent LEC networks that may not be used at any particular time.[67] However, AT&T's argument itself overreaches by applying a "future use" extension to the "network element" definition.

Under AT&T's theory, any spool of fiber cable standing in a LEC's equipment yard, or any other piece of spare equipment that could be used in the future for interoffice transmission, should be treated as a network element. Neither the statute nor the First Order gives any indication that such possible future use should determine network element status. Indeed, such an interpretation would force incumbent LECs, as carriers of last resort, to take additional and otherwise unnecessary measures to ensure that they can fulfill their legal obligations to have capacity available for service to consumers.

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[66] Section 3(51) of the 1996 Act defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 USC § 153(51).

[67] AT&T Petition at 35, *citing* First Order at para. 432.

B. The Commission Properly Declined To Require Subloop Unbundling

A few petitioners[68] challenge the Commission's decision to have the states address the technical feasibility of subloop unbundling on a case-by-case basis.[69] In light of the difficult issues regarding network reliability and service quality noted by the Commission, evaluation of specific requests for subloop unbundling is far preferable to mandating a national subloop unbundling requirement with the potential for serious unintended consequences.

There is no universally accepted definition of subloop unbundling that the Commission can or should adopt. The future demand for the type of unbundling contemplated by petitions is uncertain at best and currently is minimal. The issues raised by the petitioners will be most effectively resolved, not by regulation, but through market forces, as evidenced by customer demand and by network testing and service trials.

MCI tacitly acknowledges the important role of case-by-case treatment of subloop unbundling. Even while making the blanket claim that no technical impediment to subloop unbundling exists, MCI concedes that network reliability concerns are "arguably" present in certain individual cases, which can adequately be addressed in the context of specific requests for unbundling.[70] MCI and MFS seek to provide further assurances that because subloop unbundling does not necessarily require physical access by a new entrant's personnel, network

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[68] *See, e.g.*, ALTS Petition at 11-12; MCI Petition at 16; MFS Petition at 9.

[69] *See* First Order at para. 391.

[70] *See* MCI Petition at 16-17.

reliability concerns are minimized.[71] However, at the same time, MCI claims that new entrants, not incumbent LECs, will exercise overall responsibility for the reliability of a loop comprised of the new entrant's feeder and an unbundled distribution element, with the qualification that the new entrant may "occasionally" require the incumbent LEC's cooperation in addressing maintenance issues.[72]

USTA respectfully submits that the scenario contemplated by these petitioners -- where new entrants are nominally responsible for loop reliability even though they need not have physical access to the unbundled portions of the subloop -- is a recipe for unreliability. Indeed, the First Order states that incumbent LECs have a continuing duty to maintain, repair, or replace the unbundled network elements.[73] Rather than mandating unbundling based on untested assumptions, the Commission should maintain its current policy regarding subloop unbundling.

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[71] *See* MCI Petition at 17-18; MFS Petition at 9-10. MCI argues that most LEC distribution and feeder facilities are cross-connected at the feeder/distribution interface ("FDI"), and that as a result, cross-connecting a requesting carrier's facilities is no different for an incumbent LEC than cross-connecting its own feeder. MCI Petition at 16. MCI is incorrect. A substantial number of LEC distribution and feeder facilities do not have FDI, particularly in urban areas where competition is strongest.

[72] *See* MCI Petition at 18-19.

[73] *See* First Order at paras. 258, 268.

C. Advanced Intelligent Network Features Should Not Be Unbundled Further

The Commission should deny MCI's request that the Commission require further unbundling of incumbent LECs' Advanced Intelligent Network ("AIN") capabilities. MCI specifically asks the Commission to order the delivery of AIN triggers to third party Service Control Points ("SCPs") and the interconnection of third party call-related (SCP) databases.[74]

The Commission properly declined to require the unbundling of such capabilities, stating that it intended to address this issue in 1997, taking into account, *inter alia*, any relevant decisions of state commissions.[75] USTA believes that the Commission's announced course of action is the most prudent one. Although MCI makes terse claims that such unbundling is technically feasible, the records of the Intelligent Network proceeding in CC Docket No. 91-346 and of this proceeding demonstrate that these forms of unbundling are not yet technically feasible. As the First Order noted, such unbundling may cause multiple harms to which LEC switches could be vulnerable.[76] Numerous network reliability and security issues remain to be resolved.

In light of the technical infeasibility of further AIN unbundling as requested by MCI, USTA recommends that the Commission defer considering this issue, consistent with its holding in the First Order. To do so best reflects the fluid status of AIN development as well as the possibility of further information to be gained from state developments.

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[74] *See* MCI Petition at 24-25.

[75] *See* First Order at paras. 501-503.

[76] *See* First Order at paras. 475 nn. 1097-1102, 501 n. 1168.

D. The Commission Should Not Mandate A Deadline For National Standards For Electronic Interfaces For Operations Support Systems

The Commission should deny MCI's petition to require a date certain for the establishment of national standards for the electronic interfaces to be used for access to OSS.[77] MCI provides no new information that should alter the Commission's decision to "monitor closely the progress of industry organizations" as they implement the rules regarding operations support systems, rather than mandate a deadline for national standards.[78] There is little chance that any participant in the industry groups could cause delays without attracting attention from other group members, which could then notify the Commission or other authorities. Indeed, the Commission has pledged to watch the development of national standards closely. There is no reason to believe that the Commission would not respond to a complaint of delaying tactics.[79]

However, the fact that MCI expresses concern about the progress of industry standards groups further demonstrates that the First Order's deadline of January 1, 1997 for

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[77] *See* MCI Petition at 39-40.

[78] *See* First Order at para. 528. The Commission has stated its intent to decide whether to issue a separate notice of proposed rulemaking or take other action to guide industry efforts at arriving at appropriate national standards for access to OSS. *Id.*

[79] One industry group, the Ordering and Billing Forum ("OBF"), in which MCI participates, has already published some standards for unbundled loops and basic resale. This industry forum should be allowed to continue its work; no action by the Commission that would thwart its progress should be considered. *Cf.*, *800 Data Base Access Tariffs and the 800 Service Management System Tariff*, Report and Order, FCC 96-392 (rel. Oct. 28, 1996) at para. 199 (finding that OBF should resolve certain issues, rather than imposing new requirements on the LEC(s).

implementation of nondiscriminatory access requirements to OSS is unreasonable. USTA supports deferral of that January 1, 1997, deadline.[80]

E. Additional Reporting Requirements And Performance Standards Are Unnecessary

In their petitions, WorldCom and Teleport urge the Commission to establish national performance standards and reporting requirements for access to unbundled network elements.[81] These parties insist that although the Commission has adopted national guidelines, "these are insufficient to protect against" the potential for discriminatory behavior.[82] For example, Teleport calls for mandated standards for installation intervals, mean time to repair, and service availability standards.[83] Both parties recommend various reporting requirements, such as WorldCom's proposals to require a status report on OSS by December 1, 1996 and quarterly reports showing that requesting carriers are receiving nondiscriminatory access to

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[80] *See* Local Exchange Carrier Coalition ("LECC") Petition at 4-5. The Commission also should not be distracted by proposals, such as that of Sprint, to mandate implementation of interim mechanized ordering as a substitute for manual interchange of information. *See* Sprint Petition at 6. The time and effort needed to implement such systems would be invested more profitably in pursuing and implementing industry standards. Any mechanized "interim" capability would be short-lived and costly. Manual interim processes should be permitted until industry standards are finalized.

[81] *See* WorldCom Petition at 8-10; Teleport Petition at 3-6.

[82] Teleport Petition at 4.

[83] *See* Teleport Petition at 3.

OSS functions,[84] and Teleport's suggestion that incumbent LECs be required to report information separately by residential, small business, large business, and exchange area.[85]

WorldCom and Teleport fail to appreciate the First Order's treatment of the provisions in the 1996 Act governing nondiscriminatory access. The Commission's rules mandate nondiscriminatory access and provide ample enforcement authority against those that do not comply with them.[86] After acknowledging and largely agreeing with the concerns of potential new entrants, the Commission crafted comprehensive rules regarding nondiscriminatory access. Additional national reporting requirements would burden incumbent LECs and Commission resources without providing a realistic means of ensuring compliance with the rules.[87]

In addition, WorldCom and Teleport fail to recognize the wisdom of the Commission's decision to rely on the states to devise specific requirements. As the First Order noted, "the states are best situated to issue specific rules because of their existing knowledge regarding incumbent LEC networks, capabilities, and performance standards in their separate jurisdictions and because of the role they will play in conducting meditations, arbitration, and approving agreements."[88] This finding comports with the letter and spirit of the 1996 Act and

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[84] *See* WorldCom Petition at 9.

[85] *See* Teleport Petition at 6.

[86] *See* First Order at paras. 124-129.

[87] Of course, parties may negotiate individualized arrangements, including, if agreed upon, some type of reporting requirements or performance standards.

[88] First Order at para. 310.

acknowledges the wide variations among the states and the regional differences in network functions and capabilities.

WorldCom and Teleport also ask the Commission to impose national reporting requirements on incumbent LECs.[89] As the First Order appropriately concludes, however, "the record is insufficient at this time to adopt such requirements."[90] To this finding, Teleport's only response is that it does not agree,[91] while WorldCom merely claims that the additional reports will aid in the monitoring and enforcement of various Commission rules, and, curiously, "maximize the ability of potential new entrants to establish compatible systems quickly."[92] The First Order properly leaves this issue to the states.[93] Because the petitions do not explain why the First Order's treatment of this issue is not sufficient, the petitions should be dismissed.

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[89] *See* WorldCom Petition at 9; Teleport Petition at 5.

[90] First Order at para. 311.

[91] *See* Teleport Petition at 5.

[92] WorldCom Petition at 9. It is difficult to understand how Teleport's proposed reporting requirements will help new entrants establish compatible systems. Direct inquiries to incumbent LECs, rather than reading reports filed at the Commission, would seem to be the most productive source of information for this endeavor.

[93] *See* First Order at para. 311.

F. Billing and Collection Services Do Not Constitute A "Network Element"

The Commission should deny the request of Pilgrim Telephone, Inc. ("Pilgrim") to classify billing and collection services as a "network element."[94] A service, like billing and collection, cannot be a network element, which is defined in pertinent part to mean "a facility or equipment used in the provision of a telecommunications service."[95] Even further, billing and collection services do not satisfy the definition of "telecommunications service,"[96] since they are not offerings of "telecommunications for a fee directly to the public," where "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[97] Billing and collection does not involve transmission of such information. Indeed, if anything, it involves the calculation, storage, and eventual transmission of information gathered by carriers about customers' use of carrier services. Indeed, the Commission recognized as much when it deregulated and detariffed such services years ago.[98]

Contrary to Pilgrim's unsupported assertions about Congress' intent, absolutely nothing in the 1996 Act has changed this well-settled area. Requesting carriers may be able to gain

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[94] *See* Pilgrim Petition at 3-4.

[95] *See* 47 USC § 153(29).

[96] *See* 47 USC § 153(51).

[97] *See* 47 USC § 153(48).

[98] *See Detariffing of Billing and Collecting Services*, Report and Order, 102 FCC 2d 1150 (1985), *recon. denied*, 1 FCC Rcd. 445 (1986).

access to information sufficient to perform billing and collection, but incumbent LECs can continue to decide whether to provide billing and collection services, as well as the terms, conditions, and limitations under which those services will be offered. In that regard, Pilgrim's attempt to bootstrap the duty to negotiate in good faith under the 1996 Act to a limitation on incumbent LECs' legitimate inquiries associated with billing, collection, and other service matters outside the 1996 Act is novel but unavailing.[99] The Commission should rightfully decline to accept Pilgrim's requests for clarification of this issue.

G. Access to Call Related Databases Has Been Addressed By The Commission

Pilgrim seeks access to what it describes as "call related databases" that contain information on "900 number blocks and international call blocks."[100] The Commission has previously addressed this issue in its *Third Report and Order*, CC Docket No. 91-35 (released April 5, 1996). USTA believes that no further action is required by the Commission.

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[99] An incumbent LEC might, for example, observe a policy of declining to bill and collect for 900 and similar services that involve adult material. Requesting advertising copy and asking other questions meant to discover the type of services to be provided by the entity requesting billing and collection services can hardly be objectionable as "editorial and censorship control," Pilgrim Petition at 6, to anyone but the purveyor of such material. The provider is free to continue to sell what it can, but must collect its own charges.

[100] Pilgrim Petition at 5.

H. Collocation Requirements Apply Only For Transmission Equipment

The Commission should deny the requests of AT&T and MFS to require collocation of remote switch modules ("RSMs") on the premises of incumbent LECs, as well as MFS's broader request for mandatory collocation of packet and data switches.[101] The First Report properly declined to adopt a general requirement that incumbent LECs permit collocation of "switching equipment," such as the RSMs, packet switches, and data switches at issue in these petitions, finding that such equipment appears not to be used for network interconnection or access to unbundled elements.[102] In doing so, the Commission rightly applied Section 251(c)(6), which provides for "physical collocation of equipment necessary for interconnection or access to unbundled network elements."[103]

AT&T and MFS base their requests on claims that RSMs and the other types of switches at issue perform both switching functions and transmission or multiplexing functions. Most importantly, petitioners apparently argue that because RSMs and other types of switches principally perform transmission-like functions, rather than traditional switching functions, collocation should be required on a national basis.[104] This argument is greatly overstated. Claiming that an RSM "replaces" multiplexing and transmission facilities is only true insofar as any concentration device, whether a stand-alone switch or a loop concentrator, is a

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[101] *See* AT&T Petition at 31, 34, MFS Petition at 11-14.

[102] *See* First Order at para. 581.

[103] *See* 47 USC § 251(c)(6).

[104] *See* AT&T Petition at 32-33, MFS Petition at 13-14.

V. THE COMMISSION SHOULD NOT CREATE ADDITIONAL COMPETITIVE IMBALANCES BY ACCORDING CMRS PROVIDERS SPECIAL TREATMENT

A. Paging Companies Do Not Provide Telephone Exchange Service

The Commission properly excluded CMRS paging companies from its list of those CMRS providers that offer "telephone exchange service."[106] The Commission should deny petitions to reverse this holding.[107] Such petitions misconstrue the Commission's plain reading of the 1996 Act and adopt strained interpretations of the statutory language.[108] In holding that cellular, broadband PCS, and covered SMR carriers provide telephone exchange service, the Commission correctly focused on the fact that those carriers provide local, two-way switched voice service as a principal part of their business.[109]

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[106] *See* First Order at paras. 1005, 1013. In the Second Report and Order in this proceeding, the Commission specifically found that paging providers do not offer telephone exchange service. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order, CC Docket No. 96-98, FCC 96-333 (rel. Aug. 8, 1996) ("Second Order") at para. 333 n. 700.

[107] *See, e.g.,* AirTouch Petition at 7-12; PageNet Petition at 13-17.

[108] The relevant section of the statutory definition of "telephone exchange service" is

> [S]ervice within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 USC § 153(47).

[109] *See* First Order at para. 1013.

In contrast, paging companies do not offer telephone exchange service because they do not provide services that could reasonably fall within the statutory definition. In particular, they do not offer service comparable to local, two-way switched voice service.[110] The Commission correctly refused to find that paging companies qualify under either prong of the 1996 Act's definition of telephone exchange service.

Paging companies fail to offer any convincing rationales for revisiting the Commission's sound analysis. Whether such networks permit end users to communicate through alphanumeric or delayed voice-mail offerings is irrelevant.[111] No such offerings can be construed as remotely "comparable" to two-way switched voice.

Discussions of cases applying "exchange service" definitions prior to the 1996 Act are neither controlling nor persuasive.[112] They ignore the clear implication and common meaning associated with the use of "telephone" in the phrase "telephone exchange service" and its definition. Plainly stated, paging is not a telephone service. Both the governing statutory definition and the telecommunications industry itself have changed significantly in the past year. For that reason, USTA believes that the Commission correctly focused on defining "comparable" by analyzing the actual services at issue.[113] Accordingly, the Commission

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[110] *See* First Order at para. 1005.

[111] *See, e.g.,* Airtouch Petition at 11 (requesting the Commission to define "comparable" as providing for reciprocal communication).

[112] *See, e.g.,* PageNet Petition at 13-15 (citing Commission decision from 1963 and from 1983 decision construing the Modification of Final Judgment). None of the claimed precedent dealt with interpreting the new definition in the 1996 Act.

[113] The Commission's finding that paging companies do not offer an "intercommunicating" service is set forth in the Second Order at para. 333 n. 700. Petitioners' attempts to textually

(continued...)

should not give weight to claims that paging companies offer exchange services because their network topographies are similar to those of cellular, broadband PCS and covered SMR providers.[114]

B. The Commission Should Not Grant Paging Companies TELRIC-Based Termination Compensation

The Commission correctly determined that paging is significantly different from wireline or wireless voice services, using different types and amounts of equipment and facilities.[115] The Commission explained that because of these major differences, the incumbent LEC's forward-looking costs would not be reasonable proxies for the costs of paging providers. The First Order recognized that because of differences in network configuration and traffic duration, using the incumbent LEC's forward-looking costs as a proxy for a paging provider's costs "might create uneconomic incentives for paging providers to generate traffic simply in order to receive termination compensation."[116]

The Commission should reject arguments that it should reverse this analysis. The basis for such claims is that the paging industry is facing competitive pressures from other industries

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[113](...continued)
deconstruct the term "intercommunicate" are non-sequiturs. *See* PageNet Petition at 12. Regardless of whether one could conceivably argue that one-way paging with "an element of reciprocal communications" is "intercommunication," there can be no doubt that such services are not comparable to two-way switched voice service.

[114] *See* PageNet Petition at 15.

[115] *See* First Order at para. 1092.

[116] First Order at para. 1092.

and services such as broadband PCS and cellular. However, this narrow concern in no way justifies a subsidy to paging companies in the form of terminating compensation that bears no relationship to cost. It would be unsound policy and a contravention of the 1996 Act to so subsidize the one-way paging industry in its efforts to compete with advanced communications services.[117] Moreover, claims that the Commission's ruling creates potential for arbitrage are speculative.[118] If there is a problem, it is that the compensation rates for CMRS providers other than paging firms also are not cost-based. The Commission should not compound the problem by extending such rates to providers that do not even provide telephone exchange service. Without information regarding paging providers' costs of terminating local traffic, the incentives that could cause such arbitrage and its policy significance are unclear.

In this regard, the Commission wisely has decided to refrain from precipitous action and has committed to initiate a proceeding to determine an appropriate proxy for paging costs.[119] Whether a competing LEC chooses to enter into an agreement with a paging carrier in the absence of information about a paging carriers' costs merely reflects the competing LEC's valuation of the lack of information about costs and the market risks involved. Of course, such an agreement would reflect compensation arrangements voluntarily entered into by the parties, rather than a mandated rate imposed without a record to support it.

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[117] *See, e.g.,* AirTouch Petition at 19.

[118] *See* AirTouch Petition at 24.

[119] *See* First Order at para. 1093.

C. Cellular Licensees Should Not Be Permitted To Define Points Of Origin Of Wireless Calls Based On MSA-RSA Or Other Boundaries

In the First Order, the Commission held that all calls by CMRS providers within the same Major Trading Area ("MTA") should be deemed local calls for the purposes of applying the inter-company compensation obligations of Section 251(b)(5), regardless of the LECs' or CMRS providers' local service area.[120] USTA supports the view that such a definition is improperly discriminatory, and should be changed to be consistent with incumbent LECs' service areas.[121]

The Commission should not exacerbate the competitive imbalance now present in the First Order by permitting cellular operators with multicellular systems in multiple Metropolitan Statistical Areas ("MSAs") or Rural Statistical Areas ("RSAs") to define their local calling areas based on the contiguous footprint of their network operations.[122] Allowing cellular providers to determine their own calling areas, effectively choosing the points of origin of wireless calls, would provide massive incentives for cellular operators to report origination so as to maximize their benefits under reciprocal compensation arrangements. Because multicellular system boundaries do not coincide with state boundaries, CMRS providers would gain substantial control over determining the jurisdictional status of wireless calls.

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[120] *See* First Order at para. 1036, App. B-40, 47 CFR § 51.701(b)(2).

[121] *See* LECC Petition at 16.

[122] *See* Comcast/Vanguard Petition at 8-10.

USTA believes that the Commission's adoption of an MTA-based structure for CMRS providers' calling areas will cause detrimental shifts of revenues and costs from the interstate to the intrastate jurisdiction.[123] Permitting cellular providers still more flexibility to determine the jurisdiction of their calls would be even more problematic.

D. CMRS Providers Should Not Be Permitted To Control Incumbent LEC's Retail Rates

In a joint petition, Comsat Cellular Communications, Inc. and Vanguard Cellular Systems, Inc ("Comcast/Vanguard") seek the ability to associate NXX codes with any point they choose, without requiring a switch or interconnection at that point.[124] The Commission should deny this extraordinary request, which essentially asks it to somehow grant to CMRS providers the ability to control a LEC's retail pricing decisions, as well as the ability to preempt intrastate rate matters wholly within the jurisdiction of state commissions.

As a matter of jurisdiction alone, the Commission must reject such a request. There is nothing in the 1996 Act that provides for any such authority, much less the delegation of such authority to a private party. Pursuant to the 1996 Act, state commissions retain jurisdiction over intrastate matters, including how LECs charge their end users. Comcast/Vanguard's attempt to use the numbering authority given the Commission to control intrastate rates is unavailing. There is nothing in Section 251(b) that remotely speaks to this issue. Nor can

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[123] *See* LECC Petition at 17.

[124] *See* Comcast/Vanguard Petition at 11-14.

Section 251(e) be read as providing a "back door" means of regulating when LECs can impose intrastate toll charges, or preempting a state commission's jurisdiction over intrastate rates.

As a factual matter, Comcast/Vanguard's request only conceivably could makes sense in those situations where the CMRS subscriber actually receives a landline end user's call within that end user's local calling area. However, Comcast/Vanguard's preemptive solution to these situations is complete overkill. To the extent that this issue between the parties cannot be resolved in a mutually satisfactory manner in negotiation, then it is properly a matter of arbitration before the appropriate state commission.

E. CMRS Providers Are Not Entitled To "Interim Rate Relief"

Comcast/Vanguard seek interim rate relief prior to the renegotiation of current interconnection arrangements.[125] Their argument is based on a false premise. The Commission has not, as Comcast/Vanguard assert, determined that existing interconnection arrangements are "presumptively unlawful."[126] In reality, the Commission declined to adopt existing rates in establishing proxy rates given the environment in which they were set, not on the basis that each and every existing interconnection arrangement was "unlawful."

Assuming *arguendo* that the Commission has jurisdiction over this matter, the Commission instead permits existing CMRS-LEC interconnection agreements to be re-negotiated under auspices of the Act. Requiring the requested "interim relief" would wholly ignore the facts surrounding existing interconnection arrangements, and instead treat them as if

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[125] *See* Comcast/Vanguard Petition at 3-8.

[126] *See id.* at 3.

they were cast in the mold envisioned in the 1996 Act. Addressing and perhaps modifying these arrangements requires negotiation under the 1996 Act, not imposition of rates that fail to reflect the structure of these relationships.

VI. POLICIES REGARDING POLE ATTACHMENTS AND CONDUITS MUST REFLECT THE ACTUAL TERMS OF THE STATUTE

WinStar asks the Commission to establish as a general guideline a right of access to incumbent LECs' roofs and riser conduit "in order for WinStar to install 38 GHz radio equipment in furtherance of its transmission and distribution network."[127] This request, which would force incumbent LECs and other utilities to locate Winstar's 38 GHz microwave equipment on their rooftops, is not based on any reasonable interpretation of incumbent LECs' obligations under the 1996 Act, particularly Section 224(f)(1).[128]

In adopting general guidelines to govern arms-length negotiations among parties, the Commission properly refused to adopt the identical request made by WinStar in initial comments in this proceeding.[129] The Commission recognized that an overly broad interpretation of "pole, duct, conduit, or right-of-way" as used in Section 224(f)(1) could adversely affect the owners and managers of small buildings, as well as small incumbent LECs. Such expansive treatment would impose burdens upon incumbent LECs and utilities to

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[127] *See* WinStar Petition at 6.

[128] Section 224(f)(1) applies to all utilities, requiring nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by them.

[129] *See* First Order at para. 1185 and n. 2895, *citing* WinStar Comments at 3.

control effectively and monitor such rights of way located on their premises.[130] The First Order thus found that Section 224(f)(1) does not mandate that a utility must make space available on its roof.[131]

From a policy perspective, incumbent LECs' rooftops or risers cannot be considered "bottlenecks" for WinStar in particular or for the wireless industry generally.[132] For WinStar's purposes, no special geographic or technical characteristics distinguish these areas from those owned by any other entity.[133] Site design and acquisition for network architectures in the wireless industry rely on careful balancing of radio propagation issues and other factors, including the comparative advantages of available real estate. Negotiating leases for optimal locations for network towers, base stations, dishes and other infrastructure is often intensely competitive.

In such situations, however, markets allocate resources with efficiency. Incumbent LECs and utilities do not have a corner on the roof and riser market. Section 224(f)(1), which addresses access issues historically raised by poles, ducts, conduits, and rights-of-way, does not reasonably apply to rooftops and risers.

130/ *See* First Order at para. 1185.

131/ *See* First Order at para. 1185.

132/ WinStar asserts that lack of access to incumbent LECs' roofs and risers is a potential bottleneck, impeding wireless carriers' entry into the local market. WinStar Petition at 6.

133/ The Commission has addressed related issues regarding microwave facilities siting in other proceedings. Such issues should not be relitigated here. *See Expanded Interconnection with Local Telephone Company Facilities*, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) at para. 68 (noting that LECs must provide special access for microwave interconnection for switched transport).

The Commission has considered WinStar's claims and did not adopt them in the First Order. No new arguments or facts are presented to justify embracing WinStar's bold invitation to exceed the statutory provisions of the 1996 Act. The Commission should therefore reject WinStar's request.[134]

VII. CONCLUSION

USTA opposes the foregoing petitions for reconsideration or clarification. The public interest would be best served if the Commission reaffirms its holdings regarding these matters as articulated in the First Order or, in some cases, alters its holdings as requested in other petitions. WHEREFORE, USTA respectfully requests that the Commission deny the petitions for reconsideration or clarification as described herein.

Respectfully submitted,

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October 31, 1996

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[134] The Commission should also permit the terms of voluntarily negotiated agreements for access to control over the requirement for uniform rates. For example, a utility or incumbent LEC should be permitted to recover its reasonable costs for reviewing and processing requests to attach, particularly as requesting parties may abandon their requests for a variety of reasons. To hold otherwise would burden incumbent LECs and utilities with expenses related to requests that cannot be recouped. *See, e.g.*, Florida Power & Light Petition at 30 (noting the need for permitting negotiations and flexibility to recoup processing and other costs).

CERTIFICATE OF SERVICE

I, Gina Thorson, do certify that on October 31, 1996 copies of the Oppositions to the Petitions for Review of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first - class, postage prepaid to the persons on the attached service list.

Gina Thorson

Gina Thorson