2. Discussion

337. We will adhere to our tentative conclusion to exclude unbundled network elements from Part 69 access charges. This conclusion applies to all incumbent LECs.[485] As we noted in the *Local Competition Order*, payment of cost-based rates represents full compensation to the incumbent LEC for use of the network elements that carriers purchase.[486] We further noted that sections 251(c)(3) and 252(d)(1), the statutory provisions establishing the unbundling obligation and the determination of network element charges, do not compel telecommunications carriers using unbundled network elements to pay access charges.[487] Moreover, these provisions do not restrict the ability of carriers to use network elements to provide originating and terminating access.[488] Allowing incumbent LECs to recover access charges in addition to the reasonable cost of such facilities would constitute double recovery because the ability to provide access services is already included in the cost of the access facilities themselves. Excluding access charges from unbundled elements ensures that unbundled elements can be used to provide services at competitive levels, promoting the underlying purpose of the 1996 Act.[489] If incumbent LECs added access charges to the sale of unbundled elements, the added cost to competitive LECs would impair, if not foreclose, their ability to offer competitive access services.[490] The availability of access services at competitive levels is vital to the general approach we adopt in this Order, which relies on the growth of competition, including from competitors using unbundled network elements, to move overall access rate levels toward forward-looking economic cost.[491] In addition, we

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[485] Although our rule applies to all incumbent LECs, we note that small LECs (those with fewer than two percent of the nation's subscriber lines) may petition the appropriate state commission for a suspension or modification of the unbundling requirements of the 1996 Act. 47 U.S.C. § 251(f)(2). In addition, a rural telephone company is exempt from the obligation to provide access to unbundled network elements until it has received a bona find request for unbundled elements. 47 U.S.C. § 251(f)(1). *See also, Local Competition Order*, 11 FCC Rcd at 1611.

[486] 11 FCC Rcd at 15864.

[487] *Id.*

[488] *Id.*

[489] *See* 11 FCC Rcd at 15682.

[490] There would be serious questions about the wisdom of a market-based approach to access reform as advocated by some incumbent LECs, *see, e.g.*, Ameritech Comments at 38; Cincinnati Bell Comments at 13, if incumbent LECs could impose access charges on the use of unbundled network elements.

[491] Were we to allow the assessment of access charges by incumbent LECs for access services provided by carriers over unbundled network elements, we would be compelled to take a more prescriptive approach to the rate level issue.

note that excluding unbundled network elements from access charges benefits small entities seeking to enter the local service market by ensuring that they can acquire unbundled elements at competitive prices.

338. We disagree with suggestions offered by some commenters that access charges should be imposed on unbundled elements because cost-based rates for such elements would not recover universal service support subsidies built into the access charge regime.[492] Although our plan to implement comprehensive universal service reform is not fully implemented, we believe excluding access charges from the sale of unbundled elements will not dramatically affect the ability of price cap LECs to fulfill their universal service obligations. First, competitors using unbundled network elements to provide interstate services will contribute to universal service requirements pursuant to section 254. Carriers receive no exemption from their obligation to contribute to universal service by using unbundled network elements. Second, rate structure modifications adopted in this Order -- including reallocation of TIC costs, adoption of a mechanism to phase out the TIC, and raising multi-line SLCs -- should reduce the impact on price cap LECs of excluding the recovery of TIC costs in the sale of unbundled network elements. Third, if unbundled network element prices are geographically deaveraged, LECs will receive higher prices when they sell unbundled network elements that embody higher costs. Fourth, because the difference between the level of access charges and the forward-looking economic costs of network elements may include more than universal service support, imposing access charges on the sale of unbundled network elements could recover from market entrants substantially more than amounts used to support universal service. Accordingly, we are not persuaded by suggestions that the universal service obligations of price cap LECs compel the imposition of access charges on the purchase of unbundled network elements by requesting carriers.

339. Although, in the *Local Competition Order*, we allowed application of certain non-cost-based access charges (the CCLC and a portion of the TIC) to unbundled elements, we limited the duration of such application to a transition period ending June 30, 1997 even if access and universal service reform were not completed by the end of the transition period.[493] The transition period was limited in order to minimize the burden on competitive local service providers seeking to use unbundled network elements to offer the competitive services that the 1996 Act sought to promote. The interim application of certain access charges was also limited to non-cost-based charges because such charges, unlike facilities-based charges, were more likely to include subsidies for universal service. All facilities-based charges were completely excluded from unbundled network elements to prevent double recovery by incumbent LECs of the costs of these facilities when they are purchased by competitive carriers.

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[492] PacTel Comments at 55-57. *See also* GVNW Comments at 5.

[493] 11 FCC Rcd at 15866.

340. We are also unpersuaded by suggestions that access charges should be imposed on unbundled elements because provision of competitive service by rebundling the same network elements used by the incumbent LEC to provide access is equivalent to resale of a retail service.[494] First, in the *Local Competition Order*, we recognized major differences between competition through the use of unbundled network elements and competition through resale of an existing retail service offered by an incumbent LEC. We explained, for example, that an entrant relying on unbundled elements rather than resale has the flexibility to offer all telecommunications services made possible by using network elements but also assumes the risk that end users will not generate sufficient demand to justify the investment. The entrant using a resale strategy, however, is limited to offering the retail service itself without the attendant investment risk.[495] Thus, we reject the notion that the rebundling of network elements is equivalent to resale. Second, although we concluded in the *Local Competition Order* that IXCs must continue to pay access charges to incumbent LECs for access services when the end user is served by a competitive carrier reselling the incumbent LEC's retail services, our conclusion was based on the resale provisions of the 1996 Act which limit resale to retail services offered to subscribers or other customers who are not telecommunications carriers.[496] The resale provision does not apply to non-retail services, including access services, that may be offered using the same facilities.[497] Unlike the provision of local exchange services, access services are not services that LECs provide directly to end users on a retail basis. To impose access charges on the sale of unbundled elements would contravene the terms of the resale provision by effectively treating exchange access as a service provided on a retail basis.

B. Treatment of Interstate Information Services

1. Background

341. In the 1983 *Access Charge Reconsideration Order*, the Commission decided that, although information service providers[498] (ISPs) may use incumbent LEC facilities to originate

[494] BellSouth Comments at 13; PacTel Reply at 8-10.

[495] 11 FCC Rcd at 15667-68.

[496] 47 U.S.C. § 251(c)(4)(A).

[497] 11 FCC Rcd at 15982-83.

[498] The term "enhanced services," which includes access to the Internet and other interactive computer networks, as well as telemessaging, alarm monitoring, and other services, appears to be quite similar to the term "information services" in the 1996 Act. "Enhanced services" are defined in § 64.702(a) of our rules: "For the purposes of this subpart, the term *enhanced services* shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act

and terminate interstate calls, ISPs should not be required to pay interstate access charges.[499] In recent years, usage of interstate information services, and in particular the Internet and other interactive computer networks, has increased significantly.[500] Although the United States has the greatest amount of Internet users and Internet traffic, more than 175 countries are now connected to the Internet.[501] As usage continues to grow, information services may have an increasingly significant effect on the public switched network.

342. As a result of the decisions the Commission made in the *Access Charge Reconsideration Order*, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.[502] The business line rates are significantly lower than the equivalent interstate access charges, given the ISPs' high volumes of usage.[503] ISPs typically pay incumbent LECs a flat monthly rate for their connections regardless of the amount of usage they generate, because business line rates typically include usage charges only for outgoing traffic.

343. In the *NPRM*, we tentatively concluded that ISPs should not be required to pay interstate access charges as currently constituted. We explained that the existing access charge system includes non-cost-based rates and inefficient rate structures. We stated that there is no

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on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional different, or restructured information; or involve subscriber interaction with stored information." The 1996 Act defines "information services" as offering the capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). For purposes of this order, providers of enhanced services and providers of information services are referred to as ISPs.

[499] MTS and WATS Market Structure, Memorandum Opinion and Order, Docket No. 78-72, 97 FCC 2d 682, 711-22 (*Access Charge Reconsideration Order*). *See also* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (*ESP Exemption Order*).

[500] The number of U. S. households with Internet access more than doubled over the past year, and approximately 38.7 million Americans over the age of 18 have accessed the Internet at least once. Jared Sandberg, "U.S. Households with Internet Access Doubled to 14.7 Million in Past Year, *Wall Street Journal*, October 21, 1996, at B11.

[501] Network Wizards Internet Domain Survey, January 1997, available on the World Wide Web at <http://www.nw.com/zoneWWW/top.html>.

[502] *ESP Exemption Order*, 3 FCC Rcd at 2631 nn.8, 53. To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.

[503] CIEA Comments at 5-6.

reason to extend such a system to an additional class of customers, especially considering the potentially detrimental effects on the growth of the still-evolving information services industry. We explained that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use incumbent LEC networks to receive calls from their customers.[504] We solicited comment on the narrow issue of whether to permit incumbent LECs to assess interstate access charges on ISPs.[505] In the companion *Notice of Inquiry (NOI)*, we sought comment on broader issues concerning the development of information services and Internet access.[506]

2. Discussion

344. We conclude that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs. We think it possible that had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid. Maintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry[507] and advances the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[508]

345. We decide here that ISPs should not be subject to interstate access charges. The access charge system contains non-cost-based rates and inefficient rate structures, and this Order goes only part of the way to remove rate inefficiencies. Moreover, given the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. Commercial Internet access, for example, did not even exist when access charges were established. As commenters point out, many of the characteristics of ISP traffic (such as large numbers of incoming calls to Internet service providers) may be shared by other classes of business customers.

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[504] NPRM at para 288.

[505] *Id.*

[506] *See In the Matter of* Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket No. 96-263, Notice of Inquiry, FCC 96-488 (rel. December 24, 1996) (*NOI*).

[507] *See, e.g.*, CompuServe/Prodigy Comments at 11; Information Industry Association Comments at 4; Minnesota Internet Services Trade Association Reply at 1.

[508] 47 U.S.C. § 230(b)(2).

346. We also are not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.

347. Finally, we do not believe that incumbent LEC allegations about network congestion warrant imposition of interstate access charges on ISPs.[509] The Network Reliability and Interoperability Council has not identified any service outages above its reporting threshold attributable to Internet usage, and even incumbent LEC commenters acknowledge that they can respond to instances of congestion to maintain service quality standards. Internet access does generate different usage patterns and longer call holding times than average voice usage. However, the extent to which this usage creates congestion depends on the ways in which incumbent LECs provision their networks, and ISPs use those networks. Incumbent LECs and ISPs agree that technologies exist to reduce or eliminate whatever congestion exists; they disagree on what pricing structure would provide incentives for deployment of the most efficient technologies.[510] The public interest would best be served by policies that foster such technological evolution of the network. The access charge system was designed for basic voice telephony provided over a circuit-switched network, and even when stripped of its current inefficiencies it may not be the most appropriate pricing structure for Internet access and other information services.

348. Thus, in our review of the record filed in response to the *NOI,* we will consider solutions to network congestion arguments other than the incumbent LECs' recommendation that we apply access charges to ISPs' use of circuit-switched network technology. We intend rather to focus on new approaches to encourage the efficient offering of services based on new network configurations and technologies, resulting in more innovative and dynamic services than exist today. In the *NOI,* we will address a range of fundamental issues about the Internet and other information services, including ISP usage of the public switched network.[511] The *NOI* will give us an opportunity to consider the implications of information services more broadly, and to craft proposals for a subsequent NPRM that are sensitive to the

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[509] *See, e.g.,* USTA Comments at 81-82.

[510] SWBT Comments at 20; PacTel Reply at 26; Internet Access Coalition Reply at 11-12; America On-Line Reply at 7-9.

[511] In particular, we requested data about alleged network congestion, rates paid by ISPs today, alternative network access technologies, and additional services desired by ISPs. *NOI* at ¶¶ 313-317.

complex economic, technical, and legal questions raised in this area. We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system.

C. Terminating Access

349. In the NPRM, we requested comment regarding the regulation of terminating access. We noted that, unlike originating access, the choice of an access provider for terminating access is made by the recipient of the call. The call recipient generally does not pay for the call and, therefore, is not likely to be concerned about the rates charged for terminating access. We suggested that neither the originating caller nor its long-distance service provider can exert substantial influence over the called party's choice of terminating access provider.[512] Thus, even if competitive pressures develop at the originating end as new entrants offer alternatives, the terminating end of a long-distance call may remain a bottleneck, controlled by the LEC providing access for a particular customer.[513] We also recognized, however, that excessive terminating access charges could furnish an incentive for IXCs to enter the access market in order to avoid paying excessive terminating access charges.[514]

1. Price Cap Incumbent LECs

a. Background

350. We requested comment on various alternative special methods for regulating the terminating access rates of price cap LECs. For instance, we sought comment on whether to establish a ceiling on the terminating access rates of price cap LECs equal to the forward-looking economic cost of providing the service. We suggested alternative methods for measuring forward-looking economic cost, including reference to prices in reciprocal compensation arrangements for the transport and termination charges of telecommunications under sections 251(b)(5) and 252(d)(2) or a requirement that terminating rates be based on a TSLRIC study or other acceptable forward-looking cost-based model.[515]

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[512] NPRM at ¶ 271.

[513] *Id.*

[514] *Id.* at ¶ 272.

[515] NPRM at ¶ 274.

b. Discussion

351. We believe that new entrants, by purchasing unbundled network elements or providing facilities-based competition, will eventually exert downward pressure on originating access rates assessed by incumbent LECs. We agree that excessive terminating access rates could encourage long-distance companies to avoid the payment of such charges by seeking to become the local exchange and exchange access provider for end user customers. These market developments, however, would not fully address the concerns expressed in the NPRM and reflected in comments with respect to the ability of incumbent LECs to charge unreasonable rates for terminating access.

352. We are also not convinced that a significant competitive impact would result from changes in calling patterns between pairs of callers. Commenters have not described any realistic way that users, by changing their calling patterns, could experience savings attributable to differing levels of terminating access charges paid by IXCs.[516] Although one commenter points to high termination charges in foreign countries as affecting the market for overseas calls originating in the United States,[517] such results are less likely to occur for domestic calls, which are much less expensive than international calls and are subject to geographic rate averaging and rate integration requirements.[518] Thus, we are reluctant to base our approach on the expectation that a significant proportion of callers will implement such a strategy.

353. Accordingly, we are establishing regulatory requirements that will address the potential that incumbent LECs could charge unreasonable rates for terminating access. Specifically, we are adopting rules in this Order that, for price cap LECs, will limit recovery of TIC and common line costs from terminating access rates for a limited period, and then eliminate any recovery of common line and TIC costs from terminating access. Under this approach, beginning January 1, 1998, price cap LECs will recover common line and residual TIC revenues through a new flat charge, subject to a ceiling. Remaining common line and residual TIC revenues will then be first recovered through originating access rates, subject to a ceiling. Any remaining common line and residual TIC revenues may then be recovered through terminating rates. As the caps on SLCs applicable to non-primary residential lines and the PICC are raised, none of these residual revenues will be recovered through

[516] We question whether switching carriers would have an immediate impact on the overall cost of long-distance calls between discrete pairs of callers. A local access provider's terminating access charges are spread across an IXC's customer base. As a practical matter, alterations in calling behavior, unless done on a massive scale across the IXC's customer base, are not likely to have an immediate or predictable impact on the bills of two callers seeking to reduce the cost of their long-distance calls to each other.

[517] TCI Comments, Attachment A at 4.

[518] NPRM at n. 357.

terminating access charges. When the increased SLCs and PICCs are fully implemented, recovery of these costs will be more susceptible to competitive forces because IXCs could seek to influence the end user's choice of its provider of local service, and the end user's choice of service provider will determine whether the incumbent LEC is able to recover these costs from the end user.

354. In addition, pending full recovery of all common line and residual TIC costs in flat rate SLCs and PICCs, this approach will put downward pressure on terminating access rates by lowering the overall service revenues derived from terminating access charges. Because competitive pressure is more likely to develop on the originating end of a long-distance call, we can rely to a greater extent on competitive forces to ensure just and reasonable rates under this approach by moving recovery of certain revenues from terminating access to originating access. By stripping terminating access rates of CCL and residual TIC charges and, pending full implementation of the new flat charges, placing more of the burden of TIC recovery on originating access rates, we reduce potential excesses in terminating access charges while exposing the CCL and residual TIC recovery to competitive pressures in the originating access market.

355. The NPRM described proposals linking terminating rates to originating rate levels or shifting costs from terminating to originating access charges.[519] Some commenters support limiting price cap LEC terminating access rates to the level of the LEC originating access rates.[520] If originating access charges are lowered because of competition, the ceiling on terminating access rates would be lowered as well, placing downward pressure on terminating rates. This approach, however, would not substantially affect terminating access rates where originating access rates have not responded to competitive inroads. Moreover, linking an incumbent LEC's terminating access rate to its own originating rate could reduce the incumbent LEC's incentive to lower its originating access rates. Thus, we decline to adopt this method of regulating terminating access rates.

356. The NPRM requested comment on the possibility of eliminating all charges for terminating access by shifting the burden of recovering all costs currently recovered in terminating access rates to originating access charges.[521] We decline to adopt this approach because a complete shift of terminating access costs to originating access conflicts with one of the basic objectives of this proceeding -- to ensure that charges for access services reflect the manner in which the costs of providing those services are incurred. Switching costs, for example, should continue to be recovered in part from terminating access charges because

[519] NPRM at ¶ 276.

[520] BA/NYNEX Comments at 42; Ohio Commission Comments at 12.

[521] NPRM at ¶ 276.

those costs are traffic sensitive and are related to the volumes of both originating and terminating traffic. Moreover, we emphasize that, as discussed in Section III.A, the rate structure we are adopting, which will replace per-minute recovery of the CCL charge and the TIC with flat rate charges, helps to achieve our goal of ensuring that charges for access services reflect the manner in which costs are incurred. Our requirement that incumbent LECs recover a greater portion of common line and TIC costs in originating access rates pending full implementation of flat-rated charges will address concerns about the reasonableness of terminating access charges while providing price cap LECs sufficient latitude to recover the reasonable costs of deploying their facilities to provide terminating access services.

357. The NPRM also discussed the alternative of requiring price cap LECs to establish end user charges for terminating access. This approach would place direct responsibility for the cost of terminating access on the recipient of terminating access services and would expose terminating access to competitive pressures. We noted that wireless companies already charge called parties for receiving calls and requested comment on how we might implement a system of end user charges in the context of access reform and whether its implementation would increase the number of uncompleted calls due to a reluctance by called parties to accept the charges.[522] We agree with commenters that such a change could prove disruptive to consumers of wireline services.[523] After review of the record, which produced few, if any, advocates of such an approach, we conclude that we should not mandate at this time this change in current pricing practices for wireline service.

2. Non-Incumbent LECs

a. Background

358. In the NPRM, we requested comment about whether to impose ceilings on the terminating access rates of non-incumbent LECs.[524] We stated in the NPRM that our policy since the *Competitive Carrier Proceeding*,[525] has consistently been that a carrier is non-

[522] NPRM at ¶ 275.

[523] Ameritech Comments at 54; LCI Comments at 19; California Commission Comments at 17-18.

[524] NPRM at ¶ 280.

[525] In the *Competitive Carrier Proceeding*, we established a comprehensive framework for determining whether carriers are dominant or non-dominant, classified then existing classes of carriers as either dominant or non-dominant, and promulgated general definitions providing that a carrier will be non-dominant in the absence of a Commission finding of market power. *Competitive Carrier First Report and Order*, 85 FCC 2d at 51 (promulgating 47 C.F.R. § 61.15(A)(2)).

dominant unless the Commission makes or has made a finding that it is dominant.[526] We noted that, since the *Competitive Carrier Proceeding*, new entrants into the exchange access market have been presumptively classified as non-dominant because they have not been shown to exercise significant market power in their service areas.[527] At the same time, we stated that competitive LECs may possess market power over IXCs needing to terminate calls because the LEC controlling the terminating local loop is the only access provider available to the IXC seeking to terminate a long-distance call on that particular loop.[528] We solicited comment on several alternatives, including whether we should use incumbent LEC terminating access rates as a benchmark to determine the reasonableness of competitive LEC terminating rates. We invited commenters to offer other approaches including, for example, whether we should establish a presumption of reasonableness if the competitive LEC's terminating access rate is no higher than the incumbent LEC's rate in the same geographic market.[529]

b. Discussion

359. We recently noted that the test in deciding whether to apply dominant carrier regulation to a class of carriers is whether those carriers have market power.[530] As we discussed in the *Dominant/Nondominant Order*, in determining whether a firm possesses market power, the Commission has previously focused on certain well-established market features, including market share, supply and demand substitutability, the cost structure, size or

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[526] NPRM at ¶ 277.

[527] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (*Competitive Carrier NPRM*); First Report and Order, 85 FCC 2d 1 (1980) (*First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (*Competitive Carrier Further NPRM*); Second Further Notice of Proposed Rulemaking, FCC 82-187. 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report and Order*); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Fourth Report and Order*), *vacated, AT&T Co. v. FCC,* 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI Telecommunications Corp. v. AT&T Co.*, 509 U.S. 913 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report and Order); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Sixth Report and Order*), *vacated, MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the *Competitive Carrier proceeding*).

[528] *Id.* at ¶ 279.

[529] *Id.* at ¶ 280.

[530] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 and 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142 at ¶ 12 (rel. April 18, 1997) *(Dominant/Non-Dominant Order)*.

resources of the firm, and control of bottleneck facilities.[531] Competitive LECs currently have a relatively small market share in the provision of local exchange and exchange access service. Nonetheless, at first blush, there is a concern that a competitive LEC may have market power over an IXC that needs to terminate a long-distance call to a customer of that particular competitive LEC. Therefore, we sought comment on whether and to what extent we should regulate the terminating access charges of competitive LECs.

360. We conclude, based on the record before us, that non-incumbent LECs should be treated as nondominant in the provision of terminating access. Although an IXC must use the competitive LEC serving an end user to terminate a call, the record does not indicate that competitive LECs have previously charged excessive terminating access rates. Nor have commenters provided evidence demonstrating that competitive LECs are, in fact, charging excessive terminating rates. Indeed, the record suggests that the terminating rates of competitive LECs are equal to or below the tariffed rates of incumbent LECs.[532] In addition, the record does not show that competitive LECs distinguish between originating and terminating access in their offers of service. Therefore, it does not appear that competitive LECs have structured their service offerings in ways designed to exercise any market power over terminating access. Accordingly, the concerns expressed in the NPRM about the ability of competitive LECs to exercise market power in the provision of terminating access are not substantiated in the record.

361. Further, as competitive LECs, which have a small share of the interstate access market, attempt to expand their market presence, the rates of incumbent LECs or other potential competitors will constrain the terminating access rates of competitive LECs.[533] Specifically, competitive LECs compete with incumbent LECs whose rates are regulated. The record indicates that long-distance carriers have established relationships with incumbent LECs for the provision of access services, and new market entrants are not likely to risk damaging their developing relationships with IXCs by charging unreasonable terminating access rates.[534] This is especially true with respect to competitive access providers seeking to

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[531] *Dominant/Non-Dominant Order* at ¶ 93. *See also Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* Notice of Proposed Rulemaking, FCC No. 96-308, CC Docket No. 94-149 at ¶ 133 (rel. July 18, 1996).

[532] Spectranet Comments at 7; TCI Comments, Attachment A at 6.

[533] ALTS Comments at 29; American Communications Services Reply at 21; ICG Telecom Group Reply at 23.

[534] *See* WinStar Comments at 5-6; TCI Comments, Attachment A at 9; Cox Communications Reply at 4-5.

maintain or expand their access transport, special access, or other services apart from switched access.[535]

362. In addition, we believe that overcharges for terminating access could encourage access customers to take competitive steps to avoid paying unreasonable terminating access charges. If, for example, a competitive LEC consistently overcharged an IXC for terminating access, the IXC would have an incentive to enter a marketing alliance with another competitive LEC in the same market or in other geographic markets where the overcharging competitive LEC seeks to expand. Although high terminating access charges may not create a *disincentive* for the call recipient to retain its local carrier (because the call recipient does not pay the long distance charge), the call recipient may nevertheless respond to *incentives* offered by an IXC with an economic interest in encouraging the end user to switch to another local carrier. Such an approach could have particular impact when the IXC has significant brand recognition among consumers. Moreover, as noted in the NPRM, excessive terminating access charges could encourage IXCs to enter the access market in an effort to win the local customer.[536] We believe that the possibility of competitive responses by IXCs will have a constraining effect on non-incumbent LEC pricing.

363. Thus, we will not adopt at this time any regulations governing the provision of terminating access provided by competitive LECs.[537] Because competitive LECs have not charged unreasonable terminating access rates, and because they are not likely to do so in the future, competitive LECs do not appear to possess market power. Thus, the imposition of regulatory requirements with respect to competitive LEC terminating access is unnecessary. We similarly find no reason to adopt a presumption of reasonableness where a competitive LEC's terminating access rates are less than its rates for originating access or less than the incumbent LEC's terminating access rates. Instead, if we need to examine the reasonableness of competitive LEC terminating access rates in an individual instance, we can do so taking into account all relevant factors including relationships to other rates. Thus, if an access provider's service offerings violate section 201 or Section 202 of the Act, we can address any issue of unlawful rates through the exercise of our authority to investigate and adjudicate complaints under section 208.[538] On the basis of the current record, we conclude that reliance on the complaint process will be sufficient to assure that non-incumbent LEC rates are

[535] ALTS Comments, Attachment B at 14.

[536] NPRM at ¶ 272.

[537] We are examining in a separate proceeding whether tariffing of rates for access services provided by competitive LECs is necessary to assure that such rates are reasonable. *See* Petitions Requesting Forbearance of Hyperion Telecommunications, Inc. (CCB/CPD No. 96-462) and Time Warner Communications (CCB/CPD No. 96-902).

[538] 47 U.S.C. § 208.

reasonable. We emphasize that we will not hesitate to use our authority under section 208 to take corrective action where appropriate.

364. We will be sensitive to indications that the terminating access rates of competitive LECs are unreasonable. The charging of terminating access rates above originating rates in the same market, for example, may suggest the need to revisit our regulatory approach. Similarly, terminating rates that exceed those charged by the incumbent LEC serving the same market may suggest that a competitive LEC's terminating access rates are excessive. If there is sufficient indication that competitive LECs are imposing unreasonable terminating access charges, we will revisit the issue of whether to adopt regulations governing competitive LEC rates for terminating access.

3. "Open End" Services

365. In some cases, an IXC is unable to influence the end user's choice of access provider for originating access services because the end user on the terminating end is paying for the call. For example, charges for the "open end" originating access minutes for 800 or 888 services are paid by the recipient of the call. Consequently, the Commission has treated incumbent LEC originating "open end" minutes as terminating minutes for access charge purposes.[539] The NPRM solicited comment on whether such regulatory treatment should be retained for "open end" services under which terminating access rates serve as originating access rates, and whether this approach should be extended to competitive LECs.[540]

366. We continue to believe that "open end" originating minutes should be treated as terminating minutes for access charge purposes. Although few comments were filed regarding this issue, commenters addressing this matter advocate retention of the current regulatory approach.[541] By continuing to treat "open end" originating minutes as terminating minutes for access charge purposes, we recognize that access customers have limited ability to influence the calling party's choice of access provider. Accordingly, access charges for these "open end" minutes will be governed by the requirements we adopt in this Order applicable to terminating access provided by incumbent LECs. Thus, residual common line charges and the per-minute TIC will not be recovered through "open end" originating minutes except to the extent such recovery is permitted under the rules described in Section III.A of this Order.

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[539] 47 C.F.R. § 69.105(b)(1)(iii).

[540] NPRM at ¶ 281.

[541] ACTA Comments at 24; WorldCom Comments at 93.

D. Universal Service-Related Part 69 Changes

367. In the NPRM, we recognized that, because of the role that access charges have played in funding and maintaining universal service, it is critical to implement changes in the access charge system together with complementary changes in the universal service system. In this section, we address the manner in which incumbent LECs must adjust their interstate access charges to reflect the universal service support mechanisms adopted in the *Universal Service Order*.

1. Background

368. In November 1996, pursuant to Section 254 of the Act, the Federal-State Universal Service Joint Board issued its recommendations to the Commission for reforming our system of universal service so that universal service is preserved and advanced, but in a manner that permits the local exchange and exchange access markets to move from monopoly to competition.[542] In our *Universal Service Order*, we are adopting most of the Joint Board's recommendations relating to the support of rural and high cost areas.

369. Section 254 of the Act requires that any federal universal service support provided to eligible carriers be "explicit"[543] and recovered on an "equitable and nondiscriminatory basis"[544] from all telecommunications carriers providing interstate telecommunications service. In our companion *Universal Service Order*, we agree with the Joint Board that these programs must be replaced with universal service support mechanisms that satisfy section 254.[545]

370. Currently, there are three mechanisms designed expressly to provide support for high cost and small telephone companies: the Universal Service Fund (high cost assistance fund),[546] the Dial Equipment Minutes (DEM) weighting program,[547] and Long Term Support (LTS).[548] An incumbent LEC is eligible for high cost assistance from the current Universal

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[542] *Joint Board Recommended Decision*, 12 FCC Rcd 87.

[543] 47 U.S.C. § 254(e).

[544] 47 U.S.C. § 254(d).

[545] *See* Section III of the *Universal Service Order*.

[546] 47 C.F.R. § 36.601 *et seq.*

[547] 47 C.F.R. § 36.125(b).

[548] 47 C.F.R. §§ 69.105, 69.502, 69.603(e), 69.612.

Service Fund if its embedded loop costs exceed 115 percent of the national average loop cost. This program is funded entirely by IXCs.[549] DEM weighting assistance is an implicit support mechanism that permits LECs with fewer than 50,000 access lines to apportion a greater proportion of these local switching costs to the interstate jurisdiction than larger LECs may allocate. Finally, the existing LTS program supports carriers with higher-than average subscriber line costs by providing carriers that are members of the NECA pool with enough support to enable them to charge IXCs only a nationwide average CCL interstate access rate.[550] LTS payments reduce the access charges of smaller, rural incumbent LECs participating in the loop-cost pool by raising the access charges of non-participating incumbent LECs.

371. In the NPRM, we sought comment on whether incumbent LECs' access charges must be adjusted to reflect elimination of LTS contribution requirements and receipt of explicit universal service funds in order to prevent incumbent LECs from being compensated twice for providing universal service.[551] We proposed a downward exogenous cost adjustment for price cap incumbent LECs to reflect elimination of LTS contribution requirements and any revenues received from any new universal service support mechanisms, and sought comment on how interstate costs must also be reduced to account for explicit universal service support.[552]

2. Discussion

372. In our companion *Universal Service Order*, we conclude that a carrier will continue to receive universal service support based upon the existing LTS, high cost, DEM weighting mechanisms, until the carrier begins to receive support based upon forward-looking economic cost.[553] In the following sections, we will discuss the manner in which incumbent LECs must reduce their interstate access charges to reflect the elimination of the obligation to contribute to LTS, increase their interstate access charges to permit recovery of the new

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[549] Each IXC with at least .05 percent of presubscribed lines nationwide contributes to the fund an amount based on the number of its presubscribed lines. 47 C.F.R. § 69.116.

[550] Prior to 1989 all LECs were required to participate in a pool of carrier common line costs and revenues. Beginning in April 1989, LECs were permitted to withdraw from the pool, but LECs with below average CCL charges that choose to exit the pool are required to contribute enough so that LECs remaining in the pool would be able to charge the same industry average CCL rates they would have charged if the pool were still mandatory for all LECs. *See* MTS and WATS Market Structure; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286, Report and Order, 2 FCC Rcd 2953 (1987).

[551] NPRM at ¶ 244.

[552] NPRM at ¶¶ 245-46.

[553] *See* Section VII.D of the *Universal Service Order*.

universal service obligation, and, to the extent necessary, adjust their interstate access charges to account for any additional universal service funds received under the modified universal service mechanisms.

a. Removal of LTS Obligation from Interstate Access Rates

373. In our companion *Universal Service Order*,[554] we agree with the Joint Board that LTS payments constitute a universal service support mechanism that is inconsistent with the Act's requirement that support be collected from all providers of interstate telecommunications services on an equitable and non-discriminatory basis[555] and be available to all eligible telecommunications carriers.[556] In that order, we conclude that LTS should be removed from the interstate access charge system. We provide, instead, for recovery of comparable payments from the new federal universal service support mechanisms.[557]

374. Currently, only incumbent LECs that do not participate in the NECA CCL tariff (non-pooling incumbent LECs) make LTS payments and only incumbent LECs participating in the NECA CCL tariff receive LTS support.[558] Non-pooling incumbent LECs' contributions to the common line pool are set annually based on the total projected amount of LTS, converted to a monthly payment amount. Non-pooling incumbent LECs recover the revenue necessary for their LTS contributions through their CCL charges. We agree with commenters that argue that, to the extent we do not reduce interstate access revenues by the amount of LTS contribution currently recovered in the rates, incumbent LECs will double recover. We therefore conclude that incumbent LEC interstate access charges must be reduced to reflect elimination of the obligation to contribute to LTS.

375. Because payments from the existing LTS mechanism will cease on January 1, 1998, incumbent LECs should no longer contribute to the existing LTS fund after that date. For price cap LECs, which were requested to stop participating in the NECA Common Line tariff before coming under price cap regulation, LTS contributions were included in the common line revenue requirement when the PCI for the common line basket was established.[559] We conclude that price cap LECs must make a one-time downward exogenous

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[554] *See* Section XII.B of the *Universal Service Order*.

[555] 47 U.S.C. § 254(d).

[556] *See* 47 U.S.C. § 254(e).

[557] *See* Sections VII and XII.B of the *Universal Service Order*.

[558] *See* 47 C.F.R. § 69.105(b)(3)-(4).

[559] *See* 47 C.F.R. §§ 69.501(a).

adjustment to the PCI for the common line basket to account fully for the elimination of their LTS obligations. This exogenous adjustment shall be made in a manner consistent with section 61.45 and other relevant provisions of the Commission's rules.[560]

376. Non-pooling, rate-of-return LECs recover their LTS contributions in the common line revenue requirement.[561] Because current LTS contributors will no longer be making such contributions after January 1, 1998, their CCL charges should be adjusted to account for this change. Rate-of-return LECs that formerly made LTS contributions should recompute their common line revenue requirements based on the elimination of their LTS obligations, and adjust their CCL charges accordingly.[562]

377. We note that the replacement of LTS with comparable support from the new universal service support mechanisms requires us to amend the NECA Common Line tariff rules, which establish the CCL for pooling members at the average of price cap LECs' CCL charges.[563] Under the current LTS support system, NECA annually projects the common line revenue requirement, including an 11.25 percent return on investment, for incumbent LECs that participate in the common line pool.[564] NECA then computes the total amount of LTS support needed by subtracting the amount pooling carriers will receive in CCL revenues and SLCs from the pool's projected revenue requirement, after removing pay telephone costs and revenues. Our rules currently provide that the NECA CCL tariff be set to recover the average of price cap LECs' CCL charges.[565] If we were to retain this rule, our decision eliminating LTS obligations for price cap LECs and requiring them to reduce their CCL charges accordingly would automatically reduce the CCL revenues of NECA pool members. Further, reductions would occur as price cap LECs implemented our decisions in Section III of this Order, which restructures the common line rate structure for price cap LECs to recover common line costs through flat-rated charges instead of the per-minute CCL charge. Because we have deferred consideration of access reform for non-price cap LECs[566] and did not seek

[560] 47 C.F.R. § 61.45.

[561] *See* 47 C.F.R. § 69.501(a).

[562] *See* 47 C.F.R. § 69.105(b)(4)(ii).

[563] *See* 47 C.F.R. § 69.105(b)(2).

[564] The actual rate of return that pooling companies earn on a monthly basis is determined by the total rate of return that the pool earns, *i.e.*, the difference between the total costs that the pooling companies submit and the total amount of revenue in the pool, as a percentage of all pooling companies' total common line investment.

[565] *See* 47 C.F.R. § 69.105(b)(2).

[566] *See* Section V.B, *supra*.

comment on this issue in the NPRM, we must address this issue in a future proceeding that undertakes access reform for small, non-price cap LECs.

b. Recovery of New Universal Service Obligations

378. In the *Universal Service Order*, we conclude that assessment of contributions for the interstate portion of the high cost and low-income support mechanisms shall be based solely on end-user interstate revenues,[567] and that assessment of universal support for eligible schools, libraries, and rural health care providers shall be based on interstate and intrastate total end-user revenues.[568] As to the manner in which carriers may recover their contributions to the universal service fund, in our *Universal Service Order* we conclude that carriers may recover universal service contributions via interstate mechanisms.[569] In this Section, we address the manner in which incumbent price cap LECs may recover their universal service contributions. We address non-price cap LECs' recovery of universal service contributions in Section XIII.F of the *Universal Service Order*.

379. Price cap LECs may treat their contributions to the new universal service mechanisms, including high cost and low-income support and support for eligible schools, libraries, and health care, as exogenous changes to their price cap indices (PCIs).[570] Because the only interstate revenues that will serve as the basis for assessing universal service contributions in 1998 will be end-user revenues, we find that price cap LECs recovering their universal service obligation through interstate access charges must recover those contributions in the baskets for services that generate end-user interstate revenues. Because price cap LECs do not recover revenues from end users of services in all baskets, the exogenous adjustment should not be across-the-board. The baskets containing end-user interstate services are the common line, interexchange, and trunking baskets.[571] Price cap LECs electing to recover their universal service obligation through interstate access charges must therefore apply the full amount of the exogenous adjustment among these three baskets on the basis of relative size of end-user revenues. We note, however, that the tandem-switched transport, interconnection

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[567] *See* Sections VII, VIII, and XIII.F of the *Universal Service Order*.

[568] *See* Sections X, XI, and XIII.F of the *Universal Service Order*.

[569] *See* Section XII of the *Universal Service Order*.

[570] *See* Section XIII.F of the *Universal Service Order*.

[571] The end-user charges assessed on services in the common line basket are recovered through the SLC; in the interexchange basket, end-user charges are recovered through per-minute toll charges; and in the trunking basket, end user charges are recovered through special access service provided directly to end users.

charge, and tandem switch signalling service categories[572] in the trunking basket do not recover end-user interstate revenues. In order to prevent recovery from customers of these services, the service band indices (SBI) for these service categories should not be increased to reflect the exogenous adjustment to the PCI for the trunking basket. To reflect the exogenous adjustment to the trunking basket PCI, price cap LECs should, instead, increase the SBIs for the remaining service categories in the trunking basket[573] based on the relative end-user interstate revenues generated in each service category.

380. In 1999, the percentage of price cap LECs' revenues that will be assessed for universal service support may increase as a result of the anticipated increases in high cost, low-income support and support for schools, libraries, and health care in 1999. Price cap LECs shall therefore perform an upward exogenous adjustment to the PCIs for the common line, interexchange, and trunking baskets in the same manner as the exogenous adjustment performed in 1998, to reflect any change in the assessment rate in 1999.

c. Adjustments to Interstate Access Charges to Reflect Additional Support from the Modified Universal Service Mechanisms

381. In our *Universal Service Order*, we conclude that the federal universal service mechanism should support 25 percent of the difference between the forward-looking economic cost of serving the customer and the appropriate revenue benchmark.[574] We further conclude in that order that 25 percent approximates the portion of the cost of providing the supported network facilities that would be assigned to the interstate jurisdiction, and that, by funding these interstate costs, we will ensure that federal implicit universal service support is made explicit. Consistent with our decision in the *Universal Service Order* to fund only interstate costs through the federal universal service fund, we direct incumbent LECs to use any universal service support received from the new universal service mechanisms to reduce or satisfy the interstate revenue requirement otherwise collected through interstate access charges.

382. *Non-Rural Carriers.* In our *Universal Service Order*, we conclude that, until a forward-looking economic cost methodology takes effect on January 1, 1999, non-rural carriers will continue to receive high cost assistance and LTS amounts based on the existing

[572] 47 C.F.R. §§ 61.42(e)(2)(v), (vi), and (vii).

[573] The four remaining service categories in the trunking basket are as follows: (1) voice grade entrance facilities, voice grade direct-trunked transport, voice grade dedicated signalling transport, voice grade special access, WATS special access, metallic special access, and telegraph special access services; (2) audio and video service; (3) high capacity flat-rated transport, high capacity special access, and DDS services; and (4) wideband data and wideband analog services. *See* 47 C.F.R. §§ 61.42(e)(2)(i), (ii), (iii), (iv).

[574] *See* Section VII.C.6 of the *Universal Service Order*.

universal service mechanisms.[575] As there will be no change until January 1, 1999 to the support non-rural incumbent LECs currently receive as high cost and LTS support, we conclude that it is not necessary at this time to determine the manner in which non-rural carriers should adjust their interstate access charges to reflect a difference in universal service support. We will address this issue prior to the January 1, 1999, effective date of the forward-looking cost mechanisms for non-rural carriers.

383. *Rural Carriers.* In our *Universal Service Order*, we conclude that rural carriers, as defined in section 153(37) of the Act,[576] shall continue to receive support based on embedded costs for at least three years.[577] Beginning on January 1, 1998, rural carriers shall receive high cost loop support, DEM weighting assistance, and LTS benefits on the basis of the modified support mechanisms.

384. In our *Universal Service Order*, we adopt modified per-line support mechanisms for providing support comparable to the LTS support received under the existing mechanisms. Beginning on January 1, 1998, we will allow a rural carrier's annual LTS support to increase from its support for the preceding calendar year based on the percentage of increase of the nationwide average loop cost.[578] Rural, non-price cap LECs should continue to apply any revenues received from the modified universal service support mechanisms that replace current LTS amounts to the accounts to which they are currently applying LTS support.

385. We also decide in the *Universal Service Order* that, from January 1, 1998 through December 31, 1999, rural carriers shall calculate their high cost support using the current high cost formulas. We conclude that no adjustment to rural incumbent LECs' interstate access charges is necessary at this time because incumbent LECs will continue to use the existing high cost formulas to determine high cost support. As we determine in that order, however, beginning January 1, 2000, rural carriers shall receive high cost loop support for their average loop costs that exceed 115 percent of an inflation-adjusted nationwide average loop cost. The inflation adjusted nationwide average cost per loop shall be calculated by multiplying the 1997 nationwide average cost per loop by the percentage in change in Gross Domestic Product Chained Price Index (GDP-CPI) from 1997-1998.[579] We conclude

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[575] *See* Section VII.D.1 of the *Universal Service Order*.

[576] *See* 47 U.S.C. § 153(37).

[577] *See* Section VII.D.2 of the *Universal Service Order*.

[578] *See* Section VII.D.2 of the *Universal Service Order*.

[579] *See* Section VII.D.2 of the *Universal Service Order*. The inflation adjusted nationwide average loop cost for the year 2000 shall be calculated in the following manner: 1998 GDP-CPI X 1997 nationwide average loop cost = 2000 inflation adjusted nationwide average loop cost.

that rural, non-price cap LECs should continue to apply any revenues received from the modified universal service support mechanism that replace amounts received under the current high cost support system to the accounts to which they are currently applying high cost support.

386. Finally, in our *Universal Service Order*, we adopt the Joint Board's recommendation that a subsidy corresponding in amount to that generated formerly by DEM weighting be recovered from the new universal service support mechanisms.[580] Beginning on January 1, 1998 and continuing until permanent mechanisms for them become effective, rural carriers will receive DEM weighting assistance calculated as follows: assistance will equal the difference between the 1996 weighted DEM factor and the unweighted DEM factor multiplied by the annual unseparated local switching revenue requirement. As with comparable LTS and high cost support, rural, non-price cap LECs should continue to apply any support received from the modified universal service support mechanisms that replaces existing DEM weighting amounts to the accounts to which they are currently applying DEM weighting assistance.

387. Currently, the high cost and DEM weighting support mechanisms shift a portion of the intrastate revenue requirement to the interstate jurisdiction in order to permit LECs to recover a greater percentage of their costs from the interstate jurisdiction. Some non-price cap LECs are concerned that, to the extent that support from the modified universal service mechanisms is not applied to the intrastate jurisdiction, an intrastate revenue shortfall will occur.[581] In the *Universal Service Order*, we conclude that, until universal service support is based on forward-looking economic cost, carriers should continue to receive amounts from the new universal service mechanisms comparable to existing high cost and DEM weighting support. In that order, we do not alter the existing revenue-shifting mechanisms in place for the current high cost support and DEM weighting at this time.[582] Thus, no intrastate revenue shortfall will occur, because no revenue requirement is being shifted back to the intrastate jurisdiction.

E. Part 69 Allocation Rules

1. Background

388. In the NPRM, we solicited comment on whether it would be appropriate for incumbent price cap LECs to be relieved of complying with Subparts D and E of Part 69 of

[580] *See* Section VII of the *Universal Service Order*.

[581] *See, e.g.*, Roseville Tel. Comments at 16.

[582] *See* Section VII.D of the *Universal Service Order*.

our rules, which address the allocation of investments and expenses to the access rate elements.[583]

2. Discussion

389. We conclude that at this time we should maintain our Part 69 cost allocation rules. In this Report and Order, we have instituted a phasing out of the CCL charge. Until the per-minute CCL charge is phased out completely and multi-line PICCs do not recover any common line revenues,[584] price cap LECs will need to use these rules to calculate the SLC. Therefore, we decline to eliminate the cost allocation rules at this time. We note that we may revisit this issue when these rules are no longer needed to calculate the SLC.

F. Other Proposed Part 69 Changes

1. Background

390. In the NPRM, we sought comment on revisions necessary to update Part 69 and conform it to the 1996 Act. In the NPRM, we made several proposals that we thought necessary to bring Part 69 current, including: eliminating the rules that provide for a "contribution charge" that may be assessed on special access and expanded interconnection; removing the rule and sections referencing the rule that establishes the equal access rate element; and removing the rule and sections referencing the rule that establishes a rate element for costs associated with lines terminating at "limited pay telephones"; and changing the definition of "Telephone Company" to mean incumbent LEC. We also sought comment on whether rate elements and subelements established pursuant to waiver should be incorporated into Part 69.[585]

2. Discussion

391. The passage of the 1996 Act and the subsequent enactment of implementing regulations requires that we update and revise various sections of Part 69. Sections 69.4(f) and 69.122 of our rules provide for a "contribution charge" that may be assessed on special access and expanded interconnection. These sections are inconsistent with section 254 as amended by the 1996 Act, which requires, *inter alia*, that such carrier contributions be equitable and nondiscriminatory. Furthermore, our rules governing the contribution charge merely allow a LEC to try to justify this charge in the expanded interconnection context. No

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[583] NPRM at ¶ 294.

[584] *See* Section III.A.

[585] NPRM at ¶¶ 295-299.

party has even attempted to justify such a charge in more than four years. Given this and the relevant amendments in the 1996 Act, we find that there is no need for this rate element. We conclude that sections 69.4(f) and 69.122 of our rules, which provide for a "contribution charge" that may be assessed on special access and expanded interconnection, should be deleted.

392. Under Part 69, we required carriers to eliminate any separate equal access charge by January 1, 1994.[586] We conclude, therefore, that section 69.4(d), which established the equal access rate element for a limited duration, should be deleted because of the expiration of the designated time period. Similarly, we conclude that section 69.107, which governs the computation of the equal access rate element charges, and sections 69.308 and 69.410, which concern allocation of costs to that rate element, should be deleted because the designated time period for separate equal access rate elements has expired. We conclude that references to these deleted sections should also be removed from Part 69.[587] To ensure consistency, a new section, designated as section 69.3(3)(12), should be added and should read as follows: "Such a tariff shall not contain any separate carrier's carrier tariff charges for an Equal Access element." Similarly, we conclude that section 69.205, which concerns transitional premium charges for IXCs and others should be deleted because the designated transition period for these charges has expired.

393. Section 69.103 requires incumbent LECs to establish a separate rate element for costs associated with lines terminating at "limited pay telephones."[588] Sections 69.303(a), 69.304(c), 69.307(c), and 69.406(a)(9) concern the allocation of costs to this rate element. Section 276 of the Act and the implementing regulations require a new per call compensation plan, which requires, *inter alia*, that incumbent LECs remove all payphone costs from access charges.[589] This new compensation plan, as well as the payphone dialing parity requirements,[590] have eliminated the need for sections 69.103, 69.303(a), 69.304(c), 69.307(c), and 69.406(a)(9). We conclude that these sections should be deleted.

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[586] 47 C.F.R. § 69.4(d).

[587] Section 69.309 refers to section 69.308 and section 69.411 refers to section 69.410.

[588] We note that few, if any, payphone service providers offer this type of service today.

[589] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-128, FCC 96-388 (rel. Sep. 20, 1996) (*Payphone Order*), *recon.*, FCC 96-439 (rel. Nov. 8, 1996) (*Payphone Reconsideration Order*), *appeal docketed sub nom.*, *Illinois Public Telecommunications Ass'n v. FCC and United States*, Case No. 96-1394 (D.C. Cir., filed Oct. 17, 1996).

[590] *Payphone Order* at ¶¶ 291-293.

394. We conclude that codifying previously-granted Part 69 waivers is not necessary at this time. Under the *Price Cap Performance Review Third Report and Order*, a party seeking to introduce a new service may do so by filing a petition showing that the new service is in the public interest.[591] Once that petition for a new service has been granted, carriers seeking to introduce the same service with the same rate structure may do so under expedited procedures.[592] This streamlined alternative for introducing new services should resolve past difficulties encountered with the Part 69 waiver process. The proposed codification of previously-granted waivers is thus unnecessary. We therefore decline to codify previously-granted Part 69 waivers into our rules.

395. NECA and TCA have requested that the Commission extend to all rate-of-return companies, the right to offer new services based on an expedited process, which requires, *inter alia*, a showing that the new service is in the public interest. In the Third Report and Order, we granted to incumbent price cap LECs the right to introduce new services under a streamlined procedure.[593] We will address the request of NECA and TCA when we take up access reform for rate-of-return companies in the near future.

396. In the NPRM, we solicited comment on whether we should adopt regulatory requirements to govern rates for terminating access offered by competitive LECs. In Section VI.C., *supra*, we conclude that we will not adopt such regulatory requirement at this time. For the same reasons, we find it unnecessary to apply any of our Part 69 regulations to competitive LECs. We therefore conclude that Section 69.2(hh), which currently defines "Telephone Company" by reference to Section 3(r) of the 1934 Act, should be changed to read as follows: "'Telephone Company' or 'local exchange carrier' as used in this Part means an incumbent local exchange carrier as defined in section 251(h)(1) of the 1934 Act as amended by the 1996 Act." There is no indication in the record that competitive LECs have exercised any degree of market power in provision of terminating access or other access services. By definition, non-dominant carriers do not exercise market power. Further, non-dominant carriers possess a negligible share of the current access market and they will be competing with incumbent LECs whose rates are subject to regulation. As a practical matter, the rates of the incumbent LECs will serve as a constraint to some degree on the pricing and practices of non-dominant LECs. We therefore find on this record that it is sufficient to rely on the Section 208 complaint process to assure compliance with the Act by competitive LECs, and that we should not apply Part 69 to them. To the extent that our definitions or our application of Part 69 needs in the future to be expanded to encompass LECs other than incumbent LECs, we can revisit this issue.

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[591] NPRM at ¶ 309.

[592] NPRM at ¶ 310.

[593] NPRM at ¶¶ 309-310.