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

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

CC Docket No. 96-98

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**AT&T OPPOSITION TO AND COMMENTS ON PETITIONS FOR RECONSIDERATION  
AND CLARIFICATION OF FIRST REPORT AND ORDER**

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## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY .....	iii
<b>I. THE COMMISSION SHOULD REJECT ATTEMPTS TO RESTRICT THE AVAILABILITY OF UNBUNDLED NETWORK ELEMENTS AND INTERCONNECTION TO ILEC NETWORKS .....</b>	<b>2</b>
A. Availability Of Operations Support Systems .....	3
B. Direct Routing Of Operator Services And Directory Assistance Traffic To New Entrants' Service Platforms .....	5
C. Branding Requirements .....	6
D. Interconnection Between CLECs In Collocated Space .....	6
E. Collocation In ILEC Vaults .....	7
<b>II. THE COMMISSION SHOULD MODIFY AND/OR CLARIFY CERTAIN RULES IMPLEMENTING THE OBLIGATIONS OF ILECS TO PROVIDE ACCESS TO UNBUNDLED NETWORK ELEMENTS ....</b>	<b>7</b>
A. Connection Of Advanced Intelligent Network Service Control Points To ILEC Switches .....	8
B. Access To Call-Related Databases .....	9
C. Cross-Connects, Network Interface Device And Dark Fiber .....	9
<b>III. THE COMMISSION SHOULD REJECT EFFORTS TO UNDERMINE IMPLEMENTATION OF ITS TELRIC PRICING STANDARD .....</b>	<b>11</b>
A. Nonrecurring Charge Abuses And Other Improper Charges .....	14
B. Cost Data And Cost Studies .....	17
C. Geographic Deaveraging .....	18
D. Enhanced Services .....	20
E. Non-Cost-Based Access Charges .....	22

	<u>Page</u>
F. Reciprocal Compensation .....	23
<b>IV. THE COMMISSION SHOULD REJECT ILEC ATTEMPTS TO FORECLOSE VIABLE RESALE COMPETITION, BUT CLARIFY THE PRINCIPLES USED IN DETERMINING AVOIDED COST DISCOUNTS .....</b>	<b>24</b>
A. Services Available For Resale At Wholesale Rates .....	25
B. Avoided Costs .....	27
<b>V. THE COMMISSION SHOULD NOT RECONSIDER ITS RULES RELATING TO POLE ATTACHMENTS .....</b>	<b>31</b>
A. The Commission Should Reject The Electric Companies' Attempts To Eviscerate The Rules Relating To Capacity Issues .....	32
B. The Electric Utilities' Various Other Objections To The <u>First Report And Order</u> Are Meritless .....	36
<b>VI. THE COMMISSION SHOULD NOT RECONSIDER ITS PROCOMPETITIVE DECISIONS WITH REGARD TO CMRS PROVIDERS .....</b>	<b>41</b>
A. The Commission Correctly Defined A CMRS Local Calling Area As The Major Trading Area In Which The Wireless Provider Operates .....	41
B. The Commission Should Reject The LEC Coalition's Attempt To Deny Compensation To Paging Providers .....	42
C. The Commission Should Reject The Colorado PUC's Request For Reconsideration Of The Commission's Refusal To Classify CMRS Operators As LECs .....	43
<b>VII. THE COMMISSION SHOULD DENY THE REQUESTS FOR RECONSIDERATION OF ITS RULINGS UNDER 251(h)(2) .....</b>	<b>43</b>
<b>VIII. THE COMMISSION SHOULD DENY REQUESTS THAT IT DISREGARD ITS STATUTORY DUTY UNDER SECTION 208 OF THE ACT TO ADJUDICATE COMPLAINTS AGAINST ILECS .....</b>	<b>46</b>

## SUMMARY

The First Report and Order is a critical and laudable step toward opening local exchange monopolies to competition. Predictably, however, the ILECs filing petitions for reconsideration and clarification seek to narrow the network element, collocation, resale and pricing rules that the Commission has found to be essential to creating such competition. Some of the ILECs, joined by a number of utilities, likewise seek to eviscerate the rules intended to implement their obligations to provide to telecommunications carriers nondiscriminatory access to pole attachments and rights of way, to the detriment of facilities-based competition. Finally, several state commissions have filed petitions asking the Commission to deny itself and to new entrants enforcement mechanisms that Congress has carefully included in the 1996 Act to ensure the consistent and vigorous implementation of the national policy framework it creates. Because these ILEC, utility and state commission petitions offer little, if any, new analysis, and virtually no new facts, they provide no basis for reconsideration of the First Report and Order, and their petitions should be denied under the Commission's existing standards and requirements.

In all events, these petitions are meritless. For example, several ILECs request that the Commission postpone the required implementation of nondiscriminatory access to operations support systems, and relieve ILECs of their obligation to route operator services and directory assistance traffic to new entrants' service platforms (Section I). Grant of these requests would violate the plain language of the Act and impede, if not prevent, the development of effective local exchange competition.

Other parties have requested modifications and clarifications concerning ILEC obligations to provide access to network elements that are consistent with the Act, would promote competition, and therefore should be granted (Section II). The Commission thus

should grant MCI's request for further unbundling of ILEC advanced intelligent network (AIN) capabilities. It also should clarify that ILECs are required to permit new entrants to enter their customer data in ILEC call-related databases and to "read" such databases, and that cross-connects are an indispensable part of the network elements that ILECs must make available under Section 251(c)(3).

The Commission should reject misguided efforts to undermine implementation of the TELRIC pricing standard (Section III). At the outset, the Commission should deny the request that the TELRIC standard be modified to include some "portion" of the difference between embedded costs and economic costs. Rates either reflect forward-looking costs or they do not, and if they do not, efficient entry will not occur. Claims that the TELRIC methodology is not sufficiently well-defined are similarly misplaced, and should be rejected.

The Commission should likewise reject other ILEC requests that would jeopardize its TELRIC pricing standard, including requests that it: permit ILECs to impose mandatory demand forecast submissions as well as volume and term commitments on new entrants; relax its geographic deaveraging requirement; extend indefinitely ILEC receipt of above-cost access charge subsidies; and impose asymmetrical compensation on new entrants. Further, in order to permit new entrants to obtain virtual collocation equipment at economical rates and to provide a constraint against excessive ILEC charges for physical collocation, the Commission should grant requests that it impose a virtual collocation "leaseback" requirement on ILECs.

The Information Technology Association of America's (ITAA) requests pertaining to the use by CLECs of network elements and wholesale services to provide enhanced as well as basic services should be denied (Section III.D). Requiring CLECs to pay

charges beyond those specified in Sections 251(c) and 252(d) for network elements and services violate the plain language of the Act, and the Computer II provisions relied upon by ITAA are inapplicable to non-facilities-based carriers. Moreover, the competition that will be created by effective implementation of the First Report and Order will ensure that enhanced service providers receive services at competitive rates.

The Commission should rebuff ILEC attempts to foreclose viable resale competition (Section IV), and reject renewed ILEC demands that contract and customer specific service offerings as well as trials be excluded from an ILEC's resale obligations. The Commission likewise should deny rehashed assertions that only ILEC costs that are actually shed in a wholesale environment should be considered avoided. The Commission has considered and rejected this argument, because it would permit ILECs to inflate their wholesale costs and would require new entrants to subsidize an ILEC's retail efforts. Finally, the Commission should clarify its avoided cost principles as requested by MCI.

Because the changes requested by utility companies would prevent new entrants from obtaining access to utility facilities in violation of Section 224 of the Act, the Commission should deny petitions for reconsideration of the its pole attachment rules (Section V).

With respect to CMRS (Section VI), the Commission should reject ILEC attempts to redefine CMRS local calling areas and to deny paging providers mutual compensation. Colorado's request that CMRS providers be reclassified as LECs should also be denied.

The Commission should not permit states to impose on non-incumbent LECs those obligations the Act imposes only on incumbent LECs (Section VII). The First Report

and Order properly applied the plain meaning of Section 251(h)(2). Allowing states to impose obligations on non-ILECs which do not meet the standards of Section 251(h) would violate the clear language and intent of the Act.

Finally, the Commission should deny requests that it relinquish its authority and ignore its duty under Section 208 to adjudicate complaints under the Act (Section VIII).

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**AT&T OPPOSITION TO AND COMMENTS ON PETITIONS FOR RECONSIDERATION  
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Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby opposes and comments upon the petitions filed by other parties for reconsideration and clarification of the Commission's First Report and Order, which adopted rules necessary to implement the duties imposed on incumbent local exchange carriers ("incumbent LECs" or "ILECs") by Section 251 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").<sup>1</sup>

Predictably, most of the ILECs filing petitions seek to narrow the rules that the Commission has found to be essential to creating local exchange competition, including rules requiring ILECs to provide nondiscriminatory access to operations support systems for unbundled network elements, to price such elements based on forward-looking economic costs, and to offer at

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<sup>1</sup> A list of the parties filing petitions for reconsideration and/or clarification, and the abbreviations for each used herein, is attached hereto.

wholesale rates all of their telecommunications services for resale. Some of the ILECs, joined by a number of utilities, likewise seek to eviscerate the rules intended to implement their obligations to provide to telecommunications carriers nondiscriminatory access to pole attachments and rights of way, to the detriment of facilities-based competition. Finally, several state commissions have filed petitions asking the Commission to deny itself and to new entrants enforcement mechanisms that Congress has carefully included in the 1996 Act to ensure the consistent and vigorous implementation of the national policy framework it creates.

Although they were filed by different parties and address different issues, the petitions filed by ILECs, utilities and state commissions do have one thing in common: the issues they raise were all thoroughly considered and properly rejected by the Commission. These petitions offer little, if any, new analysis, and virtually no new facts. They thus provide no basis for reconsideration of the First Report and Order, and should be denied under the Commission's existing standards and requirements.<sup>2</sup>

**I. THE COMMISSION SHOULD REJECT ATTEMPTS TO RESTRICT THE AVAILABILITY OF UNBUNDLED NETWORK ELEMENTS AND INTERCONNECTION TO ILEC NETWORKS.**

Several ILECs have asserted an array of challenges to the Commission's rules implementing the interconnection, access and collocation rights of prospective competitors. Some ILECs request the Commission to postpone the effective date of their obligation to

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<sup>2</sup> See, e.g., Creation of an Additional Private Radio Service, 1 FCC Rcd. 5, 6 (1986) ("Our standards and requirements for petitions for reconsideration are well established . . . . [P]etitions for reconsideration are not granted for the purpose of altering our findings on the basis of matters that have already been fully considered and substantively settled.")

provide access to operational support systems (LEC Coalition at 4-5; Sprint at 5-7). Other ILECs claim that it is not technically feasible to route operator services and directory assistance traffic directly to new entrants' platforms or to rebrand such services when resold by new entrants (LEC Coalition at 21-22). Some ILECs also request the Commission not to require that new entrants be permitted to interconnect with each other in collocated space (id. at 5-6). These ILECs would also erect a blanket prohibition against any collocation in ILEC vaults, regardless of whether space or technical constraints prevent such collocation (id.). The Commission should reject each of these requests.

**A. Availability Of Operations Support Systems.**

The First Report and Order recognizes that operations support systems are critically important to the introduction and viability of local services competition:

[I]f competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing.<sup>3</sup>

For this reason, the Commission properly construed the nondiscrimination provisions of Sections 251(c)(3) and 251(c)(4) to require ILECs to provide nondiscriminatory access to operations support systems no later than January 1, 1997.

A number of ILECs, however, ask the Commission to delay implementation of these nondiscrimination requirements for up to an additional 24 months.<sup>4</sup> By their requests,

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<sup>3</sup> First Report and Order, ¶ 518.

<sup>4</sup> Sprint at 6 (requesting 24 month postponement); LEC Coalition at 4 (12 months).

these petitioners, which already can and do offer packages of local and long distance services, seek to thwart a critical component of others' attempts to compete on the same basis. Their requests, however, are as unsupported as they are anticompetitive.

In particular, the ILECs' requests to delay access to these vital operations support systems are based on nothing more than unsupported assertions that they cannot implement the required interfaces promptly.<sup>5</sup> The Commission, however, thoroughly considered and rejected these and similar arguments when it adopted the January 1, 1997 deadline. The Commission specifically found that the provision of nondiscriminatory access to operations support systems was technically feasible (§ 520), and that ILECs should provide such access "as expeditiously as possible," but no later than January 1, 1997 (§ 525). No petitioner has attempted to rebut this finding of technical feasibility. Indeed, the June 28, 1996 joint Bell Atlantic/AT&T *ex parte* in this proceeding demonstrates that ILECs ranging from the largest BOC to the smallest LEC could utilize off-the-shelf equipment and software to accomplish such access. Further, the consequences of granting the deferral sought by the ILECs would be substantial. As the Commission found, the denial of nondiscriminatory ccess

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<sup>5</sup> The First Report and Order (§ 10) recognizes that ILECs have no incentives to implement measures that could erode their local monopolies. Accordingly, the Commission should continue to be skeptical of ILECs' efforts to resist the adoption or application of rules on the ground that they are incapable of complying with them. Such claims should be subject to stringent burdens of proof, which have not been satisfied here.

to operations support systems would deny to new entrants "a meaningful opportunity to compete," to the detriment of consumers.<sup>6</sup>

**B. Direct Routing Of Operator Services And Directory Assistance Traffic To New Entrants' Service Platforms.**

The LEC Coalition (at 21-22) claims that it is not technically feasible for ILECs to route operator services and directory assistance traffic directly to the platforms of new entrants, and requests the Commission to reconsider its rules requiring direct routing.<sup>7</sup> The claims regarding the technical feasibility of direct routing, however, are not supported by the evidence, and should be rejected. For example, SNET has stated that it intends to use line class codes to provide such direct routing to AT&T by December 1, 1996.<sup>8</sup> Bell Atlantic stipulated in arbitration with AT&T that it would directly route such traffic to AT&T's platforms commencing April 1, 1997.<sup>9</sup> Southwestern Bell Telephone Company ("SWBT") has agreed to implement such direct routing in all switches with existing capability (using line class

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<sup>6</sup> Id., ¶¶ 312, 315. Moreover, even after access to operations support systems is granted, new entrants must invest substantial time and effort to develop and deploy their own systems to interoperate with the ILEC's systems. Thus, the effect of delaying access will be to compound the delay that is already built into the process.

<sup>7</sup> Time Warner claims that new entrants are legally barred from using their own operator services and directory assistance platforms to reduce the costs incurred by ILECs in providing wholesale services. This argument lacks merit. See pp. 26- 27, infra.

<sup>8</sup> Letter from Frances C. Clark, SNET, to James Kerby, AT&T, dated September 24, 1996.

<sup>9</sup> Agreement for Withdrawal and Modification of Arbitration Issues at 5-6, Docket A-310125F0002 (Pa. PSC, filed September 20, 1996).

codes or similar methods) by June 30, 1997, and in all other switches by December 31, 1997.<sup>10</sup>

**C. Branding Requirements.**

The LEC Coalition's claim (at 20-21) that it is technically infeasible to rebrand operator services and directory assistance calls is likewise refuted by the evidence. SWBT, for example, has agreed to rebrand all directory assistance and operator services calls commencing on March 1, 1997, with full implementation by June 30, 1997. SWBT/AT&T Stipulation, ¶ 1. In the interim, SWBT will unbrand operator services and directory assistance calls handled by live operators. *Id.* This agreement is inconsistent with any claim that the Commission's branding requirements are infeasible, and is dispositive of the LEC Coalition's request that those requirements be reconsidered.<sup>11</sup>

**D. Interconnection Between CLECs In Collocated Space.**

The LEC Coalition insists that the Commission cannot require ILECs to permit new entrants to interconnect with one another in collocated space (at 5-6). The Coalition concedes that such interconnection provides an efficient means for new entrants to interconnect (at 6), but argues that Section 251(c)(6) of the Act does not allow the Commission to issue rules that allow attainment of these efficiencies. This claim is nonsense. Section 251(c)(6)

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<sup>10</sup> Stipulation between SWBT and AT&T dated September 25, 1996 ("SWBT/AT&T Stipulation"), ¶¶ 2, 3.

<sup>11</sup> Moreover, the First Report and Order (¶ 971) explicitly leaves room for an ILEC to prove to a state commission that there are equipment or other problems particular to its network that render rebranding technically infeasible. This provision is a complete answer to the LEC Coalition's purported concerns about branding requirements.

expressly requires collocation to be provided on "terms and conditions that are just, reasonable, and nondiscriminatory," and the Commission correctly held that efforts of an ILEC to condition another carrier's collocation rights on its agreement not to interconnect in the collocated space would be unjust and unreasonable (¶ 594). The Commission also held that, in all events, Section 4(i) of the Communications Act is an independent source of authority for this aspect of its interconnection rules (*id.*). The LEC Coalition provides no basis for reconsideration of these holdings.

**E. Collocation In ILEC Vaults.**

The LEC Coalition requests (at 5-6) the Commission to grant ILECs unfettered discretion to deny requests for collocation in ILEC vaults, based on alleged "space limitations." However, the Commission's Rules already provide relief from collocation requirements where it is not possible to expand the space involved. Rule 51.321(d). There thus is no need to modify the Rules, and adopting the blanket prohibition advanced by the LEC Coalition would needlessly prohibit otherwise valid, and competitively necessary, collocation arrangements.

**II. THE COMMISSION SHOULD MODIFY AND/OR CLARIFY CERTAIN RULES IMPLEMENTING THE OBLIGATIONS OF ILECS TO PROVIDE ACCESS TO UNBUNDLED NETWORK ELEMENTS.**

Several petitioners have requested that the Commission modify and/or clarify its First Report and Order to ensure that new entrants have access to ILEC unbundled network elements as required by the Act. AT&T supports these requests to the extent described below.

**A. Connection Of Advanced Intelligent Network Service Control Points To ILEC Switches.**

MCI requests that the Commission require further unbundling of advanced intelligent network ("AIN") capabilities. Specifically, MCI seeks unbundling of AIN triggers so that new entrants may deliver information needed for call processing to third party service control points ("SCPs") and interconnect with third party AIN SCP databases using the SS7 network. AT&T supports this request. As MCI shows, the mediation functions that currently exist in SS7 networks support such interconnection. This type of interconnection has been proven to be technically feasible, because it has been used to provide 800 number portability for the past three years. Further, in the recent Manhattan local number portability trial, the routing instructions using agreed-upon translation types and subsystems numbers were provided by the MCI SCP.<sup>12</sup>

MCI's petition also demonstrates that these AIN capabilities are not proprietary to ILECs and that the inability to access such AIN capabilities will impair new entrants' opportunities to compete in the local services market. If new entrants are not permitted to connect third party AIN SCPs using the SS7 network, they will be forced to duplicate new service logic in every ILEC SCP. Moreover, because ILECs use various AIN vendors, new entrants would be required to configure their services in different service reation environments ("SCEs"), service management systems ("SMSs") and SCPs for each ILEC across the country. The Commission therefore should grant MCI's request.

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<sup>12</sup> Letter, with attachments, from B. Brady, AT&T, to W. Caton, FCC, in Docket Nos. 91-346 and 95-116 (April 10, 1996); MCI at 25.

**B. Access To Call-Related Databases.**

The First Report and Order recognizes that in order for new entrants to offer viable local services competition, they must have access to call-related databases that are controlled by the incumbent LEC, including access to 911 databases (ALI), bill-to-third party, collect call screening, and calling card validation databases (LIDB), emergency numbers databases, directory assistance databases, and AIN databases. Accordingly, the First Report and Order mandates such access. As MCI correctly points out (at 27-28), however, such access must necessarily allow a new entrant to enter data for its customers into the ILEC's databases and to "read" the information within those databases. If new entrants cannot enter their customers' data into these databases through the same administration system used by the ILEC, with the same intervals and with the same guarantee of accuracy, they will not be able to offer services that are fully competitive. For this reason, the Commission should clarify that access to call-related databases includes the ability to enter customer information in and read the databases.

**C. Cross-Connects, Network Interface Device And Dark Fiber.**

ALTS, MCI, MFS and WorldCom request that the Commission reconsider and/or clarify the First Report and Order to ensure that particular ILEC network elements are available to new entrants on an unbundled basis. AT&T supports these requests.

ALTS (at 8) and MFS (at 8-9) request that ILECs be required to provide cross-connects as unbundled network elements. Regardless of whether a cross-connect is considered a separate network element, AT&T understands the First Report and Order to require that they be made available to requesting carriers. In particular, cross-connects are an indispensable part of the network elements that the Commission has already identified. AT&T believes that

cross-connects are included within the scope of network elements identified in the First Report and Order and must be provided by ILECs under Section 251(c)(3).<sup>13</sup> The Commission can either grant the request of ALTS and MFS or confirm AT&T's interpretation of the First Report and Order.

AT&T also agrees with MFS (at 4-5) that the Commission should clarify that the unbundled loop includes use of the network interface device ("NID"), and that payment of the loop default proxy entitles a requesting carrier to use of the incumbent's NID. The First Report and Order establishes no separate NID proxy and discusses the NID under the "loop" heading in the unbundling section. See First Report and Order at ¶¶ 392-96. Further, AT&T's preliminary analysis indicates that none of the states whose loop studies the Commission used to establish its default loop proxies authorized a separate charge for use of the NID – strong evidence that NID costs are reflected in those state loop studies, and thus that the loop proxies established by the Commission will fully compensate incumbent LECs for both loop and NID facilities. Thus, the Commission should clarify that only if a requesting carrier requests access to the incumbent's NID, but *not* the incumbent's loop – so that, for example, the requesting carrier could connect its own loop facilities to the customer premises through the existing NID – *and* no forward-looking NID cost study consistent with the Commission's rules is available should there be any separate default proxy charge for the NID. Clarification of this issue is important to prevent double recovery of NID costs in a manner that could impose a barrier to competitive entry.

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<sup>13</sup> See First Report and Order, ¶ 386 (ILECs must provide cross-connect facilities between an unbundled loop and a CLEC's collocated equipment).

Like AT&T, MCI requests (at 20-23) that ILECs be required to provide dark fiber as an unbundled network element.<sup>14</sup> Dark fiber is nothing more than excess transmission facility capacity and easily falls within the statutory and Commission definition of network element,<sup>15</sup> as the Public Utility Commission of Texas recently found.<sup>16</sup> There is no reason to require new entrants to litigate this issue on a state-by-state basis.

### **III. THE COMMISSION SHOULD REJECT EFFORTS TO UNDERMINE IMPLEMENTATION OF ITS TELRIC PRICING STANDARD.**

Most of the incumbent local exchange monopolists, the opponents of the economic cost-based prices that will foster local exchange competition, have chosen to pursue their challenges to the Commission's pricing rules in court. Thus, those parties that have filed petitions before the Commission on pricing issues are virtually unanimous in their acceptance of and praise for the Commission's total element long run incremental cost ("TELRIC") approach. Indeed, only two petitions challenge TELRIC even indirectly.

The Colorado Public Utilities Commission ("COPUC") asks the Commission to modify its rules to require that rates be based only "largely" on forward-looking economic cost to allow some unspecified "portion" of the difference between embedded costs and economic

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<sup>14</sup> As AT&T pointed out in its petition, the Commission need not find that dark fiber is a new or additional network element. The Commission need only require that ILECs must make dark fiber available to new entrants, as transmission or loop facilities (as appropriate).

<sup>15</sup> AT&T at 35-37.

<sup>16</sup> Transcript of Open Meeting, Docket Nos. 14454 et al. at 23-47 (Texas PUC, October 16, 1996).

costs to be recovered from requesting carriers (at 5-6). Even ignoring the impossibility of any principled determination whether rates that include embedded cost "add-ons" are based "largely" on forward-looking costs, that approach is flatly inconsistent with the Commission's competitive market model and would deny consumers free choice among local service providers on the basis of price, service and quality. Rates either reflect forward-looking costs or they do not, and if they do not, the efficient level of entry will not occur. Thus, even if there were a legitimate reason why incumbents should receive tributes in some form, no embedded cost add-ons can be recovered through input prices to those competitors if meaningful competition is to exist.

COPUC also claims (at 6) that the Commission's TELRIC methodology is not sufficiently "well-defined" to facilitate implementation in contested arbitrations. That view likely reflects incumbents' efforts to disrupt arbitration processes with pricing theories that defy not only the Act and the First Report and Order, but settled economic principles. Those efforts will surely continue, but AT&T believes that through close adherence to the First Report and Order, states can effectively and expeditiously implement TELRIC, as regulators have done with similar approaches in this and other industries. See, e.g., First Report and Order at ¶¶ 631, 792. Even so, AT&T agrees with MCI that the Commission could advance those efforts (and the pace of competitive entry) by recognizing the Hatfield Model as a workable and appropriate tool for setting network element rates -- as the Iowa Commission recently did.<sup>17</sup>

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<sup>17</sup> See Preliminary Arbitration Decision, In re Arbitration of AT&T Communications of the Midwest, Inc., and MCI Metro Access Transmission Services, Inc. v. U S West

(footnote continued on following page)

Margaretville Telephone Company's constitutional challenge to the Commission's pricing rules is likewise meritless. Margaretville contends that rules that facilitate local exchange competition are compensable Fifth Amendment "takings" of Margaretville's "right" to "hold competitive advantages over new market entrants" (at 3). As an initial matter, it was Congress, and not the Commission, that mandated local exchange competition, and thus Margaretville is simply wrong in asserting that the Commission had an obligation to consider this claim.<sup>18</sup> In any event, like the other "takings" claims that have been bandied about by incumbents, Margaretville's version is long on rhetoric and short on substance. In this regard, Margaretville identifies no contract that, as the law requires, *unmistakably* promises it (or any other incumbent) a perpetual monopoly insulated from competitive forces.<sup>19</sup> It is well settled that "[t]he franchise to exist as a corporation, and to

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(footnote continued from previous page)

Communications, Inc., Docket Nos. ARB-96-1 et al. at 4 (Iowa Department of Commerce Utilities Board, issued October 18, 1996) ("The Board finds the rates proposed by AT&T, which were stated to be also acceptable to MCI . . . are the most credible in these proceedings. They are supported by cost studies using a model that is publicly available and can be verified"). See also MCI at 5 ("[t]he flexible nature of the Hatfield Model permits the Commission, state commissions and interested parties, to examine alternative assumptions").

<sup>18</sup> See, e.g., Johnson v. Robison, 415 U.S. 361, 368; Meridith Corp. v. FCC, 809 F.2d 863, 872 (D.C. Cir. 1987) (agency has no obligation to consider a constitutional challenge to a statute because of the "well known principle that regulatory agencies are not free to declare an act of Congress unconstitutional").

<sup>19</sup> See, e.g., National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., 470 U.S. 451, 466 (1985) ("For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise');

(footnote continued on following page)

function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition and affords the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field." Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 139 (1939).<sup>20</sup>

The forty or so remaining petitioners are content to work within the basic TELRIC framework. As a number of those petitions confirm, however, even within that framework, the Commission must be vigilant and clarify or reconsider certain aspects of the First Report and Order if it is to thwart the myriad protectionist schemes that incumbents have already hatched to raise their potential rivals' costs.

**A. Nonrecurring Charge Abuses And Other Improper Charges.**

Other potential entrants echo AT&T's concern over the proliferation of inflated "nonrecurring" charges that threaten the framework established by the Act and the

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(footnote continued from previous page)

United States v. Winstar Corporation, 116 S.Ct. 2432 (1996) (opinion of Souter, J.) (reprising consistent application of the "unmistakability" doctrine to allegations that "a state or local government entity had made a contract granting a private party some concession (such as a tax exemption or a monopoly), and a subsequent governmental action had abrogated the contractual commitment").

<sup>20</sup> See also id. at 141 ("Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy. That policy is subject to alteration at the will of the legislature. The declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business or thereafter embarking in it"); Cox Cable Communications, Inc. v. U.S., 866 F.Supp. 553, 559 (M.D. Ga. 1994) (rejecting takings claim challenging the Cable Television Consumer Protection and Competition Act of 1992 and noting that "Congress never promised that it would abstain from all actions having an economic impact upon the cable industry and thereby provide these media providers with eternal monopolistic, industry-wide protection from competition").

Commission's Rules. See ALTS at 3 (citing the need for "specific protections against ILEC efforts to use outrageous nonrecurring charge demands as a tactic to sabotage any meaningful provisioning of unbundled network elements"); MFS at 5-8.<sup>21</sup> AT&T addressed both the problem and appropriate solutions in its petition, see AT&T at 8-19, and will not repeat those arguments here.<sup>22</sup> Two related issues warrant further comment.

First, the Commission should reject the LEC Coalition's request (at 19-20) that incumbents be allowed to impose unwarranted additional costs on their potential rivals in the form of mandatory demand forecast submissions and volume and term commitments with "termination liability." A demand forecast requirement would serve no legitimate purpose. Even incumbents, who with asymmetrically superior access to current and historical data are in the best position to forecast demand, have been unable to do so effectively.<sup>23</sup> This request for demand forecasting can only be designed to waste new entrants' time and money and to obtain

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<sup>21</sup> AT&T agrees with MFS that if the cost of a particular arrangement is already recovered through generally applicable network element charges based upon forward-looking economic costs, the ILEC should not be permitted to double recover through additional "conditioning", "preparation" or other non-recurring charges. As MFS notes "[t]he resolution of these issues in particular cases will necessarily be fact-specific," MFS at 7, and thus AT&T does not support any specific Commission rules regarding which activities may support such charges and which may not.

<sup>22</sup> For the reasons stated by ALTS (at 4-5, 8-9), AT&T agrees that capping nonrecurring charges to carriers at the lowest non-recurring charge for the most analogous ILEC retail service and prohibiting service charges for services that can be initiated through "paper changes" are additional appropriate measures to address nonrecurring charge abuses.

<sup>23</sup> See, e.g., Memorandum Opinion and Order, Annual 1985 Access Tariff Filings, 4 FCC Rcd. 1453, 1453 (1988) ("actual results confirm that many of the LECs do not do an adequate job of forecasting demand").

confidential marketing information that could be improperly used to frustrate new entrants' marketing strategies. The LEC Coalition's "termination penalty" proposal, which by its terms would apply only to new entrants, is similarly discriminatory, anticompetitive, and unnecessary. The Coalition offers no evidence that the "frivolous interconnection requests" it purports to address with this proposal are likely to occur at all, much less at levels sufficient to impose significant costs. In any event, forward-looking rates for individual network elements (including appropriate service order costs and the costs associated with appropriate levels of excess capacity) cover all of the incumbents' legitimate costs of providing those elements. No additional charges or penalties should be allowed -- it will be difficult enough for new entrants to overcome incumbent advantages without also having to pay the incumbent if they fail perfectly to predict demand for their new services.

Second, AT&T agrees with MFS and ALTS that the Commission should require incumbents to offer interconnectors a collocation "leaseback" option under which interconnectors have the option of providing to the incumbent the equipment to be used in a virtual collocation arrangement, subject to a leaseback agreement that allows the equipment to be repurchased when it is no longer needed. As MFS notes (at 15), this option both protects the interconnector from excessive equipment charges and protects the incumbent from risking capital in underused equipment. Id. Equally important, this virtual collocation option also provides an effective "market" constraint on ILEC attempts to charge anticompetitive rates for

physical collocation. See id. (noting that incumbents that refuse to offer leaseback arrangements consistently demand the highest prices for physical collocation).<sup>24</sup>

**B. Cost Data And Cost Studies.**

The petitions also underscore that, as AT&T demonstrated (at 20-25), certain clarifications are needed to stem incumbent efforts to manipulate cost study inputs and abuse their control over key data. In this regard, MCI provides additional examples of how incumbents seek to misapply demand forecasts to inflate unit incremental costs. Properly calculated unit costs must reflect all demand that the capacity in question can serve. Thus, unit network element charges should reflect expected future demand levels if the modeled network is designed to meet that future demand, and current demand if the modeled network is based on current demand,<sup>25</sup> and, in all events, fill factors "should be based on forward-looking, expected usage rather than current usage as ILECs are asserting in state TELRIC proceedings." MCI at 29. Similarly, charges for the costs associated with quality improvements that can be sold to more than one carrier must reflect the demand of all such carriers and not simply the carrier that initially requested the improvement. See MCI at 32.

AT&T also agrees with ALTS (at 6-7) and others that the Commission should correct 47 CFR § 51.301(c)(8)(ii) to properly provide that it is the *incumbent's*, and *not* the requesting carrier's, refusal to provide cost data that violates the duty to negotiate in good

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<sup>24</sup> See also ALTS at 14-15.

<sup>25</sup> Given economies of scale, estimating unit costs based on current demand is conservative and, if anything, slightly overstates incumbents' true economic costs. See AT&T at 23.

faith. However, AT&T opposes MFS' request (at 19) that the Commission preempt state procedures and require states to allow "other carriers who may be affected by the outcome" of an arbitration to review and contest the parties' cost studies. Section 252 arbitrations are to resolve the specific issues disputed between the negotiating parties. The Act provides other avenues for other carriers to advocate their interests, either by initiating their own negotiations and arbitrations or by taking advantage of the Section 252(i) most favored nation protections.<sup>26</sup>

**C. Geographic Deaveraging.**

Absent a requirement that network element rates reflect the significant "geographic" cost differences that exist between urban and rural areas, incumbents could use rate averaging to protect their monopolies in urban areas and deny consumers in those areas local service choices by inflating urban network element prices with costs from rural areas. See AT&T at 26-28. Citing administrative burdens, several petitioners nonetheless urge the Commission to relax its deaveraging rules either by "clarifying" that some unspecified network element rates need not be deaveraged (MFS at 20), exempting interim default rates from the deaveraging requirement (Sprint at 7-9), or, as the Washington Utilities and Transportation Commission ("WUTC") proposes, dropping the deaveraging requirement altogether (at 3-7).

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<sup>26</sup> AT&T also opposes NECA's request that the Commission attempt to resolve in this proceeding the myriad issues raised by the act's impact on the Commission's existing separations rules. Although these are significant issues, they can only be resolved on a permanent basis after the Commission has completed access and universal service reform. AT&T believes, however, that NECA's proposal for an interim workaround has merit. Because purchasers of unbundled elements will be using them for both intrastate and interstate purposes, AT&T agrees that as an interim measure, unbundled element revenues should be booked to a separate account and unbundled element costs (as approximated by unbundled element revenues) should be removed prior to separations.