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June 10, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions in the Telecommunciations Act of 1996; CC Docket No. 96-98

Dear Ms. Salas:

Enclosed for filing in the above-captioned matter is an original and 12 copies of MCI WORLDCOM, Inc.'s Reply Comments in the above captioned-matter. Also enclosed is an extra copy to be file-stamped and returned.

Pursuant to the Commission's request, MCI WORLDCOM, Inc. is also submitting a copy of its Reply Comments electronically via the Internet.

Thank you for your assistance.

Sincerely,

Donald B. Verrilli Jr. (MTAA)

Donald B. Verrilli, Jr.

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

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REPLY COMMENTS OF MCI WORLDCOM, INC.

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EXECUTIVE SUMMARY

The initial comments and accompanying factual material provide compelling support for a Commission rule that requires unbundled access, on a nationwide basis, to each of the core network elements identified in the First Report and Order, whether used for voice or advanced services. Apart from the ILECs themselves, whose comments demonstrate nearly uniform hostility to any rule that would require them to open their networks to competition, virtually all of the commenters point in the same direction: Analysis of the purposes of the Act and local telephone markets today should lead the Commission to a construction of the "necessary" and "impair" standards that would require the unbundling of the core components of the local telephone network. Unbundling is critical because competitors need to share in overwhelming economies of scale, density, and connectivity that exist in the local telephone networks if they are to be able to offer competition to the ILECs for all classes of customers in all regions of the country for voice and advanced services. By allowing competitors to share these economies, unbundling will facilitate, not deter, facilities-based competition, and holds out the best hope of bringing promptly to all consumers the many benefits of competition.

Most commenters agree that rules that identify elements to be unbundled on a nationwide basis are far preferable to rules that address unbundling on a case-by-case or state-by-state basis. Most notably, the majority of State Commission comments urge the Commission to identify a core group of elements that should be unbundled on a uniform, nationwide basis. The various case-by-case unbundling rules proposed by the ILECs share two common defects. First, they are underinclusive, in that they would deny competitors access to elements in many situations where the denial would impair their ability to offer service. Second, they would result in interminable delay and unnecessary cost by involving regulators and courts in difficult and often subjective evaluations of the dynamics of individual local markets. The record in this proceeding

demonstrates that no practical alternatives to network elements leased from the ILECs currently are available in many, if not most cases. Thus a rule requiring these elements be available on a nationwide basis is far preferable to a rule designed to capture the relatively exceptional case in which ILEC elements are not needed. This is especially true where, as here, the risks of an underinclusive regulation are great, and the risks of a regulation that may in certain instances be overinclusive are negligible, especially given the overriding incentive of CLECs to avoid reliance on their dominant competitor.

Most commenters agree that section 251 should be given its natural construction, allowing the Commission to consider other factors, in addition to impairment and necessity, in determining whether or not to unbundle an element. The ILECs' arguments that other factors ought to limit the reach of the Act's unbundling requirement are without merit. BellSouth argues that consideration of the need to preserve the ILECs' incentives to invest in innovative technology counsels against unbundling, and even ought to trump an unbundling request when the CLEC would be impaired without the element. But while BellSouth (and the other ILECs) have produced no evidence showing that this concern about ILEC investment is well-founded, the comments and supporting declarations of MCI WorldCom and others conclusively show that leasing will not discourage ILEC investment in new or innovative facilities. Nor will unbundling deter investment by CLECs that do not want to defend any more than necessary on their principal competitors. Similarly without merit are the ILEC claims that the Commission should ignore the fact that in section 271 of the Act Congress itself already determined that unbundling on a nationwide basis of core network elements is an essential prerequisite for local competition.

Also unavailing is the ILECs' reliance on the essential facilities test, or on tests even more strict than the essential facilities doctrine. Although the ILECs attempt to brush aside

Congress' decision to use the words "necessary" and "impair," the plain and ordinary meaning of these terms is that "necessary" is more lenient than "essential," and "impair" is more lenient than "necessary." The question is whether the Commission should limit the leasing obligation to only those facilities that are essential in the antitrust sense. That result would be contrary to the language, structure, and purpose of the Act. Nor, contrary to ILEC suggestions, did the seven-member majority of the Supreme Court endorse any particular definition of the word "impair," much less the definition proposed by the ILECs. It simply required the Commission to adopt "some limiting standard, rationally related to the goals of the Act." Iowa Utilities Board, 119 S.Ct. at 735.

As important as the construction given to the terms "impair" and "necessary" is the way the standard is applied to the various network elements under consideration. The ILECs argue that each element must be analyzed on a stand-alone basis to determine if CLECs would be impaired without access to the element and support their claim with an exhaustive catalog in that purports to identify non-ILEC network components. If there is a single alternate source for the element in question in that catalog, that, according to most of the ILECs, ought to end the inquiry. But this approach would deny access to elements that CLECs need to be able to complete. Elements must be connected to one another to provide service; in particular, CLECs need an efficient means to connect their networks to unbundled ILEC loops. In determining whether CLECs need access to ILEC switches, for example, the Commission must first consider if there is some efficient way for CLECs to connect ILEC loops to the CLECs' switches and to do so without protracted delays. If there is not, then the CLECs are impaired without access to the ILEC switches, even if in some abstract sense a CLEC is free to purchase a switch from a switch vendor.

Each one of the core network elements should be unbundled:

Loops (including NID, Intrabuilding Network Cable, and Electronics). There is virtual unanimity that loops are a classic bottleneck element that need to be provided if there is to be any prospect of local competition. The ILECs correctly observe that MCI WorldCom and others occasionally connect their fiber rings directly to large business customers, but they fail to propose an administrable rule that would enable the Commission (or state commissions) to identify in advance those situations in which CLECs would not be impaired without access to ILEC loops because they are able profitably to deploy their own fiber optic networks. The ILECs' wildly different limiting proposals are implausible and arbitrary, and merely prove that no manageable limiting rule would accomplish the legitimate purpose of prohibiting leasing where self-provisioning is feasible. Nor is there any reason for such a rule. The availability of unbundled loops will not slow MCI WorldCom's continuing efforts to expand its local network.

Transport. No ILEC seriously denies that CLECs would be impaired without access to shared transport facilities that enable CLECs to share in the tremendous economies of scale and scope reflected in their transport network. The ILEC proposals regarding dedicated transport each exhibit the same flaw as their proposals regarding loops because the ILEC proposals for identifying available alternative sources are underinclusive and application of many of them would be administratively unworkable.

Switching. Like most other competitors, MCI WorldCom does not lease ILEC switching in order to combine it with its own loops and transport, but to use it as part of a combination of elements including ILEC loop and transport. The opening comments of MCI WorldCom and others demonstrate that CLECs are profoundly impaired without access to this combination of ILEC elements, which includes switching. The ILEC comments are entirely beside the point, for

they treat switching as a stand-alone element, and fail to address the economics and network issues involving switching as it is actually used by CLECs, and as it is actually configured in the ILEC network.

Signaling. Most commenters, including most ILEC commenters, agree that the ILEC switching element does not work without access to the ILEC's signaling and call-related databases. If CLECs are impaired without access to ILEC switching, they are therefore by the same token impaired without access to those signaling systems and databases. The record establishes that there is no adequate substitute for the ILECs own ubiquitous signaling systems; indeed, the ILECs alone maintain many of the critical databases. Moreover, none of the functionalities to which the CLECs seek access is proprietary in nature, and they were instead designed to a uniform standard to allow seamless interconnectivity between networks.

OSS. Virtually all commenters, including the ILEC commenters, agree that operations support systems (OSS) must be unbundled.

OS/DA. Finally, the opening comments demonstrate that there is not yet an alternate supplier of operator services and directory assistance databases equal in quality to the ILECs. Accordingly, CLECs are impaired without access to those ILEC databases. Equally to the point, unless CLECs use their own switches, they cannot efficiently interconnect to their own DA and OS platforms because ILEC subscribers do not currently provide customized routing (to the CLEC platforms) that the CLEC can use. For this reason as well, so long as CLECs need to rely on ILEC switching, they also need to rely on ILEC OS and DA platforms.

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REPLY COMMENTS OF MCI WORLDCOM, INC.

I. INTRODUCTION

In reply to Comments filed in response to the Second Further Notice of Proposed Rulemaking, ("Second FNPRM"), in the above-captioned dockets,[1/] MCI WORLDCOM, Inc., ("MCI WorldCom"), hereby respectfully submits these Reply Comments.

II. SECTION 251 SHOULD BE CONSTRUED TO FACILITATE THE USE OF UNBUNDLED NETWORK ELEMENTS AS A COMPLEMENTARY MEANS TO FOSTER PROMPT AND UBIQUITOUS LOCAL COMPETITION

Virtually all commenters agree that the purposes of the 1996 Act are to promote the prompt development of ubiquitous local competition, to encourage investment by all sectors of the industry, and to do so in a way that minimizes the need for intrusive regulatory intervention in the businesses of competitive local exchange carriers ("CLECs") and incumbent local exchange carriers ("ILECs"). See, e.g., Ameritech Comments ("Ameritech") at 15; BellSouth

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1/ Second Further Notice of Proposed Rulemaking, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, FCC 99-97 (rel. Apr. 16, 1999) ("Second FNPRM").

Comments ("BellSouth") at 7; United States Telephone Association Comments ("USTA") at 2, 3, 9, 18, 19; AT&T Comments ("AT&T") at 13; Competitive Telecommunications Association ("CompTel") at 3-4. Not surprisingly, however, the ILEC commenters seek to qualify and constrict the Act's purposes in order to preserve their monopolies over local telephone service. Six points deserve mention.

First, section 251(c) of the Act includes the unbundling obligation for ILECs as an important and procompetitive means for CLECs to enter local telecommunications markets, along with facilities-based entry and resale. Iowa Utils. Bd. v. FCC, 120 F.3d at 753, 791 (8th Cir. 1997), aff'd in part, rev'd in part sub. nom. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999). Contrary to ILECs' contentions, see, e.g., BellSouth 4-5 (Act cannot be read to suggest that more unbundling is better than less); U S West Comments ("U S West") at 3-5 (unbundling should occur only where there is market failure or where costs of sharing are outweighed by benefits), the Act does not treat unbundled network elements ("UNEs") as a disfavored method of entry.[2/] Nothing in the language, structure, or legislative history of the Act suggests that the Commission should take a grudging or reluctant attitude toward the availability of UNEs. To the contrary, as explained in MCI WorldCom's initial comments and below, ILECs must make UNEs available to all CLECs on a nondiscriminatory basis when denial of access would "impair" -- not "destroy" or "demolish" -- the ability of any requesting CLEC to provide any service it seeks to offer.

2/ Consistent with this view, the Eighth Circuit interpreted the requirements of section 251(c)(3) broadly. See 120 F.3d at 808-11 (upholding the FCC's broad definition of network elements), id. at 813-15 (upholding the FCC's conclusion that CLECs may provide local service entirely using UNEs) id. at 815-17 (rejecting the ILEC argument that unbundling will hinder development of facilities-based local competition or discourage innovation). The Supreme Court endorsed the Eighth Circuit's view on each of these points, AT&T v. Iowa Utils. Bd., 119 S. Ct. at 734, 736-38.

A second, and related, point is that the ILECs give insufficient weight to the legislative intent to promote the prompt development of local competition. In fact, the Act "provides for unbundled access to incumbent LECs' network elements as a way to jumpstart competition in the local telecommunications industry." 120 F.3d at 811 (emphasis added); id. at 816 ("Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry, and thus required incumbent LECs to allow competing carriers to use their networks in order to hasten the influence of competitive forces in the local telephone business."). Thus, although the ILECs claim that the Commission should be content if entry may occur within the next two years, see, e.g., BellSouth at 15-16, the Act's goal in 1996 was to promote competition promptly, not in the next millennium. S. Rep. No. 104-23, at 1 (1995) ("S. Rep."); H. Rep. No. 104-204, at 1 (1995) ("H. Rep."). See Declaration of John E. Kwoka, Jr. ("Kwoka Initial Decl.") ¶ 16 (attached to MCI WorldCom opening comments as Tab 2). The fact that uncertainty about the availability of specific UNEs remains more than three years after enactment, and that no meaningful local competition has become established in the meantime, highlight the fact that access to UNEs is critical to the prompt emergence of competition.

Third, contrary to the ILECs' views, the Act preserves the ability of different CLECs to pursue different entry strategies, and does not favor one strategy over another. Although one CLEC may not need access to an unbundled ILEC element, another CLEC, with a different entry strategy, may. In fact, Congress contemplated that a variety of companies would adopt a variety of business plans to bring competition to the local marketplace. S. Rep. at 4-10. Of course, we readily agree that the purpose of the Act is to promote competition, and not particular competitors (including inefficient competitors). See, e.g., Ameritech at 19; Bell Atlantic

Comments ("Bell Atlantic") at 8; USTA at 8. But the unbundling requirements liberate new entrants from the potentially slow, expensive, and incomplete options of purely facilities-based entry and resale; they do not impose a straightjacket into which only the ILECs' vision of a desirable competitor must fit. If a CLEC's ability to pursue a particular strategy would be impaired by denial of unbundled access, section 251(c)(3) guarantees its availability. After all, section 251(d)(2)(B) considers "the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer" (emphasis added) - - not the services that other CLECs offer or that the ILEC offers or would like the CLEC to offer. See Reply Declaration of John E. Kwoka, Jr. ("Kwoka Reply Decl.") ¶ 10 (attached hereto as Tab 10).

Fourth, unbundling should occur in a way that drives local rates to competitive levels and facilitates innovative and high-quality services. One critical goal of the 1996 Act is to reduce the retail price that the ILECs have been able to extract from consumers in a monopoly environment. This goal is advanced when CLECs can obtain elements at a cost-based rate from ILECs that is significantly lower than the rates others would pay to any alternative source. Equally important, unbundling may enable CLECs to provide more innovative and better services more quickly and ubiquitously than they would otherwise be able to do. As the Eighth Circuit recognized, by facilitating competition, unbundling facilitates innovation. Iowa Utils. Bd. v. FCC, 120 F.2d at 816-17.

Fifth, the acknowledged "deregulatory" goal of the Act, see, e.g. BellSouth at 7, means that the Commission should strive for rules that are easy to apply and that are efficient in their application. For example, any rule that sought to restrict unbundling by requiring regulators to evaluate the business plans of individual CLECs on an ongoing basis would mean more, not less,

regulation, especially if the ILEC has to make the element available to some customers in some parts of its region on a nondiscriminatory basis and at cost-based rates.

Sixth, the Act requires ILECs to unbundle network elements if unbundling would facilitate competition in the local marketplace as it exists today. This may mean that a particular element will be unbundled only on a transitional basis until local markets have evolved to the point where denial of access will not impair CLEC competitiveness. But temporary access may be a crucial means to accelerate the establishment of effective local competition and certainty will be ensured for local entry.

III. THE COMMISSION SHOULD IDENTIFY CORE NETWORK ELEMENTS THAT MUST BE UNBUNDLED ON A UNIFORM NATIONWIDE BASIS

The ILEC comments do nothing to undermine the force of the Commission's determination in its initial Local Competition Order, consistent with its rulemaking obligation in section 251(d)(1) and (d)(2), that the Commission should establish a core group of network elements that must be uniformly unbundled on a nationwide basis. See MCI WorldCom Comments ("MCI WorldCom") at 4-10. Nothing has changed in the last three years to justify a different approach. Indeed, the various ILEC proposals to restrict unbundling on a case-by-case basis for narrow geographic and/or product markets serve to substantiate MCI WorldCom's position that a case-by-case approach would frustrate the fundamental purposes of the unbundling requirement in multiple ways — by denying CLECs access to UNEs when they need access in order to compete effectively, by imposing unnecessary costs on ILECs, by delaying the advent of local competition, and by creating a regulatory morass for both federal and state commissions. Just as they have done under the original unbundling regulation, state commissions will continue to perform an important role in applying the Commission's

unbundling requirements and in extending them when necessary to further the Act's goals of introducing competition rapidly into local markets.

A. The Commission Should Impose Uniform Nationwide Rules

The case-by-case approach advocated by the ILECs that would require unbundling only at some locations or for some customers would be a recipe for disaster. First, all of the case-by-case standards proposed by the ILECs are predictably underinclusive in that they would deny CLECs access to elements even in situations where the denial would impair their ability to offer services they seek to offer. For example, SBC's proposal to exclude loops connecting certain large business customers from the unbundling obligation would deny many customers the benefit of competition through unbundled loops. Some differences in various geographic areas and product segments may have some correlation with the degree to which a CLEC is impaired without access to an ILEC's elements. But no accurate, reliable, and practical method exists for drawing lines by particular regions, wire center areas, or product markets that includes only the customers the CLEC would be materially hampered in serving without unbundled access to an element.

Second, implementation of a case-by-case approach would generally retard the development of local competition and significantly raise the cost of entry. See Kwoka Initial Decl. ¶ 34. For example, U S West would have the Commission establish a rebuttable presumption against unbundling of high-capacity loops, putting the burden on CLECs to demonstrate that their ability to serve individual customers would be impaired if unbundled access were denied. See U S West at 39. That the presumption is rebuttable reflects even U S West's recognition that its proposal is too restrictive. CLECs would therefore be forced to use their resources to pursue an endless series of proceedings to rebut the presumption, and the

history of the last three years demonstrates that ILECs would force CLECs to litigate meritorious claims. BellSouth's proposal for unbundling according to geographic zones exemplifies the chaos and consequent barriers to entry that would ensue from this type of rule. See BellSouth at 1-3, 13, 29-30. See also Ameritech at 5, 53, 58, 65; USTA at 4,17, 24, 31; U S West at 28-30. BellSouth demands that different unbundling rules apply in different zones in each state, although BellSouth does not make clear exactly how the zones would be defined, what the respective roles of federal and state regulators would be in defining these zones, or whether and how parties might attack a given zone assignment or boundary. BellSouth at 1-3, 29-30. Given the limited resources and enormous competing demands on the time of federal and state commissions, and the lack of clarity in BellSouth's proposal, proceedings to define these zones would inevitably take months to complete, leaving CLECs high and dry in the meantime. The result would be exactly what the ILECs want: CLECs would have to divert resources from competition to litigation, the development of competition would be forestalled if not foreclosed, and over-analysis would produce paralysis. "No one can seriously believe that competition in the local exchange would emerge our of this administrative and legal black hole." Kwoka Initial Decl. ¶ 34.

The third point is related to the second: a case-by-case approach requiring regulators to sift through CLEC-specific, area-specific or customer-specific evidence of impairment would be contrary to the deregulatory purposes of the Act. To implement this approach, government officials would, for example, have to evaluate the actual and likely success of individual CLECs in individual markets, and to do so on a continuing basis as competition - - however stifled - - gradually evolves. Macro-regulation is essential to allowing unbundling to serve its crucial role under the Act, but the micro-regulatory morass into which the ILECs would plunge the

regulators is totally antithetical to the deregulatory thrust of the Act. That is why most of the state commissions that filed comments advocate uniform nationwide rules for unbundling of the seven core elements designated by the Commission in the Local Competition Order or at least of the elements identified in the 271 checklist.[3/] The burdens that the ILECs' proposed case-by-case approach would place on state commissions would generally be as unwelcome as they would be anticompetitive.

Only an unbundling requirement that focuses on general needs and not on exceptions to the rule will enable CLECs to provide the services they seek to offer and thereby introduce competition into local markets promptly and ubiquitously. The record in this proceeding establishes that, as a general rule, the core elements that MCI WorldCom proposes to be covered by a nationwide rule are not practically available to CLECs from alternate sources, either self-provisioned or third-party provisioned. See, e.g., Declaration of Sherry Lichtenberg

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3/ See Connecticut DPUC at 4 ("CTDPUC recommends that the FCC reaffirm those unbundled network elements originally identified by the Commission in its First Report and Order"); Illinois Commerce Commission ("ICC") at 11 ("The ICC recommends that the FCC re-establish the original minimum list of seven network elements"); id. at 14-15 (advocating further unbundling of sub-loops and dark fiber); Iowa Utilities Board at 6-7 ("The network elements from the § 271 checklist easily satisfy even the 'necessary' standard and should continue to be on the nationwide unbundled network elements list, even if they are proprietary"); Kentucky PSC at 2 ("Reinstatement of the FCC's initial list of UNEs is necessary to promote meaningful competition. . . . [T]he Kentucky PSC has concluded that local competition will not occur unless key UNEs are available on a platform basis"); Texas PUC at 14 ("[T]he Texas PUC supports the list of seven UNEs set forth by the FCC in the Local Competition First Report and Order," because they are "necessary" to provide telecom service and the lack would impair CLECs' meaningful opportunity to compete) id. at 15-18 (stating that sub-loops and dark fiber are unbundled in Texas); Washington UTC at 14 (stating that the WUTC supports unbundling of elements listed in the § 271 checklist, because loops and Operations Support Systems ("OSS") are "absolutely essential to a CLEC's ability to provide local service," and all of the other elements on the list are "necessary").

("Lichtenberg Decl.") (attached hereto as Tab 11) (explaining why switching is not practically available to CLECs from alternate sources).

The Commission should require unbundling of an element on a nationwide basis if the record shows that lack of access would produce impairment in a substantial percentage of cases or for any significant class of customers in any significant area, even if lack of unbundled access to a network element would not impair some CLECs' ability to offer some services in some other cases. If CLECs' ability to provide the services they seek to offer to any material group of customers, whether defined geographically or otherwise, is impaired, then the purposes of the Act require that the element be made available on an unbundled basis. Otherwise, substantive segments of the nation will be denied the benefits of local competitions.

The benefits of this uniform approach are manifest because it would avoid costs and delays described above that a case-by-case approach would impose on CLECs and regulators. The costs of a uniform approach are minor at worst. First, CLEC self-interest will cause them not to lease the element in any cases where they can reasonably avoid reliance on their major competitor. Second, to the extent that alternative sources of the elements are generally available in some areas or for some customers, effective competition at the wholesale level would give ILECs an incentive to lease elements so that they can keep traffic on their networks - - just as interexchange carriers have incentives to engage in vigorous competition to provide interexchange services on a wholesale basis.[4/] Third, the Commission will have to establish the terms and conditions of access in any event because ILECs will make elements available on an

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4/ See Declaration of Ken Baseman, Rick Warren-Boulton and Susan Woodward ¶ 20-21 ("Baseman/Warren-Boulton/Woodward Decl.") (attached hereto as Tab 12); see also Memorandum Opinion and Order, In re Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. 13 Communications Reg. (P & F) 477 (1998)).

unbundled basis in at least some circumstances. Although the Act protects competition and not just individual competitors, ILEC interests are protected by the requirement that in all cases, CLECs must pay cost-based rates, including a reasonable profit. See 47 U.S.C. § 252(d)(1).

In any event, the overriding consumer interest in fostering the rapid development of effective local competition, after years of ILEC-induced delay, justifies an unbundling rule that is overinclusive rather than underinclusive. Consumers can only benefit if key network elements are available at the wholesale level at their economic cost because retail competition will cause the savings to be reflected in lower retail prices for local telecommunications services. The harm to consumers and competition from a crabbed construction of the unbundling requirement far exceeds any possible risk to the ILECs from a more expansive interpretation.[5/]

For these reasons, MCI WorldCom urges the Commission to designate a core set of elements that must be uniformly unbundled on a nationwide basis.

B. The Roles of the Commission and State Regulators

For over three years, state commissions have applied nationwide unbundling rules formulated by the Commission without any complaint that the Commission left the states with too little to do. Continuing the approach in the original Rules 317 and 319 — an approach not called into question by the Supreme Court's remand — will continue to maximize the prospects for local competition. Indeed, that is precisely why Congress instructed the Commission in section 251(d)(1) to promulgate unbundling requirements and obligated the states to apply them

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5/ See, e.g., Resorts Int'l Hotel Casino v. NLRB, 996 F.2d 1553, 1558 (3d Cir. 1993) (approving rejection of rule requiring burdensome and subjective inquiry in favor of bright-line rule because "[a]lthough the rule may not produce the perfect result in all cases, 'the best should not be the enemy of the good'" (quoting Pennsylvania v. ICC, 535 F.2d 91, 96 (D.C. Cir. 1976) (upholding certain rail regulations because alternatives would either be too expensive or too omplex to administer.) "[T]here may be impossibility in substance and in effect even when something can be achieved, but at a cost taht wholly outweighs any conveivable benefit.".

in arbitration proceedings pursuant to section 251(c)(1). Even a major ILEC like SBC recognizes the benefits of a rule that applies consistently across state and even national borders. See SBC Comments ("SBC") at 18-20. State commissions will continue to have a critical role in arbitrating unbundling disputes pursuant to section 252, identifying additional network elements that should be unbundled pursuant to the standards in a revised Rule 317, and determining the terms and conditions for access to all of these UNEs.

Contrary to the position of some ILECs and state commissions, the Commission should not delegate to state commissions its responsibility under section 251(d)(2) to establish standards and identify an initial list of elements that must be unbundled. BellSouth at 29-30; USTA at 45; Ameritech at 48-49. The Commission has as complete a record as any state commission could develop as the basis for determining the scope of the unbundling requirement, and forcing CLECs to fight the same fight more than 50 times instead of once will only consume resources that should be more usefully deployed in the competitive struggle. For the reasons explained above, and contrary to ILEC arguments, BellSouth at 29-31; Ameritech at 48-49; U S West at 28, the unbundling obligation should not vary from state to state, or from end office to end office, or from customer to customer, depending on alleged differences in local conditions. In any event, the conditions that create impairment do not vary from state to state, and a CLEC that has the right to unbundled access to an ILEC element in certain circumstances in one state ought to have the same right in any other state where the same circumstances exist. Allowing each state to formulate its own unbundling regulation would inevitably lead to inconsistent approaches. "The comments of the Ohio PUC demonstrate that delegation to state commissions will result in inadequate and unsupported unbundling rules. Rejecting the recommendation of most other state commissions that filed comments addressing the same issue (including the ICC, which also

regulates Ameritech), the Ohio PUC concluded that Ameritech should not be required to unbundled operator services/directory assistance, switching, or interoffice transport. Ohio PUC at 5-6. If the Commission permits state commissions to perform the role that Congress expected the Commission to carry out in determining which elements should be unbundled, ill-considered and unjustified decisions will inevitably result. Some of the states (as the comments reflect) will make the right decisions, but the wrong decisions would deny millions of the customers the benefits of competition and seriously obstruct the ability of CLECs like MCI WorldCom to implement national business plans. In short, the result of a state-by-state approach would be denial of access to elements in some states even though impairment will surely occur.".[6/]

Some ILECs have disputed the states' right to supplement the Commission's list of elements that must be unbundled. See, e.g., BellSouth at 29-30; U S West at 31. However, the Commission correctly recognized that its unbundling requirements generally set a floor, not a ceiling, for state commissions. That is why the Commission promulgated Rule 317 to define the standards that state commissions should apply in determining which additional elements should be unbundled. Congress included provisions in the Act specifically intended to allow states to enforce rules that further the procompetitive goals of the Act. Section 251(d)(3) of the Act allows states to enforce "any regulation, order or policy" of a state commission that "establishes access and interconnection obligations of local exchange carriers," that "is consistent with the requirements of this section," and that "does not substantially prevent implementation of the requirements of this section and the purposes of this part." The plain language of section 251(d)(3) clearly allows states to impose unbundling requirements above and beyond those

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6/ It would create exactly the same problems for the Commission to delegate to the states authority to determine when to terminate Commission-defined unbundling obligations as it would to delegate the authority to define those obligations in the first place.

established by the Commission, including supplementing the minimum national standards adopted by the Commission. See also 47 U.S.C. § 261(b), (c) (providing that states are not precluded from enforcing existing state regulations and imposing additional state requirements so long as the regulations or requirements are not inconsistent with the Act).[7]

Some ILECs make the related demand the Commission to preempt state laws to the extent they impose a broader unbundling obligation than the Commission defines in this proceeding. See, e.g., GTE Comments ("GTE") at 29; SBC at 20. Just as it would generally further the purposes of the Act for a state commission to apply the new version of federal rule 317 to add elements to the minimum list developed by the Commission, it would generally further the purposes of the Act for state commissions to reach the same result under state law. The ILECs cite no authority for the Commission to preempt any such state law based on this record. See 47 U.S.C. § 252(e)(3), (f) (preserving the right of a state commission to "establish[] and enforc[e] other requirements of State law in its review" of interconnection agreements or statements of generally available terms). Section 253 contemplates preemption only if a state legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," and enforcement of procompetitive state laws would not run afoul of section 253.

Incredibly, some ILECs go so far as to argue that although (they contend) states are precluded from adding elements to a nationwide list and supplementing the Commission's minimum unbundling requirements, states should be permitted to deny access to network

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7/ Other sections of the Act also preserve states' rights to enforce their own laws, rules and regulations. See Pub. L. No. 104-104, § 601, 110 Stat. 56, 143 (Feb. 8, 1996), reprinted at 47 U.S.C.A. § 152 Hist. and Stat. Notes (West Supp. 1998) (uncodified) (providing that the Act shall not be construed to modify, impair, or supersede state or local law unless expressly provided in the Act).

elements that the Commission determined should be unbundled. BellSouth at 30 ("While [a State's] reducing the [Commission's] list is consistent with Congress's de-regulatory goals, adding to it is not."); see also U S West at 31. To MCI WorldCom's knowledge, states have rarely attempted in the last three years to deny access to any element covered by the Commission's previous unbundling regulation, and for good reason.[8/] The ILECs do not identify, and MCI WorldCom cannot imagine, any circumstances in which a state regulation inconsistent with the Commission's minimum requirements would satisfy the requirements of section 251(d)(3). To the contrary, it should be apparent that denial of access to an element in the face of a Commission finding that impairment would result would be inconsistent with the requirements of section 251 and substantially prevent implementation of the Act's requirements. However, the Commission need not and should not decide this question in the abstract. See Iowa Utils. Bd., 120 F.3d at 806-07.

For all these reasons, the Commission should promptly exercise its authority, and its responsibility, to promulgate uniform nationwide unbundling rules for state commissions to apply and, where appropriate, extend.

IV. PROCEDURAL ISSUES

A. Evidentiary Standards

Several commenters state that in this rulemaking CLECs should bear the burden of production or proof. See BellSouth at 28-29; GTE at 3-4; USTA at 7, 8, 30; U S West at 32. Some even suggest heightened evidentiary standards for the CLECs' submissions. See GTE at 3-4 (convincing evidence); U S West at 30 (impairment must be "clearly demonstrated");

8/ MCI WorldCom has been obliged to litigate State commission failures to unbundle shared transport in several states.

BellSouth at 30 (clear and convincing proof). Such standards are contrary both to statutory text and purposes. The Commission's goal should be to guarantee unbundling whenever it would facilitate the prompt development of local competition, not stretch for ways to deny it. Imposing the burden of proof on the CLECs, and especially a heightened burden, would frustrate the substantive purposes of the unbundling requirement.

In any event, this rulemaking is governed by section 553 of Title 5, which does not establish an express evidentiary standard for the support of a rule adopted through informal rulemaking. It is generally recognized, however, that "legislative facts are not susceptible to the kind of evidentiary proof routinely required to support findings of adjudicative facts." 1 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law § 7.5, 322 (3d ed. 1994). As MCI WorldCom stated in its opening comments, MCI WorldCom at 14, under well-established principles of administrative law, the Commission's rule must rest on a reasonable interpretation of the statute and be supported by an explanation based on sufficient record evidence to provide a rational basis for its conclusions. See, e.g., Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).[9/] Neither the Title 5 nor the Communications Act requires particular proof from specific parties, and certainly neither articulates a heightened proof standard like that proposed by some commenters. Commenters including MCI WorldCom and other CLECs, state commissions, and consumer groups have built a record more than ample to sustain a Commission determination that each of the network elements addressed herein should be unbundled on a national basis. This is all that is required.

9/ This standard is precisely the one the Commission followed in its first rulemaking in this docket, and no party challenged that standard.

Commenters have also suggested burdens of proof to be applied in future proceedings to modify a Commission - promulgated list of core elements. See BellSouth at 30-31 (CLEC burden of establishing or defending continuation of unbundling by clear and convincing evidence in state public utility commissions); USTA at 4, 46 (sunset unless a CLEC proves that consumer welfare would suffer without continued unbundling). But, just as with this initial proceeding, additions to a Commission-promulgated list of core elements need simply be based on an adequate record. Neither the Commission nor the States should place inappropriate burdens on proponents of additional unbundling.

As to the separate circumstance in which a party may a advocate elimination or modification of an unbundling requirement adopted in this proceeding, the party seeking such modification should have the burden to show that circumstances have changed substantially so as to justify the requested alteration. Moreover, the Commission should not delegate authority to states to eliminate or modify Commission unbundling requirements because such delegation would create all the same problems as delegating to states the authority to formulate the requirements in the first place.

B. Sunsets

Several ILECs endorse sunsets, proposing time limits of two to five years on at least some network elements. See, e.g., Ameritech at 106 (FCC should adopt loop sunset); USTA at 7, 17-18, 46 (two year sunset on all unbundling); U S West at 40 (5 year sunset on loop unbundling). Some additionally suggest an end to unbundling requirements upon the occurrence of certain conditions. See, e.g., BellSouth at 74-75 (sunset sooner than two years if wireless growth is faster than predicted); USTA at 7, 17-18, 46 (sunset to occur in two years or whenever any facilities-based competitor enters a market). As explained in the opening comments, see

MCI WorldCom at 11-14, MCI WorldCom believes that sunset provisions, be they time-defined or event-triggered, would frustrate the purpose of the Act as these are necessarily based on unreliable predictions about the development of the market. Instead, the Commission should engage in a periodic review of its regulations to examine evidence of changes in the market and their actual effect that might merit alteration of those rules. In such a proceeding, any decision to alter the regulations already in effect would, as in the initial rulemaking, need to be supported by record evidence. Moreover, given that the regulation in effect will be supported by evidence resulting from the Commission's current extensive examinations, MCI WorldCom reasserts that the regulations should remain in effect absent substantial new evidence of changed circumstances sufficient to justify a different conclusion. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (indicating presumption against change to existing policies unless change is justified by record evidence).

Sunset provisions will also have anti-competitive effect. A time-defined sunset, set in advance, would encourage ILECs to withhold and slow-roll access to UNEs in hopes of outlasting the requirements. See U S West Communications, Inc. v. FCC, No. 98-1468, 1999 WL 362834, at *4 (D.C. Cir. June 8, 1999). ("Incentives are not as crucial in a situation where the business prohibition will be lifted in a fixed time . . . as where its duration depends on the BOC's own actions.")

Automatic event-triggered termination provisions would wreak havoc of CLEC business plan and the development of local competition. The sort of "sudden death" unbundling standard advocated by Hausman and Sidak embraced by USTA (Hausman and Sidak Affidavit in ¶ 166 attachment to USTA), would create a totally unpredictable environment that would substantially increase the risk and cost of entry. Under a system where unbundling of an element is no longer