

to the extent technically feasible, a LEC must identify and rebrand the traffic it provides to its competitors.⁸⁷¹

444. We decline to expand the definition of OS/DA, as proposed by some commenters, to include an affirmative obligation to rebrand OS/DA⁸⁷² and to provide directory assistance listing updates in daily electronic batch files.⁸⁷³ We find such modifications unnecessary because, as mentioned above, these obligations already exist under section 251(b)(3), and the relevant rules promulgated thereunder.

b. Proprietary Concerns Associated with OS/DA

445. With the exception of one commenter, no parties identify proprietary concerns associated with OS/DA, and we find none.⁸⁷⁴ Moreover, we do not discern any copyright, patent, or trademark or trade secrecy implications associated with OS/DA. Accordingly, we analyze incumbent LECs' obligations to provide unbundled access to its OS/DA under the "impair" standard.⁸⁷⁵

⁸⁷¹ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, CC Docket Nos. 96-115, 96-98, 99-273, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, FCC 99-227, paras. 141-148 (rel. September 9, 1999) (*Directory Listing Information Order*).

⁸⁷² See RCN Comments at 20 (stating that incumbent LECs should be required to rebrand OS/DA services for the requesting carrier).

⁸⁷³ See, e.g., AT&T Comments at 134; MCI WorldCom Comments at 71-74; MediaOne Comments at 13; Metro One Comments at 17-18.

⁸⁷⁴ We note that while Metro One argues that directory assistance is not proprietary and should be unbundled, it identifies unpublished directory assistance listings as the only conceivably "proprietary" aspect of the incumbent LECs' OS/DA services. Metro One, however, does not describe the intellectual property concerns associated with unpublished listings and does not claim a need for unbundled access to unpublished listings under the "necessary" standard in section 251(d)(2)(A). Metro One simply states that incumbent LECs have refused to make unpublished listings available to requesting carriers, while they enjoy access to unpublished listings in the provision of directory assistance to their customers. Metro One Comments at 10-11. Metro One requests that in lieu of providing the "non-published" customer's name and address, the incumbent LEC provide the name of the customer without the telephone number or address with a notation that the listing is non-published. *Id.* We note that pursuant to rule 51.217(c)(3)(iii), however, LECs cannot provide access to unlisted telephone numbers or other information customers have asked a LEC not to make available. 47 C.F.R. § 51.217(c)(3)(iii). Conversely, section 251(c)(3) requires LECs to provide nondiscriminatory access to directory assistance. 47 U.S.C. § 251(c)(3). The Commission recently resolved any potential inconsistency by requiring a LEC to make available to requesting carriers the names and addresses of unlisted or unpublished subscriber information to the extent its own operators have access to this information. For example, if subscriber information is not available to the incumbent's operator, then no access need be given to the competitor. See *Directory Listing Information Order* at paras. 164-169.

⁸⁷⁵ See, e.g., Cox Comments at 30 (stating that OS/DA are not proprietary, so they should be subject to the "impair" test).

c. **Unbundling Analysis**

446. Consistent with the unbundling analysis set forth above, we conclude that where an incumbent LEC provides customized routing to the requesting carrier as part of the unbundled switching element, lack of access to the incumbent's OS/DA on an unbundled basis does not materially diminish a requesting carrier's ability to provide the services it seeks to offer. The record demonstrates that a variety of alternative providers of OS/DA offer services at comparable cost and quality to those of the incumbents. We agree with the incumbent LECs, MGC, and the Ohio PUC that the incumbents enjoy no material advantage obtaining the key inputs for OS/DA services.⁸⁷⁶ Certain commenters point to differences in cost and the amount of time required to implement services provided by these alternative sources to support their arguments that competing carriers are impaired without access to the incumbents' OS/DA services. The majority of these commenters, however, focus on the differences in the quality and accessibility of the information in the incumbent LECs' OS/DA databases relative to that available from third-party sources. As discussed more fully below, we find that these quality differences are addressed adequately by other sections of the Act.

447. Alternatives in the Marketplace. Competition in the provision of operator services and directory assistance has existed since divestiture.⁸⁷⁷ Such competition has accelerated in the directory assistance market as a result of the Supreme Court's decision to allow copying of carriers' white pages listings in their entirety.⁸⁷⁸ For example, according to SBC, more than 30 competitive LECs presently provide their own OS/DA services or resell the services of non-incumbent LECs.⁸⁷⁹ In Bell Atlantic's region, only 70 out of 400 interconnection agreements require Bell Atlantic to provide OS/DA as an unbundled network element.⁸⁸⁰ Thus, in more than 80% of Bell Atlantic's interconnection arrangements, competitive LECs have chosen to provide OS/DA for themselves or to obtain such service from wholesale providers. According to the Rural Telephone Coalition, rural incumbent LECs have obtained OS/DA services from outside sources for many years because they find third-party sources to be cost-effective.⁸⁸¹ In

⁸⁷⁶ Bell Atlantic Comments at 32-36; Cincinnati Bell Comments at 7; MGC Comments at 31; Ohio PUC Comments at 11-13.

⁸⁷⁷ See Cincinnati Bell Comments at 7 (attests that the market for OS/DA has been competitive for years because it has purchased OS/DA services from competitive providers for that long); USTA UNE Report at IV-1.

⁸⁷⁸ *Feist v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991).

⁸⁷⁹ SBC Reply Comments at 22. See also Cincinnati Bell Comments at 7 (reports awareness of 17 competitive providers of operator services and 13 directory assistance providers).

⁸⁸⁰ Bell Atlantic Comments at 32. Bell Atlantic also asserts that there is an over-capacity in the OS/DA market that has resulted in an increased competitiveness within the market, a trend it expects to continue for the next two to three years. *Id.* at 32-33.

⁸⁸¹ Rural Telephone Coalition Comments at 10-11. See also Cincinnati Bell Comments at 7.

addition, Bell Atlantic reports that its wireless affiliate, Bell Atlantic Mobile, relies on a third-party OS/DA provider.⁸⁸² MGC advocates that OS/DA not be unbundled because, in its view, competitive LECs can purchase OS/DA from a number of vendors offering cost-effective nationwide alternatives to those of the incumbent LECs.⁸⁸³

448. Even requesting carriers advocating the unbundling of operator and directory assistance services acknowledge that there exists a substantial number of alternative providers of operator and directory assistance services. For example, AT&T, MCI WorldCom, and Sprint have already established national operator services via toll-free numbers.⁸⁸⁴ McLeod USA self-provisions nationwide directory assistance service.⁸⁸⁵ Metro One provides OS/DA services to ALLTEL and GST Telecom.⁸⁸⁶ Cox and Omnipoint obtain OS/DA service from Teltrust, and WinStar obtains these services from Frontier.⁸⁸⁷ Requesting carriers may also obtain OS/DA services and directory listings from numerous wholesale providers, including CenturyTel Telecommunications, Clifton Forge, Consolidated Communications, Excell, Experian's TEC Group, Frontier, HebCom, InfoNXX, Metro One, Quest411 and Teltrust.⁸⁸⁸

449. It appears that this increasing availability of competitive OS/DA providers coincides with a decrease in incumbent LEC OS/DA call volumes. Evidence in the record indicates that call volumes to incumbent OS/DA services have declined steadily over the past few years. For example, SBC claims directory assistance call volumes have decreased almost 30 percent since 1995, and SBC operator-assisted calls have dropped by over 50 percent during the same period.⁸⁸⁹ Similarly, BellSouth's operator-assisted call

⁸⁸² Bell Atlantic Comments at 34 (stating that InfoNXX provides OS/DA services for a variety of telecommunications service providers, including Bell Atlantic's wireless subscribers).

⁸⁸³ MGC Comments at 31. MGC, however, currently purchases OS/DA services from the incumbent LECs. Letter from Scott A. Sarem, Assistant Vice President, Regulatory, MGC, to Christopher Libertelli, Common Carrier Bureau, Policy Division, Federal Communications Commission, CC Docket Nos. 96-98, 95-185 (filed August 12, 1999).

⁸⁸⁴ See Bell Atlantic Comments at 33. Bell Atlantic also points out that MCI WorldCom, AT&T and Sprint offer operator services and directory assistance as both wholesale and retail services. *Id.*

⁸⁸⁵ USTA UNE Report IV-9.

⁸⁸⁶ *Id.* at IV-2, 5.

⁸⁸⁷ *Id.* at IV-2, 5 (citation omitted).

⁸⁸⁸ See Bell Atlantic Comments at Ex. 4. In addition, various Internet sites provide national directory listings at no charge, including Alta Vista People Search, At Hand, Big Yellow, Bigbook, 555-1212.com, InfoSpace, InfoUSA, Switchboard.com, Smartpages, WhoWhere People Finder, Worldpages, Yahoo! People Finder, and Zip2. See USTA UNE Report at IV-1 to 6.

⁸⁸⁹ SBC Comments at 64.

volumes have declined over 60 percent in the past eight years.⁸⁹⁰ According to Bell Atlantic, it lost greater than 67 percent of its wholesale directory assistance calls between 1994 and 1998.⁸⁹¹ In fact, Bell Atlantic claims that interexchange carriers accounted for over 68% of the operator services market in 1998 and represented 72% of the wholesale operator services market by 1997.⁸⁹² This trend, combined with the number of alternative operator services and directory assistance providers outside the incumbent LECs' networks, strongly suggests that requesting carriers are not impaired without access to the incumbent LECs' OS/DA service. Significantly, we find that the existence of multiple alternative providers of OS/DA service in the marketplace, coupled with evidence of competitors' decreasing reliance on incumbent OS/DA services, demonstrates that requesting carriers' ability to provide the services it seeks to offer is not materially diminished without access to the incumbent's OS/DA service on an unbundled basis.

450. Cost. In light of the significant evidence of multiple third-party providers of OS/DA, we find unpersuasive assertions that replication of OS/DA service facilities and functionalities would involve substantial and material cost and would delay competitive entry into the local market.⁸⁹³ The costs associated with self-provisioning OS/DA include: (1) the cost of the facility, including employees, real estate, computers,⁸⁹⁴ (2) the cost of transporting traffic to the facilities; and (3) the cost of obtaining the underlying subscriber information contained in OS/DA databases.⁸⁹⁵ We acknowledge that, in some situations, depending on the type of OS/DA service a requesting carrier seeks to provide, OS/DA service may be more expensive if it is purchased from third-party providers than it would be if purchased from the incumbent. We find, however, that such differences will not materially diminish a requesting carrier's ability to provide local exchange or exchange access service.

451. We are unpersuaded by Cox's argument that OS/DA service should be unbundled because incumbents enjoy economies of scale and scope that greatly reduce the cost of providing these services to their own customers.⁸⁹⁶ In light of the number of alternative providers currently providing OS/DA service and the competitive market that is developing for long distance transport, we find this argument unconvincing. We also

⁸⁹⁰ USTA UNE Report at IV-6.

⁸⁹¹ Bell Atlantic Comments at 34-35. *See also* USTA UNE Report at IV-6 (citing that Bell Atlantic lost approximately 60 percent of its wholesale DA calls between 1994 and 1997).

⁸⁹² Bell Atlantic Comments at 33 (citation omitted).

⁸⁹³ *See, e.g.*, CompTel Comments at 46-47.

⁸⁹⁴ By use of the term "facility," we refer to the real estate, employees, and computers used in the provision of OS/DA call centers.

⁸⁹⁵ *See, e.g.*, USTA UNE Report at IV-9 to 10.

⁸⁹⁶ Cox Comments at 32.

find that incumbents do not have any particular advantage in obtaining the facilities needed to create a call center, including employees, real estate and computers.⁸⁹⁷ In addition, unlike many other network elements, such as switching or transport, the ability to provide a nationwide OS/DA service does not require large amounts of sunk and fixed costs in facilities that must be deployed ubiquitously in order to serve a broad customer base. Rather, a requesting carrier can establish one call center or a few regional centers to which it can transport all of the calls on its network and provide OS/DA service nationwide.⁸⁹⁸ Moreover, we believe that a competitive LEC or a group of competitive LECs can achieve economies of scale by aggregating demand for OS/DA services over various regions by processing them through a single call center. Unlike the self-provisioning of switches, or other such network elements, self-provisioning a single OS/DA platform would not require the competitive carrier to deploy equipment throughout the network to ubiquitously serve its customers.

452. Certain competitive LECs assert that purchasing long-haul DS1 facilities to alternative OS/DA call centers is more expensive than purchasing local loops to access OS/DA services provided by incumbent LECs.⁸⁹⁹ In particular, Time Warner claims that special access rates to trunk its OS/DA calls to a vendor's national call center are approximately \$500,000 a year.⁹⁰⁰ MediaOne estimates that remote long-haul facilities cost \$1500-\$2000 per month for a DS1 compared to local loops provisioned by the incumbent LEC for about \$500 per month.⁹⁰¹

453. While, on its face, the disparity between transport costs to carry OS/DA traffic between the competitor's switch and a self-provisioned call center appears significant, it does not persuade us that transport costs associated with self-provisioning or purchasing OS/DA from third-party vendors materially diminishes the ability of requesting carriers to provide local exchange service. The record reveals a number of alternative OS/DA providers with multiple call centers located throughout the country. For example, HebCom operates five regional call centers, Excell operates six regional call centers and InfoNXX operates four.⁹⁰² Teltrust operates a national OS/DA service with

⁸⁹⁷ See, e.g., Bell Atlantic Comments 35-36; GTE Comments at 53; USTA UNE Report at IV-9 to 10.

⁸⁹⁸ We note that whether the requesting carrier is purchasing OS/DA from a third-party provider or the incumbent LEC, the costs would include the cost of the underlying subscriber information contained in the OS/DA databases (which is generally subject to various pricing schemes and includes the cost of the facilities) and the cost of transport to the OS/DA call center.

⁸⁹⁹ MediaOne Comments at 13.

⁹⁰⁰ Time Warner states that it migrated to the incumbent LEC's OS/DA services, in part, to reduce transport expenses. Time Warner July 15, 1999 *Ex Parte*, Attachment at 1.

⁹⁰¹ See, e.g., MediaOne Comments at 12-13.

⁹⁰² USTA UNE Report at IV-9 to 10. See also Letter from John T. Lenahan, Assistant General Counsel, Ameritech, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket

several call centers.⁹⁰³ The availability of multiple locations of alternative providers, both regional and national, allows competitors to choose a service that will be most cost-efficient, depending on the area in which it provides service. It is not clear from the record whether Time Warner considered the availability of these regional solutions to its OS/DA needs when making its initial decision to transport calls.⁹⁰⁴ Additionally, the incumbent LEC itself often maintains regional call centers that are outside the local calling area of a particular call center. Bell Atlantic, for example, offers directory assistance for most of New England (Rhode Island, Vermont, New Hampshire, Maine and western Massachusetts) out of its Providence, RI, Burlington, VT and Portland, ME offices, with all calls routed through a switch in Manchester, NH.⁹⁰⁵ In such cases, the incumbent may also incur long-haul transport costs to trunk its OS/DA traffic to the call center.

454. Regardless of the OS/DA provider, the cost of transporting traffic to the call center is factored into the overall price of OS/DA services. Where a competitive LEC obtains OS/DA services from an incumbent LEC, even at cost-based rates, the incumbent charges the competitive LEC for transport, either separately or as part of the total cost for OS/DA service. Similarly, where a competitive LEC obtains OS/DA from an alternative OS/DA provider, the carrier or OS/DA provider must pay for transport to the call center. It is notable that rural incumbent LECs, which arguably have to haul traffic the furthest, find third-party OS/DA sources cost-effective.⁹⁰⁶ The fact that rural LECs and a significant number of competitive LECs and interexchange carriers presently either self-provision these services or rely on wholesale providers for their OS/DA services constitutes substantial evidence that the cost of transport does not materially diminish the ability to provide service.

455. Because OS/DA databases are available on a value added and nondiscriminatory basis under section 251(b)(3) of the Act, a competing carrier need only provide transport to an incumbent's LEC's database. We acknowledge that self-provisioning OS/DA service may require competing carriers to incur substantial start-up costs that may represent a high percentage of overall expenses until call volumes and customer penetration levels rise.⁹⁰⁷ We find, however that the costs of self-provisioning OS/DA do not impair a requesting carrier's ability to provide service because in addition

No. 96-98, at 2 (filed July 30, 1999) (Ameritech July 30 *Ex Parte*).

⁹⁰³ Teltrust Comments at 3-4.

⁹⁰⁴ See, e.g., Ameritech July 30, 1999 *Ex Parte* at 2-3.

⁹⁰⁵ Letter from Dee May, Director Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98, Attachments (filed August 30, 1999).

⁹⁰⁶ See Rural Telephone Coalition Comments at 10-11

⁹⁰⁷ See Qwest Reply Comments at 83-85.

to self-provisioning, there are multiple alternatives available in the market.⁹⁰⁸ In addition, regional or nationwide OS/DA call centers enable competitive carriers to aggregate call volume to reach sufficient economies of scale. We note too that carriers are not limited to self-provisioning. Carriers may choose instead to use alternative OS/DA providers, reducing the fixed costs of provisioning OS/DA services. Moreover, competitive carriers who wish to obtain OS/DA from the incumbent may do so consistent with the incumbent LEC's nondiscriminatory access obligations under section 251(b)(3).⁹⁰⁹

456. Quality. We find that the functionality of third-party supplied OS/DA is sufficiently equivalent to that of the incumbent's services such that a requesting carrier's ability to provide the services it seeks to offer is not impaired without access to the incumbent's OS/DA service. Although we acknowledge that differences in quality may exist, we find that, in light of the full scope of OS/DA options available to requesting carriers, the differences identified in this proceeding do not materially diminish a requesting carrier's ability to offer local exchange or exchange access service.

457. Specifically, we find that lack of unbundled OS/DA service from the incumbent LEC does not materially diminish the ability of requesting carriers to provide the service they seek to offer; several carriers have successfully self-provisioned OS/DA, while other carriers rely upon alternative providers of OS/DA services. Requesting carriers, however, complain that the alternative sources for operator services and directory assistance are inferior because the information provided to customers is not as complete, and is not updated as frequently, as incumbent LEC databases.⁹¹⁰ According to several commenters, incumbent LECs update their directory listing databases daily, and often on a real-time basis, as they complete service order processes.⁹¹¹ In contrast, alternative providers may obtain their data from sources such as yellow pages databases, scanned white page listings, postal service change of address forms, motor vehicle registration records, and voter registration records, which are not updated as often.⁹¹² Requesting carriers, however, have the ability, under section 251(b)(3), to obtain nondiscriminatory access to the incumbent LEC's, or any other competing LEC's, databases used in the

⁹⁰⁸ See *supra* Section (IV)(B)(4).

⁹⁰⁹ Section 251(b)(3) requires incumbent LECs to "provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator service, directory assistance, and directory listing, with no unreasonable dialing delays." 47 U.S.C. § 251(b)(3).

⁹¹⁰ See, e.g., AT&T Comments at 130; Allegiance Comments at 23; Cox Comments at 33; MCI WorldCom Comments at 72; MediaOne Comments at 12; Metro One Comments at 3-4.

⁹¹¹ AT&T Comments at 130; AT&T Reply Comments at 140-141. See also Cox Comments at 33.

⁹¹² AT&T Comments at 130-131; Metro One Comments at 3-4. See also Cox Comments at 33.

provision of OS/DA.⁹¹³ Where competitive LECs may obtain OS/DA information and services, directly or indirectly, from incumbent LEC sources, we do not find cognizable differences in the quality of that information or services. The record indicates that carriers that are entitled to access to incumbent LEC database information and updates, such as competitive LECs and interexchange carriers like MCI WorldCom, Sprint and AT&T, offer directory assistance on a wholesale basis to other competitive LECs.⁹¹⁴ Additionally, we note that third-party OS/DA providers are often able to purchase incumbent LEC OS/DA database information and updates.⁹¹⁵ We are therefore not persuaded that lack of unbundled access to incumbent LEC databases used in the provision of OS/DA necessarily results in quality differences that would materially diminish a requesting carrier's ability to offer service.

458. MediaOne claims that operators of alternative OS/DA providers may be unfamiliar with the names of the local communities because their call centers are often distantly located.⁹¹⁶ We do not believe that this constitutes a material difference in quality. First, we note that MediaOne does not explain how an operator's proximity to the customer results in a difference in OS/DA service quality. Search strategies used by OS/DA operators can be based on fuzzy logic queries and phonetic spellings that enable operators to retrieve information without the exact spelling of, or familiarity with, a place or proper name. For local directory assistance, alternative providers also train their call center operators to be familiar with the localities and any necessary variations on word pronunciations.⁹¹⁷ In addition, incumbents often maintain remote or regional call centers

⁹¹³ Teltrust asserts that it has been unable to obtain nondiscriminatory access to incumbent LEC database information because it is not a telecommunications carrier. Teltrust claims that there are compelling reasons why alternative OS/DA providers are currently precluded from competing effectively against incumbent LECs, including blocked access to incumbent LEC databases and high tariff rates. Teltrust urges the Commission to clarify our access obligations to require incumbent LECs to make their OS/DA databases available to third parties that provide OS/DA as outsourced functions for requesting telecommunications carriers. Teltrust Comments at 9. We do not have a full record on this issue in this docket and therefore decline to address Teltrust's arguments at this time. We recently sought comment on whether the Commission can and should grant nondiscriminatory access to LEC directory assistance databases to those directory assistance providers that are not themselves exchange service providers or toll service providers. *Directory Listing Information Order* at paras. 155-156. Accordingly, we will address these issues in that proceeding.

⁹¹⁴ Bell Atlantic Comments at 33-34 and Exhibit 4.

⁹¹⁵ See, e.g., Letter from Lincoln E. Brown, Director-Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98, at 2 (filed July 26, 1999); Letter from Loretta Garcia, Counsel for Teltrust, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 at 1 (Teltrust obtains most of its OS/DA database information from Experian. Teltrust believes that "Experian buys its data from most of the RBOCs.") (filed August 12, 1999) (Teltrust August 12, 1999 *Ex Parte*).

⁹¹⁶ MediaOne Comments at 12. See also Allegiance Comments at 24 (local operators may have language skills that are useful in serving ethnic communities in their service areas).

⁹¹⁷ Teltrust August 12, 1999 *Ex Parte* at 2.

that are located outside the local calling area of a large percentage of the incumbent LEC's own customers⁹¹⁸ Thus, the incumbent's operators may have no more familiarity with the names of particular locales in a geographic area than do the operators of a competitor. Thus, if a competitor wants to ensure that the operators it is utilizing are trained for a particular area, it can best achieve this result by self-provisioning OS/DA service and training its own operators. Alternatively, a competitive carrier may also select an alternative OS/DA provider with a call center closer to the carrier's customer base than the incumbent's call center or contract with the provider for special operator training to cover the names of locales within the specific geographic markets the competitive carrier serves. We are satisfied that operator-training disparities between vendor-provided operators and those of the incumbent LEC do not materially diminish a requesting carrier's ability to offer service.

459. We reject arguments that we should unbundle access to the incumbent's OS/DA service because national operator services have limited ability to connect to local public safety answering points (PSAPs) in emergency situations. Specifically, certain commenters argue that in such situations, national operator services usually advise the caller to hang-up and dial 911.⁹¹⁹ While issues of public safety are of paramount concern, the standard by which we decide to unbundle a non-proprietary network element focuses on whether a carrier's ability to provide the services that it seeks to offer is impaired by lack of access to that element.⁹²⁰ Accordingly, we look to whether the ability or inability to connect OS/DA calls to a PSAP impairs the ability of a carrier to offer local exchange services. We conclude that it does not.

460. Although subscribers may mistakenly dial OS/DA to reach emergency assistance, the ability to connect a misdirected call to a PSAP is unlikely to result in a competitive advantage in the provision of local exchange service. At least one third-party provider of OS/DA service, Teltrust, states that it requires its customers to provide the emergency number of the PSAP for the originating caller so that it knows which agency to call.⁹²¹ In cases where it receives an incoming call from an 800 number and does not have an emergency number associated with the calling party's location, the operator can call emergency services if the calling party can provide the name of the location. Should a competitive carrier decide to obtain OS/DA services for its customers from the incumbent on a nondiscriminatory basis, under section 251(b)(3), it will be able to connect its customers to the PSAP in the same manner as the incumbent. Moreover, it is not clear whether all incumbent LEC OS/DA call centers, especially those with remote

⁹¹⁸ For example, Bell Atlantic provides directory assistance for New York from a call center located in Massachusetts. Bell Atlantic August 30, 1999 *Ex Parte* Attachment. *See also*, Cincinnati Bell Comments at 7 ("Neither operator services nor directory assistance have a geographically distinct market").

⁹¹⁹ Cox Comments at 33. *See also* Teligent Reply Comments at 6.

⁹²⁰ *See* 47 U.S.C. § 251(d)(2)(B).

⁹²¹ Teltrust August 12, 1999 *Ex Parte* at 2.

OS/DA call centers, have the ability to connect their own customers to every PSAP.⁹²² Thus, even if a requesting carrier had unbundled access to the incumbent's OS/DA service, its subscribers may receive instructions from the incumbent's operator that do not measurably differ from the instructions it would receive from an alternative provider's operator. Indeed the only way in which a competitor can retain control over the quality of OS/DA service is to self-provide its own OS/DA call center and train its own operators. By self-providing its own call centers it can require its customers to provide it with detailed emergency information and populate its database accordingly.

461. We find insufficient evidence in the record to suggest that, based on performance measurements, there is a material difference in the timelines with which an incumbent's operator, compared to third-party operators, can respond to an inquiry. MediaOne asserts that the average speed to answer OS/DA calls for competitors is 15-18 seconds, while the incumbent commits to answering calls to its OS/DA platform in less than six seconds.⁹²³ The data MediaOne provides, while helpful, is inconclusive. Specifically, the data, which consists of the performance of one incumbent and a few competitors, provides too small a sample size for us to extrapolate these results over the entire OS/DA industry and conclude that competitive carriers' ability to provide service is impaired. While we acknowledge that there are likely to be some measurable differences among OS/DA providers for particular OS/DA components, we do not find sufficient record evidence to conclude that a requesting carrier is impaired without access to the incumbent's OS/DA service. Moreover, applying the unbundling standard we set forth above, the question of whether lack of access to the incumbent's network element materially diminishes a requesting carrier's ability to provide the services it seeks to offer is determined based on the totality of the circumstances. Thus, while relevant, we cannot say that the proffered average speed to answer calls, or other OS/DA quality issues, contribute significantly to a competitor's overall ability to provide local exchange and exchange access service.

462. Timeliness. We do not find any impediments associated with self-provisioning OS/DA services that would delay a requesting carrier's entry into the local exchange or exchange access market. Although AT&T identifies delays associated with implementing the customized routing necessary to use alternative OS/DA providers,⁹²⁴

⁹²² AT&T argues that competitive LECs need updated and accurate information on PSAPs on the same terms that incumbent LECs provide such updates to themselves. AT&T Comments at 129-130. The obligation of a LEC to provide such listings and updates to competing providers in readily accessible formats in a timely fashion upon request, is already contained in rule 51.217(c)(3)(ii), implementing the nondiscriminatory access requirements in section 251(b)(3). 47 C.F.R. § 51.217(c)(3)(ii); 47 U.S.C. § 251(b)(3).

⁹²³ MediaOne Comments at 12.

⁹²⁴ AT&T Comments at 126-28. AT&T reports that it took two years in Texas and one year in Connecticut to resolve customize routing issues. AT&T claims that customized routing solutions, either through AIN or line class codes, can take up to two years to implement. According to AT&T, either approach requires the entrant and the ILEC to: (1) negotiate the technical details; (2) design a test plan; (3) deploy the facilities and perform the necessary changes in switch software; (4) perform the testing; and (5) resolve

the record indicates that AT&T's customized routing issues have been resolved.⁹²⁵ We are unaware of any ongoing problems that create material delays when competing carriers purchase OS/DA service from alternative providers. We agree that customized routing is necessary to access alternative sources of OS/DA for competitors not deploying their own switches.⁹²⁶ Commenters state that a key component of providing carriers with a choice of competitive OS/DA suppliers is the availability of line class codes in the unbundled switching element.⁹²⁷ Lack of a customized routing solution that enables competitors to route traffic to alternative OS/DA providers would therefore effectively preclude competitive LECs from using such alternative providers.⁹²⁸ Thus, if an incumbent LEC does not provide customized routing to requesting carriers that use the incumbent's unbundled switching element, it must provide unbundled access to its OS/DA service.

463. Impact on Network Operations. We conclude that the interoperability issues identified in the record do not materially diminish a requesting carrier's ability to provide local exchange or exchange access service. In particular, MCI WorldCom complains that incumbent LECs should implement Feature Group D signaling, instead of outdated legacy signaling protocol.⁹²⁹ According to MCI WorldCom, to use the incumbent LECs' signaling protocol instead of Feature Group D, most competitive LECs would have to either deploy new customized operator platforms or modify their existing platforms, both of which impose substantial costs.⁹³⁰ SBC responds that the customized routing of Feature Group D is not technically feasible in all end-office switches.⁹³¹

problems encountered in the test. The solution must then be deployed at all switches where customized routing is necessary. Until customized routing solutions have been tested and broadly deployed, AT&T urges the Commission to require incumbent LECs to unbundle their OS/DA services. *Id.*

⁹²⁵ Letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth, to Jake Jennings, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98 (filed July 26, 1999) (BellSouth July 26, 1999 *Ex Parte*) (Georgia from June, 5, 1997 to September 14, 1997; South Florida from August 21, 1997 to December 19, 1997; Tennessee from August 21, 1997 to week of December 8, 1997).

⁹²⁶ The Commission has required incumbent LECs to implement customized routing where it is technically feasible. *Local Competition First Report and Order*, 11 FCC Rcd at 15709, 15773, paras. 418, 536.

⁹²⁷ See, e.g., Qwest Comments at 87-88.

⁹²⁸ CompTel Reply Comments at 24.

⁹²⁹ MCI WorldCom Comments at 73. MCI WorldCom asserts that Feature Group D signaling protocol is already being used to route traffic between the ILEC switch and other carriers. MCI WorldCom adds that it would be extremely costly to accommodate "mass signaling" protocol, and that the expense is unnecessary because another protocol is available to meet competitive LECs' needs. *Id.* See also CompTel Reply Comments at 24.

⁹³⁰ Qwest Reply Comments at 84.

⁹³¹ SBC Reply Comments at 26.

BellSouth, however, offers a technical solution to MCI WorldCom's concern in some of its offices and states its willingness to deploy these solutions throughout its network.⁹³² In instances where the requesting carrier obtains the unbundled switching element from the incumbent, the lack of customized routing effectively precludes requesting carriers from using alternative OS/DA providers and, consequently, would materially diminish the requesting carrier's ability to provide the services it seeks to offer. Thus, we require incumbent LECs, to the extent they have not accommodated technologies used for customized routing, to offer OS/DA as an unbundled network element.

464. Finally, we find that the ability to obtain nondiscriminatory access to operator services and directory assistance under section 251(b)(3) significantly mitigates any potential impairment a requesting carrier may experience if denied access to the incumbent's OS/DA services as an unbundled network element.⁹³³ There are a substantial number of regional and national alternative providers of OS/DA service that are serving a variety of customers, including some incumbent LECs and IXCs. We do not find differences in cost, quality, timeliness, and ubiquity that would lead to the conclusion that requesting carriers' ability to provide local exchange and exchange access services would be materially diminished without access to the incumbent's OS/DA service as an unbundled network element. Rather, we find that these alternative sources of OS/DA service are available as a practical, economic, and operational matter. Moreover, we believe that not requiring that incumbent LECs to unbundle OS/DA service is consistent with the goals of the Act, because it will reduce competitors' reliance on the incumbent's network and create new opportunities for competitors of OS/DA service to differentiate their services through increased quality and decreased prices.

VI. MISCELLANEOUS ISSUES

A. Section 271-Related Issues

1. Background

465. Section 271(c)(2)(B) enumerates a competitive checklist that BOCs must comply with to obtain interLATA authority.⁹³⁴ In particular, prior to obtaining authority to provide long distance service, section 271(c)(2)(B) requires BOCs to demonstrate, among other things, that they are providing or "generally offering" to requesting carriers

⁹³² BellSouth July 26, 1999 *Ex Parte* (explaining the technical solutions used to resolve the compatibility issues surrounding MCI WorldCom's use of Feature Group D signaling).

⁹³³ MediaOne supports the Commission's decision not to require incumbents to unbundle OS/DA, provided the Commission reaffirms the requirement for nondiscriminatory access under section 251(b)(3), including the requirement that a LEC not discriminate in favor of its own use of these services. Letter from Tina S. Pyle, Executive Director, Public Policy, MediaOne, to Jake Jennings, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98 (filed August 12, 1999).

⁹³⁴ 47 U.S.C. § 271(c)(2)(B).

the following network elements: local loops, transport, switching, databases and signaling.⁹³⁵

466. In the *Notice*, we sought comment on the interplay between the unbundling obligations of section 251(c), and the competitive checklist network elements of section 271.⁹³⁶ Among other things, we sought comment on what pricing standards would apply if a checklist network element were no longer required to be unbundled pursuant to section 251(c)(3), after considering the “necessary” and “impair” standards of section 251(d)(2).⁹³⁷

467. Certain incumbents argue that if a network element on the checklist no longer needs to be unbundled, the item need not be provided to requesting carriers at prices predicated on our forward looking costs.⁹³⁸ Other commenters counter that the inclusion of network elements on the checklist is presumptive evidence that these elements must be unbundled,⁹³⁹ and thus, provided to requesting carriers at prices predicated on our forward looking costs.

2. Discussion

468. In this Order, we conclude that circuit switching and shared transport need not be unbundled in certain circumstances.⁹⁴⁰ Nonetheless, providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval. We therefore must decide what prices, terms, and conditions apply to these elements that no longer need to be unbundled.⁹⁴¹

469. We conclude that the prices, terms, and conditions set forth under sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of section 271.

470. The Commission must consider unbundling network elements in accordance with section 251(c)(3), while according due deference to the “necessary” and “impair” standards articulated in section 251(d)(2), and by the Supreme Court. The

935 *Id.*

936 *Notice* at para. 41.

937 *Id.*

938 *See Ameritech Comments* at 52-53; *Ameritech Joint Reply Comments* at 23.

939 *MCI WorldCom Comments* at 23; *Qwest Comments* at 56-57; *Sprint Comments* at 27.

940 *See supra* Sections (V)(D)(1) and (V)(E)(2)(b).

941 Network elements unbundled pursuant to section 251(c) must comply with the pricing standards of section 252(d)(1). 47 U.S.C. § 251(c)(3).

Commission must evaluate the network elements on the competitive checklist under the auspices of section 271. If a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a).

471. Although section 271 does not specify that the checklist network elements must be provided in accordance with section 251(c)(3), the Commission nonetheless has independent authority to ensure that items (iv)-(vi) of the checklist are provided on a reasonable, nondiscriminatory basis. In *Iowa Utils. Bd.*, the Supreme Court affirmed the Commission's regulatory authority over the pricing of section 251 unbundled network elements, rejecting the claim that this matter is reserved to the states.⁹⁴² In reaching this conclusion, the Court held that the Commission's pricing authority resides broadly in section 201(b), which grants the agency authority to prescribe rules and regulations "as may be necessary in the public interest to carry out the provisions of this Act."⁹⁴³

472. Section 201(b) provides a basis for the Commission to scrutinize the prices, terms, and conditions under which the checklist network elements are offered. Section 201(b) states that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication services, shall be *just and reasonable*, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared unlawful."⁹⁴⁴ Section 202(a) mandates that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service."⁹⁴⁵ In addition, checklist items (vii) and (x) explicitly require "nondiscriminatory access" to OS/DA, databases, and signaling.⁹⁴⁶

473. In circumstances where a checklist network element is no longer unbundled, we have determined that a competitor is not impaired in its ability to offer services without access to that element. Such a finding in the case of switching for large volume customers is predicated in large part upon the fact that competitors can acquire switching in the marketplace at a price set by the marketplace.⁹⁴⁷ Under these circumstances, it would be counterproductive to mandate that the incumbent offers the element at forward-

⁹⁴² *Iowa Utils. Bd.*, 119 S. Ct. at 732.

⁹⁴³ *Id.*

⁹⁴⁴ 47 U.S.C. § 201(b).

⁹⁴⁵ 47 U.S.C. § 202(a).

⁹⁴⁶ 47 U.S.C. § 271(c)(2)(B).

⁹⁴⁷ *See supra* Section (V)(D)(1)(b).

looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.⁹⁴⁸

B. Combinations of Unbundled Loops and Transport Network Elements

474. A number of parties identify issues surrounding combinations of loop and transport network elements. In particular, several competitive LECs argue that the Commission should identify the “enhanced extended link” (EEL) as a separate network element or require incumbent LECs to provide requesting carriers access to loop and transport elements in combination, even if those elements are not currently combined.⁹⁴⁹ Incumbent LECs argue that, for loop transport elements that are currently combined requesting carriers should not be allowed to substitute such combinations of elements for existing, regulated special access services.⁹⁵⁰ According to incumbent LECs, allowing this substitution would either force them to increase local rates or undermine universal service.⁹⁵¹

1. Enhanced Extended Link

a. Background

475. In the *Local Competition Order*, the Commission identified loops and transport as network elements subject to the unbundling obligation of section 251(c)(3). In rule 51.315(b), the Commission prohibited incumbents from separating network elements that are currently combined.⁹⁵² In addition, the Commission adopted rules 51.315(c)–(f) requiring incumbent LECs to combine unbundled network elements in any manner, even if those elements are not currently combined.⁹⁵³ The Eighth Circuit

⁹⁴⁸ See Ameritech Joint Reply Comments at 23.

⁹⁴⁹ ALTS Comments at 62-67; CompTel Comments at 47-53; e.spire Joint Comments at 28; Level 3 Comments at 20; McLeod Comments at 8.

⁹⁵⁰ Bell Atlantic Reply Comments at 26; SBC Reply Comments at 28.

⁹⁵¹ Letter from William B. Barfield, Associate General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98, at 1,6 (filed Aug. 9, 1999)(BellSouth Aug. 9, 1999 *Ex Parte*); Letter from Susanne Guyer, Assistant Vice President, Federal Regulatory, Bell Atlantic, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Aug. 25, 1999); Letter from J. Richard Teel, Vice President, BellSouth, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket 96-98, at 2 (filed Sept. 8, 1999)(BellSouth Sept. 8, 1999 *Ex Parte*). See also Letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth Corporation, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98, at 4 (filed August 26, 1999).

⁹⁵² Rule 51.315(b) states: “Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.”

⁹⁵³ Rule 51.315(c)-(f) states:

overturned a number of the Commission's rules, including rules 51.315(b)–(f).⁹⁵⁴ Rule 51.315(b), however, was reinstated by the Supreme Court.⁹⁵⁵ In light of the reasoning set forth in the Court's opinion, the Commission asked the Eighth Circuit to reinstate rules 51.315(c)–(f).⁹⁵⁶

476. In the *Notice*, we sought comment on whether we should identify additional network elements beyond the seven listed in the *Local Competition First Report and Order*.⁹⁵⁷ We also sought comment on whether, in light of the Supreme Court's decision, we could require incumbent LECs to combine network elements that are not currently combined, such as an unbundled loop with unbundled transport.⁹⁵⁸

477. In response to the *Notice*, a number of parties, including competitive LECs and state commissions, argue that we should either identify a new network element comprised of unbundled loop, multiplexing/concentrating equipment, and dedicated transport (the enhanced extended link or "EEL") or, alternatively, reinstate rules 51.315(c)–(f) which require incumbent LECs to provide unbundled loop and transport

(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:

(1) Technically feasible; and

(2) Would not impair the ability of other carriers to obtain access to the unbundled network elements or to interconnect with the incumbent LEC's network.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commissions that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

47 C.F.R. §§ 51.315(c)-(f).

⁹⁵⁴ *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813.

⁹⁵⁵ *Iowa Utils. Bd.*, 119 S.Ct at 736-738.

⁹⁵⁶ *Iowa Utils. Bd. v. FCC*, Brief for Respondents at 79-87 (Oral argument was held on September 17, 1999. To date, no decision has been announced).

⁹⁵⁷ *Notice* at para. 33.

⁹⁵⁸ *Id.*

elements on a combined basis.⁹⁵⁹ Incumbent LECs argue that we should not identify the EEL as a separate network element because it would constitute an unlawful combination of two or more elements not currently combined.⁹⁶⁰ The incumbent LECs also argue that we cannot reinstate rules 51.315(c) – (f) because they are currently pending before the Eighth Circuit.

b. Discussion

478. We decline to define the EEL as a separate network element in this Order. As discussed above, the Eighth Circuit is currently reviewing whether rules 51.315(c) – (f) should be reinstated. We see no reason to decide now whether the EEL should be a separate network element, in light of the Eighth Circuit’s review of those rules.

479. A number of commenters argue that we should reaffirm the Commission’s decision in the *Local Competition First Report and Order*.⁹⁶¹ In that order the Commission concluded that the proper reading of “currently combines” in rule 51.315(b) means “ordinarily combined within their network, in the manner which they are typically combined.”⁹⁶² Incumbent LECs, on the other hand, argue that rule 51.315(b) only applies to unbundled network elements that are currently combined and not to elements that are “normally” combined.⁹⁶³ Again, because this matter is currently pending before the Eighth Circuit, we decline to address these arguments at this time.

480. We note that in the *Local Competition First Report and Order*, and again in this proceeding, we identify the loop and dedicated transport as separate unbundled network elements.⁹⁶⁴ In particular, as discussed above, we define the loop as the functionality that extends from the customer demarcation point to the main distribution frame associated with the incumbent LEC’s central office switch. We define dedicated transport as the transmission facilities dedicated to a particular customer between wire centers owned by the incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting carriers. To the extent an unbundled loop is in fact connected to unbundled dedicated transport, the statute and our

⁹⁵⁹ AT&T Comments at 136-37; Cable & Wireless Comments at 40-41; Choice One Joint Comments at 23. *See also* California PUC Comments at 6; ALTS Comments at 62; CoreComm Comments at 36-37.

⁹⁶⁰ *See, e.g.*, GTE Comments at 84-85; Ameritech Joint Reply Comments at 26-28.

⁹⁶¹ ALTS Comments at 79-80. *See also* Excel Comments at 14; Net2000 Comments at 22; NEXTLINK Comments at 42-43; e.spire Joint Reply Comments at 17-18; GSA Reply Comments at 17.

⁹⁶² *Local Competition First Report and Order*, 11 FCC Rcd at 15648, para. 296.

⁹⁶³ GTE Reply Comments at 84-85; SBC Reply Comments at 28.

⁹⁶⁴ *Local Competition First Report and Order*, 11 FCC Rcd at 15689-93, 15718, paras. 377-85,

rule 51.315(b) require the incumbent to provide such elements to requesting carriers in combined form. Thus, although in this Order, we neither define the EEL as a separate unbundled network element nor interpret rule 51.315(b) as requiring incumbents to combine unbundled network elements that are “ordinarily combined,” we note that in specific circumstances, the incumbent is presently obligated to provide access to the EEL. In particular, the incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs. Moreover, requesting carriers are entitled to obtain such existing loop-transport combinations at unbundled network element prices.⁹⁶⁵

481. We also decline at this time to reinstate rules 51.315(c) – (f). As discussed above, this issue is currently pending before the Eighth Circuit. As a general matter, however, we believe that the reasoning of the Supreme Court’s decision to reinstate rule 51.315(b) based on the nondiscrimination language of section 251(c)(3) applies equally to rules 51.315(c) – (f). Specifically, the Court held that section 251(c)(3)’s nondiscrimination requirement means that access provided by the incumbent LEC must be at least equal in quality to that which the incumbent LEC provides to itself.⁹⁶⁶ We note that incumbent LECs routinely combine loop and transport elements for themselves. For example, incumbent LECs routinely provide combinations of loop and transport elements for themselves in order to: (1) deliver data traffic to their own packet switches; (2) provide private line services; and (3) provide foreign exchange service.⁹⁶⁷ In addition, we note that incumbent LECs routinely provide the functional equivalent of the EEL through their special access offerings.⁹⁶⁸

482. We believe that the basis upon which the Eighth Circuit invalidated rules 51.315(c) – (f) has been called into question by the Supreme Court’s decision. In particular, the Eighth Circuit determined that “unbundled” meant physical separation of network elements.⁹⁶⁹ The Supreme Court clarified that “unbundled” means “separate prices.”⁹⁷⁰ The Supreme Court also stated that section 251(c) “does not say, or even remotely imply, that elements must be provided [in discrete pieces, and never in combined form.]”⁹⁷¹ We also note that an additional basis for the Eighth Circuit’s decision to invalidate rules 51.315(b) – (f) was its understanding that incumbents “would

⁹⁶⁵ See 47 U.S.C. § 252(d)(1).

⁹⁶⁶ *Iowa Utils. Bd.*, 119 S.Ct at 737. See also *Local Competition First Report and Order*, 11 FCC Rcd. at 15658, para. 312; 47 C.F.R. § 51.311(b).

⁹⁶⁷ ALTS Reply Comments at 53; GTE Comments at 85.

⁹⁶⁸ See, e.g., GTE Comments at 85; ALTS Reply Comments at 53.

⁹⁶⁹ *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813.

⁹⁷⁰ *Iowa Utils. Bd.*, 119 S. Ct. at 737.

⁹⁷¹ *Id.*

rather grant their competitors access to their facilities” than combine elements on behalf of requesting carriers.⁹⁷² Experience over the last year demonstrates that incumbent LECs have refused to provide access to network elements so that competitors could combine them, except in situations where competitive LECs have collocated in the incumbent’s central offices.⁹⁷³ Accordingly, we believe that section 251(c)(3) provides a sound basis for reinstating rules 51.315(c) – (f).

2. Use of unbundled network elements to provide exchange access services

a. Background

483. As discussed above, in some situations in the incumbent’s network, loops and dedicated transport network elements are already combined to provide special access services for interexchange carriers. In *ex parte* filings, incumbent LECs, including BellSouth and SBC, argue that the Commission should restrict a requesting carrier from obtaining such combined facilities as unbundled network elements in order to prevent requesting carriers from by-passing existing special access services.⁹⁷⁴ BellSouth and SBC both argue that such a restriction is necessary to prevent interexchange carriers from benefiting from the difference between special access rates and unbundled network element prices and thus, protect the incumbent LECs’ current exchange access revenue streams.⁹⁷⁵ Competitive LECs respond that the plain language of section 251(c)(3)

⁹⁷² *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813.

⁹⁷³ See, e.g., AT&T Comments at 141-42. We note that we held previously in *BellSouth 271 Louisiana II* that incumbent LECs may not limit a competitor’s ability to access network elements in order to combine them to collocation arrangements. Specifically, we stated that “BellSouth’s offering in Louisiana of collocation as the sole method for combining unbundled network elements is inconsistent with section 251(c)(3).” *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20703-05, para. 168. This decision was based on our rule that requesting carriers are entitled to request any “technically feasible” methods of accessing and combining unbundled network elements. We found that section 251(c)(3) required incumbent LECs to provide “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point . . .,” which was not limited to collocation arrangements. *Id.*

⁹⁷⁴ BellSouth Aug. 9, 1999 *Ex Parte* at 1, 4-5; Letter from Martin E. Grambow, Vice President and General Counsel, SBC, to Lawrence F. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98, at 1, Att. 1-9 (filed Aug. 11, 1999) (SBC August 11, 1999 *Ex Parte*).

⁹⁷⁵ BellSouth Sept. 8 *Ex Parte* at 1; Letter from Lincoln E. Brown, Director-Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket 96-98, Att. at 2, 6-7 (filed Sept. 9, 1999) (SBC Sept. 9, 1999 *Ex Parte*). Alternatively, BellSouth argues that the Commission should decline to unbundle transport facilities between a requesting carrier’s switch and the incumbent LEC’s switch. BellSouth Sept. 8, 1999 *Ex Parte* at 1. See also SBC Sept. 9, 1999 *Ex Parte* Att. at 2-5. As discussed Section (V)(E) *supra*, we reject the incumbent LECs’ argument not to unbundle such dedicated transport links.

precludes the Commission from imposing any restrictions on the use of unbundled network elements.⁹⁷⁶

b. Discussion

484. Section 251(c)(3) of the Act requires incumbent LECs to provide to requesting carriers access to unbundled network elements “for the provision of a telecommunications service”⁹⁷⁷ In the *Local Competition First Report and Order*, the Commission found that section 251(c)(3) “permits interexchange carriers and all other requesting carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers.”⁹⁷⁸ In particular, the Commission found that its conclusion not to impose restrictions on the use of unbundled network elements was “compelled by the plain language of the 1996 Act” because exchange access and interexchange services are “telecommunications services.”⁹⁷⁹ Moreover, in the *Local Competition First Report and Order*, the Commission found that “the language of section 251(c)(3), which provides that telecommunications carriers may purchase unbundled elements in order to provide a telecommunications service, is not ambiguous.”⁹⁸⁰ This conclusion that the Act does not permit usage restrictions was codified in Rule 51.309(a), which provides that “[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.”⁹⁸¹ That rule was not challenged in court by any party.

485. Parties have raised again arguments that allowing requesting carriers to use unbundled network elements to provide exchange access would have significant policy ramifications. As BellSouth explains, existing combinations of unbundled loops and transport network elements are a “direct (and often physically identical) substitute for the incumbent LEC’s regulated access services . . . ,” but priced significantly lower than tariffed special access services.⁹⁸² The special access service that BellSouth and SBC refer to consists of entrance facilities from the interexchange carrier’s point of presence (POP) to an incumbent LEC’s switch or serving wire center (SWC), a dedicated transport

⁹⁷⁶ See, e.g., e.spire Joint Comments at 13-18; ALTS Reply Comments at 54.

⁹⁷⁷ 47 U.S.C. § 251(c)(3).

⁹⁷⁸ *Local Competition First Report and Order*, 11 FCC Rcd. at 15679, para.356.

⁹⁷⁹ *Id.* at 15679, para.356.

⁹⁸⁰ *Id.* at 15680, para.359 (citation omitted).

⁹⁸¹ 47 C.F.R. § 51.309(a).

⁹⁸² BellSouth August 9, 1999 *Ex Parte* at 1.

link from the SWC to an end office, and a channel termination facility from the end office to the end user.⁹⁸³

486. As an initial matter, under existing law, a requesting carrier is entitled to obtain existing combinations of loop and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at unbundled network element prices.⁹⁸⁴ In particular, any requesting carrier that is collocated in a serving wire center is free to order loops and transport to that serving wire center as unbundled network elements because those elements meet the unbundling standard, as discussed above. Moreover, to the extent those unbundled network elements are already combined as a special access circuit, the incumbent may not separate them under rule 51.315(b), which was reinstated by the Supreme Court.⁹⁸⁵ In such situations, it would be impermissible for an incumbent LEC to require that a requesting carrier provide a certain amount of local service over such facilities.

487. Moreover, we wish to make clear that in situations where the requesting carrier is collocated and has self-provisioned transport or obtained transport from an alternative provider, but is purchasing unbundled loops, that carrier may provide only exchange access over those facilities. Thus, for instance, a requesting carrier is entitled to purchase unbundled loops in order to provide advanced services (*e.g.*, interstate special access xDSL service).

488. Finally, we clarify that interexchange carriers are entitled to use unbundled dedicated transport from their POP to a serving wire center in order to provide local telephone exchange service. Such carriers are entitled to obtain such dedicated transport links pursuant to the unbundling standard discussed above. The fact that such carriers may also provide exchange access over those facilities does not alter our conclusion.

489. We conclude that the record in this phase of the proceeding is insufficient for us to determine whether or how our rules should apply in the discrete situation involving the use of dedicated transport links between the incumbent LEC's serving wire center and an interexchange carrier's switch or point of presence (or "entrance facilities"). Only a handful of parties commented on the special access arbitrage issue that was first raised by BellSouth's August 9, 1999, *ex parte* filing. We believe that we should fully explore the policy ramifications of applying our rules in a way that potentially could cause a significant reduction of the incumbent LECs' special access revenues prior to full

⁹⁸³ Letter from Ernest L. Bush, Jr., Assistant Vice President, BellSouth, to Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98, at 1, (filed August 16, 1999) (BellSouth August 16, 1999 *Ex Parte*)

⁹⁸⁴ See 47 C.F.R. §§ 51.309(a), 51.315(b).

⁹⁸⁵ *Iowa Utils. Bd.*, 119 S. Ct. at 736-38. We note, however, that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties required under volume or term contracts.

implementation of access charge and universal service reform. Therefore, we set certain discrete issues for further comment below.

C. Nondiscrimination Obligations of Incumbent LECs

490. We reaffirm the conclusion the Commission adopted in the *Local Competition First Report and Order* that national rules defining “nondiscriminatory access” to unbundled network elements will reduce the costs of entry and speed the development of competition in local telecommunications markets.⁹⁸⁶ We find that the phrase “nondiscriminatory access” in section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be provided in “substantially the same time and manner” to that which the incumbent provides to itself.⁹⁸⁷

491. In those situations where an incumbent LEC does not provide access to network elements to itself, we reaffirm our requirement that incumbent LECs must provide access in a manner that provides a requesting carrier with a meaningful opportunity to compete.⁹⁸⁸ Because we believe that the technical infeasibility problem will arise rarely, we expect incumbent LECs to fulfill the non-discrimination requirement in nearly all instances where they provision unbundled network elements. In the rare instances where technical feasibility issues arise, incumbent LECs must prove to a state commission that it is technically infeasible to provide access to unbundled elements at the same level of quality that the incumbent LEC provides to itself.⁹⁸⁹

VII. FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

A. Background

492. As noted above, in the *Local Competition First Report and Order*, the Commission held that for all unbundled network elements, including combinations of network elements, incumbent LECs may not impose any usage restriction on the use of such elements, or combinations thereof. In that order, however, the Commission imposed a temporary access charge on the purchase of unbundled switching. In particular, the Commission required requesting carriers to pay, for a limited time period, the carrier common line charge (CCL) and 75 percent of the Tandem Interconnection Charge

⁹⁸⁶ *Local Competition First Report and Order*, 11 FCC Rcd at 15657, para. 309.

⁹⁸⁷ *Local Competition First Report and Order*, 11 FCC Rcd at 15763-64. We note that rule 51.311(c) is currently before the Court of Appeals for the Eighth Circuit.

⁹⁸⁸ *See Ameritech Michigan Order*, 12 FCC Rcd at 20619; *Local Competition First Report and Order*, 11 FCC Rcd at 15660; *Local Competition Second Reconsideration Order*, 11 FCC Rcd at 19742.

⁹⁸⁹ *Local Competition First Report and Order*, 11 FCC Rcd at 15658-59, para. 313.

(TIC).⁹⁹⁰ The Commission found that it had discretion under the Act “to adopt a limited, transitional plan to address public policy concerns raised by the bypass of access charges via unbundled elements.” This decision was upheld by the Eighth Circuit, which found that the Commission decision was reasonable.⁹⁹¹

493. In the *Third Order on Reconsideration*, the Commission required incumbent LECs to provide access to shared transport as an unbundled network element in conjunction with local and tandem switching. In that order, the Commission limited the obligation of incumbent LECs to provision shared transport to end users to whom the requesting carrier was providing local exchange service. The Commission sought comment on whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.⁹⁹² Specifically, the *Further Notice of Proposed Rulemaking* requested comment on the “intensely interrelated” question of whether such use would conflict with the Commission’s implementation of access charge reform and universal service.⁹⁹³

B. Discussion

494. Parties have argued in this proceeding that allowing requesting carriers to obtain combinations of loop and transport unbundled network elements based on forward-looking cost would provide opportunities for arbitrage of special access services. We are cognizant that special access pre-dates passage of the 1996 Telecommunications Act and has historically been provided by incumbent LECs at prices that are higher than the unbundled network element pricing scheme of section 252(d)(1). Accordingly, in this Further Notice we consider whether there is any basis in the statute or our rules under which incumbent LECs could decline to provide entrance facilities at unbundled network element prices.

495. We seek comment on the argument that the “just and reasonable” terms of section 251(c) or section 251(g) permit the Commission to establish a usage restriction on entrance facilities. Parties should also address whether there is any other statutory basis for limiting an incumbent LEC’s obligation to provide entrance facilities as an unbundled network element.

496. We acknowledge that resolution of this issue potentially could have large financial impact on incumbent local exchange carriers. We seek comment on this issue, and on the extent to which any such impact should be considered in reaching a decision

⁹⁹⁰ *Id.* at 15864-66, paras. 721-25. The Commission selected June 30, 1997 as the ultimate end date for this transitional time period.

⁹⁹¹ *CompTel v. FCC*, 117 F.3d at 1073-75.

⁹⁹² *Local Competition Third Reconsideration Order*, 12 FCC Rcd. at 12462, para. 3.

⁹⁹³ *Id.* at 12462, 12495-96, paras. 3, 60-61. This Further Notice remains pending.

on this issue. We seek comment on the policy implications, if any, of a significant reduction in special access revenues for our universal service program.⁹⁹⁴ Finally, because the record developed in the *Further Notice of Proposed Rulemaking* in the *Shared Transport Order* is two years old, we invite parties to refresh the record on whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.⁹⁹⁵

VIII. PROCEDURAL ISSUES

A. Final Regulatory Flexibility Analysis

497. As required by the Regulatory Flexibility Act (RFA),⁹⁹⁶ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice* in CC Docket No. 96-98.⁹⁹⁷ The Commission sought written public comments on the proposals in the *Notice*, including comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁹⁹⁸

1. Need for, and Objectives of, the Third Report and Order

498. This Order responds to the Supreme Court's January, 1999, decision that directs the Commission to revise the standards used to determine which network elements incumbent LECs must unbundle pursuant to section 251 of the Act.⁹⁹⁹ More specifically, this Order gives substance to the "necessary" and "impair" standards in section 251(d)(2) of the Act. Applying these standards, and considering the availability of elements outside of the incumbent's network, this Order adopts a list of network elements that must be unbundled on a national basis, subject to certain discrete geographic and product market

⁹⁹⁴ We note that in a recent Notice of Proposed Rulemaking in the *Access Reform and Universal Service* proceeding, we tentatively concluded that when non-rural local exchange carriers receive explicit interstate universal service support, they should eliminate implicit support by reducing switched access common line rates. We did not propose to treat special access services as if the current prices of those services included implicit support for universal service. *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report and Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking, 14 FCC Rcd 8078, 8138-8139, para. 128-131 (May 28, 1999).

⁹⁹⁵ *Local Competition Third Reconsideration Order*, 12 FCC Rcd. at 12462, para. 3.

⁹⁹⁶ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁹⁹⁷ *Notice* at paras. 46-53.

⁹⁹⁸ See 5 U.S.C. § 604.

⁹⁹⁹ *Iowa Utils. Bd.*, 119 S. Ct. at 734-36.

exceptions. This Order also announces that the Commission will reexamine the national list of unbundled network elements in three years. It reaffirms a state commission's authority to require incumbent LECs to unbundle additional elements, as long as the unbundling obligations: (1) are consistent with the requirements of section 251; (2) do not substantially prevent implementation of the requirements of that section and the purposes of the Act; and (3) are consistent with the national policy framework established in this Order. Finally the Order reaffirms that incumbent LECs are obligated to offer combinations of network elements that are already combined, including combinations of loop, multiplexing/concentrating equipment, and dedicated transport if they are currently combined.

2. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

499. We received no comments in response to the IRFA in the *Notice*. We did, however, receive some general small-business-related comments which are discussed throughout the Order and are summarized in subsection 5 of the FRFA, *infra*.

3. Description and Estimate of the Number of Small Entities to which Rules will Apply

500. In the FRFA to the Commission's *Local Competition First Report and Order*,¹⁰⁰⁰ we adopted the analysis and definitions set forth in determining the small entities affected by this Order for purposes of this FRFA. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by rules.¹⁰⁰¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁰⁰² The RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act,¹⁰⁰³ unless the Commission has developed one or more definitions that are appropriate to its activities.¹⁰⁰⁴ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).¹⁰⁰⁵ Below we further

¹⁰⁰⁰ *Local Competition First Report and Order*, 11 FCC Rcd at 16150-56, paras. 1343-57.

¹⁰⁰¹ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

¹⁰⁰² 5 U.S.C. § 601(6).

¹⁰⁰³ 15 U.S.C. § 632.

¹⁰⁰⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

¹⁰⁰⁵ 15 U.S.C. § 632.

describe and estimate the number of small entities that may be affected by the rules adopted in this Order.

501. We have included small incumbent LECs in this RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."¹⁰⁰⁶ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not national in scope.¹⁰⁰⁷ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other non-RFA contexts.

502. The United States Bureau of the Census (the Census Bureau) reports that at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.¹⁰⁰⁸ These firms include a variety of different categories of carriers, including LECs, interexchange carriers, competitive access providers, wireless providers, operator service providers, pay telephone operators, wireless providers, and resellers. At least some of these 3,497 telephone service firms may not qualify as small entities because they are not "independently owned and operated."¹⁰⁰⁹ For example, a wireless provider that is affiliated with a LEC having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 of these telephone service firms are small entities that may be affected by this Order. Since 1992, however, many new carriers have entered the telephone services marketplace. At least some of these new entrants may be small entities that are affected by this Order.

503. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies that had been operating

¹⁰⁰⁶ 5 U.S.C. § 601(3).

¹⁰⁰⁷ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, Federal Communications Commission (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *Local Competition First Report and Order*, 11 FCC Rcd at 16144-45, paras. 1328-30.

¹⁰⁰⁸ United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

¹⁰⁰⁹ 15 U.S.C. § 632(a)(1).