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

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CC Docket No. 98-5

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In The Matter of)

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Petition of LCI Telecom Corp.)
for Declaratory Rulings)
_____)

COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION
ON PETITION FOR EXPEDITED DECLARATORY RULINGS

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RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), a national trade association representing more than 650 entities engaged in, or providing products and services in support of, telecommunications resale, urges the Commission to grant the Expedited Declaratory Rulings sought by LCI International Telecom Corp. and adopt a "fast track plan" to "jump-start" local competition and speed BOC entry into the in-region, interLATA market. In TRA's view, LCI's proposal to structurally separate BOC wholesale network operations from retail activities, thereby creating a "carrier's carrier" which would provide network services on a wholesale basis to competitive LECs, as well as to the BOC retail affiliate, would, if properly implemented, provide the elements necessary to create a viable local resale market.

Long experience in the domestic, interexchange market, coupled with additional experience gleaned from the wireless and now local markets, has taught TRA's resale carrier members that viable resale in a given market is contingent upon the presence of three essential elements, the absence of any one of which will severely hinder the growth and development of a dynamic resale industry. The confluence of these three "building blocks" has produced a strong and rapidly expanding resale industry in the domestic, interexchange market; the absence of one of these elements continues to hinder resale of wireless service. The presence of only one of the three resale "building blocks" at the local level has all but prevented the resale of local service.

Viable resale of local service requires the introduction into each local market of one or more facilities-based providers, at least one of which acts as a "carrier's carrier" or as a "hybrid" service provider committed to the wholesale market. LCI has proposed a means to achieve this

objective expeditiously across entire states and regions. Under the LCI proposal, a BOC's wholesale network affiliate would assume the mantle of "carrier's carrier," fulfilling the critical role filled by WilTel in the domestic, interexchange industry of the early 1990s. As LCI correctly notes, structural separation of a BOC's wholesale network operations from its retail activities would minimize, perhaps eliminate, the "conflicts inherent when the RBOC provides inputs to competitors while competing directly with them."

Obviously, the most effective means of ensuring that BOC "conflicts of interest" are eliminated would be through complete divestiture by a BOC of its retail operations. TRA recognizes, however, that BOC participation in the LCI "fast-track plan" must be voluntary and that, therefore, the plan must be palatable, if not attractive, to the BOCs to be implemented. Thus, while divestiture may be the obvious course, it likely would not be a practical alternative.

The details of LCI's "fast-track plan" certainly should be scrutinized closely, with an eye toward striking a workable balance which would achieve the dual objectives of creating a legitimate "carrier's carrier" while preserving the attractiveness of the plan to the BOCs. The perfect, however, should not become the enemy of the good. Dramatic action is clearly necessary to create a competitive local market. A creative alternative such as that proposed by LCI may well be a workable vehicle to achieve this end.

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**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION
ON PETITION FOR EXPEDITED DECLARATORY RULINGS**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to *Public Notice*, DA 98-130 (released January 26, 1998), as modified by *Order*, DA 98-339 (released February 20, 1998), hereby submits the following comments in support of the "Petition for Expedited Declaratory Rulings" ("Petition") filed by LCI International Telecom Corp. ("LCI") on January 22, 1998. TRA agrees with LCI that structural separation of the wholesale and retail operations of incumbent local exchange carriers is necessary to "jump-start more active retail -- and especially residential competition" in the local telecommunications market.² Subject to the qualifications set forth herein, TRA, accordingly, urges the Commission to grant the LCI Petition.

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services.

² LCI Petition at 3.

I.

INTRODUCTION

In its Petition, LCI proposes "a 'fast track' plan" intended both to "achieve local competition -- for residential as well as business consumers -- on a rapid basis"³ and to speed Bell Operating Company ("BOC") entry into the in-region, interLATA market. Specifically, LCI proposes a corporate structure which would separate a BOC's wholesale network operations from its retail activities, creating a "carrier's carrier" which would provide network services on a wholesale basis to competitive LECs, as well as to the BOC retail affiliate. The separation proposed by LCI would include significant independent public equity participation (with associated board representation) in the BOC's retail affiliate, as well as a prohibition against sharing by the wholesale and retail affiliates of "officers, directors, personnel, equipment, buildings, services or other resources."⁴ Accounting and transactional safeguards, as well as nondiscrimination, customer proprietary network information ("CPNI") and "pick and choose" requirements, would apply to dealings between the BOC wholesale and retail affiliates, and the BOC's existing customer base would ultimately be allocated through balloting among the BOC retail affiliate and competitive LECs. Regulation of the BOC retail affiliate would be significantly relaxed, while the BOC wholesale affiliate would be subject to the Section 251 and 252 requirements applicable to incumbent LECs, including an obligation to deliver existing combinations of network elements.⁵

³ Id. at 3.

⁴ Id. at 17.

⁵ 47 U.S.C. §§ 251, 252.

In exchange for separating its wholesale network operations from its retail activities, a BOC would qualify for "fast-track" entry into the in-region, interLATA market. To this end, the BOC that agreed to structurally separate its wholesale and retail operations would be afforded a rebuttable presumption that it had satisfied both the 14-point competitive checklist and the public interest requirements embodied in Section 271.⁶ Accordingly, "qualification under Section 271 would be attainable much faster by an RBOC under this structure, and would be far easier for the Commission to determine and verify."⁷

TRA's resale carriers have been among those entities aggressively attempting to enter the local market. Indeed, TRA's most recent survey of its membership revealed that roughly a third of TRA's resale carrier members were currently reselling, or endeavoring to resell, local service, while in excess of another third were planning to enter the market within the next 12 months.⁸ Notably, TRA's resale carrier members are collectively serving both residential and business customers; in fact, a number of TRA's resale carrier members serve residential customers either exclusively or predominantly.⁹

⁶ 47 U.S.C. § 271.

⁷ LCI Petition at 26.

⁸ Telecommunications Resellers Association, "1997 Reseller Membership Survey and Statistics," pp. 1, 15 (Oct. 1997).

⁹ A majority of TRA's resale carrier members provide service to residential users. *Id.* at 1.

TRA's resale carrier members have encountered the same "critical barriers" to entry detailed by LCI in its Petition. Deficient operations support systems ("OSS"),¹⁰ inadequate pricing margins, and the unavailability of crucial services¹¹ and facilities² have severely hindered

¹⁰ As the Commission has recognized, "if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 518 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *cert. granted sub. nom. AT&T Corp. v. Iowa Utilities Board* (Nov. 17, 1997), *pet. for rev. pending sub. nom., Southwestern Bell Telephone Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997). To date, the Commission has found deficient the OSS functionalities provided by every BOC that has applied for in-region, interLATA authority. *See, e.g., Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, FCC 97-418, ¶¶ 87 - 151 (released Dec. 24, 1997), *appeal pending sub nom. BellSouth Corporation v. FCC*, Case No. 98-1019 (D.C.Cir. Jan. 13, 1998); Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543, ¶¶ 128 - 58 (1997).

¹¹ TRA has recently filed a "Petition for Declaratory Ruling" seeking to compel the resale of voice messaging services. *See Public Notice*, DA 98-520 (released March 17, 1998). Other key impediments to local market entry include the unavailability for resale of inside wire installation and maintenance services and the inability of resale carrier customers to assume existing incumbent LEC contracts with end-users, such as contracts for Centrex service, without incurring termination penalties and to resell at wholesale rates the services taken under those contracts.

¹² Perhaps the single greatest impediment to competitive local market entry is the refusal of incumbent LECs to make existing combinations of network elements and network elements in "platform" configurations available to competitive LECs. As the Commission has recognized, "the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications market." Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418 at ¶ 195. The Commission has further correctly concluded that "limitations on access to combinations of unbundled network elements . . . seriously inhibit the ability of potential competitors to enter local telecommunications markets

[footnote continued on following page]

market entry by TRA's resale carrier members. In a recent survey, more than 80 percent of TRA's resale carrier members identified either incumbent LEC operational impediments or resistance to competitive entry, on the one hand, or lack of adequate margins, on the other hand, as the "single greatest impediment to competitive local exchange market entry."¹³

These "critical barriers" to entry are all the more formidable for the small to mid-sized resale carriers that comprise the "rank and file" of TRA's membership. As the Commission has recognized, smaller carriers "are likely to have less of a financial cushion than larger entities" and hence are less able to "expend their limited resources securing their right to interconnection, services, and network elements to which they are entitled under the 1996 Act."¹⁴ It is thus not surprising that some of TRA's resale carrier members are beginning to abandon the local market, finding that given incumbent LEC recalcitrance, not only is the cost of providing service prohibitive, but the damage

[footnote continued from preceding page]

through the use of unbundled elements, and . . . therefore significantly impede the development of local exchange competition." Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543 at ¶ 332. As the Commission explained, "in practice, it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbent's network without the assistance of the incumbent." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶¶ 293 - 94. Moreover, as the Commission has noted, "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." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 12 FCC Rcd. 12460 (Aug. 18, 1997), *pet. for rev. pending sub. nom.*, Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997).

¹³ Telecommunications Resellers Association, "1997 Reseller Membership Survey and Statistics" at 16.

¹⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 61.

done to relationships with existing long distance customers by the poor service attributable to the operational and billing difficulties created by the incumbent LECs is intolerable.

Given this backdrop, TRA agrees with LCI that dramatic action is necessary to "jump start" local competition. TRA's resale carrier members are more than willing to accept BOC entry into the in-region, interLATA market as the price for creating viable competitive opportunities in the local market. Having competed successfully for a decade against carriers larger than they by orders of magnitude, TRA's resale carrier members do not fear additional competition from the BOCs. Their only fear is that they will be denied the opportunity to compete on equal terms because barriers to entry into the local market have not been effectively dismantled.

TRA also agrees that the solution proposed by LCI is a workable one. TRA's resale carrier members are highly cognizant of the three elements necessary to create a viable resale industry in a given market. Two of the three essential resale "building blocks" are not currently present in the local market; indeed, the only market in which all three elements currently exist is the inter-exchange market, the wireless market evidencing only two of the three elements. LCI's proposed structural separation of BOC wholesale network operations from BOC retail activities, if implemented correctly, would generate in the local market the two additional prerequisites to viable resale.

II.

ARGUMENT

A. Viable Resale in a Market Requires the Presence of Three Essential Elements

Long experience in the domestic, interexchange market, coupled with additional experience gleaned from the wireless and now local markets, has taught TRA's resale carrier

members that viable resale in a given market is contingent upon the presence of three essential elements, the absence of any one of which will severely hinder the growth and development of a dynamic resale industry. The confluence of these three "building blocks" has produced a strong and rapidly expanding resale industry in the domestic, interexchange market; the absence of one of these elements continues to hinder resale of wireless service. The presence of only one of the three resale "building blocks" at the local level has all but prevented the resale of local service.

The three prerequisites to viable resale are as fundamental as they are obvious. The first element is regulatory. Given that resale necessarily requires a facilities-based carrier to make its network and other services available to competitors, resale must be supported by the twin regulatory directives that all services must be made available for resale and that resale of such services must not be unreasonably restricted. As the Commission has recognized, a facilities-based carrier that "serves virtually all subscribers in its . . . serving area . . . has little economic incentive to assist new entrants in their efforts to secure a greater share of that market."¹⁵ Thus, resale will likely flounder absent regulatory intervention.¹⁶

The second element is no less obvious than the first. This element is the availability of one or more facilities-based alternatives. Obviously, the behavior of a single source provider of network services is not disciplined by market forces. A captive resale carrier customer of such a supplier has little, if any, economic leverage. As the Commission has recognized, negotiations between resale carriers and sole source network service providers "are not analogous to traditional

¹⁵ Id. at ¶ 10.

¹⁶ Id. at ¶ 241 ("There is 'no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent clear legal requirements to do so.'").

commercial negotiations in which each party owns or controls something the other party desires;" rather the network service provider is being asked to "make available . . . [its] facilities and services to . . . a carrier[] that intend[s] to compete directly with . . . [it] for its customers and its control of . . . [its] market."¹⁷ As succinctly stated by the Commission, "[i]n a competitive market, an individual seller . . . would not be able to impose significant restrictions and conditions on buyers because such buyers turn out to be sellers;" thus the ability "to impose resale restrictions and conditions is . . . evidence of market power and . . . reflects an attempt . . . to preserve . . . market position."¹⁸ Thus, bargaining power will only begin to be equalized once alternative network options are available to resale carriers.

The third element, while no less critical to viable resale, is somewhat more nebulous. This element involves the recognition by one or more facilities-based providers that provision of service on a wholesale basis can be a highly profitable business. A cozy duopoly or oligopoly is no less damaging to resale than a monopoly. If all facilities-based market participants, either individually or jointly, determine to restrict competitive entry to network-based providers, resale will not thrive. Someone must break with the pack and either take on the mantle of a "carrier's carrier" or establish a legitimate wholesale operation to complement its retail activities.

The domestic, interexchange, the wireless and the local markets offer case studies on the impact of the presence and/or absence of one or more of the three prerequisites to viable resale, both as currently constituted and over time. As set forth below, only the domestic, interexchange

¹⁷ Id. at ¶ 55.

¹⁸ Id. at ¶ 939.

market currently evidences the presence of all three of the resale "building blocks," with the wireless and the local markets lacking one or more of these three critical elements:

Resale Building Blocks

<u>Elements</u>	<u>Market</u>		
	<u>Domestic Interexchange</u>	<u>Wireless</u>	<u>Local</u>
Resale Requirement	Yes	Yes	Yes
Facilities-Based Competition	Yes	Yes	No
Carrier's Carrier	Yes	No	No

The result is that only the domestic, interexchange resale market is thriving, while the wireless resale market continues to struggle and the local resale market is only marginally functional. But this was not always the case. The domestic, interexchange resale industry has evolved over the past decade as the second and especially the third critical elements emerged.

The problems encountered by carriers attempting to resell local service are remarkably similar to those faced by "switchless resellers" in the late 1980s and early 1990s. In the late 1980's, AT&T Corp. ("AT&T") controlled nearly 80 percent of the interLATA toll market.¹⁹ In attempting to resell AT&T services, switchless resellers experienced massive provisioning delays, high levels of service order rejections, inaccurate and untimely billing, denial of preferred price

¹⁹ Industry Analysis Division, Common Carrier Bureaus, Federal Communications Commission, "Long Distance Market Shares," Table 5 (January 1997).

points and service options, and abuse of carrier confidential data, among other problems.²⁰ While MCI Telecommunications Corp. ("MCI") and Sprint Corp. ("Sprint") operated alternative physical networks, neither were particularly receptive to resale. For example, MCI revised its tariff in early 1990 to impose substantially higher rates on any customer that did not own at least 20 percent of its locations -- *i.e.*, resale carriers.²¹ At the same time, Sprint revised its tariffs to reserve its most attractive rates to customers with at least 5 percent "on-net-to-on-net traffic," knowing that very few "switchless resellers" could meet this standard.²² Accordingly, the competitive forces necessary to discipline AT&T's market behavior were lacking.

It was only with the entry of WilTel into the market as a "carrier's carrier" and the decision by Sprint to serve the wholesale market that the problems that plagued resale providers of domestic, interexchange service began to disappear. AT&T was slow to react to these changes and hence lost the bulk of its resale carrier customers over a span of only a few years. From a high of roughly 80 percent in the late 1980s and early 1990s, AT&T's share of the resale market tumbled to 26 percent in 1994 and 20 percent in 1994, less than half of its overall market share.²³ Indeed, by

²⁰ For a detailed description of these problems *see* "Comments of the Telecommunications Resellers Association" in Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252 filed on June 9, 1995, in which TRA opposed AT&T's request to be reclassified as a nondominant carrier.

²¹ Langner, M., "Top Carriers Take Steps to Define Role of Aggregators," Network World (July 9, 1990).

²² Id.

²³ Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, ¶ 65 (1995), *recon.* 12 FCC Rcd. 20787 (1997); Letter from J. Argentieri, Government Affairs Vice President, AT&T Corp., to W. F. Caton, Acting Secretary, Federal Communications Commission, dated August 14, 1995; Industry Analysis Division, Common Carrier Bureaus, Federal Communications Commission, "Long Distance Market Shares," Table 5 (January 1997).

1993, more resale carriers resold services provided by WilTel and Sprint than services provided by AT&T, despite the fact that AT&T's overall market share was more than four times the collective market share of WilTel and Sprint.²⁴

Of particular interest here, neither WilTel nor Sprint experienced the provisioning, billing and other problems that AT&T had consistently alleged were insurmountable. Thus, a TRA survey of its resale carrier members conducted in 1994 revealed that while WilTel and Sprint provisioned 100 percent and roughly 90 percent of resale carrier orders, respectively, within 15 days, AT&T required between 15 to 90 days to provision roughly 85 percent of its resale carrier orders.²⁵ Likewise, WilTel and Sprint generally rejected less than 20 percent of resale carrier orders, while the majority of the survey respondents reported reject rates for AT&T between 20 and 60 percent.²⁶ More than two thirds of survey respondents reported significant billing problems with AT&T, while the large majority of WilTel and Sprint customers experienced no comparable difficulties.²⁷ Given these results, it is not surprising that the overwhelming majority of WilTel and Sprint customers reported good to excellent relations with their network service provider, while an equally large percentage of AT&T customers characterized their relationship as poor or fair.²⁸

²⁴ Industry Analysis Division, Common Carrier Bureaus, Federal Communications Commission, "Long Distance Market Shares," Table 5 (January 1997).

²⁵ "Comments of the Telecommunications Resellers Association" in Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252 filed on June 9, 1995 at Appx. 2, Chart 3.

²⁶ Id. at Appx. 2, Chart 4.

²⁷ Id. at Appx. 2, Chart 5.

²⁸ Id. at Appx. 2, Chart 1

With the emergence of WilTel and the active support of Sprint, the interexchange resale industry blossomed, achieving a current market share of approximately 17 percent.²⁹ The key to this success is the approach brought by WilTel and Sprint to the wholesale market. As a "carrier's carrier," WilTel dedicated its business to serving resale carrier customers and, accordingly, worked with those customers to develop efficient provisioning and billing systems, and strove to maintain good customer relationships. Sprint made no less of a commitment to the wholesale market, endeavoring like WilTel to make its wholesale offerings, including its systems and customer support, as well as its wholesale prices, attractive to resale carrier customers.

As is apparent, the mere presence of alternative physical networks was not enough to drive the resale industry in the domestic, interexchange market. What "jump started" long distance resale was the emergence of a "carrier's carrier" and a hybrid carrier committed to the wholesale market. It was thus the introduction of the last of the three identified resale "building blocks" that propelled resale to the next level in the domestic, interexchange market.

The experience of TRA's resale carrier members in the wireless market confirms the lessons of the long distance market. Ever since the Commission licensed two cellular service providers, the wireless market has been characterized by a modicum of facilities-based competition.³⁰ Nonetheless, resellers of cellular service have faced an uphill battle. Resale penetration in the wireless market is only one third that achieved in the domestic, interexchange market. Indeed, wireless resale simply does not exist in many markets.

²⁹ Industry Analysis Division, Common Carrier Bureaus, Federal Communications Commission, "Long Distance Market Shares," Table 3.1 (January 1998).

³⁰ Cellular Communications Systems, 86 F.C.C.2d 469, 511, 642 (1981), *recon.* 89 F.C.C.2d 58 (1982), *further recon.*, 90 F.C.C.2d 571 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

Wireless resellers have confronted, and continue to confront, many of the same problems encountered by resellers of AT&T's long distance service in the late 1980s and early 1990s. Wireless resellers, for example, are regularly denied interconnection opportunities, refused access to preferred price points and service options, and subjected to disadvantageous service terms and conditions, including exclusivity requirements.³¹ Moreover, wireless resellers are often simply denied basic resale agreements.³²

Nor has the introduction of additional facilities-based competitors in the form of broadband personal communications service ("PCS") and enhanced specialized mobile radio service ("ESMR") providers improved the lot for wireless resellers. Broadband PCS and ESMR providers appear to be even more resistant to resale than their cellular brethren. Having already announced publicly that they do not intend to voluntarily deal with resale carrier,³³ many of these carriers are

³¹ National Wireless Resellers Association, "1997 Survey of Wireless Resellers, pp. 4, 9 (July 1997). For example, 70 percent of respondents reported being denied access to bulk discount offerings made available to retail customers by cellular carriers. See "Petition for Declaratory Ruling" filed by AirTouch Communications, Inc. on April 18, 1997 (File No. WTB\POL 97-1).

³² *Id.* Over 50 percent of respondents reported being denied access to a cellular resale agreement.

³³ See, e.g., Borda, W., "Cellular Resellers Hope PCS Carriers Usher in New Age of Resale," Communications Today (June 11, 1996) ("The largest PCS player in the country is not even considering resale. Sprint Spectrum -- the alliance between Sprint, Cox Communications, Tele-Communications Inc. and Comcast Corp. -- . . . will use a mix of its own stores and retail partners to distribute the service to the mass market. . . . That kind of eliminates the need for resellers, [Ed] Mattix[, chief public relations officer for Sprint Spectrum] said. When you can reach the mass market, why do you need resellers. . . . Resale does not play a prominent role in AT&T Wireless Services' business plan. . . . AT&T feels the best way to serve customers is to do it directly, not through resellers."). See also Henderson, K., "Will Resale's Black Sheep be Welcomed into the PCS Fold," Phone +, Vol. 10, No. 6, p. 82, 84 (May 1996) (According to a spokesperson for the Personal Communications Industry Association "[r]esale is not in the best interest of customer service and technology . . . Our members . . . need to concentrate on ensuring coverage and competitive service without the distraction of running a resale program.").

simply refusing to provide a resale product.³⁴ In fact, the industry, through its trade association, has petitioned the Commission to forbear from applying its wireless resale requirements to providers of broadband PCS.³⁵

Why has resale lagged behind in the wireless market? The answer is clear: the third resale "building block" is absent. While the number of facilities-based wireless providers in any given market may ultimately double or triple, until a "carrier's carrier" emerges or at least one provider in each market commits to the wholesale provision of service, wireless resale will not explode with anywhere near the force that has characterized the long distance resale market.

If the absence of one of the three resale "building blocks" seriously hinders wireless resale market, what can be expected of the local resale market which is missing two of these three critical elements? The answer is very little and that is precisely what has thus far been achieved. More than two years have passed since enactment of the Telecommunications Act of 1996 and incumbent LECs retain a 99 percent share of the local exchange/exchange access market.³⁶ And as

³⁴ *Id.* Indeed, 60 percent of respondents reported having been denied access to a PCS resale agreement; only 7 percent of respondents had actually secured a resale agreement with an operating PCS provider. *See also* Letter From Ernest B. Kelly, III, President, Telecommunications Resellers Association, to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 10, 1997.

³⁵ "Petition for Forbearance" filed by the Broadband Personal Communications Services Alliance of the Personal Communications Industry Association on May 22, 1997.

³⁶ See, e.g., Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418 at ¶ 22 ("We recognize that local competition has not developed in South Carolina and other states as quickly as many had hoped. . . . [T]he Department of Justice estimates BellSouth's market share of local exchange in its service area in South Carolina

[footnote continued on following page]

matters are presently constituted, there is precious little hope for significant improvement. Widespread deployment of alternative physical networks in the foreseeable future is unlikely given the massive capital expenditures required to construct ubiquitous networks. And rulings by the U.S. Court of Appeals for the Eighth Circuit licensing incumbent LECs to disassemble existing combinations of network elements before delivery to competitive LECs for the sole purpose of hindering competitive entry,³⁷ unless overturned by the U.S. Supreme Court,³⁸ have seriously diminished the viability of unbundled network elements as an entry strategy by substantially increasing the cost and complexity associated with their use. As the Commission has recognized, "given the practical difficulties of requiring requesting carriers to combine elements that are part of the incumbent LEC's network," new market entrants are "seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets" by incumbent LEC disassembly of existing combinations of network elements prior to delivery to requesting carriers.³⁹

[footnote continued from preceding page]

is 99.8% based on access lines"). The U.S. Department of Justice ("Justice Department") estimated that in the State of Louisiana, "actual competitive entry . . . is still extremely limited; BellSouth's market share of local exchange in its service area is about 99.61% based on access lines." Evaluation of the Justice Department filed in CC Docket No. 97-231, Appx. B, p. 3 on December 10, 1997. In Ameritech's "in-region State" of Michigan, the Justice Department calculated that "the aggregate market share of CLECs, measured by total number of access lines statewide using all forms of competition (separate facilities, unbundled loops and resale), appears to be between 1.2% and 1.5%." Evaluation of the Justice Department filed in CC Docket No. 97-137, Appx. B, p. 3 on June 25, 1997.

³⁷ Iowa Utilities Board v. FCC, 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997).

³⁸ AT&T Corp. v. Iowa Utilities Board, Case No. 97-826 (U.S. Nov. 17, 1997).

³⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶¶ 293 - 94.

Viable resale of local service requires the introduction into each local market of one or more facilities-based providers, at least one of which acts as a "carrier's carrier" or as a "hybrid" service provider committed to the wholesale market. LCI has proposed a means to achieve this objective expeditiously across entire states and regions. Under the LCI proposal, a BOC's wholesale network affiliate would assume the mantle of "carrier's carrier," fulfilling the critical role filled by WilTel in the domestic, interexchange industry of the early 1990s. As LCI correctly notes, structural separation of a BOC's wholesale network operations from its retail activities would minimize, perhaps eliminate, the "conflicts inherent when the RBOC provides inputs to competitors while competing directly with them."⁴⁰

A facilities-based carrier which provides both retail and wholesale services, particularly a carrier which is compelled by law, rather than by market forces, to provide the wholesale services, will at best be somewhat schizophrenic in its dealings with its resale carrier customers. While resale carrier customers might contribute substantial wholesale revenues to a facilities-based carrier, they will also compete fiercely with the facilities-based carrier for retail dollars. The larger the market share held by the facilities-based carrier, the more important the latter element and the less important the former element.

In the domestic, interexchange industry of the late 1980s and early 1990s, out of every 100 customers secured by resale carriers, roughly 80 were taken away from AT&T, while less than 10 were drawn from Sprint. Accordingly, Sprint sensibly elected to offer a legitimate wholesale product as a means of expanding both its market share and its revenue base, while AT&T actively resisted resale to preserve its market share and maintain its current revenue stream. Of course, nearly

⁴⁰ LCI Petition at 13.

100 out of every 100 local customers secured by resale carriers will be taken away from incumbent LECs. AT&T, whose market share has dropped to approximately 50 percent, has yet to fully embrace resale. It is unlikely that incumbent LECs will ever do so as long as they provide both retail and wholesale services.

If structured as a "carrier's carrier," a BOC's incentives will mirror those of the WilTel of the early 1990's. Profitability will be contingent upon the success of its resale carrier customers. The success of its resale carrier customers in turn will depend on the speed and efficiency of provisioning, the accuracy of billing, and the affordability of services, among other things. Accordingly, the BOC will be strongly incited to remedy, rather than create or perpetuate, provisioning and billing problems and will be inclined to price its wholesale services so as to share adequate revenues with its resale carrier customers. Issues such as the availability of existing combinations of network elements should simply cease to be issues. Local competition should become the objective; partnering, rather than confrontation, should guide relationships between network service provider and resale carrier customer.

According, if structured properly, the LCI "fast-track plan" holds the promise of achieving what otherwise might take years to occur and which may never occur in many markets -- *e.g.*, the availability of local service options for all Americans.

B. Care Must be Taken to Ensure That BOC Wholesale Network Affiliates Have the Incentives of "Carrier's Carrier"

TRA has long argued that permitting premature entry by BOCs into the in-region, interLATA market would jeopardize the vibrant and dynamic competition that now characterizes the domestic, interexchange market, and retard the emergence and development of competitive local

exchange/exchange access markets. As the Commission has recognized, "incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act*, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."⁴¹ "Section 271 . . . creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets."⁴² Moreover, as the Commission has acknowledged, "in the absence of . . . incentives . . . directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree."⁴³ The Commission, accordingly, should not simply give away the "carrot" relied upon by Congress to prompt "the opening [of] all telecommunications markets to competition."⁴⁴

As noted above, the LCI "fast-track plan" holds substantial promise. As LCI has recognized, the key to success is ensuring that BOC "conflicts of interest" are eliminated. Obviously, the most effective means of doing so would be through complete divestiture by a BOC of its retail operations. TRA recognizes, however, that BOC participation in the LCI "fast-track

⁴¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 55 (emphasis added).

⁴² Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543 at ¶ 14.

⁴³ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 18.

⁴⁴ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Joint Explanatory Statement").

plan" must be voluntary and that, therefore, the plan must be palatable, if not attractive, to the BOCs to be implemented. Thus, while divestiture may be the obvious course, it likely would not be a practical alternative.

TRA firmly believes that when dealing with entities as large as the BOCs and with the virtually unlimited resources of the BOCs, regulatory safeguards, no matter how well intended and how well designed, will never be effective in controlling corporate behavior. Regulation of the BOCs will only work if the BOCs attempt, in good faith, to honor both the letter and the spirit of the regulations. The greater the percentage of independent ownership of the structurally separate BOC wholesale and retail affiliates, the greater the impetus to honor nondiscrimination and other requirements. LCI's "seven minimums" obviously will contribute greatly in structuring BOC incentives, but nonetheless leave intact incentives by the BOC wholesale network affiliates to prefer the BOC retail affiliate.

The details of LCI's "fast-track plan" certainly should be scrutinized closely, with an eye toward striking a workable balance which would achieve the dual objectives of creating a legitimate "carrier's carrier" while preserving the attractiveness of the plan to the BOCs. The perfect, however, should not become the enemy of the good. Dramatic action is clearly necessary to create a competitive local market. A creative alternative such as that proposed by LCI may well be a workable vehicle to achieve this end.

III.

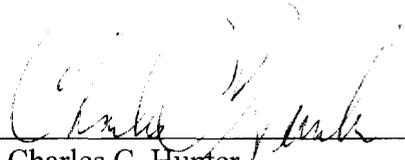
CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission, consistent with the above, to grant the Expedited Declaratory Rulings sought by LCI International Telecom. Corp. and adopt a "fast-track plan" to "jump-start" local competition and speed BOC entry into the in-region, interLATA market.

Respectfully submitted,

**TELECOMMUNICATIONS
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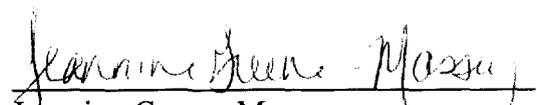
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