

short-term promotional offerings, 120 days is too long to be considered short-term.²²³⁹ IXCs and resellers contend that contract offerings should be made available for resale.²²⁴⁰

945. Incumbent LECs, some state commissions, and the Ohio Consumers' Counsel argue that if promotions and discounts are subject to wholesale pricing, reseller end-users must take such promotions and discounts under the same conditions as incumbent LEC end users.²²⁴¹ Resellers argue, however, that incumbent LECs will use this latitude to engage in anticompetitive practices by creating conditions that will have an unnecessarily greater impact on typical reseller end users than incumbent LEC end users.²²⁴²

946. Incumbent LECs also seek to limit reseller end user eligibility to purchase resold incumbent LEC high-volume offerings to those eligible to receive such offerings directly from the incumbent LEC.²²⁴³ Such a limitation would prevent high-volume services from being resold to low-volume customers. MFS argues that such restrictions should be considered *per se* unreasonable because this is a significant source of the resellers' competitive advantage.²²⁴⁴ The Ohio and Pennsylvania Commissions also support resellers' rights to aggregate low volume customers to take advantage of the resulting buying power.²²⁴⁵

947. U S West generally argues that resellers should make the same type of purchasing commitments made by current purchasers of wholesale services.²²⁴⁶ Often, U S West argues, wholesalers are required to concentrate their purchases on services from a limited number of switches in order to receive volume discounts. U S West argues that incumbent LECs should be allowed to require the same types of commitments from resellers purchasing such services.²²⁴⁷ U S West and GTE propose allowing incumbent LECs to

²²³⁹ Ohio Consumers' Counsel reply at 30.

²²⁴⁰ See, e.g., LDDS reply at 43; Telecommunications Resellers Ass'n reply at 14.

²²⁴¹ See, e.g., SBC reply at 15 n.34, PacTel comments at 45 n.95; Alabama Commission comments at 26; Ohio Consumers' Counsel comments at 35-36.

²²⁴² See, e.g., Cable & Wireless comments at 42; Telecommunications Resellers Ass'n comments at 19 n.50.

²²⁴³ See, e.g., GTE comments at 49-50; California Commission comments at 35-37; PacTel reply at 45 n.95.

²²⁴⁴ MFS comments at 70.

²²⁴⁵ Ohio Commission comments at 65; Pennsylvania Commission comments at 36. The Ohio Commission, however, specifically states that it is opposed to federal rules on this subject. Ohio Commission at 65.

²²⁴⁶ U S West comments at 67.

²²⁴⁷ *Id.*

impose term requirements on resold offerings.²²⁴⁸ Cable & Wireless opposes both of these requirements and suggests that they be made presumptively unreasonable.²²⁴⁹

b. Discussion

948. 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 noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts.²²⁵⁰

949. There remains, however, the question of whether all short-term promotional prices are "retail rates" for purposes of calculating wholesale rates pursuant to section 252(d)(3). The 1996 Act does not define "retail rate;" nor is there any indication that Congress considered the issue. In view of this ambiguity, we conclude that "retail rate" should be interpreted in light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

950. We must also determine when a promotional price ceases to be "short term" and must therefore be treated as a retail rate for an underlying service. Incumbent LEC commenters support 120 days as the maximum period for such promotions. This has been criticized as being too long. We are concerned that excluding promotions that are offered for as long as four months may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale. We believe that promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such

²²⁴⁸ U S West comments at 67; GTE comments at 47.

²²⁴⁹ Cable & Wireless comments at 48-49.

²²⁵⁰ Limited time offerings of service are still subject to resale pursuant to *supra* Section VIII.A.

promotions. We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A). To preclude the potential for abuse of promotional discounts, any benefit of the promotion must be realized within the time period of the promotion, e.g., no benefit can be realized more than ninety days after the promotional offering is taken by the customer if the promotional offering was for ninety days. In addition, an incumbent LEC may not use promotional offerings to evade the wholesale obligation, for example by consecutively offering a series of 90-day promotions.

951. We find unconvincing the arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts. The 1996 Act on its face does not exclude such offerings from the wholesale obligation. If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. The avoidable costs for a service with volume-based discounts, however, may be different than without volume contracts.

952. We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential anticompetitive effects. We recognize, however, that there may be reasonable restrictions on promotions and discounts. We conclude that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions. These rules are to be developed, as necessary, for use in the arbitration process under section 252.

953. With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers.²²⁵¹ We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. We note, however, that in

²²⁵¹ See, e.g., *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Report and Order, 60 FCC 2d 261, 308-16 (1976) (divisions of full time private line circuits will enable smaller users to make efficient, discrete use of private line offerings, and such advantages will be in terms of cost savings and selectivity rather than technical advantages).

calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.

3. Below-Cost and Residential Service

a. Background and Comments

954. Responding to our general questions regarding the scope of limitations that may be placed on competitors' resale of incumbent LEC services,²²⁵² parties addressed in their comments whether below-cost and residential services are subject to section 251(c)(4). Generally, those arguing against application of the wholesale discount also argue against requiring or even allowing resale of below-cost services. Incumbent LECs, including small incumbent LECs serving higher cost areas, and some state commissions argue that restrictions on resale of below-cost services are permissible.²²⁵³ They argue that these services are often funded through internal subsidies that diminish with the onset of competition.²²⁵⁴ GTE argues that there simply are no costs to avoid where below-cost services are offered at wholesale.²²⁵⁵ GTE and PacTel argue that, if we were to apply wholesale pricing to services offered below cost, we should delay doing so until states have had the opportunity to rebalance rates.²²⁵⁶

955. Potential competitors, primarily IXCs, argue that incumbent LEC losses will not be increased as a result of resale of these services, even at a discount, so long as the services are only sold to the same class of customers to whom the incumbent LEC's offering is available.²²⁵⁷ Jones Intercable further argues that not allowing resellers to "serve" customers currently subscribing to below-cost service violates the universal service provisions of the

²²⁵² NPRM at para. 175.

²²⁵³ See, e.g., MECA comments at 60; SBC comments at 71-72; SNET comments at 31-32; U S West comments at 67; GTE comments at 46 (acknowledging, however, that its position on this might change depending on the outcome of universal service reform); Oregon Commission comments at 31. Additionally, incumbent LECs argue that steps should be taken to ensure that the underlying provider of the service continues to receive universal service payments. See, e.g., NYNEX comments at 84.

²²⁵⁴ SNET comments at 31-32. Bell Atlantic argues that this might even be considered an unconstitutional taking. Bell Atlantic reply at Attachment 2 (Epstein Declaration), p. 7.

²²⁵⁵ GTE comments at 46.

²²⁵⁶ PacTel reply at 44; GTE reply at 26-27.

²²⁵⁷ See, e.g., AT&T comments at 80; California Commission reply at 21-22; Competition Policy Institute comments at 24; GCI comments at 1, 14; LDDS comments at 84; MCI comments at 89; Sprint reply at 35-37; TCC comments at 44 n.44; Telecommunications Resellers Ass'n reply at 15.

1996 Act.²²⁵⁸ The Telecommunications Resellers Association notes that establishing rules based on whether a service is offered below, at, or above cost will invite lengthy regulatory disputes.²²⁵⁹ Additionally, TCC points out that incumbent LECs will continue to receive access revenue even from resold service and such revenue will continue to subsidize such services.²²⁶⁰

b. Discussion

956. Subject to the cross-class restrictions discussed below, we believe that below-cost services are subject to the wholesale rate obligation under section 251(c)(4). First, the 1996 Act applies to "any telecommunications service" and thus, by its terms, does not exclude these types of services. Given the goal of the 1996 Act to encourage competition, we decline to limit the resale obligation with respect to certain services where the 1996 Act does not specifically do so. Second, simply because a service may be priced at below-cost levels does not justify denying customers of such a service the benefits of resale competition. We note that, unlike the pricing standard for unbundled elements, the resale pricing standard is not based on cost plus a reasonable profit. The resale pricing standard gives the end user the benefit of an implicit subsidy in the case of below-cost service, whether the end user is served by the incumbent or by a reseller, just as it continues to take the contribution if the service is priced above cost. So long as resale of the service is generally restricted to those customers eligible to receive such service from the incumbent LEC, as discussed below, demand is unlikely to be significantly increased by resale competition. Thus, differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by proportionate decreases in expenditures that are avoided because the service is being offered at wholesale.

957. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, MECA argues that services incumbent LECs offer at below cost rates should not be subject to resale under section 251(c)(4). We do not adopt MECA's proposal. As explained above, we conclude that the 1996 Act provides that below-cost services are subject to the section 251(c)(4) resale obligation and that differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by decreases in expenditures that are avoided because the service is being offered at wholesale. Therefore, resale of below-cost services at wholesale rates should not adversely impact small

²²⁵⁸ Jones Intercable comments at 32-33.

²²⁵⁹ Telecommunications Resellers Ass'n reply at 15.

²²⁶⁰ TCC comments at 44 n.44.

incumbent LECs.²²⁶¹ We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

4. Cross-Class Selling

a. Background

958. In the NPRM, we sought comment on the meaning of section 251(c)(4)(B) which provides that "[a] State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers."²²⁶² We suggested that competing telecommunications carriers should not be allowed to purchase a subsidized service that is offered to a specific category of subscribers and then resell such service to other customers. We tentatively concluded, for example, that it might be reasonable for a state to restrict the resale of a residential exchange service that is limited to low-income consumers, such as the existing Lifeline program.²²⁶³ We noted that we have generally not allowed carriers to prevent other carriers from purchasing high-volume, low-price offerings to resell to a broad pool of lower volume customers.²²⁶⁴ Similarly, we inquired into the propriety of practices such as limiting the resale of flat-rated service.²²⁶⁵

b. Comments

959. There is a general consensus among incumbent LECs, IXC's, and others that resale of residential service should be limited to customers eligible to take such service from the incumbent LEC under section 251(c)(4)(B).²²⁶⁶ There is a similar consensus that resale of

²²⁶¹ See Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

²²⁶² NPRM at para. 176.

²²⁶³ *Id.*

²²⁶⁴ *Id.*

²²⁶⁵ This practice of limiting the resale of flat-rated services was listed as an example of state practices on which we sought comment in the NPRM at para. 177.

²²⁶⁶ See, e.g., ACTA comments at 25; Ameritech comments at 54; California Commission comments at 35-37; CFA/CU comments at 16; Comptel reply at 43 n.114; GTE comments at 49-50; GVNW comments at 39; Illinois Ind. Tel. Ass'n comments at 6; MCI comments at 89; NCTA comments at 57; PacTel comments at 87; Sprint comments at 70. Texas Public Utility Counsel argues that the residential cross class selling restrictions

Lifeline service should be limited to those eligible to receive such service from the incumbent LEC.²²⁶⁷ Some argue that section 251(c)(4)(B) is only applicable to classes of subscribers whose service is explicitly subsidized or provided at below-cost rates and that broader cross-class restrictions should be considered unreasonable.²²⁶⁸ Ohio Consumers' Counsel argues that residential services that may be offered above cost are still offered at a lower profit margin than business services for public policy reasons, justifying the inclusion of all residential services in the scope of section 251(c)(4)(B).²²⁶⁹

960. NYNEX and the Massachusetts Commission argue that incumbent LECs may prohibit the resale of flat-rated services.²²⁷⁰ They argue that resale of services to multiple-use customers would be unfair to incumbent LECs. National Private Telecommunications Association and Jones Intercable advocate that incumbent LECs should not be allowed to impose resale restrictions that would prevent the offering of shared tenant services operations. Shared tenant services operations involve using trunking to serve multiple unit dwellings with fewer lines than would be needed if each unit separately subscribed to service directly from the incumbent LEC.²²⁷¹

961. Finally, some parties express concern that incumbent LECs will create multitudes of classes in order to prevent resellers, as a practical matter, from competing to provide such services and recommend that any new classes be presumed unreasonable.²²⁷²

c. Discussion

962. There is general agreement that residential services should not be resold to nonresidential end users, and we conclude that restrictions prohibiting such cross-class reselling of residential services are reasonable. We conclude that section 251(c)(4)(B) permits states to prohibit resellers from selling residential services to customers ineligible to subscribe to such services from the incumbent LEC. For example, this would prevent resellers from

should merely prohibit the resale of flat-rated residential service to business customers. Texas Public Utility Counsel comments at 44-45.

²²⁶⁷ See, e.g., California Commission comments at 36-37; LDDS comments at 84; NYNEX comments at 80.

²²⁶⁸ See, e.g., AT&T reply at 38-39; DOJ comments at 54; Telecommunications Resellers Association comments at 17 n.46.

²²⁶⁹ Ohio Consumers' Counsel comments at 36.

²²⁷⁰ NYNEX comments at 80; Mass. Commission comments at 5; MECA comments at 61.

²²⁷¹ National Private Telecommunications Ass'n reply at 4-5; Jones Intercable reply at 27.

²²⁷² CompTel comments at 102.

reselling wholesale-priced residential service to business customers. We also conclude that section 251(c)(4)(B) allows states to make similar prohibitions on the resale of Lifeline or any other means-tested service offering to end users not eligible to subscribe to such service offerings. State commissions have established rate structures that take into account certain desired balances between residential and business rates and the goal of maximizing access by low-income consumers to telecommunications services. We do not wish to disturb these efforts by prohibiting or overly narrowing state commissions' ability to impose such restrictions on resale.

963. Shared tenant services are made possible through the resale and trunking of flat-rated services to multiple customers. We do not believe that these or other efficient uses of technology should be discouraged through restrictions on the resale of flat-rated offerings to multiple end users, even if incumbent LECs have not always priced such offerings assuming these usage patterns. We therefore conclude that such restrictions are presumptively unreasonable.

964. We also conclude that all other cross-class selling restrictions should be presumed unreasonable. Without clear statutory direction concerning potentially allowable cross-class restrictions, we are not inclined to allow the imposition of restrictions that could fetter the emergence of competition. As with volume discount and flat-rated offerings, we will allow incumbent LECs to rebut this presumption by proving to the state commission that the class restriction is reasonable and nondiscriminatory.

5. Incumbent LEC Withdrawal of Services

a. Background

965. In the NPRM, we sought comment on whether an incumbent LEC can avoid making a service available at wholesale rates by ceasing to offer the retail service on a retail basis, or whether the incumbent should first be required to make a showing that withdrawing the offering is in the public interest or that competitors will continue to have an alternative way of providing service. We also asked if access to unbundled elements addresses the concern that incumbent LECs could withdraw retail services.²²⁷³

b. Comments

966. A number of large incumbent LECs and USTA argue that incumbent LECs should be allowed to withdraw services unilaterally and unconditionally.²²⁷⁴ These parties

²²⁷³ NPRM at para. 175.

²²⁷⁴ See, e.g., Ameritech comments at 54-55; GTE comments at 48; SBC comments at 73.

argue that they have the right to make their own business decisions and the right to terminate the offering of a service that they feel is unprofitable.²²⁷⁵ Some potential competitors also supported the ability of incumbent LECs to withdraw service, but explicitly conditioned such support on bilateral "grandfathering" of existing customers, *i.e.*, allowing current end users of the terminated service to continue to purchase the service at least for a limited time.²²⁷⁶ These services then would not be required to be offered for resale because they are no longer offered to the public.²²⁷⁷ Thus, these parties argue that there would be a permissible restriction on the resale of "grandfathered" services permitting resale only to "grandfathered" customers. Some incumbent LECs suggest that potential concerns over incumbent LEC withdrawal of service would be eliminated if both resellers and incumbent LECs could compete for grandfathered customers.²²⁷⁸

967. Several commenters, primarily IXC, resellers, and state commissions, expressed concern about the incumbent LECs' ability to circumvent resale obligations by withdrawing services that resellers are able to use to compete effectively.²²⁷⁹ IXC, resellers, some state commissions, and others argue that unilateral withdrawals of service should be considered presumptively unreasonable.²²⁸⁰ Several commenters discuss U S West's attempted withdrawal of Centrex service, a small business service that resellers frequently wish to purchase to compete with incumbent LECs, as an example of such behavior.²²⁸¹ Others ask us to require that there be a substitutable alternative to a withdrawn service before it could be withdrawn.²²⁸² The Telecommunications Resellers Association and Cable & Wireless argue

²²⁷⁵ See, e.g., Ameritech reply at 48; GTE comments at 48-49; MECA comments at 60-61.

²²⁷⁶ See, e.g., Cable & Wireless comments at 42-43.

²²⁷⁷ See, e.g., SBC comments at 73; J. Staurulakis comments at 5-6.

²²⁷⁸ Ameritech reply at 49; NYNEX reply at 37.

²²⁷⁹ See, e.g., ACTA comments at 9; AT&T reply 37-38; CompTel comments at 101; DOJ comments at 55; Florida Commission comments at 36; MCI comments at 85; Sprint reply at 35-37; Telecommunications Resellers Ass'n comments 18-19.

²²⁸⁰ See, e.g., AT&T reply at 37-38; Cable & Wireless comments at 43; Ohio Commission comments at 63-64; Pennsylvania Commission comments at 36; Washington Commission comments at 32-33; ASCI comments at 59-60; Competition Policy Institute comments at 25.

²²⁸¹ See, e.g., ACTA comments at 9; MCI comments at 87-88; TCC comments at 44.

²²⁸² Competition Policy Institute comments at 25; GST comments at 32; MFS comments at 71-72; Ohio Commission comments at 65. MCI and Frontier propose that a showing that there is no demand for a service would also be sufficient. MCI comments at 88; Frontier comments at 28. DoJ argues that unilateral withdrawal should only be allowed if the service is shown to be obsolete. DoJ comments at 55-56.

that even the existence of a competitive alternative is not sufficient to prevent anticompetitive behavior because such a standard represents an open invitation to strategic manipulation of service offerings and pricing.²²⁸³ Both the Ohio Commission and the Competition Policy Institute argue that access to unbundled elements does not alleviate concerns about incumbent LEC withdrawal of service offerings.²²⁸⁴

c. Discussion

968. We are concerned that the incumbent LECs' ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent. We decline to issue general rules on this subject because we conclude that this is a matter best left to state commissions. Many state commissions have rules regarding the withdrawal of retail services and have experience regulating such matters. States can assess, for example, the universal service implications of an incumbent LEC's proposal to withdraw a retail service. Therefore, we conclude that our general presumption that incumbent LEC restrictions on resale are unreasonable does not apply to incumbent LEC withdrawal of service. States must ensure that procedural mechanisms exist for processing complaints regarding incumbent LEC withdrawals of services. We find it important, however, to ensure that grandfathered customers -- subscribers to the service being withdrawn who are allowed by an incumbent LEC to continue purchasing services -- not be denied the benefits of competition. We conclude that, when an incumbent LEC grandfathers its own customers of a withdrawn service, such grandfathering should also extend to reseller end users. For the duration of any grandfathering period, all grandfathered customers should have the right to purchase such grandfathered services either directly from the incumbent LEC or indirectly through a reseller.²²⁸⁵ The incumbent LEC shall offer wholesale rates for such grandfathered services to resellers for the purpose of serving grandfathered customers.

6. Provisioning

a. Comments

969. Resellers and IXCs express concern that incumbent LECs are not making, and will not make, services available for resale in a timely manner or fail to provide a minimal level of operational support and service quality.²²⁸⁶ Such resellers and IXCs also argue that

²²⁸³ Telecommunications Resellers Ass'n comments at 19 n.49; Cable & Wireless comments at 43.

²²⁸⁴ Ohio Commission comments at 64; Competition Policy Institute comments at 26.

²²⁸⁵ See *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 38.

²²⁸⁶ See, e.g., Telecommunications Resellers Ass'n comments at 20-23; MCI comments at 88-89.

incumbent LEC claims of capacity shortages should not excuse failures to provide timely service or to treat resellers on an equal basis with other incumbent LEC customers.²²⁸⁷ Cable & Wireless argues that customer changeover charges should not be allowed to exceed the same Primary Interexchange Carrier ("PIC") charge that is imposed when customers switch from one IXC to another.²²⁸⁸ TCC proposes a set of rules regarding nondiscriminatory treatment of resellers and reporting requirements to implement such rules.²²⁸⁹ These rules include provision of unbranded or rebranded operator and directory assistance services, a proposal also supported by AT&T, TCC, and ACSI.²²⁹⁰ Incumbent LECs argue that refusing to build out their networks to handle reseller requests when they lack capacity is a reasonable course of action to prevent stranded investment should the reseller eventually build facilities of its own.²²⁹¹

b. Discussion

970. We conclude that service made available for resale be at least equal in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users. Practices to the contrary violate the 1996 Act's prohibition of discriminatory restrictions, limitations, or prohibitions on resale. This requirement includes differences imperceptible to end users because such differences may still provide incumbent LECs with advantages in the marketplace. Additionally, we conclude that incumbent LEC services are to be provisioned for resale with the same timeliness as they are provisioned to that incumbent LEC's subsidiaries, affiliates, or other parties to whom the carrier directly provides the service, such as end users. This equivalent timeliness requirement also applies to incumbent LEC claims of capacity limitations and incumbent LEC requirements relating to such limitations, such as potential down payments. We note that common carrier obligations, established by federal and state law and our rules, continue to apply to incumbent LECs in their relations with resellers. With regard to customer changeover charges, we conclude that states should determine reasonable and nondiscriminatory rates for such charges.

²²⁸⁷ See, e.g., Telecommunications Resellers Ass'n reply at 16 n.34; LDDS reply at 43.

²²⁸⁸ Cable & Wireless comments at 49-50.

²²⁸⁹ See TCC reply at 29-33.

²²⁹⁰ See AT&T comments at 81 n.123; TCC reply at 31; ACSI comments at 47-48.

²²⁹¹ See, e.g., U S West comments, Exhibit A (Federal Implementation of the Telecommunications Act of 1996) at 25-26. Incumbent LECs argue that they should be able to require minimum volume and term discounts if they must build out facilities. See Ameritech at 54; MECA comments at 60.

971. Brand identification is likely to play a major role in markets where resellers compete with incumbent LECs for the provision of local and toll service. This brand identification is critical to reseller attempts to compete with incumbent LECs and will minimize consumer confusion. Incumbent LECs are advantaged when reseller end users are advised that the service is being provided by the reseller's primary competitor. We therefore conclude that where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller branding requests presumptively constitutes an unreasonable restriction on resale. This presumption may be rebutted by an incumbent LEC proving to the state commission that it lacks the capability to comply with unbranding or rebranding requests. We recognize that an incumbent LEC may incur costs in complying with a request for unbranding or rebranding. Because we do not have a record on which to determine the level of fees or wholesale pricing offsets that may reasonably be assessed to recover these costs, we leave such determinations to the state commissions.

D. Resale Obligations of LECs Under Section 251(b)(1)

972. Section 251(b)(1) imposes a duty on all LECs to offer certain services for resale. Specifically, section 251(b)(1) requires LECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."²²⁹²

1. Background

973. In the NPRM, we sought comment generally on the relationship of section 251(b)(1) to section 251(c)(4).²²⁹³ We sought comment on whether all LECs are prohibited from imposing unreasonable restrictions on resale of their services, but only incumbent LECs that provide retail services to subscribers that are not telecommunications carriers are required to make such services available at wholesale rates to requesting telecommunications carriers.²²⁹⁴ We also sought comment on what types of resale restrictions should be permitted under section 251(b)(1) and stated our belief that few, if any, conditions or limitations should be permitted for the same reasons that resale restrictions are sharply limited under section

²²⁹² 47 U.S.C. § 251(c)(4).

²²⁹³ NPRM at para. 173.

²²⁹⁴ *Id.* at para. 174.

251(c)(4).²²⁹⁵ We also asked what standards should be adopted for determining whether resale restrictions should be permitted, and whether presumptions should be established.²²⁹⁶

2. Comments

974. A variety of commenters, including Cable & Wireless, Teleport, and several state commissions, support the view that wholesale pricing does not apply to nonincumbent LECs.²²⁹⁷ A similar group of parties argue that the prohibition on unreasonable or discriminatory resale restrictions applies to nonincumbent LECs.²²⁹⁸ The Ohio Consumers' Counsel contends that although nothing in section 251 requires states to create wholesale pricing for section 251(b)(1) resale, nothing in the 1996 Act prevents imposition of such pricing.²²⁹⁹

975. The Telecommunications Resellers Association argues that all resale restrictions by all LECs should be presumed unreasonable.²³⁰⁰ MFS and Citizens Utilities contend that resale restrictions in sections 251(b)(1) and 251(c)(4)(B) should be interpreted in the same way.²³⁰¹ MFS and GST both argue that any restriction of a type that has been found reasonable for incumbent LECs should be presumed reasonable for all other LECs.²³⁰² NCTA asserts that new competitors have a great incentive to minimize costs, which will often involve using resellers for distribution purposes.²³⁰³ They argue that to ensure that the resale obligations of entrants do not adversely impact their ability to engage in facilities-based

²²⁹⁵ *Id.*

²²⁹⁶ *Id.* at para. 197.

²²⁹⁷ *See, e.g.*, Cable & Wireless comments at 38 n.68; Teleport comments at 55; Pennsylvania Commission comments at 35.

²²⁹⁸ Ohio Commission comments at 60-61; Pennsylvania Commission comments at 35; Teleport comments at 55; Cincinnati Bell comments at 31.

²²⁹⁹ Ohio Consumers' Counsel comments at 35.

²³⁰⁰ Telecommunications Resellers Ass'n comments at 53.

²³⁰¹ MFS comments at 69; Citizens Utilities comments at 27.

²³⁰² MFS comments at 75-76; GST comments at 33.

²³⁰³ NCTA comments at 20-21.

competition with incumbent LECs, the Commission should defer the duty of facilities-based competitors to engage in resale.²³⁰⁴

3. Discussion

976. There are two differences between the resale obligations in section 251(b)(1) and in section 251(c)(4): the scope of services that must be resold and the pricing of such resale offerings. Section 251(b)(1) requires resale of all telecommunications services offered by the carrier while section 251(c)(4) only applies to telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. Thus, the scope of services to which section 251(b)(1) applies is larger and necessarily includes all services subject to resale under section 251(c)(4). We need not prescribe a minimum list of services that are subject to the 251(b)(1) resale requirement for the same reasons that we specified for not prescribing such a list in Section VIII.A. of this Order. We note that section 251(b)(1) clearly omits a wholesale pricing requirement. We therefore conclude that the 1996 Act does not impose wholesale pricing requirements on nonincumbent LECs. Nonincumbent LECs definitionally lack the market power possessed by incumbent LECs²³⁰⁵ and were therefore not made subject to the wholesale pricing obligation in the 1996 Act. Their wholesale rates will face competition by incumbent LECs, making a wholesale pricing requirement for nonincumbent LECs unnecessary.

977. Sections 251(b)(1) and 251(c)(4) contain the same statutory standards regarding resale restrictions. Therefore, we conclude that our rules concerning resale restrictions under section 251(b)(1), such as the general presumption that all resale restrictions are unreasonable, should be the same as under section 251(c)(4). We conclude that any restriction of a type that has been found reasonable for incumbent LECs should be deemed reasonable for all other LECs as well.

E. Application of Access Charges

1. Background

978. In the NPRM, we suggested that an entrant that merely resold a bundled retail service purchased at wholesale rates would not receive access revenues.²³⁰⁶ In other words, IXC's must still pay access charges to incumbent LECs for originating and terminating

²³⁰⁴ *Id.* at 21.

²³⁰⁵ See 47 U.S.C. § 251(h)(2).

²³⁰⁶ NPRM at para. 186.

interstate traffic of an end user served by a telecommunications carrier that resells incumbent LEC services under section 251(c)(4).

2. Comments

979. Parties that commented on this issue generally agree with our analysis in the NPRM. Some commenters argue that incumbent LECs, including small incumbent LECs, should continue to receive access charge revenues when resellers purchase wholesale services under section 251(c)(4).²³⁰⁷ The Rural Telephone Coalition argues that retail local service rates, upon which wholesale rates will be based, have been developed with the assumption that incumbent LECs will receive access charge revenues.²³⁰⁸ The Wisconsin Commission points out that Wisconsin law currently prevents resale of access services performed by at least small LECs.²³⁰⁹ On the other hand, the Texas Office of Public Utility Counsel asserts that switched access services are offered to end users and should be subject to resale.²³¹⁰ While they did not explicitly address the issue, some potential competitors alluded to their assumptions that such access charges would continue to be retained by the incumbent LEC.²³¹¹

3. Discussion

980. We conclude that the 1996 Act requires that incumbent LECs continue to receive access charge revenues when local services are resold under section 251(c)(4). IXC's must still pay access charges to incumbent LECs for originating or terminating interstate traffic, even when their end user is served by a telecommunications carrier that resells incumbent LEC retail services. Resale, as defined in section 251(b)(1) and 251(c)(4), involves services, in contrast to section 251(c)(3), which governs sale of network elements. New entrants that purchase retail local exchange services from an incumbent LEC at wholesale rates are entitled to resell only those retail services, and not any other services -- such as exchange access -- the LEC may offer using the same facilities. IXC's must therefore still purchase access services

²³⁰⁷ Rural Tel. Coalition comments at 20; Citizens Utilities comments at 25; J. Staurulakis comments at 6.

²³⁰⁸ Rural Tel. Coalition comments at 20. USTA makes a similar point, and emphasizes that incumbent LECs should continue to recover the SLC under these circumstances. USTA reply at 31.

²³⁰⁹ Wisconsin Commission comments at Attachment, pp. 7-8.

²³¹⁰ Texas Public Utility Counsel reply at 17-18.

²³¹¹ See, e.g., TCC comments at 44 n.44; LDDS comments at 81; LDDS reply at 42, 46.

from incumbent LECs outside of the resale framework of 251(c)(4), through existing interstate access tariffs.²³¹²

981. Most existing interstate access charges are recovered from IXC's, and therefore can easily be recovered by incumbent LECs whether or not the incumbent LEC retains its billing relationship with the end user subscriber. To allow incumbent LECs to continue recovering the subscriber line charge (SLC), however, the mechanism for assessment of the SLC must be modified. The SLC is currently assessed directly on end users as a monthly charge.²³¹³ When an end user customer receives local exchange service from a reseller, however, the incumbent LEC will have no direct commercial relationship with that end user. Because the end user would not be a customer of the incumbent LEC, the incumbent LEC could not bill SLC directly to the end user as specified under our existing rules.

982. In March 1995, in the *Rochester Waiver Order*, we granted Rochester Telephone waivers to permit Rochester Telephone to recover the SLC from carriers that purchase local exchange service for resale, rather than recovering the SLC directly from end users.²³¹⁴ In that order, we stated that by offering the local exchange service for resale and by unbundling subscriber lines from other network functions, Rochester Telephone created a situation where it would no longer have a direct relationship with end users, IXC's, or both, and that such a situation was not contemplated when the Commission created the rules governing the recovery of access charges. We also permitted Rochester Telephone to bill to resellers the PIC change charge, which is assessed by incumbent local exchange carriers on end users that wish to change their primary interexchange carrier (PIC).

983. The resale requirements of the 1996 Act create a situation for the entire industry that is analogous to the situation Rochester Telephone faced in 1995. We therefore conclude that similar relief is warranted here with respect to the SLC, so that incumbent LECs can recover the SLC from resellers, as we conclude the 1996 Act mandates. Although the PIC change charge is not a part of access charges, and is assessed only when an end user changes his or her primary interexchange carrier, this charge has similar characteristics to the SLC and therefore should also be subject to the rule we adopt. Incumbent LECs may assess the SLC and the PIC change charge on telecommunications carriers that resell incumbent LEC services under section 251(c)(4).

²³¹² As discussed above, a different result occurs in the context of unbundled network elements. Purchasers of unbundled network elements in effect stand in the shoes of the LEC, and are entitled to revenues from all of the services provided using those elements.

²³¹³ 47 C.F.R. § 69.104.

²³¹⁴ *Rochester Telephone Corporation, Petition for Waivers to Implement its Open Market Plan, Order*, 10 FCC Rcd 6776 (1995) (*Rochester Waiver Order*).

984. Although incumbent LECs may continue to recover the SLC when other carriers resell their local exchange services, the SLC is not subject to the wholesale pricing standard of section 252(d)(3). As described above, resellers of local exchange service are not reselling access services; they are purchasing these services from incumbent LECs in the same manner they do today. The SLC is a component of interstate access charges, not of intrastate local service rates. Consistent with the principles of cost-causation and economic efficiency, we have required the portion of interstate allocated loop costs represented by the SLC to be recovered from end users, rather than from carriers as with other access charges. Although the SLC is listed on end user monthly local service bills, this charge does not represent a "telecommunications service [an incumbent LEC] provides at retail to subscribers." Rather, the SLC, like other interstate access charges, relates solely to incumbent LEC interstate access services, which are provided to other carriers rather than retail subscribers and which we have concluded are not subject to the resale requirements of section 251(c)(4). Therefore, the reseller shall pay the SLC to the incumbent LEC for each subscriber taking resold service. The specific SLC that applies depends upon the identity of the end user served by the reselling telecommunications carrier.

**IX. DUTIES IMPOSED ON "TELECOMMUNICATIONS CARRIERS"
BY SECTION 251(a)****A. Background**

985. Section 251(a) imposes two fundamental duties on all telecommunications carriers: (1) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;" and (2) "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to sections 255 or 256."²³¹⁵ In this proceeding we determine which carriers are "telecommunications carriers" as defined in section 3(44) of the Act.²³¹⁶ In the NPRM, we tentatively concluded that, pursuant to the statute's definition of "telecommunications carrier" and "telecommunications service," to the extent a carrier is engaged in providing for a fee local, interexchange, or international services, directly to the public or to such classes of users as to be effectively available directly to the public, that carrier falls within the definition of "telecommunications carrier." We sought comment on which carriers are included under this definition, and on whether a provider may qualify as a telecommunications carrier for some purposes but not others.²³¹⁷

986. We also tentatively concluded that we should determine whether the provision of mobile satellite services is Commercial Mobile Radio Services (CMRS) or Private Mobile Radio Service (PMRS) based on the factors set forth in the *CMRS Second Report and Order*.²³¹⁸ We sought comment on the meaning of offering service "directly or indirectly" to

²³¹⁵ 47 U.S.C. § 251(a). Section 255 addresses access by persons with disabilities and ensures that manufacturers and providers of telecommunications will design equipment and provide service that is accessible to, and usable by, individuals with disabilities. Section 256 provides for coordination for interconnectivity "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services." 47 U.S.C. §§ 255, 256.

²³¹⁶ The term telecommunications carrier means "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." 47 U.S.C. § 153(44).

²³¹⁷ NPRM at para. 246.

²³¹⁸ NPRM at para. 247. The Commission makes this determination by looking at an array of public interest considerations (e.g., the types of services being offered and the number of licensees being authorized). See, e.g., *Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, GN Docket No. 84-1234, Second Report and Order, 2 FCC Rcd 485, 490 (1987); *Amendment to the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to a Radiodetermination Satellite Service*, GN Docket No. 84-689, Second Report and

the public in the context of section 251(a)(1) and on whether section 251(a) allows non-incumbent LECs discretion to interconnect directly or indirectly with a requesting carrier.²³¹⁹ We also sought comment on what other actions we should take to ensure that carriers do not install network features, functions, or capabilities that are inconsistent with guidelines and standards established pursuant to sections 255 and 256.

B. Comments

987. Parties generally agree with our tentative conclusion that, to the extent a carrier is engaged in providing for a fee local, interexchange, or international services, directly to the public or to such classes of users as to be effectively available to the public, that carrier falls within the definition of "telecommunications carrier."²³²⁰ BellSouth claims that the term "telecommunications carrier" should be synonymous with "common carrier."²³²¹ The Texas Commission argues that the obligations of section 251(a) should apply to all telecommunications carriers -- incumbent LECs and non-incumbent LECs alike.²³²² Metricom argues, however, that because non-dominant carriers lack incentives to deny interconnection to other carriers, the Commission should forbear from imposing any interconnection requirements upon such carriers.²³²³ UTC argues that a party must be offering commercial telecommunications services to be a telecommunications carrier.²³²⁴ UTC contends that utilities and other private system operators engage in a cost-sharing for construction and operation of private telecommunications networks. UTC claims that this should not constitute a "fee" in the sense of being a payment for receiving a telecommunications service. UTC further argues that the mere provision of infrastructure, such as "dark fiber" or wholesale capacity, to third-party carriers does not constitute a direct offering to the public, and thus does not qualify carriers offering such infrastructure as telecommunications carriers under the Act. Several CMRS carriers contend that CMRS providers are telecommunications carriers

Order, 104 FCC 2d 650, 665-66 (1986).

²³¹⁹ NPRM at para 248.

²³²⁰ See, e.g., Louisiana Commission comments at 21; Illinois Commission comments at 81-82; Pennsylvania Commission comments at 41; BellSouth comments at 75.

²³²¹ BellSouth comments at 75; COMAV comments at 60; accord United Cerebral Palsy Ass'n at 3 and American Foundation for the Blind at 3 (favoring a broad definition of telecommunications carrier that includes any provider of access to any network available to the public).

²³²² Texas Commission comments at 34; NWRA comments at 12-13 (arguing that both facilities based carriers and resellers meet the definition of telecommunications carriers).

²³²³ Metricom comments at 3.

²³²⁴ UTC comments at 5-7.

within the meaning of the Act.²³²⁵

988. The Illinois Commission argues that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251.²³²⁶ BellSouth claims, however, that a carrier may be a common carrier for some purposes, but not for others. For example, BellSouth argues that, when a common carrier also provides an information service, it is a common carrier for the provision of the telecommunications service, but a non-common carrier for the provision of the information service.²³²⁷ ATSI contends that enhanced service providers are telecommunications carriers and entitled to the benefits of section 251.²³²⁸

989. The Illinois Commission argues that the Commission should continue to define mobile satellite service (MSS) as either CMRS or PMRS according to the Commission's factors set forth in the *Second CMRS Report and Order*.²³²⁹ It argues, however, that if an MSS provider offers substitute services for those of a landline LEC, the MSS provider should also be defined as a LEC and treated accordingly under state and federal law.

990. With regard to the phrase "directly or indirectly" in section 251(a), Arch and Sprint argue that the goal is to ensure that all subscribers of one carrier are able to reach all subscribers of other carriers. They claim that this is achieved when two competitors interconnect to an incumbent LEC's network.²³³⁰ Comcast asserts that requiring competitors to interconnect "directly or indirectly" reflects the Act's goal of applying less stringent obligations to carriers lacking market power by enabling competitors to interconnect with

²³²⁵ See, e.g., Nextel comments at 6-7; NWRA comments at 12-13; Metricom comments at 1-7; COMAV comments at 60.

²³²⁶ Illinois Commission comments at 81.

²³²⁷ BellSouth comments at 75. UTC claims that only those portions of a Utility's network that is being used in the offering of telecommunications services is subject to the Act's interconnection obligations. Portions that are used on a private basis only are not. Bundling information services with telecommunications services should only create common carrier obligations to the extent that would apply if the telecommunications services were offered by themselves. UTC comments at 9-10.

²³²⁸ ATSI reply at 6 (enhanced service providers (ESPs) must have access to network elements at terms and conditions that allow ESPs to offer competitive services in the marketplace).

²³²⁹ Illinois Commission comments at 81.

²³³⁰ Arch comments at 18; Sprint comments at 89. The parties add that carriers should be permitted, on a voluntary basis, to establish direct interconnection. *Id.*

other carriers in a cost efficient manner.²³³¹ The Texas Commission argues that the obligations under section 251(a) should apply to all telecommunications carriers, incumbent and non-incumbents, alike. The Texas Commission claims that, if "non-[incumbent] LECs are allowed the discretion to determine whether to offer direct or indirect connection to another carrier, then the goal of encouraging the most efficient interconnection and thereby bringing the benefits of a competitive market to all consumers will not be realized."²³³²

991. The Commission received few comments on the meaning of section 251(a)(2). Commenters representing individuals with disabilities state that the term "network features, functions, and capabilities" should be defined as broadly as possible to ensure that individuals with disabilities have access to the network.²³³³ The American Foundation for the Blind also suggests that any service deployed by a telecommunications carrier, or by a provider connecting to a telecommunications network, and intended for public use should be considered an installation of "features, functions, or capabilities."²³³⁴ The United Cerebral Palsy Associations state that there are currently proceedings underway by both the Commission and by the United States Architectural & Transportation Barriers Compliance Board (Access Board) as part of the section 255 mandate. The United Cerebral Palsy Associations urge the Commission to state that the Commission has the power to enforce both the standards developed in its proceedings and those of the Access Board.²³³⁵

C. Discussion

992. A "telecommunications carrier" is defined as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)."²³³⁶ A telecommunications carrier shall be treated as a common carrier under the Act "only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether

²³³¹ Comcast comments at 16-17.

²³³² Texas Commission comments at 34.

²³³³ See, e.g., American Foundation for the Blind comments at 2; United Cerebral Palsy Ass'n comments at 2.

²³³⁴ American Foundation for the Blind comments at 2.

²³³⁵ United Cerebral Palsy Ass'n comments at 2.

²³³⁶ 47 U.S.C. § 153(44). The term "aggregator" is defined as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2).

the provision of fixed and mobile satellite service shall be treated as common carriage.²³³⁷ A "telecommunications service" is defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."²³³⁸ We conclude that to the extent a carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of "telecommunications carrier."²³³⁹ We find that this definition is consistent with the 1996 Act,²³⁴⁰ and there is nothing in the record in this proceeding that suggests that this definition should not be adopted. Also, enhanced service providers, to the extent that they are providing telecommunications services, are entitled to the rights under section 251(a).

993. We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise. We agree with those parties that argue that all CMRS providers are telecommunications carriers and are thus obligated to comply with section 251(a).²³⁴¹ These carriers meet the definition of "telecommunications carrier" because they are providers of telecommunications services as defined in the 1996 Act and are thus entitled to the benefits of section 251(c), which include the right to request interconnection and obtain access to unbundled elements at any technically feasible point in an incumbent LEC's network. PMRS is defined as any mobile service that is not a commercial service or the functional equivalent of a commercial mobile service.²³⁴² We conclude that to the extent a PMRS provider uses capacity to provide domestic or international telecommunications for a fee directly to the public, it will fall within the definition of "telecommunications carrier"

²³³⁷ 47 U.S.C. § 153 (44).

²³³⁸ 47 U.S.C. § 153(44). "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

²³³⁹ NPRM at para. 246.

²³⁴⁰ 47 U.S.C. § 153(44), 153(46).

²³⁴¹ The term "CMRS" is defined as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). CMRS includes, among others, some private paging, personal communications services, business radio services, and mobile service that is the functional equivalent of a commercial mobile radio service. 47 C.F.R. § 20.9.

²³⁴² 47 U.S.C. § 332(d)(3).

under the Act and will be subject to the duties listed in section 251(a).²³⁴³

994. We conclude that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services" and thus such operators of private networks are not subject to the requirements of section 251(a). We believe that such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications service."²³⁴⁴ Conversely, to the extent an operator of a private telecommunications network is offering "telecommunications"²³⁴⁵ for a fee directly to the public, or to such classes of users as to be effectively available directly to the public (i.e., providing a telecommunications service),²³⁴⁶ the operator is a telecommunications carrier and is subject to the duties in section 251(a). For example, the furnishing of infrastructure to the public for the provision of telecommunications services (e.g., selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator of such a network to the duties of section 251(a).

995. We conclude that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251, and is subject to the obligations under section 251(a), to the extent that it is acting as a telecommunications carrier. We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor. We find this to be contrary to the pro-competitive spirit of the 1996 Act. By rejecting this outcome we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements.

²³⁴³ The Commission held in the *CMRS Second Report and Order* that any PMRS provider that "employs spectrum for not-for-profit services, such as an internal operation, but also uses its excess capacity to make available a service that is intended to receive compensation, will be deemed to be a 'for profit' service to the extent of such excess capacity activities." *Implementation of Section 3(n) and 332 of the Communications Act*, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1429 (1994) (*CMRS Second Report and Order*).

²³⁴⁴ 47 U.S.C. § 153(46).

²³⁴⁵ The term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." 47 U.S.C. § 153(43).

²³⁴⁶ 47 U.S.C. § 153(46).

In addition, we conclude that enhanced service providers that do not also provide domestic or international telecommunications, and are thus not telecommunications carriers within the meaning of the Act, may not interconnect under section 251.

996. Consistent with our tentative conclusion in the NPRM, we will determine whether the provision of mobile satellite service (MSS) is CMRS (and therefore common carriage) or PMRS based on the factors set forth in the *CMRS Second Report and Order*.²³⁴⁷ Commenters have not raised objections to the Commission's tentative conclusion on this issue.

997. Regarding the issue of interconnecting "directly or indirectly" with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices. The interconnection obligations under section 251(a) differ from the obligations under section 251(c). Unlike section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power. Given the lack of market power by telecommunication carriers required to provide interconnection via section 251(a), and the clear language of the statute, we find that indirect connection (e.g., two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a). We decline to adopt, at this time, Metricom's suggestion to forbear under section 10 of the 1996 Act²³⁴⁸ from imposing any interconnection requirements upon non-dominant carriers. We believe that, even for telecommunications carriers with no market power, the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives. Nothing in the record convinces us that we should forbear from imposing the provisions of section 251(a) on non-dominant carriers. In fact, section 251 distinguishes between dominant and non-dominant carriers, and imposes a number of additional obligations exclusively on incumbent LECs.²³⁴⁹ Similarly, we also do not agree with the Texas Commission's argument that the obligations of section 251(a) should apply equally to all telecommunications carriers. Section 251 is clear in imposing different obligations on carriers depending upon their classification (i.e., incumbent LEC, LEC, or telecommunications carrier).²³⁵⁰ For example, section 251(c) specifically imposes obligations upon incumbent LECs to interconnect, upon request, at all technically feasible points. This direct interconnection, however, is not required under section 251(a) of all telecommunications carriers.

²³⁴⁷ *CMRS Second Report and Order*, 9 FCC Rcd at 1457-58 (1994).

²³⁴⁸ 47 U.S.C. § 160.

²³⁴⁹ See 47 U.S.C. § 251. The 1996 Act makes further provisions for rural carriers and, upon an appropriate showing, carriers serving fewer than 2 percent of the nation's access lines. See 47 U.S.C. § 251(f)(1), (f)(2).

²³⁵⁰ 47 U.S.C. § 251.

998. Section 251(a)(2) prohibits telecommunications carriers from installing network features, functions, and capabilities that do not comply with standards or guidelines established under sections 255 and 256. Because the Commission and the Architectural and Transportation Barriers Compliance Board have not developed standards or guidelines under section 255, we find that it would be premature at this point to attempt to delineate specific requirements or definitions of terms to implement Section 251(a)(2).²³⁵¹ Similarly, the Commission has asked its federal advisory committee, the Network Reliability and Interoperability Council, for recommendations on how the Commission should implement Section 256. We intend to issue a further notice of proposed rulemaking seeking comment on what accessibility and compatibility requirements apply to telecommunications carriers who install network features, functions and capabilities.

²³⁵¹ The Illinois Commission lists several features which could provide access to individuals with disabilities, such as access to interrupt messages, directory assistance and operator services by users of text telephones (TTYs). Illinois Commission comments at 82-83. Specific accessibility requirements such as those proposed by the Illinois Commission will need to be developed in proceedings to implement section 255, and therefore, we will not set forth any required "features, functions, or capabilities" in this proceeding.