

ORIGINAL

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

In the Matter of )  
Implementation of the Local )  
Competition Provisions in the )  
Telecommunications Act of 1996 )  
Interconnection Between Local )  
Exchange Carriers and Commercial )  
Mobile Radio Service Providers )

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CC Docket No. 96-98

CC Docket No. 95-185

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Federal Communications Commission  
Office of Secretary

REPLY COMMENTS OF GTE

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on behalf of its affiliated  
domestic telephone companies

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## SUMMARY

The Telecommunications Act of 1996 ("1996 Act") replaces exclusive franchises with open entry and competition for a variety of telecommunications services. The hallmark feature of this new regime is its reliance upon individualized negotiations and arbitrations conducted on a state-by-state basis. The 1996 Act gives state public utility commissions the ultimate responsibility to review, arbitrate and approve the outcomes of these negotiations.

Local exchange competition is rapidly moving forward. As Chairman Hundt stated in a recent interview with Merrill Lynch, the Eighth Circuit's stay of the *First Interconnection Order's* pricing rules is having no effect on the pace of interconnection agreements. This statement is supported by the nearly daily reports of new negotiated or arbitrated agreements. This progress clearly demonstrates that the FCC's national pricing rules are not needed to jumpstart competition.

Notwithstanding this encouraging news, AT&T, MCI and other CLECs continue to urge the Commission to plunge even further down the path of national rules and erect added barriers to recovery of ILECs' costs. However, nothing in the petitions or the comments filed in support of them warrants renewed Commission consideration of their requests. The FCC should resist defining further pricing rules that impinge on state authority, violate the statute's pricing standards and unconstitutionally fail to compensate ILECs for their legitimate costs.

In the opposition round, the CLECs make several new requests for pricing rules. These requests should be summarily denied because, like their other requests, they seek to obtain subsidies and to avoid paying for costs they cause. Specifically, each new proposed rule should be rejected as follows:

- AT&T's reformulation of MCI's method of computing an avoided cost discount for computing resale rates unreasonably lowers resale rates.
- Prohibiting minimum commitment periods and termination liability would allow CLECs to avoid paying full costs if they do not purchase sufficient quantities of ordered network elements.
- Allowing ILECs to recover only those line-conditioning costs that exceed the cost for a hypothetical, most-efficient network fails to cover full costs of the service.
- Spreading costs to modify the network to accommodate multiple providers over all demand units, including ILEC demand, makes ILECs subsidize competitive entry.
- Geographic deaveraging must be based on state-wide, rather than LEC-specific, zones to take into account different ILEC costs that vary significantly, even within the same density zone.

AT&T, MCI and other CLECs also ask the Commission to create several additional unbundled network elements. These requests were already considered and properly rejected for the following reasons: (1) sub-loop unbundling is not generally technically feasible, even though some distribution/feeder link unbundling can be accommodated in areas with special interface devices and with GTE performing the cross-connect function; (2) a California arbitration decision agrees that dark fiber does not qualify as a network element because it is not "used" in the provision of local

exchange services; and (3) the record clearly supports extension of the schedule for implementation of OSS unbundling until at least January 1, 1998.

TCG, ALTS and WorldCom renew their requests that the Commission impose performance standards and require ILECs to file reports with the Commission demonstrating that requesting carriers are obtaining nondiscriminatory access. The Commission should reject these requests because performance standards are unnecessary, and the proposed reporting requirements would be an unproductive waste of FCC resources.

Finally, several petitioners urge the Commission to preempt state processes by: (1) imposing federal procedural rules on state commissions; (2) allowing Section 208 complaints to be used to evade the state PUC and district court processes established under the 1996 Act; and (3) forbidding states from regulating both CLECs and ILECs, where consistent with the 1996 Act. None of these requests has any merit, and all are inconsistent with the statutory provisions that preserve state authority over such matters. The Commission therefore should summarily dismiss these renewed efforts to entangle the agency in legally suspect interpretations of the 1996 Act.

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**REPLY COMMENTS OF GTE**

GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone operating companies, hereby respectfully submits its reply comments concerning petitions for reconsideration of the Commission's *First Interconnection Order* in the above-captioned proceeding.<sup>1</sup> As detailed below, GTE continues to urge that the Commission summarily reject the petitions filed by AT&T, MCI and others that advocate additional forays by the FCC into interconnection pricing, further network element unbundling, or preemption of state public utility commission arbitration processes.

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<sup>1</sup> Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, CC Docket No. 96-98 (released August 8, 1996) ("*First Interconnection Order*").

## I. INTRODUCTION

The Telecommunications Act of 1996 ("1996 Act") replaces exclusive franchises with open entry and competition for a variety of telecommunications services.<sup>2</sup> The defining characteristic of this new regime is its reliance upon negotiated or arbitrated interconnection agreements between new entrants and incumbent local exchange carriers ("ILECs").<sup>3</sup> Under the 1996 Act's structure, the state public utility commissions have the ultimate responsibility to review, arbitrate and approve the outcomes of these negotiations.<sup>4</sup>

Local exchange competition is rapidly moving forward. As Chairman Hundt recently explained during an interview with the investment firm of Merrill Lynch, the Stay Order issued by the Court of Appeals for the Eighth Circuit<sup>5</sup> should not impact the pace of interconnection negotiations and arbitrations.<sup>6</sup> Chairman Hundt's observation is confirmed by near daily news reports of new agreements or completed arbitration proceedings.<sup>7</sup> State commissions are aggressively implementing the 1996

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<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>3</sup> Joint Explanatory Statement of Conference Committee, S. Conf. Rep. No. 104-458, 104th Cong., 1st Sess., at 1 (1996) ("Conf. Rep.").

<sup>4</sup> 47 U.S.C. § 252.

<sup>5</sup> *Iowa Utilities Board v. FCC*, No. 96-3321, slip op. (8th Cir., October 15, 1996) ("*Stay Order*").

<sup>6</sup> Reed Hundt, Chairman of the Federal Communications Commission, Remarks at Meeting With Merrill Lynch (October 24, 1996).

<sup>7</sup> *See, e.g., Communications Daily*, vol. 16, no. 218 at 8 (Nov. 8, 1996) (reporting agreement between TCI and Southern New England Telephone).

Act even without national rules. Broad-based local exchange competition is rapidly becoming a reality, exactly as Congress intended.

The Opposition and Comments GTE filed on October 31, 1996 fully addresses the issues raised in CLEC and electric utility reconsideration petitions. GTE's reply is therefore limited to addressing additional points raised in the responsive oppositions and comments of CLECs and IXCs. As explained below, the Commission previously rejected similar CLEC and IXC proposals as not serving the public interest or the Act's purposes.<sup>8</sup> In addition, the recent *Stay Order* underscores the questionable legal grounds upon which arguments for additional federal rules are premised.<sup>9</sup> Accordingly, the Commission should summarily dismiss these renewed efforts to entangle the agency in legally suspect interpretations of the 1996 Act.

## **II. THE FIRST INTERCONNECTION ORDER AND THE RECORD ON RECONSIDERATION ESTABLISH THAT THE PRICING PROPOSALS ADVANCED BY CLECS AND IXCS MUST BE SUMMARILY REJECTED**

The Commission adopted national pricing rules in its *First Interconnection Order*.<sup>10</sup> In their oppositions, AT&T, MCI and certain CLECs continue to request that the Commission adopt a number of new changes to the *First Interconnection*

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<sup>8</sup> See, e.g., *First Interconnection Order* at ¶¶ 923-34.

<sup>9</sup> As GTE explained in its Opposition, the Commission does not have authority to consider the petitioners' proposals for additional pricing rules without court approval, because exclusive jurisdiction over these issues now lies with the federal appellate court. Even assuming the Commission could consider the requests, it has no authority to establish national pricing standards. See GTE Opposition at 6-7.

<sup>10</sup> See *First Interconnection Order* at ¶¶ 618-862.

*Order's* pricing rules. These rules exceed the Commission's statutory authority, as evidenced by the Eighth Circuit's *Stay Order*. Moreover, the rules do not comply with the specific statutory pricing standards of the 1996 Act in any event.<sup>11</sup> For the general reasons discussed in GTE's Opposition and the specific reasons outlined below, the Commission should summarily reject these requests.

**A. AT&T's Proposed Use of A Modified MCI Avoided Cost Study Should Be Rejected.**

In the *First Interconnection Order*, the Commission adopted a national pricing formula for determining the avoided costs to be subtracted from retail rates to compute resale prices.<sup>12</sup> MCI argues that the Commission should exclude interstate access services from its default avoided cost calculations.<sup>13</sup> AT&T supports MCI's proposal, but urges the Commission also to exclude both inter- and intrastate access expenses when computing the wholesale discount.<sup>14</sup>

While in theory excluding interstate access services should not affect the avoided cost calculation,<sup>15</sup> MCI improperly calculates avoided costs. In calculating the

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<sup>11</sup> See 47 U.S.C. § 252(d).

<sup>12</sup> *First Interconnection Order* at ¶ 929.

<sup>13</sup> MCI Petition at 12-13.

<sup>14</sup> AT&T Opposition at 29-30 n.44.

<sup>15</sup> When the ratio of indirect expenses is correctly calculated and consistently applied, no difference would result from the exclusion of interstate access costs from the underlying data. The amount of avoided costs would not go down since there are no avoided retail costs associated with access services. *First Interconnection Order* at ¶ 874.

percentage of avoided costs, MCI mistakenly divides the total avoided costs by total direct expenses, rather than total revenue. MCI's error occurs when it multiplies this miscalculated percentage by all retail *revenues*, which is inconsistent with the method it used to create the percentage, *i.e.*, it used *costs* in the denominator rather than *revenues*.

Under MCI's incorrect calculations, the percentage of avoided costs improperly increases when interstate access services are excluded from the calculation. The percentage increases because the costs for interstate access services are subtracted from the denominator while the numerator remains unchanged, resulting in a higher percentage of avoided costs. AT&T's proposed modification compounds MCI's error by further reducing the denominator used to calculate the percentage of avoided costs, which results in even a higher percentage of avoided costs.

The Commission's default proxy discount range already significantly overstates ILECs' actual avoided costs. The discounts were established based on faulty industry-wide data and exclude more costs than are actually avoided by ILECs.<sup>16</sup> The FCC should not compound its error by further increasing the default discounts. Accordingly, the FCC should reject AT&T's refinement of MCI's proposed methodology for calculating avoided costs.

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<sup>16</sup> *See, e.g.*, Time Warner Petition at 5-6; USTA Opposition at 11.

**B. ILECs Are Entitled To Recover All Costs Incurred On Behalf Of Carriers Requesting Interconnection.**

In the *First Interconnection Order*, the Commission repeatedly reaffirmed that ILECs are entitled to recover the full costs of modifying their networks to provide interconnection, collocation and unbundled elements, as well as other non-recurring costs associated with interconnections. CLECs argue in their oppositions that the Commission should adopt a number of new pricing rules, including: (1) a prohibition on minimum commitment periods; (2) a prohibition on termination liability; (3) a requirement that line-conditioning costs be recoverable only if they are greater than what would be incurred for a hypothetical, most-efficient network; and (4) a requirement that the costs of modifying the current network to become a multi-provider-capable network be spread over all demand units, including ILEC demand.

GTE strongly opposes these blatant CLEC attempts to obtain artificial subsidies for their entry into the marketplace. As detailed in GTE's Opposition, any subsidized entry harms consumers and fosters economic inefficiency.<sup>17</sup> It also gives rise to serious constitutional concerns about unlawful takings.

As a separate matter, the CLEC proposals fly in the face of the Act's compensation provisions.<sup>18</sup> Minimum commitment periods and premature termination liability provisions are well-recognized mechanisms which ensure that service providers are compensated for their fixed costs that are caused by a requesting party. Contrary

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<sup>17</sup> See GTE Opposition at 5-25.

<sup>18</sup> 47 U.S.C. § 252(d)(1).

to MCI's claim, minimum commitment periods and termination liability are not barriers to entry.<sup>19</sup> These mechanisms are competitively neutral and consistent with sound economic theory because they force the requesting carrier to consider the true costs of market entry. Without minimum commitment periods and termination liability, the true cost of entry is never recognized because the ILEC subsidizes the entry. Reasonable minimum commitment periods and liability for premature termination are appropriate ways to implement full cost recovery as the 1996 Act envisioned.

Contrary to AT&T's assertions,<sup>20</sup> forward-looking recurring rates allow full cost recovery only if a sufficient number of units of the requested network element is purchased so that all costs are recovered. For example, if a LEC must invest to satisfy an interconnection request and sets the price based on a 10-year economic life, the LEC will fully recover the total cost after ten years. If the CLEC decides to discontinue interconnection after two years, the LEC will have recovered only a small portion of the original investment.

For similar reasons, the Commission should reject MFS's argument that additional charges for conditioning of unbundled loops be assessed only if the requesting carrier asks for a capability or technology that is more costly than the most-efficient network design assumed in a forward-looking cost study.<sup>21</sup> In support of its argument, MFS claims that these conditioning costs would not be incurred if a most-

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<sup>19</sup> See MCI Opposition at 8-9.

<sup>20</sup> AT&T Opposition at 15-16.

<sup>21</sup> MFS Petition at 5-8.

efficient network design forms the basis of recoverable costs.<sup>22</sup> MFS's assumptions are clearly in error. Simply stated, MFS is again fabricating theories to avoid paying the costs it causes by requesting special line-conditioning.

The Commission should also reject ALTS's new claim that the costs of modifying ILEC networks to accommodate multiple providers should be recovered over all demand units, including those of the ILEC.<sup>23</sup> As GTE explained in its Opposition, this methodology requires ILECs and their customers to subsidize CLEC entry.<sup>24</sup> The 1996 Act permits ILECs to recover all their costs of accommodating new entrants, not only a portion. Because these upgrade costs only benefit new entrants, the new entrants themselves should pay them in full. Therefore, the Commission should reject these attempts by certain CLECs to secure subsidies and to prevent ILECs from recovering the actual costs of CLEC entry.

**C. Geographic Deaveraging Must Be Based On LEC-Specific, Rather Than State-Wide, Zones.**

In the *First Interconnection Order*, the Commission required that rates for network elements be priced to reflect cost differences in geographic regions.<sup>25</sup> The FCC ordered that a carrier's rates be established for a minimum of three separate

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<sup>22</sup> *Id.*

<sup>23</sup> ALTS Opposition at 3.

<sup>24</sup> See GTE Opposition at 17-18.

<sup>25</sup> *First Interconnection Order* at ¶ 765.

zones.<sup>26</sup> AT&T and ALTS now argue that the permanent rates for unbundled loops should be based on three zones per state, rather than three zones per ILEC.<sup>27</sup>

This proposal represents yet another attempt to force ILECs to set prices based on inaccurate, hypothetical cost models rather than actual costs. As Sprint<sup>28</sup> and USTA<sup>29</sup> point out, requests for state-wide geographic zones must be rejected because the cost levels and density characteristics of ILECs operating in the same state often vary significantly from ILEC to ILEC. In fact, the requesting carriers' own costing models indicate that there are substantial differences in loop costs among ILECs even in the same density zones.<sup>30</sup>

If geographic deaveraging is based on state-wide zones, the Commission's entire purpose for employing density-based deaveraging will be defeated: the resulting price will no longer take into account differences in underlying cost characteristics. Accordingly, the Commission should reject all requests to deaverage element rates on a state-wide, rather than ILEC-specific, basis.

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<sup>26</sup> *Id.*

<sup>27</sup> AT&T Opposition at 18-19; ALTS Opposition at 5-7.

<sup>28</sup> *See* Sprint Opposition at 11-12.

<sup>29</sup> *See* USTA Opposition at 10.

<sup>30</sup> *See, e.g.,* AT&T Communications of the Midwest's (AT&T's) Petition for Arbitration with Contel of Minnesota, Inc. d/b/a/ GTE Minnesota (GTE), Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, OAH Docket No. 9-2500-10733-2, MPUC Docket Nos. P-442, 407/M-96-939 (Minn. PUC, Oct. 24, 1996) Vol. 6B Nonproprietary at 138-39 and AT&T Exhibit 44.

**III. FURTHER UNBUNDLING OF NETWORK ELEMENTS WOULD BE INCONSISTENT WITH THE 1996 ACT'S STANDARDS AND MORE REALISTIC SCHEDULES SHOULD BE ADOPTED FOR UNBUNDLING OF OPERATIONS SUPPORT SYSTEMS**

**A. The Record Shows that Sub-Element Unbundling Is Not Warranted.**

The Commission has already fully considered and ruled against the mandatory unbundling of sub-loop elements in the *First Interconnection Order*.<sup>31</sup> Nonetheless, a few commenters, including ALTS, MFS and WorldCom, continue to assert that sub-loop unbundling is technically feasible.<sup>32</sup> For example, ALTS in its opposition asserts that sub-loop unbundling at the feeder/distribution interface should be allowed because this interface is technically no different from the cross-connections provided in LEC central offices.<sup>33</sup>

The record, however, shows that the overwhelming majority of commenters oppose the petitions requesting additional unbundling of sub-loop elements.<sup>34</sup> The Commission has properly recognized the well-documented fact that providing access to loop "sub-elements," is not technically feasible as a general matter.<sup>35</sup> Moreover, there

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<sup>31</sup> *First Interconnection Order* at ¶ 259.

<sup>32</sup> *See, e.g.*, ALTS Opposition at 16-17; MFS Opposition at 6; WorldCom Opposition at 13-15.

<sup>33</sup> ALTS Opposition at 16-17.

<sup>34</sup> *See, e.g.*, Ameritech Opposition at 17; Bell Atlantic Opposition at 13-15; MFS Opposition at 4-5; Nynex Opposition at 26-27; Pactel Opposition at 22-24; SNETC Opposition at 13-15; USTA Opposition at 24-25; US West Opposition at 13-14.

<sup>35</sup> *See First Interconnection Order* at ¶¶ 390-91.

are no feeder/distribution interfaces for the vast majority of GTE's plant. As GTE indicated in its Opposition, it is feasible to unbundle feeder/distribution facilities only where an interface device exists and GTE performs the cross-connect function.<sup>36</sup> Accordingly, the Commission should refuse to mandate ubiquitous sub-loop unbundling.

**B. The Record Shows that Dark Fiber Unbundling Is Not Warranted.**

The Commission has already determined that the record is not sufficient to determine whether dark fiber qualifies as a network element under Sections 251(c)(3) and 251(d)(2) in the *First Interconnection Order*.<sup>37</sup> AT&T and MCI continue to argue in their oppositions that dark fiber must be provided as a network element.<sup>38</sup>

As GTE explained in its Opposition, a network element is a "facility or equipment *used* in the provision of a telecommunications service."<sup>39</sup> Dark fiber plainly does not meet the definition of "network element" because it is not *used* in the provision of a telecommunications service. Indeed, a California arbitrator reached this same conclusion: AT&T "should not be afforded access to Dark Fiber because Dark Fiber is not a network element within the meaning of Section 3(29) of the Act, since by

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<sup>36</sup> See GTE Opposition at 26-27

<sup>37</sup> *First Interconnection Order* at ¶ 450.

<sup>38</sup> See AT&T Petition at 35-37; MCI Petition at 20-23.

<sup>39</sup> 47 U.S.C. § 153(29) (emphasis added).

definition it is not currently used in the provision of telecommunications service."<sup>40</sup>

The Commission should thus deny any request to require unbundling of dark fiber.

**C. The Record Shows That More Realistic Schedules Are Needed For Implementation of OSS Unbundling.**

In the *First Interconnection Order*, the Commission required ILECs to provide nondiscriminatory access to operations support systems ("OSS") no later than January 1, 1997.<sup>41</sup> Sprint asked the Commission to delay implementation of OSS for up to an additional 24 months,<sup>42</sup> and the LEC Coalition asked for an additional 12 months.<sup>43</sup> Many CLECs argued against an extension of the deadline in their oppositions, claiming that access is already technically feasible and that delay would deny entrants a meaningful opportunity to compete.<sup>44</sup>

The record contains ample support for deferring the deadline for OSS unbundling until at least January 1, 1998.<sup>45</sup> ILECs need more time to resolve issues

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<sup>40</sup> In the Matter of the Petition of AT&T Communications of California, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell, Arbitrator's Report, Application 96-08-040, at 25 (Oct. 31, 1996).

<sup>41</sup> *First Interconnection Order* at ¶ 525.

<sup>42</sup> Sprint Petition at 6.

<sup>43</sup> LEC Coalition Petition at 4.

<sup>44</sup> See, e.g., AT&T Opposition at 3-5; CompTel Opposition at 4; General Communications, Inc. at 9; MCI Opposition at 20-22.

<sup>45</sup> See, e.g., Ameritech Opposition at 14; Bell Atlantic Opposition at 17-18; BellSouth Opposition at 7-8; CompTel Opposition at 4; NyNex Opposition at 2; SNET Opposition at 11-12; USTA Opposition at 27-28.

relating to consumer privacy concerns and technical feasibility. CLECs themselves have yet to resolve what type of access they need. Therefore, GTE supports the request of the LEC Coalition for a deferral of the January 1, 1997 deadline for implementation of the requirements for nondiscriminatory access to ILECs' OSS.

#### **IV. NO NEW ILEC PERFORMANCE STANDARDS OR REPORTING REQUIREMENTS ARE NECESSARY**

The Commission found in the *First Interconnection Order* that no special ILEC performance standards or reporting requirements are necessary.<sup>46</sup> TCG, ALTS and WorldCom renew their requests that the Commission impose performance standards and require ILECs to file reports with the Commission demonstrating that requesting carriers are obtaining nondiscriminatory access.<sup>47</sup> These requests ask the FCC to establish performance standards, including: (1) the ILEC speed of satisfying interconnection requests to competitors and itself; (2) the average repair time; and (3) other unspecified performance criteria. They ask that the FCC order ILECs to file quarterly reports detailing how they actually perform these functions. WorldCom argues that reporting requirements will reduce the FCC's burden because it will reduce

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<sup>46</sup> See *First Interconnection Order* at ¶¶ 307-311.

<sup>47</sup> See, e.g., TCG Opposition at 2; ALTS Opposition at 32; WorldCom Opposition at 6-9. For example, WorldCom requests that ILECs be required to file quarterly reports with the Commission demonstrating, on a quantitative and qualitative basis, that requesting carriers are obtaining nondiscriminatory access to OSS functions. WorldCom Petition at 8-10.

the number of complaints interconnectors will have to file to obtain nondiscriminatory treatment.<sup>48</sup>

Performance standards are unnecessary because the 1996 Act's nondiscrimination provisions provide clear obligations for ILECs. The CLECs provide no record on which to set such criteria. ILEC performance obligations are best left to private negotiations as envisioned by the Act, because different interconnectors may desire higher or lower performance levels, and will be willing to pay accordingly. The states and the FCC have ample enforcement tools to remedy any violations of these obligations.<sup>49</sup>

For the same reasons, there is no basis to impose additional reporting requirements. Reporting requirements are unnecessarily burdensome and expensive for both the LECs and the Commission itself. A LEC would incur significant expenses and administrative burden in compiling the information needed for submitting a report. Likewise, the Commission would experience high costs and burden in analyzing the submitted reports. WorldCom's suggestion that reporting somehow reduces the burden on the FCC by reducing the number of complaints filed is both illogical and wrongly presumes there will be widespread violations of statutory duties. Therefore, the Commission should reject all petitions requesting establishment of performance standards or additional reporting requirements.

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<sup>48</sup> ALTS Opposition at 32.

<sup>49</sup> See *First Interconnection Order* at ¶¶ 124-29.

## V. THE FCC SHOULD NOT PREEMPT STATE ARBITRATION PROCESSES

### A. There Is No Basis for the FCC to Order PUCs to Use Federal Procedural Rules.

In the *First Interconnection Order*, the Commission required states that conduct a proceeding to review a TELRIC study to "provide notice and an opportunity for comment to affected parties," but did not impose any procedural rules to govern these or any other state proceedings.<sup>50</sup> MFS requested the Commission to preempt state procedures and require states to allow "other carriers who may be affected by the outcome" of an arbitration to review and contest the parties' cost studies.<sup>51</sup> The majority of the parties that filed oppositions, including AT&T, argue against the imposition of national rules governing arbitration proceedings.<sup>52</sup>

The FCC was entirely correct in refusing to adopt national rules governing state arbitration proceedings. Section 252 commits these rules to state commission discretion. States need to be able to devise their own procedures to suit their particular needs. Section 252's arbitration proceedings are designed to adjudicate a decision between two negotiating parties.<sup>53</sup> Allowing third parties to participate in arbitrations

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<sup>50</sup> See, e.g., *First Interconnection Order* at ¶¶ 619, 770 and 1089 (the state "must create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate.").

<sup>51</sup> MFS Petition at 19.

<sup>52</sup> AT&T Opposition at 17-18.

<sup>53</sup> In contrast, all interested parties are usually only allowed to participate in rulemaking proceedings, which formulate rules of general applicability.

as a matter of course would significantly lengthen and complicate the process, making it difficult or impossible to meet the nine-month statutory deadline.<sup>54</sup> In any event, there is no reason to believe that third-party participation is necessary because third parties can protect themselves by initiating their own negotiations or avail themselves of Section 252(i)'s protections.<sup>55</sup> For all these reasons, the Commission should decline to preempt state arbitration procedural rules.

**B. Section 208 Complaints Should Not Be Used To Evade the State PUC and District Court Processes Established Under the 1996 Act.**

In the *First Interconnection Order*, the Commission concluded that it may exercise enforcement authority under § 208 "even if the carrier [that is the subject of the § 208 complaint] is in compliance with an agreement approved by the state commission."<sup>56</sup> The Texas PUC asked the Commission to reconsider this conclusion, arguing that the Commission's Section 208 authority does not extend to an alleged

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<sup>54</sup> Allowing third-parties to participate in arbitrations would fundamentally change the character of the proceeding. Section 252(b)(5) requires parties to continue to negotiate in good faith while arbitration proceedings are pending before state commissions. *See* 47 U.S.C. § 252(b)(5). Third-party participation would severely chill the interconnecting parties' ability to negotiate during an arbitration proceeding.

<sup>55</sup> Section 252(i) provides in relevant part as follows:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C. § 252(i).

<sup>56</sup> *First Interconnection Order* at ¶ 127.

violation of Section 251.<sup>57</sup> The Wisconsin PSC did not challenge the Commission's authority to entertain complaints under Section 208, but urged the Commission to refrain from doing so "during pending negotiations or arbitrations," to avoid a "multiplicity of proceedings."<sup>58</sup> In its Opposition, AT&T argues that the Commission has the authority to consider a Section 208 complaint at any time, and that Wisconsin's request is "premature and probably unnecessary."<sup>59</sup>

The Commission may not entertain Section 208 complaints about matters subject to negotiation and arbitration pursuant to Section 252 until the parties first pursue their remedies under Section 252. The defining characteristic of the 1996 Act is its reliance on individualized negotiations at the local level that are subject to ultimate state public utility commission review, arbitration and approval.<sup>60</sup> Aggrieved parties may seek review of state decisions in federal district court by filing a complaint under Section 252(e)(6).<sup>61</sup> By contrast, Section 208, which predates the 1996 Act, is general in its scope, providing aggrieved parties the right to file complaints with the Commission alleging acts or omissions in violation of the Act.

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<sup>57</sup> Texas PUC Petition at 8-11.

<sup>58</sup> Wisconsin PSC Petition at 8-9.

<sup>59</sup> AT&T Opposition at 46-47.

<sup>60</sup> 47 U.S.C. § 252.

<sup>61</sup> 47 U.S.C. § 252(e)(6).

Statutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme.<sup>62</sup> Where general and specific provisions of a statute could be interpreted as conflicting, the specific will prevail.<sup>63</sup> However, Sections 252(e)(6) and 208 need not be interpreted as conflicting. Although Section 252(e)(6) does not supersede the Commission's authority to consider complaints under Section 208, the Commission may not entertain a complaint about a state decision under Section 252 because the aggrieved party should utilize the specific appeal process provided in Section 252(e)(6). Therefore, the Commission should reject AT&T's suggestion that a party can choose to file a Section 208 complaint rather than utilizing Section 252's procedures.

**C. States May Regulate Both CLECs and ILECs Where Consistent With the 1996 Act.**

In the *First Interconnection Order*, the Commission concluded that absent a decision by the Commission, a state "may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs."<sup>64</sup> The

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<sup>62</sup> See, e.g., *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 830 (9th Cir. 1996) ("In interpreting a statute, we 'look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress. . . .'" (citations omitted)).

<sup>63</sup> See, e.g., *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 228-29 (1957) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" (citations omitted)).

<sup>64</sup> *First Interconnection Order* at ¶ 1248.

Public Utilities Commission of Ohio ("PUCO") requests the Commission to reconsider this decision and to clarify that states may impose additional requirements, consistent with the 1996 Act, on all LECs.<sup>65</sup> AT&T and other CLECs go far beyond the FCC's holding and argue that states may not impose any obligations on non-ILECs unless they can be declared ILECs under Section 251(h)(2).<sup>66</sup>

Section 252(e)(3) preserves the states' ability to enforce requirements under state law. Congress explicitly provided in Section 252(e)(3) that:

. . . nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.<sup>67</sup>

Federal law does not supersede state police powers "unless that was the clear and manifest purpose of Congress."<sup>68</sup> Because Congress gave states clear authority to regulate local phone service whether provided by a LEC or an ILEC in a manner consistent with the 1996 Act, the FCC should reject any suggestion that states have no authority to regulate CLECs.

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<sup>65</sup> PUCO Petition at 4-6.

<sup>66</sup> AT&T Opposition at 43-45. Section 251(h)(2) authorizes the Commission to treat comparable local exchange carriers (or class or category thereof) as an incumbent local exchange when certain criteria are satisfied. 47 U.S.C. Section 251(h)(2).

<sup>67</sup> 47 U.S.C. § 252(e)(3).

<sup>68</sup> Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).