

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	
)	
Interconnection between Local Exchange)	CC Docket No. 95-185
Carriers and Commercial Mobile Radio)	
Service Providers)	
)	
_____)	

REPLY COMMENTS OF USTA

Its Attorneys

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

U.S. Telephone Association
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7249

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SUMMARY

The initial comments regarding the Further Notice in this proceeding demonstrate that the Commission should not permit requesting carriers to 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. As USTA explained in its initial comments, this is a proper application of the rule developed for local switching elements in the First Reconsideration Order, the reasoning of which applies to this situation as well.

Reversing the existing rule, as some parties advocate, would seriously harm the Commission's current efforts to reform its access charge and universal service systems. Reversal would permit IXCs and others to engage in regulatory arbitrage by "mixing and matching" unbundled network elements and exchange access services. A "mix and match" regime would cause operational problems as well, since incumbent LECs' networks are not configured to distinguish among requesting carriers or IXCs on the basis of whether they are taking transport and switching functionalities as unbundled network elements or as parts of interstate access services. A "mix and match" scenario would cause major jurisdictional problems as well, since the states would have control of the rates for unbundled network elements that carry interstate traffic.

Application of the Commission's existing rule is consistent with the 1996 Act when considered as a whole. It is also consistent with the Eighth Circuit's decisions interpreting the 1996 Act, which clearly distinguish between unbundled network elements and interstate exchange access services. As importantly, reversing the Commission's existing rule would not promote competition or its benefits.

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REPLY COMMENTS OF USTA

I. INTRODUCTION

The initial comments filed regarding the Further Notice of Proposed Rulemaking in this proceeding (the "Further Notice")^{1/} demonstrate that the Commission should not permit requesting carriers to 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.

^{1/} See Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-98, 95-185, FCC 97-295 (rel. Aug. 18, 1997) ¶¶ 3, 60-74, 79 ("Further Notice"). Paragraphs 1-2, 4-59, and 75-78 of the foregoing release are referred to herein as the "Third Reconsideration Order."

The United States Telephone Association ("USTA")^{2/} urges the Commission to state that its existing rule to this effect, adopted in the First Reconsideration Order in this docket for unbundled local switching, applies as well to shared and dedicated transport facilities used in conjunction with switching.^{3/} Application of the existing rule would avoid the unnecessary incurrence of such costs and preserve the Commission's carefully crafted plans for reform of its interstate access charge and universal service systems. This is consistent with the letter and intent of the Telecommunications Act of 1996 (the "1996 Act").^{4/}

II. REVERSING THE COMMISSION'S EXISTING RULE WOULD HARM ACCESS REFORM AND UNIVERSAL SERVICE WHILE CAUSING OPERATIONAL AND JURISDICTIONAL PROBLEMS

As USTA has explained, if the Commission were to permit carriers to use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to carry interstate toll traffic to customers to whom the carrier does not provide local exchange

^{2/} USTA filed initial comments in this proceeding. See Comments on Further Notice of Proposed Rulemaking of USTA, CC Docket Nos. 96-98, 95-185 (filed Oct. 2, 1997) ("Comments of USTA"). All references to "Comments" of a party hereinafter are to that party's initial comments in this proceeding filed on or about October 2, 1997.

^{3/} See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 11 FCC Rcd 13042 (1996) ("First Reconsideration Order") at 13047-13049. In the First Reconsideration Order, the Commission expressly held that a requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service. See *id.* at 13049.

^{4/} The 1996 Act substantially amended the Communications Act of 1934 (the "Communications Act").

service, the existing access charge regime, and consequently the universal service system, would be threatened.^{5/} Without application of the existing rule, requesting carriers would be able to "mix and match" unbundled network elements and access services.^{6/} Because of price differences among these offerings, the result would be to disrupt the revenue flows that continue to support universal service.

Some commenters, particularly interexchange carriers ("IXCs") whose profitability would most benefit from such regulatory arbitrage, dismiss the economic impacts of any change to the Commission's existing rule.^{7/} However, these impacts are substantial. USTA estimates conservatively that approximately \$700 million in incumbent LEC revenues could be lost annually if transport services were converted to unbundled network elements priced at allegedly "cost-based" levels.^{8/} Because the Commission is also considering that these unbundled network elements can be used in conjunction with unbundled switching, the net revenue losses could increase substantially.

The Commission should avoid the risk of such losses -- and the consequent harm to the universal service system -- by applying its existing rule of the First Reconsideration

^{5/} See Comments of USTA at 3, 8-10, GTE at 4-10.

^{6/} See, e.g., Comments of WorldCom, Inc. ("WorldCom") at 4 (describing a "mix and match" scenario).

^{7/} See, e.g., Comments of AT&T Corp. ("AT&T") at 7 (stating that any losses "would be a small fraction" of the access revenues collected annually.)

^{8/} This estimate is based on data from RBOCs only. If other USTA members were included, USTA would expect the estimated annual loss to increase. See also Comments of BellSouth at 4 (estimating a net revenue loss to it of nearly \$300 million if all transport services are converted to unbundled network elements, and considerably more if used in conjunction with unbundled switching).

Order. Some commenters incorrectly claim that a "mix and match" regime, under which requesting carriers could freely substitute unbundled network elements for access services without serving local customers, would further the Commission's goals of "market-based" access charge reform.^{9/} Such arguments ignore the disruptive manner in which this would occur, since under a "mix and match" regime, requesting carriers would likely replace their use of exchange access service with unbundled network elements priced at far lower rates. Indeed, such a regime would not be "market-based" at all. The rates for the unbundled network elements that would substitute for exchange access service are set under state regulation, pursuant to interconnection agreements or arbitration. This, of course, would be contrary to the Commission's transitional approach in its ongoing "market-based" proceedings on reforming the access charge and universal service systems. Those proceedings recognize the need for interstate access charges to recover universal service support, at present and until January 1, 1999.^{10/} Some of the Commission's actions in those proceedings affirm existing subsidies and add new ones.^{11/}

As the Association for Local Telecommunications Services ("ALTS") points out, the arbitrage implicit in a "mix and match" regime would undercut the Commission's carefully

^{9/} See Comments of MCI Telecommunications Corp. ("MCI") at 4-5, AT&T at 5-6.

^{10/} See Comments of GTE at 4-5, *citing Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1997) ("Universal Service Order")* ¶ 246 n.650, and *Access Charge Reform, First Report and Order, CC Docket No. 96-262, FCC 97-158 (rel. May 16, 1997) ("Access Charge Order")* ¶¶ 9, 15.

^{11/} See Comments of GTE at 5 n.11.

crafted process of access charge reform.^{12/} Sprint Corporation ("Sprint") also notes the need to avoid upsetting the "delicate balance" of proceedings that the Commission has established in implementing the local telecommunications provisions of the 1996 Act.^{13/} That process should not be derailed by uncoordinated action based on the Further Notice. Maintenance of the First Reconsideration Order's existing rule is consistent with the Eighth Circuit's *CompTel* decision,^{14/} which upheld an interim requirement as a reasonable means of avoiding "serious disruption" of universal service for the nine-month period between the adoption of the Interconnection Order and the statutory deadline for the adoption of universal service rules under the 1996 Act.^{15/} As USTA has noted, the complex situation facing the Commission amply justifies application of the existing rule to unbundled shared and dedicated transport used in conjunction with switching.

Operational difficulties will also result if the Commission's existing rule is not applied to the scenario of the Further Notice. As Southwestern Bell Telephone Company ("SWBT") describes, incumbent LECs' networks have been engineered to route calls efficiently and bill based on assumptions consistent with the present system of access charges. These networks are not configured to distinguish among requesting carriers on the basis of whether they are taking transport and switching functionalities as unbundled network elements or as parts of

^{12/} See Comments of ALTS at 3, 7-9.

^{13/} See Comments of Sprint at 2, 4-5.

^{14/} See *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

^{15/} See *id.* at 1074.

interstate exchange access services.^{16/} These difficulties are especially significant because, as the Eighth Circuit has found, the 1996 Act "implicitly requires unbundled access only to an incumbent LEC's *existing* network -- not to a yet unbuilt superior one."^{17/} Indeed, although some parties complain of various technical configurations to which, they allege, the existing rule would subject them,^{18/} today's networks cannot feasibly be adapted to the complexities of a "mix and match" regime.

As importantly, a "mix and match" regime would have unlawful jurisdictional consequences. The rates for unbundled network elements are under the states' jurisdiction, while the rates for interstate access services are under the Commission's jurisdiction.^{19/} As a result, if the Commission were to permit the substitution of unbundled shared and dedicated transport elements for interstate exchange access services, it would improperly cede to the states jurisdiction over the affected interstate traffic.^{20/} The National Exchange Carrier Association, Inc. ("NECA") notes that substantial shifts in jurisdictional cost recovery could result, with adverse effects to carriers subject to both federal and state regulation.^{21/}

^{16/} See Comments of SWBT at 3-5, 6 ("This is an industry problem in that the Further Notice would demand treatment of access that the Public Switched Network is currently incapable of accomplishing. ").

^{17/} See *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*Iowa Utilities Board*") at 813 (emphasis in original).

^{18/} See, e.g., Comments of Competitive Telecommunications Association ("*CompTel*") at 5-6.

^{19/} See generally *Iowa Utilities Board*, *supra* note 17.

^{20/} See Comments of USTA at 6-8, Ameritech at 4, SWBT at 7-8, NECA at 2-3.

^{21/} See Comments of NECA at 3.

Failure to apply the existing rule would violate the jurisdictional boundary established by section 2(b) of the Communications Act and affirmed by the Eighth Circuit in *Iowa Utilities Board*. An IXC that purchases unbundled transport and switching elements in lieu of interstate access services would have no incentive to block intrastate toll calls, resulting in the improper bypass of intrastate, as well as interstate, access charges.^{22/}

III. APPLICATION OF THE COMMISSION'S EXISTING RULE IS CONSISTENT WITH THE 1996 ACT AND THE JUDICIAL DECISIONS INTERPRETING IT

Application of the Commission's existing rule to carriers purchasing switched or dedicated transport in conjunction with switching is consistent with section 251(c)(3) of the Communications Act. As several commenters have shown, that section cannot be read in isolation, but must be considered together with other statutory provisions, particularly sections 251(g) and (i).^{23/} In contrast, commenters that propose a change to the Commission's existing rule incorrectly focus on a narrow reading of section 251(c)(3) standing by itself, without reference to the rest of the Communications Act.^{24/}

Indeed, sections 251(g) and (i), as well as the legislative history of the 1996 Act, demonstrate the intent of the 1996 Act to preserve the existing access charge regime until the

^{22/} See Comments of GTE at 12.

^{23/} See, e.g., Comments of Ameritech at 5-14, Bell Atlantic at 3, NECA at 5, Time Warner Communications Holdings Inc. ("Time Warner") at 13.

^{24/} See, e.g., Comments of AT&T at 3-4, CompTel at 3-4, MCI at 3-4, WorldCom at 2-3.

Commission explicitly supersedes it.^{25/} In the context of local switching elements and unbundled local loops, the Commission has already moved strongly to preserve, not supersede, the access charge regime. In addressing the issues posed by the Further Notice, the Commission should do nothing to supersede or otherwise upset its ongoing major proceedings addressing access charge reform and the related areas of universal service and interconnection.

Moreover, the Eighth Circuit's recent decisions highlight the distinctions between unbundled network elements and interstate exchange access services recognized by the Act.^{26/} Although some parties attempt to distinguish the Eighth Circuit's holdings, these efforts are unavailing. For example, MCI claims that the Eighth Circuit's holding in *Iowa Utilities Board* is "not germane" because it is jurisdictional.^{27/}

To the contrary, the *Iowa Utilities Board* holding clearly upholds the distinction between unbundled network elements and interstate exchange access services. To the extent that the holding is couched in jurisdictional terms, it serves to emphasize the jurisdictional problems, discussed above, that a change to the existing rule would cause. Similarly, WorldCom attempts to distinguish *Iowa Utilities Board* by citing an unrelated holding in that

^{25/} Commenters seeking a change to the Commission's existing rule as applied to switched and dedicated transport conveniently do not address these statutory provisions. *See, e.g.,* Comments of CompTel at 3-4, AT&T at 4, MCI at 3, WorldCom at 2-3.

^{26/} *See Iowa Utilities Board*, 120 F.3d at 799 n.20 (holding generally that unbundled access is designed to enable a requesting carrier to offer local exchange service, while exchange access is designed for use by IXCs without enabling them to provide local telephone service themselves), *CompTel*, 117 F.3d at 1073.

^{27/} *See* Comments of MCI at 9.

decision that addresses operator services, directory assistance, caller I.D., call forwarding, and call waiting.^{28/} However, it fails to acknowledge that decision's specific and explicit distinction between unbundled access and exchange access services. Nor can parties downplay the Eighth Circuit's consistent holding in *CompTel*.^{29/} Indeed, MCI concedes that a different portion of *CompTel* holds that "LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-[1996 Act] regulations and rates."^{30/}

Application of the existing rule to the issues of the Further Notice is completely consistent with the 1996 Act and the appellate decisions interpreting it.

IV. THE REASONING OF THE FIRST RECONSIDERATION ORDER AND THE INTERCONNECTION ORDER APPLIES TO THE ISSUES RAISED IN THE FURTHER NOTICE AS WELL

In analyzing the issues associated with the use of unbundled local switching elements, the reasoning of the First Reconsideration Order applies as well to requesting carriers' use of dedicated or shared transport facilities in conjunction with switching. As USTA has noted,^{31/} the First Reconsideration Order explicitly conditioned use of unbundled local

^{28/} See Comments of WorldCom at 9.

^{29/} See 117 F.3d at 1073 (holding that IXCs are seeking to use incumbent LECs' networks to route long distance calls while "newcomer LECs" seek to use those networks to offer competing local service, and finding that the services sought are distinct).

^{30/} See Comments of MCI at 8, citing *CompTel*, 117 F.3d at 1074.

^{31/} See Comments of USTA at 11-12.

switching elements on the requesting carrier's provision of local exchange service to end users. That condition closely followed the Interconnection Order's analogous holding that "a carrier must, at least with respect to unbundled loops, provide an end user all of the services that the end user requests," including local exchange service.^{32/}

Despite the claims of some commenters, a similar analysis applies to a requesting carrier's use of dedicated and switched transport elements in conjunction with switching. Some wrongly contend that if shared or dedicated transport is offered with tandem switching, as opposed to local switching, the reasoning of the First Reconsideration Order no longer applies, since, for example, neither the transport elements nor the tandem switching elements include facilities dedicated to a particular customer as local switching elements do.^{33/} These commenters fail to recognize that shared and dedicated transport in many cases are not provided separately from unbundled local switching, as the Third Reconsideration Order recognizes.^{34/}

As a practical matter, requesting carriers and IXC's cannot share switching elements, particularly those elements' associated routing tables, with LECs, including CLECs.^{35/} The

^{32/} See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499 (1996) ("Interconnection Order") ¶ 357. The Interconnection Order was vacated in part and affirmed in part by *Iowa Utilities Board*, *supra* note 17.

^{33/} See Comments of WorldCom at 7-8 (discussing presence of line cards in local switching elements), CompTel at 10-11. See also Comments of Sprint at n. 2, LBC Communications Inc. at 2.

^{34/} See Comments of Ameritech at 17, *citing* Third Reconsideration Order ¶¶ 23 n. 69, 25, 42, and 47.

^{35/} See Comments of Time Warner at 9-11.

Third Reconsideration Order held that purchasers of unbundled local switching have the right to the same routing tables that the LEC uses for its traffic, since the routing function is part of the local switching element.^{36/} However, requesting carriers that purchase unbundled shared or dedicated transport elements instead of exchange access services must also use the routing tables in LEC end offices in order to properly route their traffic. This situation can result in a conflict over control of these routing tables between purchasers of unbundled switching elements and purchasers of unbundled shared or dedicated transport, under which neither purchaser has control over or "exclusive use of" the tables. This conflict can best be resolved if shared or dedicated transport can only be purchased in conjunction with switching elements, whether tandem switching or local switching elements.

Moreover, the analysis of the First Reconsideration Order relied predominantly on an evaluation of the rights of carriers that purchase local switching and the likely requests for service of end users served by those switching elements, not the technical details of the affected elements.^{37/} The Commission found that such carriers "would be likely to provide all available services" requested by those users, such as local exchange service.^{38/}

In the competitive environment being created by the 1996 Act, requesting carriers will increasingly seek to distinguish themselves from competitors by marketing and advertising to end users, and by offering "one-stop shopping" for integrated packages of services.

^{36/} See Third Reconsideration Order ¶ 46.

^{37/} For example, although the First Reconsideration Order found that unbundled local switching elements contain line cards that are "often dedicated to a particular customer," this was not the decisive factor in its analysis. See First Reconsideration Order at 13048.

^{38/} *Id.*

Practically speaking, end users will expect to be able to obtain local exchange service from requesting carriers, as the Commission found to be the case for such carriers that purchase local switching elements. The Commission's existing rule, like that of the First Reconsideration Order, is consistent with this market process.

V. REVERSING THE COMMISSION'S EXISTING RULE WOULD NOT PROMOTE COMPETITION OR THE BENEFITS THAT IT COULD BRING

Permitting a "mix and match" scenario to unfold would not bring additional competitive benefits to consumers or carriers. The substitution of unbundled network elements for exchange access services would permit IXCs to bypass competitive access providers, based not on more efficient competition but on a change in the regulatory environment.^{39/} This would eliminate any incentive for new carriers to compete in the provision of competitive access services.^{40/} Such a rule change, contrary to the settled approach of the First Reconsideration Order, would also heighten the regulatory uncertainty that can stunt innovation and competitive entry.

CompTel incorrectly decries the effects of continued application of the existing rule. It expresses concern that requesting carriers that offer local exchange service, and thus will be able to obtain unbundled elements as substitutes for exchange access service, will have an "artificial cost advantage" over long-distance competitors that do not so enter.^{41/} While it

^{39/} See Comments of BellSouth at 11-12.

^{40/} See Comments of Bell Atlantic at 4.

^{41/} See Comments of CompTel at 5.

is the case that the pricing of unbundled network elements is highly artificial, USTA believes that this framework provides major incentives for local entry, and is consistent with the distinctions between unbundled network elements and exchange access services established in the 1996 Act.

VI. CONCLUSION

In light of the foregoing, USTA respectfully requests the Commission to continue to apply its existing rule, adopted in the First Reconsideration Order, to prohibit requesting carriers from using unbundled dedicated or shared transport facilities in conjunction with unbundled switching to originate or terminate interstate traffic for customers unless those carriers provide local exchange service to the affected customers.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

By: Keith Townsend

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

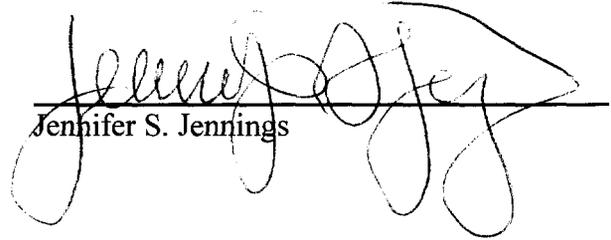
U.S. Telephone Association
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7249

October 17, 1997

USTA Reply - October 17, 1997

CERTIFICATE OF SERVICE

I, Jennifer Jennings, do certify that on October 17, 1997, copies of the foregoing
Comments of the United States Telephone Association were either hand-delivered, or deposited
in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.


Jennifer S. Jennings

William Kennard
General Counsel
Federal Communications Commission
1919 M Street, NW, Room 644
Washington, DC 20554

Janice Myles (1cc&1disk)
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, DC 20554

Robert J. Hix
Vincent Majkowski
Colorado PUC
1580 Logan Street
Office Level 2
Denver, CO 80203

Ann Kutter
Douglas Elfner
NYS Consumer Protection Board
99 Washington Avenue - Suite 1020
Albany, NY 12210

Carol Weinhaus
Telecommunications Industries Analysis Project
University of Florida College of Business Admin.
121 Mt. Vernon Street
Boston, MA 02108

Richard A. Finnigan
Washington Independent Telephone Assn.
2405 Evergreen Park Drive, SW
Suite B-1
Olympia, WA 98502

Philip L. Verveer
Sue D. Blumenfeld
Thomas Jones
Willkie Farr & Gallagher
Three Lafayette Centre - 1155 21st Street, NW
Washington, DC 20036

Janet Reno
Attorney General
US Department of Justice
10th & Constitution Ave, NW, Room 5111
Washington, DC 20530

David L. Meier
Cincinnati Bell
201 E. Fourth Street
P.O. Box 2301
Cincinnati, OH 45201

Bruce Hagen
Susan E. Wefald
Leo M. Reinbold
North Dakota PSC
600 E. Boulevard
Bismarck, ND 58505

W. Benny Won #76385
Public Utility Section
Oregon Department of Justice
1162 Court Street, NE
Salem, OR 97310

Edward C. Addison
Virginia State Corporation Commission
Division of Communications
P.O. Box 1197
Richmond, VA 23218

Howard J. Symons
Sara S. Seidman
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, PC
701 Pennsylvania Avenue, NW - Suite 900
Washington, DC 20004

Bridger Mitchell
Charles River Associates, Inc.
285 Hamilton Avenue
Suite 370
Palo Alto, CA 94301

David Turetsky
Carl Shapiro
Antitrust Division
US Department of Justice
555 4th Street, NW - Room 8104
Washington, DC 20001

Andrew Joskow
John Haynes
Antitrust Division
US Department of Justice
555 4th Street, NW - Room 8104
Washington, DC 20001

Barry Grossman
Antitrust Division
US Department of Justice
555 4th Street, NW - Room 8104
Washington, DC 20001

Michael F. Altschul
Randall S. Coleman
Cellular Telecommunications Industry Assn.
1250 Connecticut Avenue, NW
Suite 200
Washington, DC 20036

Rachel J. Rothstein
Ann P. Morton
Cable & Wireless, Inc.
8219 Leesburg Pike
Vienna, VA 22182

Cindy Schonhaut
Intelcom Group (USA) Inc.
9605 East Maroon Circle
Englewood, CO 80112

Stephen R. Rosen
Theodore M. Weitz
Lucent Technologies, Inc.
475 South Street
Morristown, NJ 07962

Anne K. Bingaman
Antitrust Division
US Department of Justice
555 4th Street, NW - Room 8104
Washington, DC 20001

John Henly
Antitrust Division
US Department of Justice
555 4th Street, NW - Room 8104
Washington, DC 20001

Donald J. Russell
Luin Fitch
Antitrust Division
US Department of Justice
555 4th Street, NW - Room 8104
Washington, DC 20001

James D. Ellis
Robert M. Lynch
David F. Brown
SBC Communications, Inc.
175 E. Houston - Room 1254
San Antonio, TX 78205

Danny E. Adams
John J. Heitmann
Kelley Drye & Warren, LLP
1200 19th Street, NW
Washington, DC 20036

Albert H. Kramer
Robert F. Aldrich
Dickstein, Shapiro & Morin, LLP
2101 L Street, NW
Washington, DC 20037

Riley M. Murphy
Charles Kallenbach
American Communications Services, Inc.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Brad E. Mutschelknaus
Steve A. Augustino
Marieann Zochowski
Kelley Drye & Warren
1200 19th Street, NW - Suite 500
Washington, DC 20036

David W. Carpenter
Peter D. Keisler
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Mark C. Rosenblum
Roy E. Hoffinger
AT&T
295 North Maple Avenue
Room 324511
Basking Ridge, NJ 07920

Joel E. Lubin
Richard N. Clarke
AT&T
295 North Maple Avenue
Room 324511
Basking Ridge, NJ 07920

Kent E. Lillie
Shop At Home, Inc.
5210 Schubert Road
Knoxville, TN 37912

Christopher C. Kempley
Deborah R. Scott
Arizona Corporation Comm.
1200 West Washington Street
Phoenix, AZ 85007

Thomas J. O'Brien
Karen J. Hardie
Office of the Consumers' Counsel
77 South High Street - 15th Floor
Columbus, OH 43266

Lisa B. Smith
Mary L. Brown
MCI
1801 Pennsylvania Avenue, NW
Washington, DC 20006

David L. Lawson
David M. Levy
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Stephen C. Garavito
Richard H. Rubin
AT&T
295 North Maple Avenue
Room 324511
Basking Ridge, NJ 07920

Karen E. Weis
AT&T
295 North Maple Avenue
Room 324511
Basking Ridge, NJ 07920

James A. Eibel
Network Reliability Council II Secretariat
7613 William Penn Place
Indianapolis, IN 46256

Robert S. Tongren
David C. Bergmann
Office of the Consumers' Counsel
77 South High Street - 15th Floor
Columbus, OH 43266

Agris Pavlovskis
Michigan Exchange Carriers Assn., Inc.
1400 Michigan National Tower
Lansing, MI 48901

Glen A. Schmiede
Mark J. Burzych
Foster, Swift, Collins & Smith, PC
313 South Washington Square
Lansing, MI 48933

Bradley C. Stillman
Dr. Mark N. Cooper
Consumer Federation of America
1424 16th Street, NW
Washington, DC 20036

Stephen G. Oxley
Wyoming PSC
700 W. 21st Street
Cheyenne, WY 82002

Laura H. Phillips
J.G. Harrington
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, NW - Suite 800
Washington, DC 20036

John G. Lamb, Jr.
Northern Telecom Inc.
2100 Lakeside Boulevard
Richardson, TX 75081

Mark J. Golden
Robert R. Cohen
Personal Communications Industry Assn.
500 Montgomery Street - Suite 700
Alexandria, VA 22314

Timothy R. Grahm
Robert M. Berger
Joseph M. Sandri, Jr.
Winstar Communications, Inc.
1146 19th Street, NW
Washington, DC 20036

Peter A. Rohrbach
Linda L. Oliver
Kyle D. Dixon
Hogan & Hartson, LLP
555 13th Street, NW
Washington, DC 20004

Steven T. Nouse
PUC of Ohio
180 East Broad Street
Columbus, OH 43266

Werner K. Hartenberger
Leonard J. Kennedy
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, NW - Suite 800
Washington, DC 20036

Stephen L. Goodman
Halprin, Temple, Goodman & Sugrue
1100 New York Avenue
Suite 650 - East Tower
Washington, DC 20005

Wayne V. Black
C. Douglas Jarrett
Susan M. Hafeli
Keller and Heckman
1001 G. Street, NW - Suite 500 West
Washington, DC 20001

Dana Frix
Maury C. Albert
Antony R. Petrilla
Swidler & Berlin, Chtd.
3000 K Street, NW - Suite 300
Washington, DC 20007

Laurie Pappas
Texas Office of Public Utility Counsel
7800 Shoal Creek
Suite 290-E
Austin, TX 78757

Charles C. Hunter
Hunger & Low, PC
1620 Eye Street, NW
Suite 701
Washington, DC 20006

Mike Pabian
Larry Peck
Gary Phillips
Ameritech
30 South Wacker Drive
Chicago, IL 60606

William P. Barr
Ward W. Wueste
Gail L. Polivy
GTE
1850 M Street, NW - Suite 1200
Washington, DC 20036

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
Sprint
1850 M Street, NW - 11th Floor
Washington, DC 20036

Madelyn M. DeMatteo
Alfred J. Brunetti
Maura C. Bollinger
SNET
227 Church Street
New Haven, CT 06506

Genevieve Morelli
Competitive Telecommunications Assn.
1900 M Street, NW
Suite 800
Washington, DC 20036

Aaron I. Fleischman
Richard Rubin
Fleischman and Walsh, LLP
1400 16th Street, NW
Washington, DC 20036

Thomas P. Hester
Kelly R. Welsh
John T. Lenahan
Ameritech
30 South Wacker Drive
Chicago, IL 60606

Antoinette Cook Bush
Linda G. Morrison
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, NW
Washington, DC 20005

Richard E. Wiley
R. Michael Senkowski
Jeffrey S. Linder
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Rodney J. Joyce
J. Thomas Nolan
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, NW
Washington, DC 20036

Michael H. Hammer
Michael G. Jones
Jennifer L. Desmond
Willkie Farr & Gallagher
Three Lafayette Centre - 1155 21st Street, NW
Washington, DC 20036

Robert J. Aamoth
Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20005

Mitchell F. Brecher
Steven N. Teplitz
Fleischman and Walsh, LLP
1400 16th Street, NW
Washington, DC 20036

Paul B. Jones
Janis A. Stahlhut
Donald F. Shephard
Timer Warner Communications Holdings, Inc.
300 Stamford Place
Stamford, CT 06902

Daniel J. Brenner
Neal M. Goldberg
David L. Nicoll
NCTA
1724 Massachusetts Avenue, NW
Washington, DC 20036

Charon R. Harris
Jennifer A. Purvis
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PPC
701 Pennsylvania Avenue, NW - Suite 900
Washington, DC 20004

Jot D. Carpenter
Telecommunications Industry Assn.
1201 Pennsylvania Avenue, NW
Suite 315
Washington, DC 20044

Andrew D. Lipman
Russell M. Blau
Swidler & Berlin, Chtd.
3000 K Street, NW
Suite 300
Washington, DC 20007

Robert B. McKenna
Kathryn Marie Krause
James T. Hannon
U S WEST
1020 19th Street, NW - Suite 700
Washington, DC 20036

Karen Finstad Hammel
Montana PSC
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620

Richard J. Metzger
Emily Williams
Association for Local Telecommunications Services
888 17th Street, NW
Suite 900
Washington, DC 20006

Howard J. Symons
Cherie R. Kiser
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PPC
701 Pennsylvania Avenue, NW - Suite 900
Washington, DC 20004

Saul Fisher
William J. Balcerski
Joseph Di Bella
NYNEX
1300 I St., NW, STE. 400 West
Washington, DC 20005

David N. Porter
MFS Communications Co., Inc.
3000 K Street, NW
Suite 300
Washington, DC 20007

Paul Rodgers
Charles D. Gray
James Bradford Ramsay
NARUC
1102 ICC Building - P.O. Box 684
Washington, DC 20044

Joel B. Shifman
Maine PUC
242 State Street - State House Station No. 18
Augusta, ME 04333

Commissioner Lowell C. Johnson
Nebraska PSC
300 The Atrium
1200 N Street,
P.O. Box 94927
Lincoln, NE 68509

E. Barclay Jackson
New Hampshire PUC
8 Old Suncook Road
Concord, NH 03301

David Kaufman
New Mexico State Corporation Comm.
P.O. Box 1269
Santa Fe, NM 87504

Stephen F. Mecham
160 East 300 South
P.O. Box 45585
Salt Lake City, UT 84145

Michael L. Ginsberg
160 East 300 South
P.O. Box 146751
Salt Lake City, UT 84145

Sheldon M. Katz
Vermont Department of Public Service
Drawer 20
Montpelier, VT 05620

George E. Young
Vermont Public Service Board
Drawer 20
Montpelier, VT 05620

Rolayne Ailts
SD PUC
500 E. Capital
Pierre, SD 57501

Terrence P. McGarty
COMAV, Corp.
60 State Street - 22nd Floor
Boston, MA 02109

Edward D. Young III
Leslie A. Vial
Bell Atlantic
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

Richard M. Tettlebaum
Citizens Utilities Company
1400 16th Street, NW
Suite 500
Washington, DC 20036

Robert A. Mazer
Albert Shuldiner
Mary Pape
Vinson & Elkins
1455 Pennsylvania Avenue, NW
Washington, DC 20004

J. Manning Lee
Teleport Communications Group, Inc.
One Teleport Drive
Suit 300
Staten Island, NY 10311

Earl Pace
BDPA
1250 Connecticut Avenue, NW
Suite 610
Washington, DC 20036

John Crump
National Bar Assn.
1225 11th Street, NW
Washington, DC 20001

Richard N. Koch
10 Lilac Street
Sharon, MA 02067

Dwight E. Zimmerman
Illinois Independent Telephone Assn.
RR 13, 24B Oakmont Road
Bloomington, IL 61704

Anne P. Schelle
American Personal Communications
One Democracy Center
6901 Rockledge Drive
Suite 600
Bethesda, MD 20817

Aliceann Wohlbruck
National Association of Development Organizations
444 North Capitol Street, NW
Suite 630
Washington, DC 20001

Charles H. Kennedy
James a. Casey
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, NW
Suite 5500
Washington, DC 20006

Robert C. Schoonmaker
GVNW Inc./Management
P.O. Box 25969
Colorado Springs, CO 80936

Charles H. Carrathers, III
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

Eric J. Branfman
GST Telecom, Inc.
3000 K Street, NW
Suite 300
Washington, DC 20007

Mark J. Tauber
Kecia Boney
Mark J. O'Connor
Piper & Marbury, LLP
1200 19th Street, NW
Washington, DC 20036

Paul Glist
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Anthony M. Black
Bell, Boyd & Lloyd
1615 L Street, NW
Suite 1200
Washington, DC 20036

Dana Frix
Swidler & Berlin
3000 K Street, NW
Suite 300
Washington, DC 20007

Mark J. Golden
Robert R. Cohen
Personal Communications Industry Assn.
500 Montgomery Street
Suite 700
Alexandria, VA 22314

Carolyn C. Hill
ALLTEL
655 15th Street, NW
Suite 220
Washington, DC 20005