

long distance market they will have no incentive to provide competitors with nondiscriminatory access to unbundled network elements.⁶⁶⁹ PacTel, however, argues that we should conclude that the checklist in section 271 is satisfied if an incumbent LEC is providing unbundled elements as required by the Commission and states, and we should not consider the terms and conditions for the provision of unbundled elements in evaluating section 271 applications.⁶⁷⁰

3. Discussion

307. We agree with those commenters, including the Florida, Illinois and Washington Commissions, that to achieve the procompetitive goals of the 1996 Act, it is necessary to establish rules that define the obligations of incumbent LECs to provide nondiscriminatory access to unbundled network elements, and to provide such elements on terms and conditions that are just, reasonable and nondiscriminatory.⁶⁷¹ As discussed above at sections II.A, II.B and V.B, we believe that incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus, have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in many kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality.

308. Consistent with arguments advanced by the Florida and Washington Commissions, incumbent LECs, and potential competitors, and as more fully discussed in the specific sections below, we adopt general, national rules defining "nondiscriminatory access" to unbundled network elements, and "just, reasonable, and nondiscriminatory" terms and conditions for the provision of such elements. We have chosen this approach, rather than allowing states exclusively to consider these issues, because we believe that some national rules regarding nondiscriminatory access will reduce the costs of entry and speed the development of competition.⁶⁷²

309. We conclude, for example, that national rules defining the 1996 Act's requirements regarding nondiscriminatory access to, and provision of, unbundled elements will reduce costs associated with potential litigation over these issues, and will enable states to conduct

⁶⁶⁹ Teleport comments at 25-35.

⁶⁷⁰ PacTel comments at 40-44.

⁶⁷¹ See *infra*, Section VII, for a discussion of just, reasonable and nondiscriminatory rates for unbundled network elements.

⁶⁷² See *supra*, Section V.B.

arbitrations more quickly by reducing the number of issues they must consider. Such rules will also facilitate the ability of the Commission to conduct arbitrations, should we assume a state's responsibilities under section 252(e)(5). We conclude further that such rules will create some uniformity across states in connection with the terms under which new entrants may obtain access to network elements, thus facilitating the ability of potential competitors, including small entities, to enter local markets on a regional or national scale. Accordingly, for all of these reasons, we reject the arguments of PacTel and USTA that we should not adopt national rules relating to incumbent LEC obligations to provide access to, and provision, unbundled elements in a nondiscriminatory manner.

310. The record compiled in this proceeding supports the adoption of uniform general rules that rely on states to develop more specific requirements in arbitrations and other state proceedings. More significantly, however, we agree with the California and Florida Commissions that 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 mediations, arbitrations, and approving agreements. We expect that the states will implement the general nondiscrimination rules set forth herein by adopting, *inter alia*, specific rules determining the timing in which incumbent LECs must provision certain elements, and any other specific conditions they deem necessary to provide new entrants, including small competitors, with a meaningful opportunity to compete in local exchange markets. The states will continue to gain expertise in connection with issues relating to just, reasonable, and nondiscriminatory access and provision of unbundled network elements. We expect to turn to the states, and rely on the expertise they develop in this area, when we review and revise our rules as necessary.

311. We agree with those commenters that argue that incumbent LECs should be required to fulfill some type of reporting requirement to ensure that they provision unbundled elements in a nondiscriminatory manner. We believe the record is insufficient at this time to adopt such requirements, and we may reexamine this issue in the future. We encourage the states, however, to adopt reporting requirements.⁶⁷³ We decline to address whether the Commission should consider any of the terms and conditions adopted here in evaluating BOC applications to provide in-region long distance services. We will consider this issue, as it arises, when we evaluate individual BOC applications.

a. Nondiscriminatory Access to Unbundled Network Elements

⁶⁷³ We address issues regarding enforcement of the rules we adopt in this Section, regarding nondiscriminatory access to, and just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements, at *supra*, in Section II.E.

312. We conclude that the obligation to provide "nondiscriminatory access to network elements on an unbundled basis"⁶⁷⁴ refers to both the physical or logical connection to the element and the element itself. In considering how to implement this obligation in a manner that would achieve the 1996 Act's goal of promoting local exchange competition, we recognize that new entrants, including small entities, would be denied a meaningful opportunity to compete if the quality of the access to unbundled elements provided by incumbent LECs, as well as the quality of the elements themselves, were lower than what the incumbent LECs provide to themselves. Thus, we conclude it would be insufficient to define the obligation of incumbent LECs to provide "nondiscriminatory access" to mean that the quality of the access and unbundled elements incumbent LECs provide to all requesting carriers is the same. As discussed above with respect to interconnection,⁶⁷⁵ an incumbent LEC could potentially act in a nondiscriminatory manner in providing access or elements to all requesting carriers, while providing preferential access or elements to itself. Accordingly, we conclude that the phrase "nondiscriminatory access" in section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself.⁶⁷⁶

313. We believe that Congress set forth a "nondiscriminatory access" requirement in section 251(c)(3), rather than an absolute equal-in-quality requirement, such as that set forth in section 251(c)(2)(C), because, in rare circumstances, it may be technically infeasible for incumbent LECs to provide requesting carriers with unbundled elements, and access to such elements, that are equal-in-quality to what the incumbent LECs provide themselves. According to some commenters, this problem arises in connection with one variant of one of the unbundled network elements we identify in this order. These commenters argue that a carrier purchasing access to a 1AESS local switch may not be able to receive, for example, the full measure of customized routing features that such a switch may afford the incumbent.⁶⁷⁷ In the rare circumstances where it is technically infeasible for an incumbent LEC to provision access or elements that are equal-in-quality, we believe disparate access would not be inconsistent with the nondiscrimination requirement. Accordingly, we require incumbent LECs to provide access and unbundled elements that are at least equal-in-quality to what the incumbent LECs provide

⁶⁷⁴ 47 U.S.C. § 251(c)(3).

⁶⁷⁵ See *supra*, Sections IV.G, IV.H.

⁶⁷⁶ We note that providing access or elements of lesser quality than that enjoyed by the incumbent LEC would also constitute an "unjust" or "unreasonable" term or condition.

⁶⁷⁷ See *infra*, Section V.J, discussing commenters' arguments regarding the possible technical limitations of such switches.

themselves, and allow for an exception to this requirement only where it is technically infeasible to meet.⁶⁷⁸ We expect incumbent LECs to fulfill this requirement in nearly all instances where they provision unbundled elements because we believe the technical infeasibility problem will arise rarely. We further conclude, however, that the incumbent LEC must prove to a state commission that it is technically infeasible to provide access to unbundled elements, or the unbundled elements themselves, at the same level of quality that the incumbent LEC provides to itself.

314. Our conclusion that an incumbent LEC must provide unbundled elements, as well as access to them, that is "at least" equal in quality to that which the incumbent provides itself, does not excuse incumbent LECs from providing, when requested and where technically feasible, access or unbundled elements of higher quality.⁶⁷⁹ As we discuss below,⁶⁸⁰ we do not believe that this obligation is unduly burdensome to incumbent LECs because the 1996 Act requires a requesting carrier to pay the costs of unbundling, and thus incumbent LECs will be fully compensated for any efforts they make to increase the quality of access or elements within their own network.⁶⁸¹ Moreover, to the extent this obligation allows new entrants, including small entities, to offer services that are different from those offered by the incumbent, we believe it is consistent with Congress's goal to promote local exchange competition. We note that, to the extent an incumbent LEC provides an element with a superior level of quality to a particular carrier, the incumbent LEC must provide all other requesting carriers with the same opportunity to obtain that element with the equivalent higher level of quality. We further note that where a requesting carrier specifically requests access or unbundled elements that are lower in quality to what the incumbent LECs provide themselves, incumbent LECs may offer such inferior quality if it is technically feasible. Finally, we conclude that the incumbent LEC must prove to a state commission that it is technically infeasible to provide access to unbundled elements, or the unbundled elements themselves, at a level of quality that is superior to or lower than what the incumbent LEC provides to itself.

b. Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Unbundled Network Elements

⁶⁷⁸ The exception described here does not excuse incumbent LECs from the obligation to modify elements within their networks to allow requesting carriers to obtain access to such elements where this is technically feasible. See *supra*, Section IV.D.

⁶⁷⁹ An incumbent LEC, in accommodating a carrier's request for a particular unbundled element, may ultimately provision an element that is higher in quality than what the incumbent provides to itself. See *infra*, Section V.J.1.

⁶⁸⁰ See *infra*, Section V.J. We require, for example, that incumbent LECs provide local loops conditioned to enable the provision of digital services (where technically feasible) even if the incumbent does not itself provide such digital services.

⁶⁸¹ See *infra*, Section VII.

315. The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.⁶⁸² We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete. Such terms and conditions should serve to promote fair and efficient competition. This means, for example, that incumbent LECs may not provision unbundled elements that are inferior in quality to what the incumbent provides itself because this would likely deny an efficient competitor a meaningful opportunity to compete. We reach this conclusion because providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets to competition is designed to achieve.

316. As is more fully discussed below,⁶⁸³ to enable new entrants, including small entities, to share the economies of scale, scope, and density within the incumbent LECs' networks, we conclude that incumbent LECs must provide carriers purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning,⁶⁸⁴ maintenance and repair, and billing functions of the incumbent LECs operations support systems. Moreover, the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers. We discuss specific terms and conditions applicable to the unbundled elements identified in this order below, in Section V.J.

H. The Relationship Between Sections 251(c)(3) and 251(c)(4)

1. Background

317. Section 251(c)(4) provides that incumbent LECs must offer "for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers that are not telecommunications carriers."⁶⁸⁵ In the NPRM, we asked for comment on the relationship between this provision and section 251(c)(3). Specifically, we asked whether carriers can order

⁶⁸² See *supras*, Sections IV.G, IV.H.

⁶⁸³ See *infra*, Section V.J.

⁶⁸⁴ The term "provisioning" includes installation.

⁶⁸⁵ 47 U.S.C. § 251(c)(4).

and combine network elements to offer the same services that incumbent LECs offer for resale under section 251(c)(4). We observed that different pricing standards under section 252(d) apply to unbundled elements under section 251(c)(3) and resold services under section 251(c)(4), and that section 251(c)(3) contemplates the purchase of unseparated facilities (*i.e.*, facilities that can be used for either inter- or intrastate services) while subsection (c)(4) does not necessarily contemplate this. We asked for comment on the implications or significance of these differences.⁶⁸⁶

2. Comments

318. A number of commenters, including incumbent LECs and CAPs, argue that, in order to distinguish section 251(c)(4) from section 251(c)(3), the Commission must conclude that new entrants can only obtain access to unbundled elements if they own or possess some local exchange facilities that they plan to use in combination with unbundled elements to provide a local service.⁶⁸⁷ According to NYNEX, the 1996 Act contemplates that new entrants will enter local telephone markets either through section 251(c)(3) or section 251(c)(4). The former is designed for entrants with some of their own facilities, and would allow them to supplement their networks; the latter is designed for new entrants that do not possess any facilities.⁶⁸⁸ MFS and Bell Atlantic concur and cite the legislative history to the 1996 Act.⁶⁸⁹

319. In support of this interpretation, some commenters cite the language of section 251(c)(3). Bell Atlantic contends that the phrase referring to unbundling at "any technically feasible point" means new entrants must have some of their own facilities to connect to that

⁶⁸⁶ NPRM at para. 85.

⁶⁸⁷ MFS comments at 36-40, 65-66; BellSouth comments at 31-33; Teleport comments at 39-42; Bell Atlantic comments at 14, reply at 5-6; Ameritech comments at 25-31; USTA comments at 23-26, reply at 10; TDS comments at 15-16; PacTel comments at 40-45; GTE reply at 17-18; SBC reply at 11; accord Pennsylvania Commission comments at 24; NYNEX comments at 29-39 (the FCC should state that new entrants can obtain unbundled elements to provide a service that is sold at resale only if they can self-provide, at a minimum, one of the elements used to provide the service).

⁶⁸⁸ NYNEX reply at 16-19 (the language of the 1996 Act and the legislative history show that resale takes precedence over the unbundling provision); accord MFS reply at 20-22 (unbundled elements are not meant as an alternative to wholesale services for pure resellers).

⁶⁸⁹ MFS comments at 37-40; Bell Atlantic comments at 12-14 (*citing* Joint Explanatory Statement at 148, which provides that, because of the significant investment required to duplicate an incumbent's network, new entrants will require access to elements in the incumbents' networks to supplement the facilities owned by the new entrants); *see also* Ameritech comments at 25-31 (Congress intended unbundled elements to be used by carriers that have some of their own facilities because the provision allows carriers to purchase only the elements they need); NYNEX reply at 16-19 (there is no evidence in the 1996 Act or the legislative history indicating that Congress intended to allow carriers to use unbundled elements an alternative way to resell services); USTA comments at 59-66.

"point."⁶⁹⁰ NYNEX argues that the phrase "such telecommunications service" excludes services provided by incumbents, and thus new entrants can only use unbundled elements to provide services that incumbents do not offer.⁶⁹¹

320. Other commenters supporting this interpretation, including incumbent LECs and CAPs, contend that we must interpret the 1996 Act in a way that gives meaning to each provision. Accordingly, they argue that we cannot allow carriers to use unbundled elements exclusively to provide services that are available at resale, because to do so would make section 251(c)(4), and its associated pricing provision, section 252(d)(3), meaningless.⁶⁹² They assert that Congress established a more favorable pricing standard for unbundled elements than resold services to encourage facilities-based entry. They argue that Congress, recognizing that facilities-based carriers incur greater risks than resellers and are a more potent competitive force, created a statutory incentive to build competing facilities by providing carriers who use unbundled elements with the opportunity to achieve higher profits. According to these commenters, if we allow carriers that merely resell services to obtain the financial benefits of unbundled elements, we would reward them though they have incurred little risk, and we would discourage them from building competing facilities.⁶⁹³ BellSouth and Ameritech argue that the language of section 251(d)(2)(B) further supports this view because, if carriers can offer a service for resale, then such carriers are not "impaired in their ability to offer a service."⁶⁹⁴

321. Ameritech, NYNEX, and MFS argue that allowing carriers to provide the equivalent of a resold service exclusively through the use of unbundled elements would eviscerate the joint marketing restriction in section 271(e)(1) because there is no comparable restriction in this provision against the joint marketing of services provided through unbundled

⁶⁹⁰ Bell Atlantic comments at 12-14. *See also* USTA comments at 59-66.

⁶⁹¹ NYNEX reply at 16-19.

⁶⁹² MFS comments at 36-40, 65-66; BellSouth comments at 31-33; NYNEX reply at 16-19; Bell Atlantic comments at 12-14; Bell Atlantic reply at 5-6; *accord* Teleport comments at 39-43 (specific provisions prevail over general ones, and thus, if carriers use unbundled elements to replicate a wholesale service offering, the specific provision dictating the price for wholesale services should be applied rather than the general one for unbundled elements); GTE reply at 17 (the Commission should not deprive incumbent LECs of their compensatory return on resold services).

⁶⁹³ MFS comments at 37-40, reply at 20-23; Teleport comments at 39-43; NYNEX comments at 29-39; USTA comments at 23-26, reply at 8-10; Bell Atlantic comments at 12-14.

⁶⁹⁴ BellSouth comments at 31-33; Ameritech comments at 25-31. For a further discussion of this argument *see supra*, Section V.E.

elements.⁶⁹⁵ BellSouth and Ameritech further contend that this view is consistent with the terms of section 251(c)(4)(B), which allows states to prohibit resellers from offering a service to a category of consumers different than the category of consumers the incumbent LEC offers that service to. They contend that, if we allowed requesting carriers to offer resold services exclusively through unbundled elements, then such carriers could evade any possible prohibition on the sale of such services and the authority to impose such limitations on resale is reserved to the states.⁶⁹⁶

322. Finally, a number of incumbent LECs and MFS argue that new entrants should not be allowed to provide services available for resale exclusively through the use of unbundled elements because such entrants could underprice: facilities-based competitors, that must recover joint and common costs, and incumbent LECs, that charge above-cost prices for some services to support universal service obligations. If new entrants could underprice incumbent LECs, they assert, then the ability of the LECs to recover their costs and meet their universal service obligations would be diminished. They also contend that allowing the exclusive use of unbundled elements would lead to arbitrage based on the pricing standards for sections 251(c)(3) and 251(c)(4). They further contend that, if resold services are priced below cost, this will discourage facilities-based entry through the purchase of unbundled elements.⁶⁹⁷

323. The Department of Justice and a number of potential competitors, including AT&T, Cable & Wireless, ALTS and LDDS, reject the view that, to give effect to section 251(c)(4), we must limit access to unbundled elements to those carriers who own some local exchange facilities. They argue that the 1996 Act allows carriers to use recombined network elements exclusively to provide services that are similar or identical to those offered by incumbent LECs for resale. To support this view they contend that the plain language of section 251(c)(3) does not contain any requirement that carriers must own some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service. According to these commenters, if we were to impose such a requirement, we would be reading into the 1996 Act a limitation on access to unbundled elements that is not stated anywhere within the statute.⁶⁹⁸

⁶⁹⁵ Ameritech comments at 25-31, reply at 24; NYNEX reply at 16-19; MFS comments at 37-40 (further arguing that the prohibition against joint marketing through the use of resold services evidences Congress's preference for facilities-based competition).

⁶⁹⁶ BellSouth comments at 31-33; Ameritech comments at 25-31.

⁶⁹⁷ Ameritech comments at 25-31, reply at 22; Bell Atlantic comments at 12-14, reply at 6; USTA comments at 23-26, reply at 8-10; MFS comments at 37-40, reply at 20-23; *accord* ALLTEL reply at 7; NYNEX comments at 29-39, reply at 16-19; Teleport comments at 39-43; PacTel reply at 25.

⁶⁹⁸ AT&T comments at 28-31, reply at 12-20; TCC comments at 27-35; Cable & Wireless comments at 26-27, reply at 20-22; DoJ comments at 48-51, reply at 23-31; Sprint reply at 24-26; LDDS reply at 25-27; ALTS reply at 24-26; *but see* GTE reply at 17-18 (new entrants have just as much opportunity to offer new services through resale as they

324. The parties which oppose conditioning access to unbundled elements on ownership of local exchange facilities also contend that sections 251(c)(3) and 251(c)(4) offer carriers different opportunities, and thus the rules of statutory construction do not require us to read use restrictions into section 251(c)(3) to distinguish and give meaning to section 251(c)(4).⁶⁹⁹ AT&T, the Department of Justice, and others argue, for example, that carriers offering services through resale are limited to the precise service that the incumbent is providing. In contrast, these parties assert that carriers exclusively using unbundled elements can offer different and new services, or the same services with higher quality. In addition, these parties note that, under section 251(c)(3), carriers purchasing an unbundled element can provide all services which that element is typically used to provide, but under section 251(c)(4), carriers purchasing services available for resale can only provide the service they purchase.⁷⁰⁰

325. Some of the commenters opposing restrictions on access to unbundled elements further argue that allowing carriers to use unbundled elements exclusively to provide the same or similar services that are sold at resale would reduce barriers to entry, and thus promote facilities-based competition. They explain that entrants using unbundled elements will incur lower costs, and will be able to offer more services than carriers who purchase services for resale. They further contend that this means that new entrants using unbundled elements will earn higher revenues, and will have more funds to build competing facilities, than carriers purchasing services available for resale. They also contend that a requirement that carriers own some facilities to purchase unbundled elements would impede entry into the access market and restrict competition for all local services to areas where construction of duplicate facilities is economically justified and has already occurred. Congress, they argue, did not intend to encourage the build out of competing facilities where it is not efficient and the reason Congress included the unbundling provision in the 1996 Act is because most areas only have one network.⁷⁰¹

326. Some of the commenters who oppose restricting access to unbundled elements to those carriers who own some local exchange facilities also argue that any such restriction would

do through unbundled elements, with resold services new entrants can add value and develop new price plans).

⁶⁹⁹ AT&T comments at 28-31, reply at 13-20; LDDS reply at 25-28; TCC comments at 27-35; CompTel reply at 13-22; DoJ comments at 48-51, reply at 23-31 (carriers will likely use resale to purchase services that incumbents price below cost, otherwise these services would never experience competition); Sprint comments at 24-26; Cable & Wireless comments at 20-22; MCI comments at 27-28 (carriers purchasing unbundled elements are not purchasing services, hence they are not the same thing as services available for resale).

⁷⁰⁰ AT&T comments at 28-31, reply at 13-20; LDDS reply at 25-28; TCC comments at 27-35; CompTel reply at 13-22; DoJ comments at 48-51, reply at 23-31; Sprint comments at 24-26; Cable & Wireless comments at 20-22; MCI comments at 27-28.

⁷⁰¹ AT&T comments at 28-31, reply at 13-20; CompTel reply at 13-22; TCC comments at 27-35; DOJ comments at 48-51, reply at 23-31.

be administratively burdensome and difficult to enforce. They contend, for example, that we would need to specify certain minimum facilities that carriers would need to own to obtain access to unbundled elements. They contend that, if we did not specify such minimum facilities, but merely required ownership or possession of a single facility (or any facility), then the requirement in general would have no practical significance.⁷⁰² The Department of Justice contends that we would need to determine whether carriers must own or possess a local exchange facility that is used for each consumer to whom they provide service.⁷⁰³ In determining the relationship between sections 251(c)(3) and 251(c)(4), the Illinois Commission asks us to consider whether our interpretation would advance competition, reduce regulation, preserve and advance universal service, remove statutory, regulatory and economic impediments to new entry, and provide states with flexibility.⁷⁰⁴

327. Finally, NYNEX argues that carriers should not be permitted to offer services to consumers by combining unbundled elements and resold services because the different rates for unbundled elements and resale of services would allow for arbitrage.⁷⁰⁵ Comptel and Sprint counter, however, that the 1996 Act does not prohibit the combined use of unbundled elements and resold services. Comptel further contends that Congress intended to provide new entrants with maximum flexibility in connection with opportunities to enter local telephone markets and thus it would be contrary to Congressional intent, as well as anticompetitive, if we prohibited carriers from using a combination of unbundled elements and services available for resale.⁷⁰⁶

3. Discussion

328. The language of section 251(c)(3) is cast exclusively in terms of obligations imposed on incumbent LECs, and it does not discuss, reference, or suggest a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements. We conclude, therefore, that Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before

⁷⁰² DoJ comments at 48-51, reply at 23-31; AT&T reply at 13-20; Cable & Wireless reply at 20-22; LDDS reply at 25-30.

⁷⁰³ DoJ comments at 48-51, reply at 23-31.

⁷⁰⁴ Illinois Commission comments at 38.

⁷⁰⁵ NYNEX comments at 38-39.

⁷⁰⁶ CompTel reply at 20-22; Sprint comments at 23-28.

they can purchase and use unbundled elements to provide a telecommunications service. We note that the Illinois Commission has reached the same conclusion.⁷⁰⁷

329. We reject the arguments advanced by Bell Atlantic and NYNEX that the language of section 251(c)(3) requires carriers seeking access to unbundled elements to own some local exchange facilities, and that this serves to distinguish section 251(c)(3) from section 251(c)(4). The "at any technically feasible point" language in section 251(c)(3) refers to points in an incumbent LEC's network where new entrants may obtain access to elements. It does not, however, require that new entrants interconnect local exchange facilities which they own or control at that technically feasible access point. If we were to conclude otherwise, then new entrants would be prohibited from requesting two network elements that are connected to each other because the new entrant would be required to connect a single network element to a facility of its own. The 1996 Act, however, does not impose any limitations on carriers' ability to obtain access to unbundled network elements. Moreover, we conclude that Congress did not intend to limit access to unbundled elements in this manner because such a limit would seriously inhibit the ability of potential competitors to enter local markets through the use of unbundled elements, and thus would retard the development of local exchange competition. We also reject NYNEX's argument that the phrase "such telecommunications service" excludes services provided by the incumbent. This interpretation is inconsistent with the 1996 Act's definition of a telecommunications service, which includes all telecommunications services provided by an incumbent.

330. We also reject the argument that language in the Joint Explanatory Statement requires us to conclude that carriers must own facilities to obtain access to unbundled elements. Congress may have recognized that carriers that own some of their own facilities will more likely benefit by entering local markets through unbundled elements rather than resale, but this consideration does not imply that carriers must own their own facilities to obtain access to unbundled elements.⁷⁰⁸

331. We are not persuaded that, in order to give meaning and effect to section 251(c)(4), we must require new entrants to own some local exchange facilities in order to obtain access to unbundled elements. We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of

⁷⁰⁷ AT&T Communications of Illinois, Inc. *et. al.*, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company, Nos. 95-0458 and 95-0531 (consol.) at 63-65 (Illinois Commission June 26, 1996).

⁷⁰⁸ See Joint Explanatory Statement at 148.

potential competitors. We therefore find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity as a means to enter local phone markets.

332. The principal distinction between sections 251(c)(3) and 251(c)(4), in terms of the opportunities each section presents to new entrants, is that carriers using solely unbundled elements, compared with carriers purchasing services for resale, will have greater opportunities to offer services that are different from those offered by incumbents. More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and to some extent, customer service. The ability of a reseller to differentiate its products based on price is limited, however, by the margin between the retail and wholesale price of the product.

333. In contrast, a carrier offering services solely by recombining unbundled elements can offer services that differ from those offered by an incumbent. For example, some incumbent LECs have capabilities within their networks, such as the ability to offer Centrex, which they do not use to offer services to consumers. Carriers purchasing access to unbundled elements can offer such services. Additionally, carriers using unbundled elements can bundle services that incumbent LECs sell as distinct tariff offerings, as well as services that incumbent LECs have the capability to offer, but do not, and can market them as a bundle with a single price. The ability to package and market services in ways that differ from the incumbent's existing service offerings increases the requesting carrier's ability to compete against the incumbent and is likely to benefit consumers.⁷⁰⁹ Additionally, carriers solely using unbundled network elements can offer exchange access services. These services, however, are not available for resale under section 251(c)(4) of the 1996 Act.⁷¹⁰

334. If a carrier taking unbundled elements may have greater competitive opportunities than carriers offering services available for resale, they also face greater risks. A carrier purchasing unbundled elements must pay for the cost of that facility, pursuant to the terms and conditions agreed to in negotiations or ordered by states in arbitrations.⁷¹¹ It thus faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. (Many network elements can be used to provide a number of different

⁷⁰⁹ See AT&T comments at 25-31.

⁷¹⁰ See *infra*, Section VII; see also Letter from Bernard J. Ebbers, President LDDS WorldCom, to Rachelle B. Chong, Commissioner, Federal Communications Commission, July 11, 1996.

⁷¹¹ See *infra*, Section VII, describing the terms under which new entrants will pay for the cost of unbundled elements.

services.) A carrier that resells an incumbent LEC's services does not face the same risk. This distinction in the risk borne by carriers entering local markets through resale as opposed to unbundled elements is likely to influence the entry strategies of various potential competitors. Some new entrants will be unable or unwilling to bear the financial risks of entry by means of unbundled elements and will choose to enter local markets under the terms of section 251(c)(4) irrespective of the fact that they can obtain access to unbundled elements without owning any of their own facilities.⁷¹² Moreover, some markets may never support new entry through the use of unbundled elements because new entrants seeking to offer services in such markets will be unable to stimulate sufficient demand to recoup their investment in unbundled elements. Accordingly, in these markets carriers will enter through the resale of incumbent LEC services, irrespective of the fact that they could enter exclusively through the use of unbundled elements.⁷¹³

335. We are not persuaded by the argument set forth by Ameritech, NYNEX, and MFS that allowing carriers to use solely recombined network elements would eviscerate the joint marketing restriction in section 271(e)(1).⁷¹⁴ It is true that the terms of section 271(e) do not restrict joint marketing through the use of unbundled elements pursuant to section 251(c)(3). As discussed above, differences in opportunities and risk will cause some new entrants to consider entering local telephone markets through resale of incumbent LEC services, even if they could enter solely through the use of unbundled elements. Thus, we conclude that section 271(e)(1) will impose a meaningful limitation on joint marketing.

336. We note, moreover, that the 1996 Act does not prohibit all forms of joint marketing. For example, it does not prohibit carriers who own local exchange facilities from jointly marketing local and interexchange service. Nor does it prohibit joint marketing by carriers who provide local exchange service through a combination of local facilities which they own or possess, and unbundled elements. Because the 1996 Act does not prohibit all forms of joint marketing, we see no principled basis for reading into section 271(e)(1) a further limitation on the ability of carriers to jointly market local and long distance services without concluding that this section prohibits all forms of joint marketing. In other words, we see no basis upon which we could conclude that section 271(e)(1) restricts joint marketing of long distance services, and local services provided solely through the use of unbundled network elements, without also concluding that the section restricts the ability of carriers to jointly market long distance services

⁷¹² See, e.g., AT&T reply at 13-20.

⁷¹³ See, e.g., Comptel reply at 13-16.

⁷¹⁴ Section 271(e)(1) provides that "[u]ntil a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment . . . a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services." 47 U.S.C. § 271(e)(1).

and local services that are provided through a combination of a carriers' own facilities and unbundled network elements.⁷¹⁵ Moreover, we do not believe that we have the discretion to read into the 1996 Act a restriction on competition which is not required by the plain language of any of its sections.

337. We also reject the argument advanced by BellSouth and Ameritech that allowing carriers to use solely unbundled elements to provide services available through resale would allow carriers to evade a possible prohibition, which is reserved to the discretion of the states, on the sale of certain services to certain categories of consumers. Under section 251(c)(4)(B) states are permitted to restrict resellers from offering certain services to certain consumers, in the same manner that states restrict incumbent LECs.⁷¹⁶ For example, states that prohibit incumbent LECs from selling to business consumers residential services priced below cost have the ability to restrict resellers from selling such services to business consumers.

338. We do not believe, however, that carriers using solely unbundled elements to provide local exchange services will be able to evade any potential restrictions states may impose under section 251(c)(4)(B). In this section Congress granted the states the discretion to impose certain limited restrictions on the sale of services available for resale. It did not, however, grant states, in section 251(c)(3), the same discretion to impose similar restrictions on the use of unbundled elements. Accordingly, we are not persuaded that allowing carriers to use solely unbundled elements to provide services that incumbent LECs offer for resale would allow competing carriers to evade a possible marketing restriction that Congress intended to reserve to the discretion of the states.

339. We agree with those commenters who argue that it would be administratively impossible to impose a requirement that carriers must own some of their own local exchange facilities in order to obtain access to unbundled elements, and they must use these facilities, in combination with unbundled elements, for the purpose of providing local services. We conclude that it would not be possible to identify the elements carriers must own without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation. We further conclude that such a requirement could delay possible innovation. These effects would diminish competition for local telephone services, and thus any local exchange facilities requirement would be inconsistent with the 1996 Act's goals of promoting competition. Moreover, if we imposed a facilities ownership requirement that attempted to avoid these competitive pitfalls, it would likely be so easy to meet it would ultimately be meaningless.

⁷¹⁵ See also AT&T reply at 14-15 (the added risk of unbundled elements also means that new entrants are not circumventing section 271's joint marketing restriction because the additional risk justifies allowing carriers more flexibility to jointly market services); LDDS reply at 28-30.

⁷¹⁶ 47 U.S.C. § 251(c)(4)(B).

340. We reject the argument that requiring carriers to own some local exchange facilities would promote competition for local exchange services, or that we should impose such a requirement for other policy reasons. To the contrary, we conclude that allowing carriers to use unbundled elements as they wish, subject only to the maintenance of the key elements of the access charge regime, described below at section VII, will lead to more efficient competition in local phone markets. If we were to limit access to unbundled network elements to those markets where carriers already own, or could efficiently build, some local exchange facilities, we would limit the ability of carriers to enter local markets under the pricing standard for unbundled elements to those markets that could efficiently support duplication of some or all of the incumbent LECs' networks. We believe that such a result could diminish competition, and that allowing new entrants to take full advantage of incumbent LECs' scale and scope economies will promote more rapid and efficient entry and will result in more robust competition.

341. Finally, we conclude that a new entrant may offer services to one group of consumers using unbundled network elements, and it may offer services to a separate group of consumers by reselling an incumbent LEC's services. With the exception noted in Section VII, *infra*, we do not address the issue of whether the 1996 Act permits a new entrant to offer services to the same set of consumers through a combination of unbundled elements and services available for resale.

I. Provision of Interexchange Services Through The Use of Unbundled Network Elements

1. Background

342. In the NPRM, we tentatively concluded that interexchange carriers are telecommunications carriers, and thus such carriers are entitled to access to unbundled elements under the terms of section 251(c)(3). We also tentatively concluded that carriers may request unbundled elements for purposes of originating and terminating toll services, in addition to any other services they seek to provide, because section 251(c)(3) provides that carriers may request unbundled elements to provide a "telecommunications service," and interexchange services are a telecommunications service.⁷¹⁷

343. In the NPRM, we sought comment on whether the 1996 Act permits carriers to use unbundled elements to provide exchange access services only, or whether carriers seeking to provide exchange access services using unbundled elements must provide local exchange service as well. We premised the latter view on the definition of the term "network element," as a facility and not a service, and on the pricing standard under section 252(d)(1) that requires network elements to be priced based on economic costs (rather than jurisdictionally separated

⁷¹⁷ NPRM at paras. 159, 163.

costs.)⁷¹⁸ We also sought comment on whether allowing carriers to purchase unbundled elements to provide exchange access services exclusively would be inconsistent with the terms of sections 251(i) and 251(g) and, further, whether this would result in a fundamental jurisdictional shift of the administration of interstate access charges to state jurisdictions.⁷¹⁹

344. Finally, in the NPRM, we tentatively concluded that, if carriers purchase unbundled elements to provide exchange access services to themselves, irrespective of whether they provide such services alone or in connection with local exchange services, incumbent LECs cannot assess Part 69 access charges in addition to charges for the cost of the unbundled elements. We based this tentative conclusion on the view that the imposition of access charges in addition to cost-based charges for unbundled elements would depart from the statutory mandate of cost-based pricing of elements.⁷²⁰

2. Comments

345. A number of potential competitors, as well as the Department of Justice, the Illinois and Ohio Commissions, NYNEX, and USTA, agree with our tentative conclusions that interexchange carriers may obtain access to unbundled elements, and that carriers may purchase unbundled elements for the purpose of originating and terminating interexchange services because such services are a type of telecommunications service.⁷²¹ Some of these commenters support our tentative interpretation of the 1996 Act by arguing that section 251(c)(3) requires incumbent LECs to provide access to network elements without regard to the types of services carriers seek to offer, or the jurisdictional nature of such services. They contend that new entrants are paying the full cost for an element and thus are entitled to recover their costs by offering any services that use the element.⁷²² Others argue that, by its plain terms, the 1996 Act

⁷¹⁸ See *supra*, Section V.C. and *infra*, Section VII.

⁷¹⁹ NPRM at para. 164.

⁷²⁰ NPRM at para. 165.

⁷²¹ NYNEX comments at 20-22; TCC comments at 27-35; Sprint comments at 67-70, reply at 32-34; Cable & Wireless comments at 27-32, reply at 20; MCI comments at 77-83; COMAV comments at 31; DoJ comments at 35-47; CompTel comments at 27, 65; Frontier comments at 11, reply at 8-11; Illinois Commission at 51-52; Ohio Commission comments at 57-58; AT&T reply at 23-24; LDDS reply at 36-38; Excel comments at 4; TCC comments at 28; USTA comments at 59-66; see also Texas Public Utility Counsel comments at 39-40 (competition will push access rates to cost so the Commission should not put effort into protecting access charges); Citizens Utilities comments at 22.

⁷²² See, e.g., DoJ comments at 35-47; AT&T reply at 23-24; TCC comments at 27-35; LDDS reply at 36-38 (because carriers pay the full unseparated cost of a network element, they are entitled to provide the full range of services over those elements); Excel comments at 4; TCC comments at 28; Frontier reply at 24-26.

does not allow incumbent LECs to limit the types of services any carrier can offer in connection with the sale of unbundled elements.⁷²³

346. The Department of Justice and AT&T also contend that there are substantial economies of scope in the provision of local exchange and exchange access services, and that new entrants will need the revenue streams from both services to support the high cost of constructing competing local exchange facilities.⁷²⁴ The Department of Justice and Comptel further assert that, if incumbent LECs are allowed to maintain market power over exchange access services then, when the BOCs are allowed into in-region long distance markets, the BOCs will be able to underprice other competitors in the sale of long distance services, and in the sale of bundled local and long distance services, and thus could undermine current competitive conditions in the long distance market.⁷²⁵

347. The commenters which support our tentative conclusion that carriers may use unbundled elements to provide interexchange services disagree, however, on whether requesting carriers can use unbundled elements solely to provide interexchange services or whether they must provide other services, including local services, as well. AT&T, MCI, Cable & Wireless, and GCI argue that the ability to provide exchange access services is a function of the loop, and the plain language of the 1996 Act does not permit incumbent LECs to deny requesting carriers the ability to obtain that functionality alone.⁷²⁶ Sprint and the Department of Justice, however, contend that, while the 1996 Act does not prohibit carriers purchasing unbundled elements from offering only exchange access services, as a practical matter, any carrier purchasing access to a local loop will have to offer both local exchange and exchange access services.⁷²⁷ The Department of Justice bases its contention on the assumption that the Commission will require carriers purchasing access to a local loop to take exclusive control of that loop. The Department of Justice explains that such a requirement is consistent with section 252's method for pricing

⁷²³ See, e.g., DoJ comments at 35-47; Illinois Commission comments at 51-52; MCI comments at 77-84.

⁷²⁴ DoJ comments at 35-47; AT&T reply at 23-24.

⁷²⁵ CompTel comments at 19-27; DoJ comments at 35-47.

⁷²⁶ AT&T reply at 23-24; Cable & Wireless comments at 27-32; MCI comments at 77-84 (defining a local loop as a single network element is inconsistent with the 1996 Act's definition of a network element which states that a functionality can be a network element); GCI comments at 11; see also ACTA comments at 17; Excel comments at 4.

⁷²⁷ Sprint comments at 67-70, reply at 34-36; DoJ comments at 35-47; see also LDDS reply at 37; cf. Citizens Utilities at 22 (it is unlikely that DXCs will purchase unbundled elements to provide solely exchange access services, because in the future they will market services through "one stop shopping," where they will offer local and long distance services as a bundled product); MFS comments at 65-66 (to meet market demand carriers will have to offer the services customers demand, and it is unlikely they will want only interexchange services).

network elements and with industry practice at the time the 1996 Act was adopted.⁷²⁸ Sprint bases its contention on the view that allowing carriers to obtain access to local loops in order to provide only a single service is inconsistent with the idea that a network element is a facility and not a service.⁷²⁹ The Department of Justice and Sprint thus argue that any carrier purchasing exclusive access to a local loop would have to provide all services demanded by the customer to whom that loop is dedicated. If a customer desires to receive both local exchange and exchange access services, then the carrier purchasing access to that customer's loop would have to provide both of these services.⁷³⁰ Sprint observes, in contrast, that if a customer has two local loops dedicated to its premises a carrier could purchase access to one of the loops merely to provide exchange access services, because the customer could receive local exchange service from another carrier over the other local loop.⁷³¹

348. In contrast, NYNEX, USTA, the Ohio Commission, and Puerto Rico Telephone argue that the 1996 Act does not impose any obligation on incumbent LECs to provide access to unbundled elements solely to allow carriers to provide originating and terminating exchange access services. They argue that carriers purchasing access to local loops in order to provide exchange access services must also provide local exchange services as well.⁷³² USTA supports its contention by arguing that, in order to obtain "access to" unbundled network elements, a carrier must "interconnect" to them under the terms of section 251(c)(2), but that carriers are eligible for interconnection under section 251(c)(2) only if they offer both local exchange and exchange access services. Accordingly, USTA asserts that carriers that interconnect to unbundled elements must offer both of these services.⁷³³ NYNEX argues that sections 251(g) and (i), and the legislative history to the 1996 Act, make clear that Congress did not intend for section 251 to supplant the existing access charge regime, and that carriers thus can not obtain unbundled local loops merely to offer exchange access services. Carriers seeking access to unbundled loops must take the entire functionality of this element, and thus will have to offer both local exchange and exchange access services.⁷³⁴ Puerto Rico Telephone further argues that the subsidies built into access charge prices enable incumbent LECs to meet their universal

⁷²⁸ DoJ comments at 35-47.

⁷²⁹ Sprint comments at 67-70.

⁷³⁰ Sprint comments at 67-70; DoJ comments at 35-47; *accord* LDDS reply at 37.

⁷³¹ Sprint comments at 67-70.

⁷³² NYNEX comments at 6, 21-22; USTA comments at 59-66; Ohio Commission comments at 57-58; Puerto Rico Tel. comments at 11-14.

⁷³³ USTA comments at 56-66.

⁷³⁴ NYNEX comments at 6, 20-22; *see also* USTA comments at 56-66 (concurring with NYNEX's reasoning).

service obligations, and that a premature elimination of this contribution would cause massive increases in local service rates.⁷³⁵

349. Disputing our tentative conclusion, a number of incumbent LECs contend that the 1996 Act prohibits interexchange carriers from purchasing unbundled elements to provide exchange access services to themselves and thus avoid payment of access charges to incumbent LECs.⁷³⁶ Bell Atlantic contends that carriers purchasing unbundled elements from an incumbent LEC must pay access charges for toll calls completed on that incumbent LEC's network. Thus, for example, if a carrier purchases an unbundled loop, and completes toll calls using its own switch and the unbundled loop, it must pay the incumbent LEC from which it purchased the loop both the cost of the loop and the carrier common line charge associated with it.⁷³⁷

350. The commenters opposing interexchange carriers' use of unbundled elements to provide interexchange services offer a number of arguments to support their view. For example, they argue that section 251(g) means that incumbent LECs must offer exchange access services under the same terms that they did prior to the passage of the 1996 Act, and the "receipt of compensation" phrase in this section means that interexchange carriers must continue to pay current access charges until they are reformed in an access charge rulemaking proceeding.⁷³⁸ They also argue that the express language of section 251(i) makes clear that the Commission's section 201 authority to regulate interstate access charges is not overridden by section 251(c)(3). They assert that, if we interpret section 251(c)(3) as allowing carriers to use unbundled elements to provide interexchange services, then our section 201 authority to regulate interstate access charges would be limited, in violation of section 251(i).⁷³⁹ They further argue that allowing carriers to use unbundled elements to provide exchange access services to themselves, and

⁷³⁵ Puerto Rico Tel. comments at 11-14; *see also* USTA reply comments at 6-8; SBC comments at 77-82 (allowing carriers to use unbundled elements to provide themselves exchange access will result in arbitrage between the price of unbundled network elements and access charges); PacTel reply at 35-36.

⁷³⁶ BellSouth comments at 30-31, 60-63, reply at 45-46; Bell Atlantic comments at 8-12; Texas Statewide Tel. Cooperative, Inc. comments at 16-17; PacTel comments at 78-80; ALLTEL reply at 6-7; Rural Tel. Coalition reply at 7-11; Ameritech comments at 26, reply at 25; SBC comments at 77-82; PacTel reply at 36; U S West comments at 59-64, reply at 6-8; *see also* NECA comments at 3-6; GTE comments at 74-79 (carriers using unbundled network elements to originate and terminate toll services should be required to charge their interexchange affiliate the same access prices they charge unaffiliated carriers).

⁷³⁷ Bell Atlantic comments at 8-12.

⁷³⁸ *See, e.g.*, BellSouth comments at 63-64; Texas Statewide Tel. Cooperative, Inc. comments at 16-17; Bell Atlantic comments at 8-12; Time Warner comments at 60-63; PacTel comments at 78-80, reply at 36; NECA comments at 3-6, reply at 5; SBC comments at 77-82; *see also* USTA comments at 5-8; GTE comments at 74-79; U S West comments at 61; ALLTEL reply at 6-7; Rural Tel. Coalition reply at 7-11.

⁷³⁹ BellSouth comments at 63-64; USTA comments at 59-66; NYNEX comments at 9-21; Bell Atlantic comments at 8-12; Time Warner comments at 60-63; Puerto Rico Tel. comments at 10-14; Texas Statewide Tel. Cooperative, Inc. comments at 16-17; NECA reply at 5; GTE comments at 74-79; Rural Tel. Coalition reply at 7-11.

interexchange services to end users, would be "inconsistent" with the purposes of section 251, which was designed to promote competition for local telephone services and was not intended as a means to evade access charges.⁷⁴⁰ They further argue that such an interpretation would transfer control of interstate access charges to the states.⁷⁴¹

351. SBC, PacTel and GTE argue that the Senate version of the 1996 Act (which was amended by the Conference Committee) makes clear that section 251 was not intended to supplant the existing access charge regime.⁷⁴² PacTel further argues that section 251(c)(3) allows carriers to obtain unbundled elements to "offer" telecommunications services, but not to receive exchange access services.⁷⁴³ Time Warner contends that none of the provisions of the 1996 Act displace section 201, which grants the Commission authority to establish access charges.⁷⁴⁴ NECA contends that the Commission may not change the separations rules that allocate costs between interstate and intrastate jurisdictions without a recommendation from the Joint Board and that it cannot modify or repeal interstate access charge rules without a formal rulemaking. Accordingly, NECA concludes, carriers must still pay interstate access charges.⁷⁴⁵ NECA also argues that, because carriers could offer long distance services without using unbundled elements, under the "impairment" standard in section 251(d)(2), incumbent LECs need not provide unbundled elements to enable carriers to offer interexchange services.⁷⁴⁶

352. SBC also argues that allowing carriers to use unbundled elements to provide interexchange services will decrease the incentives for new entrants to invest in competing facilities. As a result, SBC concludes consumers are not likely to benefit because new entrants will price exchange access services just below the levels charged by incumbent LECs.⁷⁴⁷ SBC and NECA contend that section 251(d)(3) preserves the authority of states over intrastate access

⁷⁴⁰ BellSouth comments at 63-64, reply at 45-46; Bell Atlantic reply at 4-6; Texas Statewide Tel. Cooperative, Inc. comments at 16-17; Ameritech reply at 25-26; SBC comments at 77-82 (the terms of section 251 relate only to interconnection between carriers offering local exchange services); Bell Atlantic comments at 8-12; Bay Springs, *et al.* comments at 16; *see also* Minnesota Ind. Coalition comments at 34-38 (interexchange service is not an incumbent LEC exchange service and thus IXCs should not be allowed to circumvent access charges).

⁷⁴¹ BellSouth comments at 63-64; NYNEX comments at 9-21; U S West comments at 59-66; GTE comments at 74-79; PacTel reply at 36; *see also* Rural Tel. Coalition reply at 7-11.

⁷⁴² SBC comments at 77-82; GTE comments at 74-79; PacTel comments at 78-80; *see also* NECA comments at 3-6.

⁷⁴³ PacTel comments at 78-80.

⁷⁴⁴ Time Warner comments at 60-63.

⁷⁴⁵ NECA comments at 3-6, reply at 3-7.

⁷⁴⁶ NECA reply at 5-6.

⁷⁴⁷ SBC reply at 9-11.

charges.⁷⁴⁸ Bell Atlantic contends that Congress could not have intended to overturn the existing access charge regime without expressly stating this.⁷⁴⁹ Finally, Bell Atlantic and Ameritech argue that it would be inappropriate to allow carriers to use unbundled elements to provide interexchange services because this would amount to a flash cut reform of access charges before universal service issues are addressed. They reason that, since interstate access charges subsidize local service prices, to allow access pricing to be circumvented would prevent incumbent LECs from meeting their universal service obligations and would, thus, jeopardize current local phone rates.⁷⁵⁰ The Rural Telephone Coalition agrees and notes, in particular, that rural ratepayers could be subject to higher local service rates if interexchange carriers are allowed, before proceedings regarding access reform and universal service are completed, to bypass access charges through the purchase of unbundled elements.⁷⁵¹

353. A number of potential competitors dispute the incumbent LECs' arguments. MCI and the Department of Justice contend that section 251(g) means that the exchange access rules applicable to incumbent LECs before the 1996 Act was passed continue to apply until the Commission issues "superseding regulations." Citing the Joint Explanatory Statement, they assert that the "superseding regulations" referred to are the regulations that the Commission must issue to implement the requirements of section 251. They argue that if section 251 did not affect some change in the rules on access charges, then the "receipt of compensation" language in section 251(g) would be unnecessary.⁷⁵²

354. With respect to section 251(i), Cable & Wireless contends that this section merely preserves the Commission's authority under section 201. According to Cable & Wireless, this means that carriers can obtain originating and terminating access either by purchasing unbundled network elements under section 251(c)(3) or pursuant to access charge tariffs.⁷⁵³ MCI argues that section 251(i) preserves the Commission's authority to regulate interstate access charges where incumbent LECs are still providing these services (rather than where new entrants are using

⁷⁴⁸ SBC comments at 77-82; NECA comments at 3-6; *see also* NYNEX comments at 9-21 (allowing carriers to use unbundled elements to provide exchange access services to themselves would preempt state access charge policies).

⁷⁴⁹ Bell Atlantic comments at 8-12;

⁷⁵⁰ Bell Atlantic comments at 8-12, reply at 4-6; Ameritech reply at 24-26 (prices for exchange access services should be rebalanced through a direct examination of universal service issues); *see also* USTA comments at 61.

⁷⁵¹ Rural Tel. Coalition reply at 8.

⁷⁵² DoJ comments at 52-53; MCI comments at 77-84. *But cf.* GTE reply at 39-40 (the argument that section 251(g) serves to preserve existing access charges until the Commission adopts regulations implementing section 251 deprives section 251(g) of any meaning because there is no need to preserve existing access charges).

⁷⁵³ Cable & Wireless comments at 26-32 (arguing same point in connection with section 251(g)); *see also* CompTel comments at 66.

unbundled elements.)⁷⁵⁴ MCI also argues that allowing carriers to use unbundled elements to provide originating and terminating toll services would not deprive the Commission of authority to set prices for exchange access services because in this proceeding the Commission will direct the states on how to set prices for unbundled elements.⁷⁵⁵

355. LDDS denies that the language of the Senate (as well as House) versions of the 1996 Act indicate that section 251 was not intended to supplant the existing access charge structure, and points to the fact that the language in these bills supporting this argument was not included in the final bill as amended by the Conference Committee.⁷⁵⁶ MCI and LDDS argue, respectively, that allowing carriers to use unbundled elements to provide exchange access services is not inconsistent with Congress' intent in writing section 251 because Congress intended for the 1996 Act to create a single set of rules governing relationships between carriers,⁷⁵⁷ and the 1996 Act is also about eliminating inefficient pricing in telecommunications services, including inefficient pricing of current access charges.⁷⁵⁸ Frontier contends that the statutorily-mandated rates that incumbent LECs may charge for unbundled elements will not be the same as the rates they charge for exchange access services. Frontier argues, however, that the correct response to this is not to limit the purposes for which unbundled elements may be used, but to reform access charge prices to reflect costs.⁷⁵⁹ Finally, the Ohio Commission and a number of potential local competitors agree with our tentative conclusion that incumbent LECs cannot assess part 69 access charges on top of prices for unbundled network elements because this would allow incumbent LECs to recover fees in excess of costs, in violation of the pricing standards in section 252.⁷⁶⁰

3. Discussion

356. We confirm our tentative conclusion in the NPRM that section 251(c)(3) permits interexchange carriers and all other requesting telecommunications carriers, to purchase

⁷⁵⁴ MCI comments at 77-83.

⁷⁵⁵ *Id.*

⁷⁵⁶ LDDS reply at 32.

⁷⁵⁷ MCI comments at 77-83.

⁷⁵⁸ LDDS reply at 30-32.

⁷⁵⁹ Frontier reply at 9-11.

⁷⁶⁰ Ohio Commission comments at 58; TCC comments at 27-35; Sprint comments at 67-70; MCI comments at 73; DoJ comments at 35-47, 52-53; CompTel comments at 39; Excel comments at 4; AT&T reply at 23-24; LDDS reply at 36-38.

unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers.⁷⁶¹ Although we conclude below that we have discretion under the 1934 Act, as amended by the 1996 Act, to adopt a limited, transitional plan to address public policy concerns raised by the bypass of access charges via unbundled elements, we believe that our interpretation of section 251(c)(3) in the NPRM is compelled by the plain language of the 1996 Act. As we observed in the NPRM, section 251(c)(3) provides that requesting telecommunications carriers may seek access to unbundled elements to provide a "telecommunications service," and exchange access and interexchange services are telecommunications services. Moreover, section 251(c)(3) does not impose restrictions on the ability of requesting carriers "to combine such elements in order to provide such telecommunications service[s]."⁷⁶² Thus, we find that there is no statutory basis upon which we could reach a different conclusion for the long term.

357. We also confirm our conclusion in the NPRM that, for the reasons discussed below in section V.J, carriers purchase rights to exclusive use of unbundled loop elements, and thus, as the Department of Justice and Sprint observe, such carriers, as a practical matter, will have to provide whatever services are requested by the customers to whom those loops are dedicated. This means, for example, that, if there is a single loop dedicated to the premises of a particular customer and that customer requests both local and long distance service, then any interexchange carrier purchasing access to that customer's loop will have to offer both local and long distance services. That is, interexchange carriers purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops.

358. We reject the argument advanced by a number of incumbent LECs that section 251(i) demonstrates that requesting carriers using unbundled elements must continue to pay access charges. Section 251(i) provides that nothing in section 251 "shall be construed to limit or otherwise affect the Commission's authority under section 201."⁷⁶³ We conclude, however, that our authority to set rates for these services is not limited or affected by the ability of carriers to obtain unbundled elements for the purpose of providing interexchange services. Our authority to regulate interstate access charges remains unchanged by the 1996 Act. What has potentially changed is the volume of access services, in contrast to the number of unbundled elements, interexchange carriers are likely to demand and incumbent LECs are likely to provide. When interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access "services." They are purchasing a different product, and that product is the right to exclusive access or use of an entire element. Along this same line of reasoning, we reject the

⁷⁶¹ See NPRM at paras. 159-65.

⁷⁶² 47 U.S.C. § 251(c)(3).

⁷⁶³ 47 U.S.C. § 251(i).

argument that our conclusion would place the administration of interstate access charges under the authority of the states. When states set prices for unbundled elements, they will be setting prices for a different product than "interstate exchange access services." Our exchange access rules remain in effect and will still apply where incumbent LECs retain local customers and continue to offer exchange access services to interexchange carriers who do not purchase unbundled elements, and also where new entrants resell local service.⁷⁶⁴

359. We also reject the incumbent LECs' arguments that language contained in bills that were not enacted, or legislative history connected to such bills, demonstrates that carriers cannot purchase access to unbundled elements to provide exchange access services to themselves, for the purpose of providing long distance services to consumers. The incumbent LECs are arguing in effect, that we should read into the current statute a limitation on the ability of carriers to use unbundled network elements, despite the fact that no such limitation survived the Conference Committee's amendments to the 1996 Act. We conclude, however, that the language of section 251(c)(3), which provides that telecommunications carriers may purchase unbundled elements in order to provide a telecommunications service⁷⁶⁵ is not ambiguous. Accordingly, we must interpret it pursuant to its plain meaning and not by referencing earlier versions of the statute that were ultimately not adopted by Congress.

360. Moreover, we do not believe that the Joint Explanatory Statement, which describes the House and Senate versions of the statute, and the 1996 Act as enacted, compels a different conclusion. The Joint Explanatory Statement states that the statute incorporates provisions from the Senate Bill and the House Amendment in connection with the interconnection model adopted in section 251.⁷⁶⁶ It notes that the provision in the Senate Bill relating to interconnection did not apply to interconnection arrangements between local and long distance carriers for the purpose of providing long distance services.⁷⁶⁷ The text of section 251 of the Senate Bill is consistent with this comment because it states that a local exchange carrier must offer interconnection to other carriers to allow such carriers to provide telephone exchange or exchange access services.⁷⁶⁸ The Joint Explanatory Statement, however, does not describe any restriction in the House Amendment regarding the ability of carriers to use unbundled elements to provide long distance

⁷⁶⁴ The application of our exchange access rules in the circumstances described will continue beyond the transition period described at *infra*, Section VII.

⁷⁶⁵ 47 U.S.C. § 251(c)(3).

⁷⁶⁶ Joint Explanatory Statement at 117-123.

⁷⁶⁷ *Id.* at 117.

⁷⁶⁸ S. 652, 104th Cong., 1st Sess. § 251 (1995).

service.⁷⁶⁹ Indeed, the House Amendment specifically states that carriers may obtain access to unbundled elements to offer "a telecommunications service," which is not limited to telephone exchange and exchange access services.⁷⁷⁰ We observe that the Conference Committee incorporated language from the House Amendment and not the Senate Bill in describing in section 251(c)(3) the services carriers may offer using unbundled elements. Accordingly, we do not believe that the Joint Explanatory Statement's description of the provision in the Senate Bill controls our interpretation of section 251(c)(3) as enacted.

361. We also reject the argument that allowing carriers to use unbundled elements to provide originating and terminating toll services is inconsistent with the purposes of the 1996 Act. Congress intended the 1996 Act to promote competition for not only telephone exchange services and exchange access services, but also for toll services. Section 251(b)(3), for example, imposes a duty on LECs to provide dialing parity for telephone toll service.

362. We disagree with the incumbent LECs which argue that section 251(g) requires requesting carriers using unbundled elements to continue to pay federal and state access charges indefinitely. Section 251(g) provides that the federal and state equal access rules applicable before enactment, including the "receipt of compensation," will continue to apply after enactment, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment."⁷⁷¹ We believe this provision does not apply to the exchange access "services" requesting carriers may provide themselves or others after purchasing unbundled elements. Rather, the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent.

363. We affirm our tentative conclusion in the NPRM that, telecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal or state exchange access charges except as described in section VII, *infra*, for a temporary period. As we explained in the NPRM, if we were to require indefinitely carriers purchasing unbundled elements to also pay access charges, then incumbent LECs would receive compensation in excess of their underlying network costs. This result would be inconsistent with the pricing standard for unbundled elements set forth in section

⁷⁶⁹ Joint Explanatory Statement at 120-121.

⁷⁷⁰ H.R. 1555, 104th Cong., 1st. Sess. § 242 (1995).

⁷⁷¹ 47 U.S.C. § 251(g).