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November 24, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: **Ex Parte Presentation**
CC Docket 96-98

Dear Ms. Salas:

Attached for inclusion in the public record for the above referenced proceeding is a copy of the Brief of Ameritech in its Appeal of the FCC's Third Report and Order.

Should any questions arise in connection with this filing, please contact the undersigned. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Lynn Shapiro Starr".

Attachment

cc: Richard Metzger
Richard Welsh
Don Stockdale

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IN THE UNITED STATES COURT OF APPEALS **RECEIVED**
FOR THE EIGHTH CIRCUIT

NOV 24 1997

Nos. 97-3389/3576/3663

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Consolidated Petitions for Review of an Order of the
Federal Communications Commission

**BRIEF FOR PETITIONERS AMERITECH CORP., THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE CO., AND U S WEST, INC.
and INTERVENORS BELL ATLANTIC TELEPHONE COMPANIES, GTE ENTITIES, AND
UNITED STATES TELEPHONE ASSOCIATION**

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

These consolidated petitions seek review of a final FCC order that violates the express terms of the Telecommunications Act of 1996 and contradicts this Court's decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997). The 1996 Act gives new entrants three different options for competing in local telephone markets: deploying their own facilities and interconnecting them with the network of the incumbent local exchange carrier ("LEC"); purchasing the incumbent LEC's services at wholesale rates and then reselling them to end users; or purchasing unbundled network elements ("UNEs") from the incumbent LEC and then combining them to offer a telecommunications service. In Iowa Utilities Board, this Court emphasized that the UNE option differs in material respects from the resale option. A new entrant using UNEs, unlike a simple reseller, must plan its own network, obtain the network elements on an "unbundled basis," combine them itself, and assume the risk that demand will be insufficient to cover the new entrant's investment. Moreover, the Court held that incumbent LECs are not required to provide preassembled combinations of UNEs because that would "obliterate the careful distinctions Congress has drawn" between resale and UNEs.

In the order under review here, the FCC requires incumbent LECs to provide "shared transport," which the FCC claims is a UNE. By the agency's own admission, "shared transport" is a preassembled combination of facilities that the FCC has previously ruled to be separate and distinct UNEs in their own right. Moreover, the FCC expressly designed "shared transport" to relieve new entrants of the risk of miscalculating demand – precisely the risk that this Court held new entrants using UNEs must bear. The FCC order is flatly inconsistent with the Act and this Court's decision in Iowa Utilities Board and should therefore be set aside.

This Court has ordered that argument will be heard during the week of January 12, 1998.

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PRELIMINARY STATEMENT

These consolidated petitions seek review of the Federal Communication Commission's Third Order on Reconsideration, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC No. 97-295 (rel. Aug. 18, 1997) ("Third Reconsideration Order"). A synopsis of the Order was published in the Federal Register on August 28, 1997 at 62 Fed. Reg. 45,579.

The FCC issued the Third Reconsideration Order to implement selected parts of section 251 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. The FCC has jurisdiction to implement portions of that section pursuant to 47 U.S.C. § 251(d). This Court has jurisdiction to review FCC final orders pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

Petitioner Southwestern Bell filed its petition for review in this Court on September 5, 1997. Petitioners Ameritech, Southern New England Telephone, and U S WEST filed their petitions for review in other circuits on September 4, October 22, and September 5, 1997, respectively. All of the petitions were therefore timely filed within 60 days of the entry of the Order (defined by FCC regulations as the date of publication in the Federal Register). See 28 U.S.C. § 2344; 47 C.F.R. § 1.4(a), (b)(1). The Ameritech and U S WEST petitions were transferred to this Court pursuant to 28 U.S.C. § 2112(a)(5) on October 15 and October 1, 1997, respectively. The U.S. Court of Appeals for the District of Columbia Circuit likewise transferred the Southern New England Telephone petition on November 17, 1997. In the event that this Court has not yet received this petition from the D.C. Circuit, Southern New England Telephone

has authorized the undersigned counsel to represent that it endorses the contents of this brief and plans to join it as soon as is practicable.

The motions to intervene by GTE and the United States Telephone Association were granted by this Court on November 18, 1997.

STATEMENT OF ISSUE

Whether the FCC has unlawfully defined “shared transport” in its Third Reconsideration Order because it requires incumbent local exchange carriers to provide to new entrants existing combinations of network elements, enables new entrants to evade the investment risk that the 1996 Act requires purchasers of unbundled access to bear, shifts this risk to the incumbent, and destroys the careful distinction drawn in the 1996 Act between unbundled access to network elements and resale of telecommunications services.

47 U.S.C. §§ 251(c)(3), (4)

Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), amended on rehearing October 14, 1997, petitions for cert. filed (U.S. November 17, 1997) (Nos. 97-826/829/830/831).

STATEMENT OF THE CASE

1. Section 251(c) of the Telecommunications Act of 1996. The Telecommunications Act of 1996 ("the 1996 Act" or "the Act"), Pub. L. No. 104-104, 110 Stat. 56, amended the Communications Act of 1934, 47 U.S.C. §§ 151-614, to open all parts of the telephone service business, local and long distance alike, to competitive entry. Enacted after nearly a decade of debate, the 1996 Act establishes a carefully designed structure to guide the transformation to a new competitive environment.

Section 251(c) of the 1996 Act (attached as Addendum) identifies three distinct methods by which telecommunications carriers may enter local service markets. See 47 U.S.C. § 251(c). The methods vary in the degree to which new entrants physically build their own telecommunications facilities and, therefore, also in the risks and rewards offered to the new entrants. At one end of the spectrum, section 251(c)(2) enables new entrants to compete by building their own complete telecommunications networks. Recognizing that a customer is unlikely to subscribe to a new entrant's service unless he can call and be called by users of the network of the incumbent local exchange carrier ("LEC"), Congress provided in section 251(c)(2) that the incumbent must "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent LEC's] network."^{1/}

At the other end of the spectrum, the 1996 Act enables new entrants to begin to compete without constructing any physical facilities of their own. Section 251(c)(4) allows a new entrant to buy complete telecommunications services from the incumbent LEC (that is, the same services that the incumbent LEC provides to end users) and then resell those services to

^{1/} Facilities-based competition has been possible in many areas for some time, but the 1996 Act's interconnection requirement is the first federal requirement of its kind.

customers in competition with the incumbent LEC. When a new entrant buys a finished service for resale, the new entrant does not need to know how the incumbent provides the service to the new entrant's customers. In particular, the new entrant does not need to know how calls are switched or transported within the local network; the incumbent LEC determines which routes and facilities are the most efficient and economical to transport the calls. The Act requires the incumbent to provide such services at wholesale prices, defined as the retail price less the "marketing, billing, collection, and other costs that will be avoided" by the incumbent LEC in selling at wholesale. 47 U.S.C. § 252(d)(3).

In between these two options, section 251(c)(3) gives new entrants access to network elements on an "unbundled basis" and permits the new entrant "to combine such elements in order to provide . . . telecommunications service." This subsection enables a new entrant to lease some or all of the individual elements of the incumbent LEC's network instead of having to construct those facilities itself and to assemble them into functional combinations with other facilities, whether leased or owned. Thus, for each individual facility necessary to provide a telecommunications service, a new entrant has the choice of either deploying the facility for itself or buying it from the incumbent LEC. The price for unbundled network elements ("UNEs") purchased in this fashion must be based on the cost to the incumbent LEC of providing them, including a reasonable profit. 47 U.S.C. §252(d)(1).

The price difference between the resale and UNE options is significant. On the one hand, regulators generally demand that retail prices for certain services (e.g., business services) be set at a level that helps to pay the cost of other services (e.g., basic residential

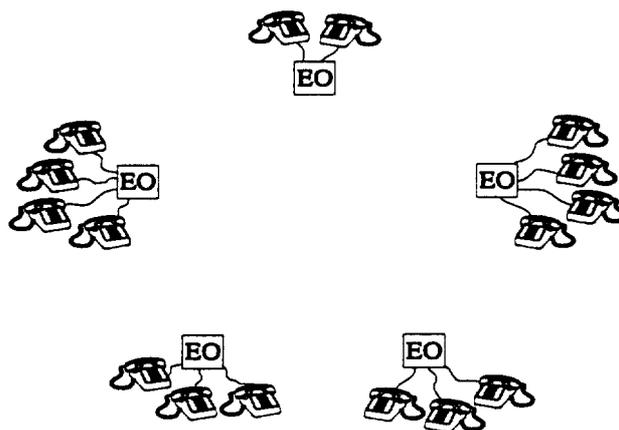
service) that are priced below cost in order to promote universal service.^{2/} On the other hand, they generally have failed to include the costs of ongoing universal service support in the prices of UNEs. As a result, UNE prices may be much lower. AT&T has estimated that, taking Pennsylvania as an example, a reseller would get a wholesale discount of 25.9% off the retail price, while a new entrant obtaining a “platform” of UNEs already assembled would get a discount of 52 percent or higher, depending on a customer’s calling patterns.^{3/}

2. The Incumbent LEC’s Network. An incumbent LEC’s network is a combination of several types of facilities and may be described, with necessary generalization and simplification, as follows. A customer’s premises are initially connected to the network via copper wires called “local loops.” These loops connect to an “end office” serving the customer’s neighborhood. Most cities contain numerous end offices; the city of St. Louis, for example, has nine end offices. The end office consists largely of a “local switch” that reads dialed numbers and, based on routing instructions incorporated into the switch by the incumbent, sets up a transmission path for each call.

^{2/} “Universal service” refers to the policy of ensuring that all Americans have the ability to receive basic telephone service at affordable rates.

^{3/} See Transcript, “AT&T Investment Community Meeting” (March 3, 1997) (comments of AT&T General Counsel John Zeglis) at 5 (Appendix at 75); see also Leslie Cauley and John R. Wilke, FCC Out of Bounds on Pricing Rules for Local Phone Markets, Court Finds, Wall St. J., Oct. 15, 1997, at B17 (Appendix at 76) (estimating that a reseller can “expect to get discounts of 17% to 24%” off the retail price, whereas a user of UNEs will receive “deeper discounts of 50% and higher”).

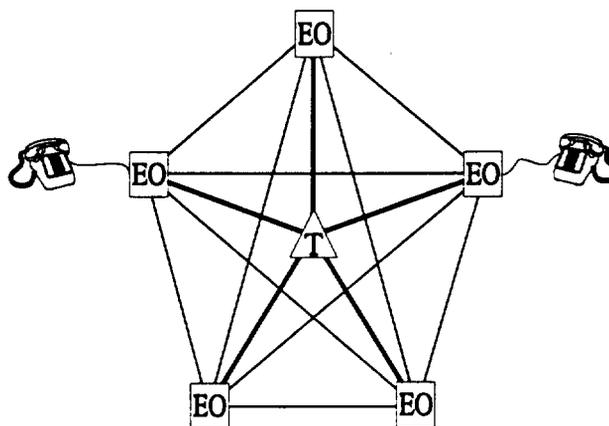
If the party being called is connected to the same end office as the caller, the switch connects them directly. The connections between customers and their end offices in a five-end-office city can be depicted like this:



Each telephone represents a customer's premises, each square is an end office, and each of the lines connecting a customer's premises to an end office is a loop. (For simplicity, the remaining diagrams do not include all of the customers.)

If the called party is outside the caller's neighborhood, the call must be "transported" from the caller's end office to the called party's end office. The local switch uses a "routing table" — a list of steps the incumbent has programmed defining how calls arriving at the switch should be treated — to select the specific pathway over which the call will be routed to its destination. These pathways consist of cables that connect end offices both to each other and to one or more "tandem switches" (sometimes called simply "tandems") in a hub-and-spoke

arrangement.^{4/} The cables connecting the switches are thus referred to as “interoffice” transmission facilities. In the five-end-office city, an interoffice network might look like this:



The first option for routing a call is over a direct end-office-to-end-office facility (depicted by the light lines). If the transmission facilities for the direct routes are being used to capacity at the time the call is placed, the call is routed indirectly through end-office-to-tandem facilities (depicted by the heavy lines) to the tandem switch (depicted by the triangle in the center) and thence to the destination end office. If there is insufficient capacity in the end-office-to-tandem cable — as might occur if, for example, the network was not designed to accommodate current traffic levels — then the caller would experience a busy signal or a longer wait for completion of the call.

The transmission cables in an incumbent LEC’s interoffice network are primarily fiber-optic, containing many glass fibers, each of which is divided electronically into hundreds of channels for voice and data transmission. Thus, a single cable could be used by multiple carriers,

^{4/} A tandem switch is one that switches traffic between other switches. See First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd. 15499, 15713 ¶ 426 (1996) (“First Report and Order”) (Appendix at 45).

each using one or more of the available channels to carry its traffic within the shared cable. For example, a new entrant might reserve a so-called “DS-1” channel, capable of carrying 24 simultaneous voice conversations, in a cable in which other carriers are using other capacity. Alternatively, a transmission cable could be dedicated to the use of a single carrier. For example, a cable linking the incumbent LEC's network with an office owned by a particular carrier would carry that carrier's traffic only, because nobody else has traffic to and from that office.

3. First Report and Order. It is against this backdrop that the FCC adopted its initial rules governing unbundled access to incumbent LECs’ network elements. In its First Report and Order, the FCC implemented Congress’s definition of a “network element” as “a” facility or equipment used in providing a telecommunications service or the “features, functions, and capabilities that are provided by means of such facility or equipment.” 47 U.S.C. § 153(29) (emphasis added); 47 C.F.R. § 51.5; First Report and Order, 11 FCC Rcd. at 15633 ¶ 262. In accordance with that definition, the FCC declared that incumbent LECs must provide each UNE facility or functionality “separate from the facility or functionality of other elements, for a separate fee.” First Report and Order, 11 FCC Rcd. at 15635 ¶ 268. The FCC also recognized that “network elements, as we have defined them, largely correspond to distinct network facilities.” Id. at 15846 ¶ 678.

The FCC determined in the First Report and Order that new entrants would have unbundled access to seven categories of network elements, including the local loop, switching capability (both local switching and tandem switching), and — at issue in this appeal —

interoffice transmission facilities. 47 C.F.R. § 51.319.^{5/} The FCC required incumbent LECs to provide these transmission facilities unbundled from local and tandem switching. See First Report and Order, 11 FCC Rcd. at 15717-18 ¶ 439 & nn. 986, 987. Moreover, the order required that these unbundled transmission facilities be made available individually, as separate network elements, enabling a new entrant to buy access to the precise facilities (and only those facilities) on the particular routes that it wanted. In explaining its decision to require incumbent LECs to provide unbundled access to interoffice transmission facilities, the FCC stressed that “it is technically feasible for incumbent LECs to unbundle the foregoing interoffice facilities as individual network elements.” First Report and Order, FCC Rcd. at 15719 ¶ 442 (emphasis added); see also id. at 15718 ¶ 441 (“[B]y unbundling various dedicated and shared interoffice facilities, a new entrant can purchase all interoffice facilities on an unbundled basis as part of a competing network, or it can combine its own interoffice facilities with those of the incumbent LEC”) (emphases added). The FCC also said its rules would allow a new entrant to “purchase unbundled facilities between two end offices of the incumbent LEC, or between the new entrant’s switching office and the incumbent LEC’s switching office.” Id. at 15719 ¶ 443.

The individual transmission facilities available in this fashion included facilities on any and all of the routes on which the incumbent LEC runs transport cables, and included facilities “dedicated to a particular customer or carrier, or shared by more than one customer or carrier,” 47 C.F.R. § 51.319(d)(1). In either event, a new entrant purchasing unbundled access

^{5/} The other elements were the network interface device (between the local loop and the customer’s inside wiring), signaling, operating support systems, and operator services. 47 C.F.R. § 51.319.

to interoffice transmission cables had to specify in advance the particular facilities that it wished to use and make an up-front financial commitment to them. The FCC therefore noted that a new entrant using UNEs would face the risk that customer demand might be insufficient to cover the new entrant's up-front investment in the specified facilities. See First Report and Order, 11 FCC Rcd. at 15668 ¶ 334.

Regarding the assembly of individual network elements into functional combinations, the First Report and Order gave a new entrant two options. First, the new entrant could combine the elements itself pursuant to 47 C.F.R. § 51.315(a), which restated the requirement of section 251(c)(3) of the Act that incumbent LECs provide the UNEs “in a manner that allows requesting telecommunications carriers to combine such network elements” to provide telecommunications services. Second, the First Report and Order permitted the new entrant to require the incumbent LEC to combine the elements for it. See id. § 51.315(c)-(f). According to the FCC, at the request of a new entrant, an incumbent LEC was required to combine network elements “in any manner, even if those elements are not ordinarily combined in the incumbent LEC’s network.” Id. § 51.315(c). The rules also forbade incumbent LECs to separate any elements that were already combined in their networks. Id. § 51.315(b); First Report and Order, 11 FCC Rcd. at 15647 ¶ 293.

The First Report and Order also expressly authorized new entrants to buy from the incumbent LEC all of the elements necessary to provide a finished service. 11 FCC Rcd. at 15666-71 ¶¶ 328-41. Together with the rules requiring the incumbent to combine elements, this enabled a new entrant to offer services to end-users exclusively through UNEs, without building any facilities of its own, without having to worry about the best way to combine individual

facilities, and, crucially, without paying the wholesale prices applicable to resale under section 251(c)(4). In other words, the FCC dictated that incumbent LEC provide complete end-to-end services to new entrants at prices that would often be dramatically lower than the wholesale price specified in the Act for resale. However, the FCC maintained that a new entrant serving local customers entirely through UNEs would “face greater risks” than new entrants serving customers through resale. *Id.* at 15668 ¶ 334. Specifically, the FCC observed that a new entrant serving customers through UNEs would “face the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost.” *Id.* For that reason, the FCC concluded, “[s]ome new entrants will be unable or unwilling to bear the financial risks of entry by means of unbundled elements and will choose to enter local markets under the [resale] terms of section 254(c) irrespective of the fact that they can obtain access to unbundled elements without owning any of their own facilities.” *Id.*

4. Iowa Utilities Board v. FCC. On review of the First Report and Order in this Court, the incumbent LECs argued that, by requiring them to provide and combine all of the UNEs needed to offer finished services, that order effectively enabled new entrants to obtain the incumbents’ finished services at UNE prices — the identical services available at wholesale prices under section 251(c)(4). The incumbent LECs argued that, if upheld, this would nullify the Act’s resale provisions, because new entrants naturally would choose to pay the cost-based rates applicable to UNEs rather than the wholesale prices applicable to resale. See Iowa Utilities Board, 120 F.3d at 813-14. They argued that making unbundled access identical with resale would enable new entrants to capture many of the customers to whom the LECs are expected to charge high prices for certain services in order to offset the low prices they are required to charge

other customers in order to promote universal service. *Id.* This would give new entrants an artificial and unintended competitive advantage.^{6/} Because incumbent LECs remain subject to universal service obligations, they further argued, this disruption in the system of universal service support would jeopardize the incumbent LECs' ability to recover the full costs of operating their networks, thus risking a serious confiscation of their property. The incumbent LECs maintained that these dangers were so pernicious that the Act should be interpreted to prohibit new entrants from reassembling a complete local exchange service entirely out of UNEs. They asked the Court to invalidate the FCC's rules requiring incumbents to provide and combine all the UNEs needed to constitute a complete service.

The Court issued its decision on July 18, 1997, invalidating some portions of the order and upholding others. Two of the holdings have central importance to this case. First, the Court explained that new entrants must buy network elements on an individual, unbundled basis and that incumbent LECs may not be required to combine such elements on the entrant's behalf: "While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LEC to do the actual combining of elements." 120 F.3d at 813. The Court concluded that "the plain meaning of the Act indicates

^{6/} As noted above, the wholesale prices charged resellers are derived from retail rates and thus preserve the above-cost contribution that retail rates include to help cover the full cost of the LECs' networks and support universal service. By contrast, the FCC and many state regulators have taken the view that the cost-based rates applicable to UNEs may not include such contributions. *See First Report and Order*, 11 FCC Rcd. at 15860 ¶ 712. The 1996 Act calls for reform of the current system of universal service subsidies, but this action has not been completed or even initiated in many jurisdictions. *See* 47 U.S.C. § 254.

that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do all of the work.” *Id.* Therefore, the Court vacated sections 51.315(c)-(f) of the FCC’s rules — the provisions that had required incumbent LECs to combine UNEs on behalf of new entrants on request. *Id.* The Court did not address section 51.315(b), which prohibited incumbent LECs from separating elements that were already combined in their networks.

Second, the Court rejected the incumbent LECs’ argument that purchasers of UNEs must be required to provide some facilities of their own, as opposed to providing local service entirely through UNEs obtained from the incumbent LEC. But the Court made clear that it did so not because UNEs and resale are interchangeable; rather, the Court took a careful look at the statutory scheme and discerned some critical differences between the two options. As the Court held, “unbundled access has several disadvantages that preserve resale as a meaningful alternative.” *Id.* at 815.

Specifically, the Court stated that, in light of its ruling on element combination, a purchaser of UNEs must assume “the additional cost of recombining the unbundled elements.” *Id.* The Court also stressed, echoing the FCC’s position in the First Report and Order concerning the distinction between UNEs and resale (11 FCC Rcd. at 15668 ¶ 334), that a purchaser of UNEs must assume the business risk of selecting and making an up-front investment in particular facilities. Thus, whereas a reseller purchases “on a unit-by-unit basis . . . only as many services (or as much thereof) as it needs to satisfy its customer demand,” a carrier purchasing unbundled access “must make an up-front investment that is large enough to pay for the cost of acquiring

access to all of the unbundled elements . . . without knowing whether consumer demand will be sufficient to cover such expenditures.” *Id.* at 815 (emphasis added).

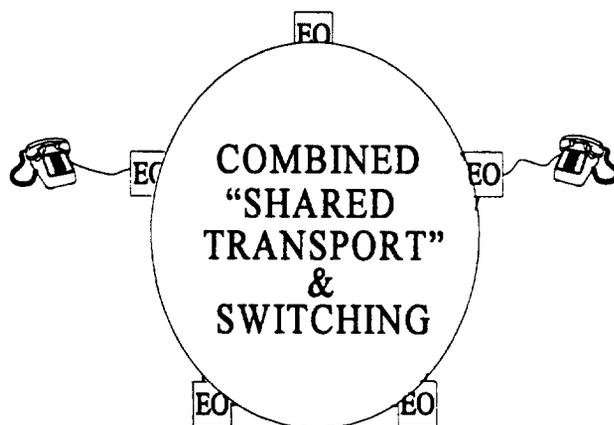
The Court’s decision confirmed that, to qualify for the cost-based prices applicable to UNEs, and hence to avoid the universal service contributions currently built into wholesale rates but not into the prices of UNEs, a new entrant must be more than a passive reseller of the incumbent LEC’s services. Rather, the 1996 Act requires that a new entrant using UNEs assume important responsibilities — including “expending valuable time and resources recombining unbundled elements” and bearing “greater risks” in attempting to “match its supply with its demand” — that resellers avoid by taking the incumbent’s finished resale services. *Id.*

5. Third Reconsideration Order. On August 18, 1997, the FCC released the Third Reconsideration Order,^{2/} which requires incumbent LECs to provide what the FCC calls “shared transport.” See Third Reconsideration Order ¶ 33; see also *id.* ¶ 22. This newly defined “shared transport,” which the FCC claims is a network element, differs in two ways from the unbundled access to interoffice transmission facilities established in the First Report and Order. First, the Third Reconsideration Order rejects the notion that new entrants must select in advance the specific interoffice transmission facilities to which they want access. According to the FCC, “shared transport” as purchased by a new entrant need not be “identifiable as a limited or pre-identified portion of the network.” *Id.* ¶ 43; see also *id.* ¶ 41. Instead, “shared transport” gives a new entrant the right to “use all of the incumbent LEC’s interoffice transport facilities”

^{2/} Third Order on Reconsideration, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC No. 97-295 (rel. Aug. 18, 1997) (“Third Reconsideration Order”) (Appendix at 1).

collectively, on an undifferentiated basis. *Id.* ¶ 34 (emphasis in original). Second, the Third Reconsideration Order suggests that new entrants need not make any up-front investment in specific interoffice transmission facilities, but rather may use such facilities on an “as-needed” basis for whatever traffic they give to the incumbent to transport. *See id.* ¶ 43.

The Third Reconsideration Order thus permits new entrants to use incumbent LEC facilities on the same as-needed, unit-by-unit basis that characterizes resale. Rather than specifying and combining the particular interoffice transmission facilities that will be used to carry their traffic, new entrants may simply obtain use of the incumbent LEC’s existing combination of interoffice cables to transport each call from an originating end office to a terminating end office, relying on the routing instructions in the incumbent LEC’s switches to select the particular facilities to be used on a call-by-call basis. From the point of view of a new entrant that purchases “shared transport,” an incumbent LEC’s interoffice network now looks like this:



“Shared transport,” in other words, involves the provision of all of the transport and switching facilities in an incumbent’s interoffice network as a combined whole and on an as-needed basis, paid for at the cost-based rates reserved for UNEs. It includes undifferentiated use of all the interoffice transmission links in an incumbent’s network — in the example of the five-office city described above (p. 5), all 10 end-office-to-end-office links and all five end-office-to-tandem links — each of which is a UNE in and of itself. The incumbent selects which links to use, as it does for its own traffic, through the routing tables it has installed in its switches. See Third Reconsideration Order ¶ 36. “Shared transport” thus gives the new entrant access to switching as well as to the transmission links.

The FCC justifies its new “shared transport” requirement by asserting that new entrants must be shielded from the risks of unbundled access, apparently on the assumption that competition will not develop if the statute is implemented in conformity with Congress’s intentions. See Third Reconsideration Order ¶¶ 35, 49, 51. Its position on this issue contrasts with both this Court’s ruling that a new entrant purchasing unbundled elements must make an investment and bear the risk of insufficient demand, see Iowa Utilities Board, 120 F.3d at 815, and the FCC’s own parallel ruling in the First Report and Order. Although the FCC stated in the First Report and Order that a carrier purchasing UNEs properly “faces the risk that end-user customers will not demand a sufficient number of services . . . for the carrier to recoup its cost,” 11 FCC Rcd. at 15668 ¶ 334, the agency in the Third Reconsideration Order justifies “shared transport” by noting that, if new entrants were required to select and buy individual transmission facilities, “they would almost inevitably miscalculate the capacity or routing patterns” necessary for their customers, Third Reconsideration Order ¶ 35. Therefore, the Third Reconsideration

Order shifts to the incumbent LEC the burdens and risks inherent in engineering and operating a transport network that can efficiently and economically carry the new entrant's traffic. Similarly, whereas the First Report and Order expressly stated that some new entrants will have insufficient volume to obtain unbundled network elements, see 11 FCC Rcd. at 15668 ¶ 334, the Third Reconsideration Order declares that “shared transport” will enable new entrants without “sufficient traffic volumes to justify the cost of dedicated transport facilities” to take advantage of the cheaper unbundled rates (that is, rates lower than the resale rates), Third Reconsideration Order ¶ 51. The FCC also worries in the Third Reconsideration Order that requiring new entrants to commit to specific facilities would force them “to continually reconfigure the unbundled transport elements as they acquire[] customers,” id. ¶ 35, and “to develop their own routing instructions,” id. ¶ 49.

The order further justifies the new “shared transport” requirement on the ground that incumbent LECs are prohibited from separating elements that are already combined in their networks. Third Reconsideration Order ¶ 44. The order declares that, although the Court’s decision in Iowa Utilities Board made clear that incumbent LECs cannot be required to rebundle separate elements, the agency is still free to require that currently combined elements be offered to new entrants in their combined form. Lest there be any ambiguity about the FCC’s intent, the then-Chairman of the agency went out of his way to emphasize that the order reflects “the importance we place on incumbents making available to new entrants their network elements on a combined basis.” Third Reconsideration Order at 44 (Separate Statement of Chairman Reed Hundt) (emphasis added). He suggested that separating currently combined elements would constitute a barrier to competition and pledged FCC action to address any such barriers. Id. To