

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

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FEDERAL COMMUNICATIONS COMMISSION
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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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OPPOSITION TO PETITIONS FOR RECONSIDERATION

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

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

INTRODUCTION AND SUMMARY

Several petitioners seek modifications to the First Report and Order that would undermine the pro-competitive, deregulatory framework embodied in the 1996 Act. These efforts must be rejected. To the extent that revisions are in order, the First Report and Order should be modified only in ways that promote, rather than impede, the Act's competitive purposes.^{2/}

^{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).

^{2/} NCTA sought reconsideration of a limited number of items in the First Report and Order aimed at furthering the Act's competitive purposes. See NCTA Petition for Reconsideration, CC Docket No. 96-98, Sept. 30, 1996 ("NCTA Petition"), at 2.

First, the Commission should reject requests from State commissions to impose incumbent local exchange carrier (ILEC) requirements on competing local exchange carriers (CLECs). The specific interconnection, unbundling and wholesale pricing obligations Congress chose to impose upon ILECs were designed to both reflect and, over time, diminish the market power over local telecommunications wielded by ILECs. By contrast, Congress opted to impose minimal obligations on CLECs in order to encourage new entry. There is no statutory or policy justification for retreating from the First Report and Order's faithful execution of the Act's directive to exempt CLECs from interconnection and unbundling obligations that are only appropriate for carriers with market power. The Commission should reiterate that States are barred from imposing ILEC requirements on CLECs, and make clear that it will exercise its authority under Federal law to prevent States from taking such steps.

Second, the Commission should spurn ILEC proposals that are designed to erect procedural obstacles to interconnection negotiations and to otherwise delay the transition to competition required by the Act. The Local Exchange Carrier Coalition (LECC) seeks to secure premature term commitments from CLECs negotiating the purchase of unbundled elements, impose "termination liability," mandate CLEC provision of demand forecasts during interconnection negotiations, and delay the switchover of customers who elect to obtain local service from a competing carrier. These proposals should be rejected, since their adoption would discourage new entry by providing ILECs with opportunities to impede negotiations and delay competition. The Commission should, however, impose performance standards on ILECs in connection with the effectuation of their duties under Section 251(c).

At a minimum, ILECs should be required to provide comparative performance data in order to ensure that the pace and quality of ILEC provisioning of interconnection and unbundled elements comports with the Act's non-discrimination requirements.

Third, the Commission should only adopt modifications of its transport and termination requirements that further the Act's competitive purposes. While the Order should be revised to exclude forward-looking common costs from the pricing standard used to establish transport and termination rates,^{3/} the Commission should reject proposals designed to undermine the principle of symmetric compensation. Switching technology has evolved to the point at which a single, integrated switch and associated distribution facilities can perform the same functions and serve a comparable geographic area as the two-tiered tandem/end office architecture employed by many ILECs. CLECs should not be forced to choose between deploying an outmoded network architecture or paying higher transport and termination rates than their competitors. If CLEC switches and associated distribution facilities embody the same functionality as ILEC tandem switches or serve a comparable geographic area, the rates paid by ILECs and CLECs should be symmetrical. In addition, the Commission should reject ILEC efforts to delay the provisioning of interim transport and termination during the pendency of interconnection negotiations.

Fourth, as demonstrated in NCTA's initial Petition, the Commission should reduce -- or eliminate altogether -- the amount of avoided indirect costs included in the calculation of the wholesale discount.^{4/} There is certainly no basis for increasing the amount of avoided

^{3/} See NCTA Petition at 7-14.

^{4/} NCTA Petition at 14-20.

indirect costs used to set wholesale rates, as requested by some petitioners. Nor should the Commission require CLECs to offer their promotional service offerings for resale under Section 251(b). Such a requirement is not authorized by the Act and would stifle the ability of facilities-based new entrants to compete during the critical start-up phase of competition. More fundamentally, the Commission should reconsider altogether its conclusion that CLECs and ILECs are subject to comparable restraints upon their ability to restrict the resale of their services. While broad-based resale requirements are appropriate for carriers with market power, there is no legal or policy basis for imposing equivalent requirements on new entrants.

Fifth, it is unnecessary and counterproductive to impose the "transmission at tariff" requirement on carriers that lack market power. If the Commission nonetheless chooses to do so, it should make clear that, consistent with the ILEC/CLEC dichotomy embodied in the 1996 Act, this requirement does not obligate CLECs to unbundle their networks.

Sixth, the Commission should not retreat from the First Report and Order's appropriate implementation of access rights to poles, ducts, conduits and rights-of-way granted to competitors by the 1996 Act. Specifically, the Commission should reject proposals designed to narrow competitors' access rights, expand utilities' ability to limit competition by warehousing pole space, and otherwise hamper implementation of the broad access right enacted by Congress in the 1996 Act.

I. THE COMMISSION SHOULD REJECT STATE EFFORTS TO IMPOSE ILEC REQUIREMENTS ON CLECs

Some States persist in their efforts to impose ILEC requirements on CLECs,^{5/} notwithstanding the Act's clear directive to the contrary and despite the Commission's faithful implementation of the Act's prohibition against burdening CLECs with ILEC obligations.^{6/} The Public Utilities Commission of Ohio ("PUCO"), for example, asserts that the states should be free to impose Section 251(c) requirements on CLECs "in the interest of encouraging . . . an efficient public switched network."^{7/} Likewise, the Texas PUC requests that the Commission declare that "states may impose additional obligations on non-incumbent LECs when the imposition of such obligations are needed [sic] to address legitimate state concerns like quality of service and the public interest."^{8/}

The Commission's decision to bar states from imposing ILEC requirements on CLECs was correct, both as a matter of law and policy. The express language of the 1996 Act and its legislative history demonstrate that Congress intended to establish different

^{5/} See, e.g., Public Utilities Commission of Ohio (PUCO) Petition at 3 "states should have the discretion to impose several of these obligations on non-incumbent LECs"); Texas Public Utilities Commission (Texas PUC) Petition at 14 (discussing added requirements imposed on LECs by state law and arguing that "these obligations are appropriate for all carriers").

^{6/} See First Report and Order at ¶¶ 1247-48.

^{7/} PUCO Petition at 3.

^{8/} Texas PUC Petition at 17.

requirements for new entrants and incumbents in the local service market and that these differences are central to the Act's regulatory scheme.^{9/}

Congress opted to exempt CLECs from the additional obligations for a simple reason: ILECs have market power; CLECs do not.^{10/} The PUCO argues that if state regulators were free to impose Section 251(c) obligations on new entrants and incumbents alike, "all carriers [would be] . . . able to share the newest technology and utilize each other's efficient network . . . promot[ing] the goal of shared technology" ^{11/} The PUCO ignores the ILEC/CLEC distinction set forth in Section 251. The unbundling obligations imposed in Section 251 do not stem from a desire to guarantee all carriers shared access to the most advanced network facilities available. Instead, they are designed to facilitate elimination of the ILECs' monopoly control over local exchange service. There is no basis for imposing upon CLECs obligations that Congress expressly decided to apply only to carriers with market power.^{12/} The market power exercised by ILECs is based on their ubiquitous

^{9/} Compare 47 U.S.C. § 251(b) with *id.* § 251(c). See generally NCTA Comments, CC Docket No. 96-98, May 16, 1996 ("NCTA Comments"), at 15-24.

^{10/} See S. Rep. No. 23, 104 Cong. 1st. Sess. 19 (1995) (limiting imposition of interconnection and unbundling requirements to "local exchange carriers with market power"); H.R. Rep. No. 204, 104th Cong., 1st Sess. 74 (1995) ("House Report") (noting that "new entrants into the market for telephone exchange service will face tremendous obstacles since they will be competing against an entrenched service provider" and that "saddling [new entrants with] the full weight" of the Act's interconnection and unbundling requirements on new entrants "will discourage persons from entering the market").

^{11/} PUCO Petition at 4.

^{12/} Cf. 47 U.S.C. § 251(h)(2) (authorizing the imposition of ILEC obligations on non-ILECs only where the latter "occupies a position in the market for telephone exchange service . . . that is comparable to the position occupied" by an ILEC and "has substantially replaced" an ILEC).

market presence and control over the bottleneck facilities used to provide local service, not on the type of technology used in those facilities. While the ILECs' market power provides them with the incentive and ability to thwart competition, CLECs have no corresponding opportunities, even when they build networks that incorporate advanced capabilities.

The PUCO also argues that ILECs and non-ILECs should have access to the advanced capabilities of hybrid fiber-coaxial (HFC) networks deployed by cable operators that enter the local exchange market.^{13/} Not only would such a requirement run afoul of the statutory prohibition and policy considerations against subjecting CLECs to ILEC requirements such as unbundling, the PUCO's proposal also would impermissibly subject cable operators to common carrier obligations with respect to facilities they deploy to provide cable service.^{14/}

The 1996 Act was intended to encourage facilities-based competition, and the obligations delineated in Section 251(c) are limited to those regarded by Congress as necessary to remove barriers to expeditious entry by new competitors. Congress expressly declined to create what PUCO seeks to impose: a generalized obligation on all carriers -- including new entrants -- to share network capabilities with competitors.^{15/} Indeed, Congress recognized that the application of ILEC requirements to CLECs could well

^{13/} PUCO Petition at 5.

^{14/} Cf. 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

^{15/} Cf. PUCO Petition at 5. ("Allowing the states to impose Section 251(c) requirements on all LECs will not only reduce barriers to entry, but will greatly enhance both ILECs and non-ILECs abilities to design efficient networks and respond directly to market demands").

discourage deployment of advanced network facilities by new entrants.^{16/} Accordingly, the Commission should reiterate both that the 1996 Act does not allow the States to impose the duties created by Section 251(c) on CLECs and that it will use its authority under Federal law to prevent States from taking such steps.^{17/}

While the statute does permit States to impose additional obligations that are consistent with the 1996 Act, Congress explicitly established a bright-line distinction between ILEC obligations and CLEC obligations that the States are bound to observe.^{18/} Thus, to the extent that Texas or any other state seeks to impose on CLECs additional obligations that Congress reserved for ILECs, it is expressly barred by statute from doing so.^{19/}

II. THE COMMISSION SHOULD REJECT ILEC EFFORTS TO THWART THE ACT'S PURPOSES BY ERECTING PROCEDURAL OBSTACLES THAT WOULD STIFLE COMPETITION FROM NEW ENTRANTS

In the First Report and Order, the Commission correctly recognized that ILEC incentives to preserve their market power in the local exchange business threatened to thwart fulfillment of the 1996 Act's competitive objectives.^{20/} Because "the new entrant has little

^{16/} House Report at 74 ("saddling [new entrants with] the full weight" of the Act's interconnection and unbundling requirements on new entrants "will discourage persons from entering the market").

^{17/} See 47 U.S.C. § 251(d)(3).

^{18/} See 47 U.S.C. § 261(b)-(c).

^{19/} At least one of the obligations that the Texas PUC would impose on CLECs -- the provision of unbundled loops -- is limited to ILECs by the 1996 Act. See Texas PUC Petition at 14.

^{20/} See First Report and Order at ¶ 55 ("We find that incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect and make use of the

to offer the incumbent," an ILEC "is likely to have scant, if any, economic incentive to reach agreement."^{21/} Indeed, the Commission noted that notwithstanding the Act's directives to provide interconnection and access to unbundled elements under just and reasonable rates, terms and conditions, "incumbent LECs have strong incentives to resist such obligations."^{22/}

The First Report and Order rejected ILEC efforts to hamper the negotiation process by imposing unnecessary conditions on the right of CLECs to seek interconnection and access to unbundled elements.^{23/} The Commission properly recognized, for instance, that the "bona fide request" requirements sought by the ILECs were "likely to impede new entry."^{24/} The Local Exchange Carrier Coalition ("LECC"), however, continues to press for negotiation requirements designed to thwart interconnection and access to unbundled elements.^{25/}

LECC argues that requesting carriers should be required to "to commit, once price is determined, to take service for a reasonable time. . .".^{26/} The Commission already has

incumbent LEC's network and services").

^{21/} Id. at ¶ 141.

^{22/} Id. at ¶ 55.

^{23/} See id. at ¶ 156.

^{24/} Id.

^{25/} LECC Petition at 19 (requesting reconsideration of decision "not to adopt additional standards to determine good faith requests for interconnection").

^{26/} Id.

rejected ILEC proposals that would require CLECs to make purchase commitments "before critical terms" -- including price -- have been resolved.^{27/} Now LECC attempts to extract a term commitment from CLECs before its members will satisfy their Section 251(c) obligations. Rather than discourage "frivolous" or "speculative" requests,^{28/} this term commitment rule would only encourage unfair "take-it-or-leave-it" pressure tactics by ILECs on nonprice terms and conditions, and thereby discourage fair negotiations.

Likewise, the Commission should reject LECC's effort to include "termination liability" provisions in agreements with CLECs.^{29/} The authorization of "termination liability" provisions over and above standard contract or tariff terms is tantamount to imposing punitive damages on CLECs in the event of unforeseen changed circumstances.^{30/} Such provisions could also discourage CLECs from revising their agreements with ILECs to take advantage of the non-discrimination requirements and "most favored nation" rights created by the 1996 Act and the Commission's rules.^{31/}

^{27/} See First Report and Order at ¶ 156.

^{28/} These are already deterred by the Commission's requirement that requesting carriers negotiate in good faith. See 47 C.F.R. § 51.301(b).

^{29/} See LECC Petition at 19.

^{30/} A general endorsement of termination liability provisions may also heighten ILEC threats of termination, which some petitioners have suggested should be delineated as bad faith practices. See Pilgrim Petition at 8.

^{31/} 47 U.S.C. § 252(i); First Report and Order at ¶¶ 859-862.

LECC's suggestion that CLECs be required to provide demand forecasts for "services to be interconnected" must also be rejected.^{32/} This proposal is a transparent attempt by ILECs to obtain access to competitors' business plans. The Commission has determined that CLECs bear the risks of insufficient demand for the end-user services that will be offered via the interconnection and unbundled elements purchased from ILECs.^{33/} Because CLECs bear the risks associated with incorrect demand projections for their services, ILECs have no need to obtain access to CLEC forecasts. The Commission already has rejected a proposal that CLECs be required to provide their cost data to ILECs, noting that "the negotiations are not about unbundling or leasing the new entrants' network."^{34/} ILEC/CLEC negotiations are not concerned with demand for CLEC services; that is the CLEC's responsibility. LECC's proposal to require CLECs to provide demand data should be rejected.^{35/} While it

^{32/} See LECC Petition at 20.

^{33/} Cf. First Report and Order at ¶ 334 (noting that a CLEC purchasing an unbundled element bears "the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost").

^{34/} First Report and Order at ¶ 155. While the First Report and Order makes clear that CLECs are not required to furnish cost data, it also states that an "incumbent LEC may not deny a requesting carrier's reasonable request for cost data during the negotiation process, because . . . such information is necessary for the requesting carrier to determine whether the rates offered by the incumbent LEC are reasonable. Given these two unequivocal statements in the First Report and Order, NCTA agrees with MCI that, due to an apparent typographical error, the rule prescribed by the Commission in § 51.301(c)(8)(ii) fails to implement the policies established in the Order properly and must therefore be revised to make clear that an incumbent LEC -- and not the requesting telecommunications carrier -- must "furnish cost data that would be relevant to setting rates if the parties were in arbitration". See MCI Petition at 41-42; 47 C.F.R. § 51.301(c)(8)(ii).

^{35/} If anything, the Commission should consider adopting additional good faith requirements that would prevent ILECs from unreasonably demanding CLEC marketing plans, targeted customers, and other proprietary information as a condition of negotiations.

may be appropriate for a CLEC requesting an unbundled element to provide, for example, an estimate of the amount of capacity required to fulfill its needs,^{36/} there is no reason why ILECs would need access to the demand projections underlying the capacity amount requested.

The Commission also must reject LECC's effort to delay the switchover of customers who elect to obtain service from CLECs.^{37/} The First Report and Order requires ILECs to "switch over customers for local service in the same interval as LECs currently switch end users" between presubscribed interexchange carriers (PICs).^{38/} Flexibility is built into this requirement, because it only applies in instances where switchovers do not involve physical modifications to the ILEC's network, but are accomplished simply through software changes.^{39/} LECC proposes that the switching interval should be equal to the time it takes an ILEC to process its own local service orders.^{40/} This proposal is inappropriate, however, since activation of a new ILEC customer may require new construction, network modifications, truck rolls, and installation activity.^{41/} Since the PIC change interval

See Pilgrim Petition at 7.

^{36/} Cf. First Report and Order at ¶ 155 ("parties should be required to provide information necessary to reach agreement").

^{37/} LECC Petition at 24-25.

^{38/} First Report and Order at ¶ 421.

^{39/} Id.

^{40/} LECC Petition at 24.

^{41/} See NCTA Comments, CC Docket No. 96-98, May 16, 1996, at 45.

requirement only applies where the switchover can be accomplished through software changes, there is no justification to adopt the slower transfer interval proffered by LECC.^{42/}

Rather than accede to ILEC efforts to delay the transition to a competitive local exchange market through the erection of procedural obstacles, the Commission should adopt additional measures aimed at expediting the process of expanding consumer choice in local telephony. First, the Commission should make clear that ILECs engaged in interconnection negotiations are required to provide existing agreements to the CLECs with which they are negotiating.^{43/} For purposes of the most favored nation requirements of the 1996 Act,^{44/} pre-Act ILEC-to-ILEC agreements should be deemed approved under Section 252(e)(1).^{45/} Since they are the product of negotiations between non-competing carriers, such agreements should be presumed to be in the public interest.^{46/}

^{42/} To the extent that an ILEC can demonstrate that a customer's switchover to a CLEC does indeed "require translations and programming work that are far more involved and time consuming than the PIC change process," LECC Petition at 25, such that the PIC interval is unreasonable, the ILEC is free to seek a waiver of the Commission's requirement. The rule adopted in the First Report and Order should not, however, be abandoned based upon unproved assertions that a software-based change of a customer's local exchange carrier is more complicated than a software-based change of a customer's interexchange carrier.

^{43/} See ALTS Petition at 9-10 (proposing that ILEC refusal to provide existing agreements be deemed violation of good-faith negotiation requirement); see also Public Service Commission of Wisconsin Petition ("Wisconsin PSC Petition") at 5-6 (arguing good-faith rule should require ILECs to supply pre-Act interconnection agreements).

^{44/} 47 U.S.C. § 252(i).

^{45/} Cf. Wisconsin PSC Petition at 2-4. NCTA does not agree, however, that ILEC-CLEC agreements should be subject to the same presumption.

^{46/} Cf. 47 U.S.C. § 252(e)(2)(A)(ii).

Second, the Commission should adopt rules imposing performance standards that would govern the ILECs' satisfaction of their Section 251(c) obligations.^{47/} Performance standards would redress the problems of inferior service quality and unreasonable delays that CLECs have experienced in their dealings with ILECs to date.^{48/} While the Commission opted to let the States decide whether to adopt specific performance standards beyond the non-discrimination requirement embodied in the Federal interconnection and unbundling rules,^{49/} it recognized that ILECs "should be required to fulfill some type of reporting requirement to ensure that they provision unbundled elements in a nondiscriminatory manner."^{50/} The Commission declined to adopt such requirements, however.^{51/} NCTA agrees with TCG that the record provides ample support for reporting requirements that obligate each ILEC to submit quarterly reports that "describe its performance in providing interconnection facilities to competitors and provide a comparison to its performance in provisioning its own requirements."^{52/} ILECs should be required to furnish comparative performance data regarding the timing and quality of service rendered in connection with the provision of interconnection and unbundled elements both to themselves and to their competitors. Such data -- offered on an exchange area basis and broken down by customer

^{47/} See First Report and Order at ¶¶ 300, 302-03; NCTA Comments at 44-46.

^{48/} See NCTA Comments at 44; TCG Petition for Reconsideration at 3.

^{49/} See First Report and Order at ¶ 310; 47 C.F.R. §§ 51.305(a), 51.307(a), 51.311.

^{50/} First Report and Order at ¶ 311.

^{51/} Id.

^{52/} TCG Petition at 4-5; see also WorldCom Petition at 9.

categories -- would further the Act's pro-competitive purposes by affording an objective means for assessing and enforcing ILEC compliance with their nondiscrimination obligations.

III. THE COMMISSION SHOULD ONLY ADOPT MODIFICATIONS OF ITS TRANSPORT AND TERMINATION REQUIREMENTS THAT PROMOTE THE ACT'S COMPETITIVE PURPOSES

A. The Act Requires the Commission to Adopt a Pricing Standard for Transport and Termination that Excludes Joint and Common Costs

As detailed in NCTA's Petition for Reconsideration, the language of the Act, basic economic principles, and the logic of the First Report and Order all require the Commission to revise its pricing standard for transport and termination to exclude forward-looking common costs.^{53/} Likewise, TCG argues that the Act precludes the Commission from utilizing the same pricing standard for transport and termination that it employs for unbundled elements.^{54/} TCG correctly notes that the "additional costs" standard specified in the statute necessarily implies that "that the pricing standard for Transport and Termination must generally, if not always, yield a lower price than the pricing standard for interconnection and unbundling," and that this lower price reflects the fact that "there is no alternative to this function from potential competitors because it is the last bottleneck facility."^{55/} TCG also points out that the overpricing of transport and termination that would result from implementation of the current pricing standard could stifle the emergence of competition. For these reasons, the Commission should adopt a revised pricing standard

^{53/} See NCTA Petition for Reconsideration, CC Docket No. 96-98 ("NCTA Petition"), at 7-14.

^{54/} TCG Petition at 6-9.

^{55/} Id. at 8. See also NCTA Petition at 11-12.

for transport and termination that excludes forward-looking common costs and satisfies the "additional costs" formula mandated by Congress.

B. The Commission Should Reject Proposals that Undermine the Symmetric Compensation Requirement

In the First Report and Order, the Commission imposed symmetric rates for transport and termination that are based upon the additional costs borne by the ILEC for transporting and terminating on its network calls originated by CLEC customers.^{56/} As part of this symmetry requirement, the Commission provided that CLECs may be compensated at the ILEC's tandem rate whenever their network technologies "perform functions similar to those performed by an incumbent LEC's tandem switch."^{57/} The Commission also prescribed a specific rule stating that CLECs are entitled to compensation at tandem-based rates whenever their switches serve geographical areas that are comparable to those served by the ILEC with which it competes.^{58/} As Cox points out, the absence of such a requirement would stifle new entrants by forcing them either to exchange traffic with ILEC tandems while accepting the lower end-office rate for transport and termination of calls on CLEC networks; to incur higher costs to obtain symmetric compensation by exchanging traffic with ILEC end offices; or to deploy superfluous tandem facilities.^{59/}

^{56/} First Report and Order at ¶ 1085-86; 47 C.F.R. § 51.711(a).

^{57/} First Report and Order at ¶ 1090.

^{58/} See id.; see also 47 C.F.R. § 51.711(a)(3).

^{59/} Cox Petition at 5-6.

LECC urges the Commission to require ILECs to pay tandem-based rates "only where [CLEC] interconnectors actually have both tandem and end office switches."^{60/} Likewise, Sprint complains that paying tandem-based rates to CLECs that utilize a single switch that combines tandem and end-office functions "overcompensat[es] the CLEC by giving the CLEC compensation for a network that does not exist."^{61/} Sprint maintains that requiring ILECs to pay "the CLEC rates for what amounts to a 'phantom' network is inconsistent with the costing standard in § 252(d)(2) that each carrier recover its additional costs of transport and termination."^{62/} Accordingly, Sprint argues that where a CLEC switch serves a geographical area comparable to an ILEC's tandem, the CLEC would be entitled only "to compensation for local switching and a portion of the facility interconnecting its switch with that of the ILEC."^{63/}

The Commission should reject the LECC and Sprint proposals. CLECs should not be forced to make a Hobson's choice between, on one hand, accepting asymmetric compensation as the "penalty" for deploying network architectures that are more advanced, efficient and integrated than architectures of ILECs, or deploying outmoded and unneeded facilities as the price for obtaining symmetric compensation. Sprint's contention that symmetric pricing requirements contravene Section 252(d) is misplaced. Indeed, Sprint's proposal would run afoul of the Act since it is tantamount to setting transport and termination rates based upon

^{60/} LECC Petition at 14-15.

^{61/} Sprint Petition at 11.

^{62/} Id.

^{63/} Id.

the particular costs incurred by carriers, which is expressly prohibited by Section 252(d).^{64/}

By contrast, symmetric compensation derived from the ILEC's rates conforms to the statutory requirements that compensation be "mutual and reciprocal" and based upon "a reasonable approximation" of the additional costs borne by carriers.^{65/}

Rather than yield to efforts to force a retreat from the principle of symmetric compensation, the Commission should refine its rules to clarify the circumstances under which it must be provided. As requested by MFS, the Commission should clarify that symmetric compensation at tandem-based rates is appropriate if a CLEC's network either embodies tandem switch-like functionality or serves a geographic area comparable to that of the ILEC.^{66/} Likewise, the Commission should endorse Cox's suggestion that symmetric compensation should be required wherever interconnecting switches perform comparable functions.^{67/}

^{64/} See 47 U.S.C. § 252(d)(2)(B)(ii); First Report and Order at ¶ 1085.

^{65/} See 47 U.S.C. § 252(d)(2)(A).

^{66/} MFS Petition at 26. MFS indicates that US West has taken the position that the First Report and Order permits a CLEC to qualify for an ILEC's tandem-based rates only if it can demonstrate both that its network performs tandem-like functions and its geographic area is comparable to the ILEC's. Id.

^{67/} Cox Petition at 7. Thus, a CLEC switch that performs both tandem and end office functions would be treated as a tandem when interconnecting with a tandem switch and as an end office when interconnecting with an end office. See id.

A comparable functionality test also would address Sprint's concern that transport and termination rates paid by ILECs would improperly include a "transport" amount, even though calls terminating on CLEC networks travel only over loop plant. Sprint Petition at 13 (asserting that it is "illogical . . . to treat some or all of the CLEC's loop plant as 'transport' when all plant behind the last point of switching for the ILEC is considered loop plant and excluded from the ILEC's compensation for transport and termination"). CLECs should not

C. ILEC Efforts to Delay the Provisioning of Transport and Termination Under the Commission's Interim Requirements Must be Rejected

The First Report and Order recognized that existing facilities-based CLECs that have not yet entered into interconnection agreements nevertheless may already be in a position to offer consumers a competitive choice for local service, if they can obtain transport and termination from ILECs.^{68/} Because the Act's goal of expeditious local competition would be thwarted by ILECs unwilling to provide transport and termination at fair rates during interconnection negotiations, the Commission ordered ILECs to provide transport and termination under interim rules to carriers that have requested interconnection but have not yet reached a final agreement.^{69/}

The Commission expressly noted that "the purpose of this interim termination requirement is to permit parties without existing interconnection agreements to enter the market expeditiously."^{70/} The Commission's rules unequivocally require that ILECs provide interim transport and termination "immediately" upon request.^{71/} LECC, however, seeks to undermine the efficacy of this interim arrangement and thwart the Act's goal of rapid competition by withholding the "immediate" provision of transport and termination

be forced to replicate the two-tiered architecture maintained by ILECs in order to receive tandem-based rates, if their networks perform both transport and end-office functions via a single, integrated switch and associated distribution facilities.

^{68/} First Report and Order at ¶ 1065.

^{69/} See id.; see also 47 C.F.R. § 51.715(a).

^{70/} First Report and Order at ¶ 1065.

^{71/} 47 C.F.R. § 51.715(a).

until a slew of "non-rate" issues are resolved.^{72/} The practical utility of the interim arrangement established by the Commission would be vitiated by adoption of LECC's suggestion, and it should therefore be rejected.

IV. THE COMMISSION SHOULD REJECT PROPOSALS TO INCREASE THE WHOLESALE DISCOUNT AND EXPAND THE RANGE OF SERVICE OFFERINGS SUBJECT TO THE RESALE REQUIREMENTS OF SECTION 251(b)

A. The Commission Should Reduce, Rather than Increase, the Amount of Avoided Indirect Costs Included in the Calculation of the Wholesale Discount

In its Petition for Reconsideration, NCTA argued that the Commission overstated the size of the wholesale discount to which resellers are entitled by departing from the statutory mandate that the discount be based upon costs actually avoided by ILECs when they offer service to a wholesale, rather than retail, customer.^{73/} The Commission compounded its error by characterizing as "avoidable" costs that will not actually be avoided by ILECs when they offer service on a wholesale basis.^{74/} NCTA's concerns are echoed by other petitioners. Time Warner also contends that the Commission has misinterpreted the statutory standard for setting the wholesale discount and improperly presumed certain costs to be

^{72/} LECC Petition at 35 ("the parties must agree on interconnection facilities arrangements, the appropriate handling of 911/E911 calls, the processing of operator services, including alternatively billed calls, and billing and compensation issues regarding jointly provisioned services").

^{73/} NCTA Petition at 14-20.

^{74/} Id. at 16-20. Costs improperly categorized as "avoidable" include advertising, marketing, and indirect costs. See id.

avoidable.^{75/} LECC notes that indirect shared costs such as general overhead are not avoided simply by virtue of offering service at wholesale rather than retail, and that in fact "it is more likely that servicing the new class of 'resale' customers created by the 1996 Act will cause general overheads to increase."^{76/}

There is certainly no basis in the record or in the 1996 Act for adopting MCI's proposal to increase the amount of avoided indirect costs used in the calculation of the wholesale discount.^{77/} MCI claims that the Commission erred by calculating the amount of indirect avoided costs based upon the ratio of avoided direct costs to total costs, since total costs include both direct and indirect costs. According to MCI, the proper method would be to calculate the amount based upon the ratio of avoided direct costs to total direct costs. As NCTA has demonstrated, however, there are no grounds for presuming that ILECs avoid indirect costs in precise proportion to the degree to which they avoid direct costs when providing service on a wholesale rather than retail basis.^{78/} Indeed, the only reasonable presumption is that there is no such proportionate relationship. While costs and salaries directly related to retailing activities may be avoided, indirect shared costs like general overhead and management salaries will continue to be incurred regardless of whether the

^{75/} See generally Time Warner Petition at 3-17.

^{76/} LECC Petition at 26.

^{77/} See MCI Petition at 14 (asserting that the Commission's approach "significantly underestimates the avoided indirect costs").

^{78/} See generally NCTA Petition, Declaration of Bruce M. Owen, attached as Appendix A.

ILEC offers service on a wholesale or retail basis.^{79/} MCI's proposal only underscores the flaws inherent in presuming that any indirect costs, such as salaries and general overhead, are avoided when ILECs offer service on a wholesale basis.

B. The Range of Services Required to Be Offered for Resale Under Section 251(b) Should Not Be Expanded

In the First Report and Order, the Commission determined that ILECs are not required to make short-term promotional offerings available at wholesale rates under Section 251(c)(4). MCI asks the Commission to hold that, regardless of the applicability of Section 251(c)(4), short-term promotional offerings must be made available for resale pursuant to the general requirements of Section 251(b)(1).^{80/}

NCTA vigorously disputes the contention that Section 251(b) can be construed to compel CLECs to make any kind of promotional offerings -- short-term or long-term -- available for resale. Notwithstanding the Commission's view that "the scope of services to which section 251(b)(1) applies is larger and necessarily includes all services subject to resale under section 251(c)(4),"^{81/} requiring facilities-based CLECs to make their promotional offerings available for purchase by resellers is directly contrary to the Act's clear preference for facilities-based competition.^{82/} Promotional offerings will be critical to facilities-based new entrants seeking to win market share from the entrenched ILEC monopolists. If the

^{79/} See Owen Declaration at 7-8; First Report and Order at ¶ 676.

^{80/} MCI Petition at 11-12.

^{81/} First Report and Order at ¶ 976.

^{82/} See NCTA Comments at 26 (citing statutory language and legislative history demonstrating Act's clear preference for facilities-based competition).

Commission requires CLECs to simultaneously make such promotions available to non-facilities-based resellers -- who already will enjoy lower short-term entry costs by virtue of their decision not to deploy their own network -- it will either discourage such promotions altogether or dilute their efficacy to the detriment of facilities-based competition, which is among the goals of the statutory scheme.^{83/}

More fundamentally, the Commission should reconsider its conclusion that CLECs and ILECs are subject to "the same statutory standards regarding resale restrictions."^{84/} While the Commission properly recognized that there is no statutory or policy basis for imposing any kind of wholesale pricing requirement on CLECs, it is equally true that there is no legal or policy justification for imposing the same expansive resale obligations upon CLECs as are imposed upon ILECs. Broad-based resale requirements are justifiably imposed only upon carriers with market power, in order to counter their incentives to engage in price

^{83/} Cf., e.g., Bob Jones University v. United States, 461 U.S. 574, 586 (1983) (Statutory language cannot be interpreted in manner that "would defeat the plain purpose of the statute"); United States v. American Trucking Associations, 310 U.S. 534, 543 (1940) (where plain meaning interpretation yields unreasonable result "plainly at variance with the policy of the legislation as a whole, this Court has followed that purpose, rather than the literal words"); Albertson's Inc. v. C.I.R., 42 F.3d 537, 545 (9th Cir. 1994) (rejecting construction "of a statutory provision that directly undercuts the clear purpose of the statute").

^{84/} First Report and Order at ¶ 977.