switch, as network elements that necessarily must be shared among the incumbent and multiple competing carriers.[107]

42. We also reject Ameritech's and BellSouth's contention that, because WorldCom and other requesting carriers seek access to an element -- shared transport -- that cannot be effectively disassociated from another element -- local switching, the requesting carriers are in fact seeking access to a bundled service rather than to transport as a network element unbundled from switching.[108] As previously discussed, several of the network elements we identified in the *Local Competition Order* depend, at least in part, on other network elements. In particular, although we identified the signalling network as a network element, the information necessary to utilize signalling networks resides in the switch, which we identified as a separate network element. In addition, we required incumbent LECs, upon request, to provide access to unbundled loops conditioned to provide, among other things, digital services such as ISDN, even though the equipment used to provide ISDN service typically resides in the local switch, rather than in the loop.[109] We thus find no basis for concluding that each network element must be functionally independent of other network elements.

43. We reject as well Ameritech's contention that a network element must be identifiable as a limited or pre-identified portion of the network. We find nothing in the statutory definition of network elements that prohibits requesting telecommunications carriers from seeking access to every transport facility within the incumbent's network. Our definition of signalling as a network element does not require requesting carriers to identify in advance a particular portion of the incumbent LEC's signalling facilities, but instead permits requesting carriers to obtain access to multiple signalling links and signalling transfer points in the incumbent LEC's network on an as-needed basis.[110] We also reject Ameritech's assertion that shared transport cannot be physically separated from switching.[111] Both dedicated and shared transport facilities are transport links between switches. These links are physically distinct from the end office and tandem switches themselves.

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[107] *See* 47 C.F.R. § 51.319(e). *See also Iowa Utilities Bd.* at ¶18 (affirming determination that signalling and databases are network elements).

[108] *See* Ameritech Opposition at 7 and Bell South Reply at 6. Ameritech also contends that incumbent LECs are not required to provide bundled services at cost-based rates under section 251(c)(3) and section 252(d)(1). *See* Ameritech Opposition at 7.

[109] *Local Competition Order*, 11 FCC Rcd at 15691, para. 380.

[110] *See generally Local Competition Order*, 11 FCC Rcd at 15738-41, paras. 479-483.

[111] *See* May 9, 1997 *ex parte* from Jim Smith, Director, Federal Relations, Ameritech, to William Caton, Acting Secretary, FCC, attaching Supplemental Rebuttal Testimony of David H. Gebhardt at 2 (Gebhardt Supplemental Rebuttal Testimony).

44. Although we conclude that shared transport is physically severable from switching, incumbent LECs may not unbundle switching and transport facilities that are already combined, except upon request by a requesting carrier. Although, the Eighth Circuit struck down the Commission's rule that required incumbent LECs to rebundle separate network elements,[112] the court nevertheless stated that it: "upheld the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into the local phone markets by requiring incumbent LECs to make their networks available to . . . competing carriers."[113] Among other things, the court left in effect section 51.315(b) of the Commission's rules, which provides that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."[114] Therefore, although incumbent LECs are not required to combine transport and switching facilities to the extent that those elements are not already combined, incumbent LECs may not separate such facilities that are currently combined, absent an affirmative request. In addition to violating section 51.315(b) of our rules, such dismantling of network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit. We believe that such actions by an incumbent LEC would impose costs on competitive carriers that incumbent LECs would not incur, and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled elements. Moreover, an incumbent LEC that separates shared transport facilities that are already connected to a switch would likely disrupt service to its own customers served by the switch because, by definition, the shared transport links are also used by the incumbent LEC to serve its customers. Thus, incumbent LECs would seem to have no network-related reason to separate network elements that it already combines absent a request.

45. We likewise reject Ameritech's contention that purchasing access to the switch as a network element does not entitle a carrier to use the routing table located in that switch.[115] According to Ameritech, vendors provide switches that are capable of acting on routing instructions, but the switch itself does not include routing instructions; those instructions are added by the carrier after it purchases the switch from the vendor and are contained in a routing table resident in the switch. Ameritech asserts that its routing tables are proprietary products, and "are not a feature of the switch."[116] In the *Local Competition Order*, we

[112] *Iowa Utilities Bd.* at *25. *See also* 47 C.F.R. § 51.315(c)-(f) (vacated rules).

[113] *Iowa Utilities Bd.* at *28.

[114] 47 C.F.R. § 51.315(b).

[115] Gebhardt Supplemental Rebuttal Testimony at 6-7.

[116] Gebhardt Supplemental Rebuttal Testimony at 6-7.

determined that "we should not identify elements in rigid terms, but rather by function."[117] Routing is a critical and inseverable function of the local switch. One of the most essential features a switch performs is to provide routing information that sends a call to the appropriate destination. We find no support in the statute, the *Local Competition Order*, or our rules for Ameritech's assertion that the switch, as a network element, does not include access to the functionality provided by an incumbent LEC's routing table. In fact, the only question addressed in the *Local Competition Order* was whether requesting carriers could obtain *customized* routing, that is, routing different from the incumbent LEC's existing routing arrangements.[118]

46. We further find that access to unbundled switching is not necessarily limited to the product the incumbent LEC originally purchased from a vendor. As we noted in the *Local Competition Order*, incumbent LECs may in some instances be required to modify or condition a network element to accommodate a request under section 251(c)(3).[119] Moreover, we held that unbundled local switching includes access to the vertical features of the switch, regardless of whether the vertical features were included in the switch when it was purchased, or whether the vertical features were purchased separately from the vendor or developed by the incumbent.[120] We held that network elements include physical facilities "as well as logical features, functions, and capabilities that are provided by, *for example, software located in a physical facility such as a switch.*"[121] We also note that the Eighth Circuit affirmed the Commission's interpretation of the Act's definition of "network elements." The court stated that "the Act's definition of network elements is not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B" and that the Act's definition explicitly made reference to "databases, signaling systems, and information sufficient for billing and collection."[122] Thus, just as databases and signaling systems may include software created by the incumbent LEC, which must be made available to competitive carriers purchasing those elements on an unbundled basis, we believe that the

[117] *Local Competition Order*, 11 FCC Rcd at 15631-32, para. 259.

[118] *Local Competition Order*, 11 FCC Rcd at 15709, para. 418. We concluded that incumbent LECs must offer customized routing unless they prove to the state commission that doing so would not be technically feasible in a particular switch.

[119] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15692, para. 382. This determination was specifically "endorsed" by the Eighth Circuit. *Iowa Utilities Bd.* at *32, n.33. *See also* 47 C.F.R. § 51.307.

[120] *See generally Local Competition Order*, 11 FCC Rcd at 15706, para. 412. *See also* 47 C.F.R. § 51.319(c)(1)(i)(C).

[121] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260 (emphasis added).

[122] *Iowa Utilities Bd.* at *20.

routing table created by the incumbent LEC that is resident in the switch must be made available to requesting carriers purchasing unbundled switching. Finally, we note that Ameritech is the only incumbent LEC that has argued in this record that the routing table is not included in the unbundled local switching element. Other incumbent LECs have stated that they offer shared transport in conjunction with unbundled local switching.[123] This suggests that other incumbent LECs recognize that the routing table is a feature, function, or capability of the switch.

47. We also disagree with Ameritech's and BellSouth's argument that defining the unbundled network element shared transport as all transport links between any two incumbent LEC switches would be inconsistent with Congress's intention to distinguish between resale services and unbundled network elements. Section 251(c)(3) requires incumbent LECs to make available unbundled network elements at cost-based rates; sections 251(c)(4) and 252(d)(3) require incumbent LECs to make available for resale, at retail price less avoided costs, services the incumbent LEC offers to retail users. In the *Local Competition Order*, we held that a key distinction between section 251(c)(3) and section 251(c)(4) is that a requesting carrier that obtains access to unbundled network elements faces greater risks than a requesting carrier that only offers services for resale.[124] A requesting carrier that takes a network element dedicated to that carrier, and recovered on a flat-rated basis, must pay for the cost of the entire element, regardless of whether the carrier has sufficient demand for the services that the element is able to provide. The carrier thus is not guaranteed that it will recoup the costs of the element. By contrast, a carrier that uses the resale provision will not bear the risk of paying for services for which it does not have customers.[125] In particular, a requesting carrier that takes an unbundled local switch must pay for all of the vertical features included in the switch, even if it is unable to sell those vertical features to end user customers.[126] Requesting carriers that purchase shared transport as a network element to provide local exchange service must also take local switching, for the practical reasons set forth herein, and consequently will be forced to assume the risk associated with switching.[127]

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[123] *See* n.77 *supra*.

[124] *Local Competition Order*, 11 FCC Rcd at 15668-69, para. 334.

[125] *Iowa Utilities Bd.* at *26-27.

[126] *Local Competition Order*, 11 FCC Rcd at 15707-08, para. 414.

[127] A requesting carrier that uses its own self-provisioned local switches, rather than unbundled local switches obtained from an incumbent LEC, to provide local exchange and exchange access service would use dedicated transport facilities to carry traffic between its network and the incumbent LEC's network. Thus, the only carrier that would need shared transport facilities would one that was using an unbundled local switch.

48. BellSouth's arguement, that assessing a usage-sensitive rate for shared transport would be inconsistent with the 1996 Act because it would not reflect the manner in which costs are incurred, is similarly unpersuasive. BellSouth's argument is premised on the assumption that incumbent LECs would be required to provide shared transport over facilities between the tandem switch and the serving wire center. In this order, however, we make clear that incumbent LECs are required to provide transport on a dedicated, but not on a shared basis, over transport facilities between the incumbent LEC's tandem and the serving wire center. Thus, BellSouth's concern is misplaced.

49. We also find that there is no element in the incumbent LEC's network that is an equivalent substitute for the routing table. We agree with Ameritech that requesting carriers could duplicate the shared transport network by purchasing dedicated facilities. But in that instance, requesting carriers would be forced to develop their own routing instructions, and would not be utilizing a portion of the incumbent LEC's network to substitute for the routing table. In the *Local Competition Order*, we specifically rejected the suggestion that an incumbent LEC is not required to provide a network element if a requesting carrier could obtain the element from a source other than the incumbent LEC.[128] The Eighth Circuit affirmed the Commission's conclusion.[129]

50. Furthermore, we find that, at this stage of competitive entry, limiting shared transport to dedicated transport facilities, as Ameritech suggests, would impose unnecessary costs on new entrants without any corresponding, direct benefits. AT&T and Ameritech have both presented evidence regarding the costs of dedicated transport facilities linking every end office and tandem in a incumbent LEC's network as significant relative to the cost of "shared transport.". For example, AT&T contends that the cost is $.041767 per minute for dedicated transport plus associated non-recurring charges (NRCs).[130] AT&T claims that Ameritech would charge a total of $5008.58 per DS1 (including administrative charges and connection charges) and $58,552.87 per switch (including customized routing and billing development).[131] AT&T argues that this compares with $.000776 per minute for unbundled shared transport.[132]

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[128] *Local Competition Order*, 11 FCC Rcd at 15643-44, paras. 286-87. We found that requiring incumbent LECs to provide an element only where it is unavailable from any other source would nullify section 251(c)(3) because any new entrant, theoretically, could duplicate the incumbent LEC's entire network. Congress recognized that such duplication could delay entry and might be inefficient.

[129] *Iowa Utilities Bd.* at *22.

[130] Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, March 20, 1997 (AT&T Mar. 20 *Ex Parte*).

[131] AT&T Mar. 20 *Ex Parte*.

[132] AT&T Mar. 20 *Ex Parte*.

Ameritech, on the other hand, contends the use of tandem routed dedicated facilities cost is $.0031148 per minute plus associated NRCs.[133] Ameritech claims that the nonrecurring charges per DS1 are $2769.27 (including administrative charges per order). Ameritech states that other NRCs include two trunk port connection charges ($770.29 initial, $29.16 subsequent), service ordering charge per occasion ($398.72 initial, $17.37 subsequent), billing development charge per switch ($35,328.87), custom routing charge, per line class code per switch ($232.24), and a service order charge ($398.73).[134] Nevertheless, under either AT&T's or Ameritech's cost calculations for dedicated transport, we conclude that the relative costs of dedicated transport, including the associated NRCs, is an unnecessary barrier to entry for competing carriers.

51. We also find that limiting shared transport to dedicated facilities, as defined by Ameritech, would be unduly burdensome for new entrants. First, we agree with MCI, AT&T, et al., that a new entrant may not have sufficient traffic volumes to justify the cost of dedicated transport facilities.[135] Second, a new entrant entering the local market with smaller traffic volumes would have to maintain greater excess capacity relative to the incumbent LEC in order to provide the same level of service quality (i.e., same level of successful call attempts) as the incumbent LEC.[136] As a new entrant gains market share and increased traffic volumes for local service, however, the relative amount of excess capacity necessary to prevent blocking should decrease. We do not rule out the possibility, therefore, that, once new entrants have had a fair opportunity to enter the market and compete, we might reconsider incumbent LECs' obligations to provide access to the routing table.[137]

52. As discussed above, requesting carriers may use shared transport to provide exchange access service to customers for whom they also provide local exchange service.

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[133] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, Mar. 28, 1997 (Ameritech Mar. 28 *Ex Parte*).

[134] Ameritech Mar. 28 *Ex Parte*.

[135] *See* n. 53 *supra*.

[136] *See* William W. Sharkey, *The Theory of Natural Monopoly* 184-85, (1982) ("that for a given number of circuits the economies [of scale] are more pronounced at higher grades of service (lower blocking probability). The economics of scale, however, decline substantially as the number of circuits increases. *Therefore for small demands a fragmentation of the network could result in a significant cost penalty, because more circuits would be required to maintain the same grade of service. At larger demands the costs of fragmentation are less pronounced.*") (emphasis added).

[137] As we held in the *Local Competition Order*, "the plain language of section 251(d)(2), and the standards articulated there, give us the discretion to limit the general obligation imposed by section 251(c)(3), but they do not require us to do so." *Local Competition Order*, 11 FCC Rcd at 15643-44, para. 286.

Several competing carriers contend that an interexchange carrier (IXC) has the right to select a requesting carrier that has purchased unbundled shared transport to provide exchange access service.[138] The carriers further contend that, if the IXC selects a requesting carrier, rather than the incumbent LEC, as the exchange access provider, the competing carrier is entitled to bill the IXC for the access services associated with shared transport. We find that a requesting carrier may use shared transport facilities to provide exchange access service to originate or terminate traffic to its local exchange customers, regardless of whether the requesting carrier or another carrier is the IXC for that traffic. We further conclude that a requesting carrier that provides exchange access service to another carrier is entitled to assess access charges associated with the shared transport facilities used to transport the traffic. We believe that this necessarily follows from our decision in the *Local Competition Order*[139] where we stated that:

> [W]here new entrants purchase access to unbundled network elements to provide exchange access services, whether or not they are also offering toll services through such elements, the new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those elements. In these circumstances, incumbent LECs may not assess exchange access charges to IXCs because the new entrants, rather than the incumbents, will be providing exchange access services . . . .[140]

We therefore find that requesting carriers that provide exchange access using shared transport facilities to originate and terminate local exchange calls may also use those same facilities to provide exchange access service to the same customers to whom the requesting carrier is providing local exchange service. Requesting carriers are then entitled to assess access charges to interexchange carriers that use the shared transport facilities to originate and terminate traffic to the requesting carrier's customers.

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[138] Letter from Bruce D. Cox, Government Affairs Vice President for AT&T, to William F. Caton, Acting Secretary, FCC, July 11, 1997; WorldCom June 27 *Ex Parte*.

[139] In the *Local Competition Order*, we adopted a limited, transitional plan to address public policy concerns raised by the potential for requesting carriers to bypass access charges through the use of unbundled network elements. *See Local Competition Order* at 15862-69, paras. 716-32. Our authority to adopt that interim plan generally was upheld in *Competitive Telecommunications Association v. FCC*, although the court noted that the Commission lacks authority to decide whether carriers are obligated to continue to pay intrastate access charges. *Competitive Telecommunications Association v. FCC*, 1997 WL 352284 (8th Cir. June 27, 1997) at *6, n.5. Outside the scope of that transitional plan, however, we held that parties that use network elements to provide interexchange or exchange access services are not required to pay access charges. *Local Competition Order*, 11 FCC Rcd at 15682, para. 363; *Access Charge Reform Order* at paras. 339-340.

[140] *Local Competition Order*, 11 FCC Rcd at 15682, para. 363 n.772.

E. Final Regulatory Flexibility Analysis

53. As required by the Regulatory Flexibility Act (RFA),[141] the Commission issued a Final Regulatory Flexibility Analysis (FRFA) in its *Local Competition Order* in this proceeding.[142] None of the petitions for reconsideration filed in Docket No. 96-98 specifically address, or seek reconsideration of, that FRFA. This present Supplemental Final Regulatory Flexibility Analysis addresses the potential effect on small entities of the rules adopted pursuant to the *Third Order on Reconsideration* in this proceeding, *supra*. This Supplemental FRFA incorporates and adds to our FRFA.

54. *Need for and Objectives of this Third Order on Reconsideration and the Rules Adopted Herein.* The need for and objectives of the rules adopted in this *Third Order on Reconsideration* are the same as those discussed in the *Local Competition Order*'s FRFA "Summary Analysis of Section V Access to Unbundled Network Elements."[143] In general, our rules adopted in Section V were intended to facilitate the statutory requirement that incumbent local exchange carriers (LECs) are required to provide nondiscriminatory access to unbundled network elements.[144] In this *Third Order on Reconsideration*, we grant in part and deny in part the petitions filed for reconsideration and/or clarification of the *Local Competition Order*, in order to further the same needs and objectives. We conclude that the duty of incumbent LECs to provide access to unbundled network elements also includes the provision of "shared transport" as an unbundled network element between end offices, even if tandem switching is not used to route the traffic. We also hold that the term "shared transport" refers to all transmission facilities connecting an incumbent LEC's switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. We conclude that incumbent LECs are obligated under Section 251(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(d)(2), to provide access to both their interoffice transmission facilities and their routing tables contained in the incumbent LEC's switches. Finally, we conclude that a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service.

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[141] *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[142] *Local Competition Order*, 11 FCC Rcd at 16143-80, paras. 1324-441.

[143] *Local Competition Order* at 16161, paras. 1374-1383.

[144] *Local Competition Order* at 16161, para. 1374.

55. *Description and Estimate of the Number of Small Entities To Which the Rules Will Apply.* In determining the small entities affected by our *Third Order on Reconsideration* for purposes of this Supplemental FRFA, we adopt the analysis and definitions set forth in the FRFA in our *Local Competition Order.*[145] The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by the rules we have adopted. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[146] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[147] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[148] Consistent with our FRFA and prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."[149] While such a company may have 1500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

56. In addition, for purposes of this Supplemental FRFA, we adopt the FRFA estimates of the numbers of telephone companies, incumbent LECs, and competitive access providers (CAPs) that might be affected by the *Local Competition Order.* In the FRFA, we determined that it was reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that might be affected.[150] We further estimated that there are fewer than 1,347 small incumbent LECs that might be

[145] *See Local Competition Order* at 16149-57, paras. 1341-60.

[146] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[147] 15 U.S.C. § 632.

[148] *Id.* (*citing* 13 C.F.R. § 121.201).

[149] *See Local Competition Order*, 11 FCC Rcd at 16150, para. 1342.

[150] *Local Competition Order* at 16150, para. 1343.

affected.[151] Finally, we estimated that there were fewer than 30 small entity CAPs that would qualify as small business concerns.[152]

57. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* As a result of the rules adopted in the *Third Order on Reconsideration*, we require incumbent LECs to provide requesting carriers with access to the same shared transport for all transmission facilities connecting incumbent LECs' switches. No party to this proceeding has suggested that changes in the rules relating to access to unbundled network elements would affect small entities or small incumbent LECs. We determine that complying with this rule may require use of engineering, technical, operational, accounting, billing, and legal skills. For example, a new entrant may be required to combine its own interoffice facilities with those of the incumbent LEC, or be required to combine purchased unbundled network elements into a package unique to its own needs.

58. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As stated in our FRFA, we determined that our decision to establish minimum national requirements for unbundled elements should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[153] National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision in the *Local Competition Order*. As stated above, no petitioner has challenged this finding. We further find that our new rules, which clarify the definition of "shared transport," will likely ensure that small entities obtain the unbundled elements that they request.

59. **Report to Congress**: The Commission will send a copy of the *Third Order on Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the *Third Order on Reconsideration* and this supplemental FRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Discussion

[151] *Local Competition Order* at 16151, para. 1345.

[152] *Local Competition Order* at 16151, para. 1347.

[153] *Local Competition Order* at 16162, para 1376.

60. In the *Local Competition Order*, we did not condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer. We recognized, however, that, as a practical matter, a requesting carrier using certain network elements would be unlikely to obtain customers unless it offered local exchange service as well as exchange access service over those network elements. In particular, we found that local loops are dedicated to the premises of a particular customer.[154] Therefore, we stated that a requesting carrier would need to provide all services requested by the customer to whom the local loops are dedicated, and that, as a practical matter, requesting carriers usually would need to provide local exchange service over any unbundled local loops that it purchases under section 251(c)(3).[155] We similarly held in our *Order on Reconsideration* that the unbundled switch, as defined in the *Local Competition Order*, includes the line card, which is typically dedicated to a particular customer. We concluded that:

> Thus, a carrier that purchases the unbundled switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user. A practical consequence of this determination is that the carrier that purchases the local switching element is likely to provide all available services requested by the customer served by that switching element, including switching for local exchange and exchange access.[156]

61. Neither of the petitions for reconsideration expressly asked the Commission to determine whether requesting carriers may purchase shared transport facilities under section 251(c)(3) of the Act to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.[157] Moreover, the oppositions and replies to the two petitions for reconsideration, as well as the *ex partes*, focused on the issue of whether requesting carriers may use unbundled shared transport facilities, in conjunction

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[154] *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

[155] *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

[156] *Order on Reconsideration*, 11 FCC Rcd at 13048, para. 11.

[157] *See, e.g.*, WorldCom Petition at 6 (new local entrants may need to use shared transport facilities between end offices as well as between an end office and a tandem); WorldCom Opposition at 4 (contending that requesting carriers that purchase unbundled local switching should be able to route calls over the same facilities the incumbent LEC uses to transport its traffic); LECC Petition at 33 ("the Order requires incumbent LECs to provide unbundled access to shared transmission facilities between end offices and tandem switches . . . [t]he Commission, however, should clarify that such shared transmission facilities may be provided to a requesting carrier only in conjunction with local switching and tandem capability).

with unbundled switching, to compete in the local exchange market.[158] In fact, the issue of whether requesting carriers may purchase unbundled shared transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service was specifically addressed only in two recent *ex parte* submissions.[159] In order to develop a complete record on this issue, we issue this further notice of proposed rulemaking specifically asking whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service. Absent restrictions requiring carriers to provide local exchange service in order to purchase unbundled shared or dedicated transport facilities, an IXC, for example, could request shared or dedicated transport under section 251(c)(3) for purposes of carrying originating interstate toll traffic between an incumbent LEC's end office and the IXC's point of presence (POP). Likewise, an IXC could request such transport network elements for purposes of terminating interstate toll traffic from its POP to an incumbent LEC's end office. Parties that advocate the use of transport network elements for the transmission of such access traffic should address whether that approach is consistent with our *Order on Reconsideration* regarding the use of the unbundled local switching element to provide interstate access service[160] as well as recent appellate court decisions interpreting section 251(c)(2) and (3).[161] Parties that advocate restricting the use of transport network elements should address whether such restrictions are consistent with section 251(c)(3) of the Act, which requires an incumbent LEC to provide access to unbundled network elements "for the provision of a telecommunications service." Moreover, those parties should also address the technical feasibility of requiring an IXC to identify terminating toll traffic that is destined for customers that are not local exchange customers of the incumbent LEC.

B. Procedural Matters

1. Ex Parte Presentations

[158] WorldCom April 16 *Ex Parte* (asserting that carriers that purchase unbundled local switching have the right to use incumbent LECs' interoffice transport facilities to complete local calls); AT&T Jan. 28 *Ex Parte* (noting that the Commission had held that carriers that seek to enter the local exchange market should be able to take advantage of the incumbent LEC's economies of scale); Bell Atlantic Reply at 10 (requesting carriers are entitled to purchase shared transport in conjunction with local switching to route local calls).

[159] WorldCom June 27 *Ex Parte*; NYNEX July 18 *Ex Parte*.

[160] *Order on Reconsideration*, 11 FCC Rcd at 13048-49, para. 12-13.

[161] *CompTel*, 11 F.3d at 1073-75; *Iowa Utilities Bd.* at n. 20.

62. This *Further Notice* is a permit-but-disclose notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.[162]

2. Initial Regulatory Flexibility Analysis

63. As required by the Regulatory Flexibility Act (RFA),[163] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking* (*Further Notice*). Written public comments are requested on the IRFA. These comments must be filed by the deadlines for comment on the remainder of the Further Notice, and should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with the RFA, 5 U.S.C. § 603(a).

64. *Need for and Objectives of the Proposed Rules.* We seek comment on whether requesting carriers may use unbundled shared transport facilities in conjunction with unbundled switching, to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service. We also seek comment on whether similar use restrictions may apply to the use of unbundled dedicated transport facilities. We propose no new rules at this time. In light of comments received in response to the *Further Notice*, we might issue new rules.

65. *Legal Basis.* The legal basis for any action that may be taken pursuant to the Further Notice is contained in Sections 1, 2, 4, 201, 202, 274, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r).

66. *Description and Estimate of the Number of Small Entities That May Be Affected by the Further Notice of Proposed Rulemaking.* In determining the small entities affected by our *Further Notice* for purposes of this Supplemental FRFA, we adopt the analysis and definitions set forth in the FRFA in our *First Report and Order*.[164] The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of

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[162] *See generally* 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

[163] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[164] *Local Competition Order*, 11 FCC Rcd at 16149-57, paras. 1341-60.

small entities that might be affected by proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[165] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by SBA.[166] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[167] Consistent with our FRFA and prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."[168] While such a company may have 1500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

67. In addition, for purposes of this IRFA, we adopt the FRFA estimates of the numbers of telephone companies, incumbent LECs, and competitive access providers (CAPs) that might be affected by the *First Report and Order*. In the FRFA, we determined that it was reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that might be affected.[169] We further estimated that there are fewer than 1,347 small incumbent LECs that might be affected.[170] Finally, we estimated that there are fewer than 30 small entity CAPs that might qualify as small business concerns.[171]

68. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.* It is probable that any rules issued pursuant to the *Further Notice* would not

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[165] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[166] 15 U.S.C. § 632.

[167] *Id.* (*citing* 13 C.F.R. § 121.201).

[168] *See Local Competition Order*, 11 FCC Rcd at 16150. para. 1342.

[169] *Local Competition Order* at 16150, para. 1343.

[170] *Local Competition Order* at 16151, para. 1345.

[171] *Local Competition Order* at 16151-52, para. 1347.

change the projected reporting, recordkeeping, or other compliance requirements already adopted in this proceeding.[172]

69. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As stated in our FRFA, we determined that our decision to establish minimum national requirements for unbundled elements would likely facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[173] National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision in the *First Report and Order*. This finding has not been challenged. We do not believe that any rules that may be issued pursuant to the *Further Notice* will change this finding. We seek comment on this tentative conclusion.

70. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.* None.

3. Comment Filing Procedures

71. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before October 2, 1997, and reply comments on or before October 17, 1997. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C., 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C., 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C., 20554.

72. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also

[172] *See, e.g., Local Competition Order* at 16161-62, paras. 1374-1375.

[173] *Local Competition Order*, 11 FCC Rcd at 16162, para 1376.

comply with Section 1.49 and all other applicable sections of the Commission's Rules.[174] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

73. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to, and not a substitute for, the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

74. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C., 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C., 20503 or via the Internet to fain_t@al.eop.gov.

V. ORDERING CLAUSES

75. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201-205, 214, 251, 252, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 214, 251, 252, and 303(r), the Third Order on Reconsideration is ADOPTED.

76. IT IS FURTHER ORDERED that changes adopted on reconsideration in section III.B. and the rule appendix will be effective 30 days after publication in the Federal Register.

77. IT IS FURTHER ORDERED, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106 (1995), that the petitions for reconsideration filed by WorldCom, Inc. and the Local Exchange Carriers Coalition are DENIED IN PART and GRANTED IN PART to the extent indicated above.

[174] *See* 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length. This summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii").

78. IT IS FURTHER ORDERED, that the Commission SHALL SEND a copy of this Third Order on Reconsideration and Further Notice of Proposed Rulemaking, including the associated Supplemental Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

79. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 201, 202, 274 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r), the FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

Final Rules

Part 51--INTERCONNECTION

1. The authority citation for part 51 continues to read as follows:

Authority: Sections 1-5, 7, 201-05, 218,l 225-27, 251-54, 271, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 218, 225-27, 251-54, 271, unless otherwise noted.

2. Paragraph (d)(1) of Section 51.319 is revised to read as follows:

§ 51.319 Specific unbundling requirements.

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(d) *Interoffice Transmission Facilities.*

(1) Interoffice transmission facilities include:

(i) Dedicated transport, defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers;

(ii) Shared transport, defined as transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC's network;

3. Section 51.515 is revised to read as follows:

§ 51.515 Application of access charges.

(d) Interstate access charges described in part 69 shall not be assessed by incumbent LECs on each element purchased by requesting carriers providing both telephone exchange and exchange access services to such requesting carriers' end users.

SEPARATE STATEMENT OF CHAIRMAN REED HUNDT

RE: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Third Order on Reconsideration and Further Notice of Proposed Rulemaking

The Commission today reaffirms and clarifies a very important aspect of our Local Competition Order: the ability of a competitive local exchange carrier to obtain transport on a shared basis from the incumbent local exchange carrier. More fundamentally, this decision highlights the importance we place on incumbents making available to new entrants their network elements on a combined basis -- a combination sometimes referred to as the UNE platform.

In the Telecommunications Act of 1996, Congress mandated that new entrants into the formerly monopolized local exchange market have the ability to choose any or all of three entry strategies: interconnection, resale and unbundled network elements. Congress correctly foresaw that new entrants would need these flexible strategies if they are to compete successfully with the incumbents and their extraordinary economies of scale and scope.

In its decision last month, the Eighth Circuit explicitly affirmed our authority under the Act to define unbundled network elements. This is a very important aspect of our local competition policies. Where the purpose or effect of moves by an incumbent LEC to break apart currently combined elements is to create a barrier to competition, we will take action to tear down or prevent the erection of such barriers.