

February 17, 2000

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*; CC Docket No. 96-98

Dear Ms. Salas:

In accordance with section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, today MCI WorldCom filed a Petition for Reconsideration of portions of the Commission's Third Report and Order in *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*; CC Docket 96-98 (rel. Nov.5, 1999) (*Third Report and Order*). Because the Commission's rules on their face do not preclude a separately filed Petition for Clarification, MCI WorldCom also is filing with the Commission today the attached Petition for Clarification of the *Third Report and Order*. If the Commission believes that separately filed Petitions for Clarification do not comport with the Commission's rules, MCI WorldCom hereby respectfully requests a page-limit extension to accommodate the Petition for Clarification in the above-referenced proceeding. The length and complexity of the *Third Report and Order* and the number of important issues that require clarification necessitates the submission of the Petition for Clarification in the present format.

Please do not hesitate to contact me with any questions.

Sincerely,



Richard S. Whitt

ORIGINAL

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

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In the Matter of:)
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Implementation of the)
Local Competition Provisions)
of the Telecommunications Act of 1996)
)

CC Docket No. 96-98

PETITION OF MCI WORLDCOM, INC. FOR CLARIFICATION

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Dated: February 17, 2000

EXECUTIVE SUMMARY

MCI WorldCom urges the Commission to clarify several issues of great importance for the implementation of the unbundled network element (“UNE”) requirements of the Telecommunications Act of 1996. Clarification will provide essential guidance to the industry. These clarifications are needed for one of two reasons: (1) for several issues, the language in the Order or in the Rules is potentially ambiguous or open to misinterpretation, or (2) for several other issues, the Order is silent, but the issues are highly relevant. In the absence of clarification from the Commission, the ILECs already are exploiting every ambiguity by clinging to the interpretation that most restricts competitive local exchange carriers’ (“CLEC”) access to UNEs. MCI WorldCom therefore respectfully requests that the Commission address these issues for clarification on an expedited basis.

- The Commission should clarify that, although it does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services, ILECs are required to make packet switching available as a UNE when they are using it to provide voice services.
- The Commission should clarify that ILECs are prohibited from tying the purchase of their advanced services to the purchase of their voice services.
- The Commission should clarify and reconfirm the applicability of Rule 51.315(b) to ordinary combinations.
- The Commission should clarify that when a CLEC purchases an unbundled loop, by itself or as part of UNE-platform, the CLEC can use all the functionalities of that loop to provide both voice and high-speed data services, either by collocating its own DSLAM at the ILEC central office or by sharing the loop with a data CLEC that collocates a DSLAM at the ILEC central office. The Commission also should clarify that the ILEC must perform all the cross-connections and other activities required for the CLEC to fully utilize the functionalities of the loop and set nonrecurring charges for these activities that are consistent with the Commission’s pricing rules and principles.
- The Commission should make clear that an ILEC must unbundle packet switching in any

location where it places advanced services equipment when a requesting carrier cannot collocate advanced services equipment in that location. The language in the Order inadvertently limits such access to remote terminal locations, but there also may not be collocation space available at the central office or at other locations.

- The Commission should make clear that states have the authority to determine rates, including zero rates, for line conditioning as long as their methodology is consistent with the FCC's forward looking pricing rules.
- The Commission should make clear that unless an ILEC that leases unbundled local switching to a requesting carrier provides a nondiscriminatory, technically feasible, and efficient method for that requesting carrier to combine that switching with their requesting carrier's own OS/DA platform or a with an available third-party OS/DA platform, the ILEC must make its own OS/DA platform available to the requesting carrier as an unbundled network element.
- The Commission should make clear that when ILECs challenge rebuttable presumptions relating to the technical feasibility of unbundling the subloop, this can be done within any acceptable state process, such as a collaborative process, not only in the context of a section 252 arbitration proceeding.
- The Commission should make clear that requesting carriers are entitled to access to unbundled network elements in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, for the efficient provision of telecommunication services. The Commission also should make clear that requesting carriers are entitled to access to combinations of unbundled elements in a fashion that allows them to use those elements efficiently and that creates minimum disruption to end-user customers.

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Petition of MCI WorldCom for Clarification

MCI WORLDCOM, Inc. (“MCI WorldCom”), by its attorneys, hereby files this petition for clarification of the Third Report and Order and Fourth Further Notice of Proposed Rulemaking (“Order”),¹ issued by the Commission on November 5, 1999 in the above-captioned proceeding. MCI WorldCom urges the Commission to clarify several issues of great importance for the implementation of the unbundled network element (“UNE”) requirements of the Telecommunications Act of 1996 to provide essential guidance to the industry. These clarifications are needed for one of two reasons: (1) the language in the Order or in the Rules is potentially ambiguous or open to misinterpretation, or (2) the Order is silent, but the issues are highly relevant. In the absence of clarification from the Commission, the ILECs already are exploiting every ambiguity by clinging to the interpretation that most restricts competitive local exchange carriers’ (“CLEC”) access to UNEs. MCI WorldCom therefore respectfully requests that the Commission address these issues for clarification on an expedited basis.

- A. The Commission should clarify that even if it does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services, ILECs are required to make packet switching available as a**

¹ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, released Nov. 5, 1999.

UNE when the ILEC is using it to provide voice services.

To foster ILEC deployment of advanced services, the Commission has chosen to restrict CLEC access to unbundled packet switching. The Commission's decision was based solely on its perception of the market for advanced services, with no consideration given to the impact on the competitive provision of voice services. Unfortunately, this decision not only harms competition in the advanced services market, as discussed above, it also harms competition in the voice services market, where packet switching can — and, according to ILEC announcements, will — be used to provide voice services to a substantial portion of customers. Thus, even if the Commission does not require ILECs to make packet switching available as an unbundled network element for the provision of advanced services, it should clarify that packet switching must be made available as a UNE when the ILEC is using it to provide voice services.

Packet switched technology can be used to provide voice services as well as high-speed Internet access. The recent announcement by SBC of its “Project Pronto” helps to clarify the issue. SBC declared that it will spend \$6 billion to make xDSL services available to approximately 80% of its customers and will use “voice trunking over Asynchronous Transfer Mode (ATM)” to transport voice traffic in packet form.² CLECs unquestionably have unbundled access to the ILECs' circuit switches to provide local voice telephone service to most residential and small business customers.³ SBC now promises that 80% of its customers will be served by packet switch “in the

² News Release “SBC Selects Suppliers for Broadband Network Project,” November 3, 1999, http://www.sbc.com/News_Center/Article.html?query_type=article&query=19991103-04, (“11/3/99 SBC News Release”) at p. 1.

³ Order at paragraphs 272 and 274.

next three years”⁴ for their local voice telephony. Given the Commission’s expressed policy of implementing the 1996 Act in a technology-neutral fashion,⁵ it cannot be the Commission’s position that voice traffic that is transmitted through a new type of switch is no longer subject to the 1996 Act’s unbundling obligation. Indeed, no rational distinction between circuit-switched voice service and packet-switched voice service can be countenanced by the Act. The Commission should clarify that packet switching must be unbundled as a network element to the extent that it is used to provide narrowband or voice services.

B. The Commission should clarify that an ILEC may not condition a customer’s purchase of its advanced services on the purchase of its voice services.

The Commission itself recognizes that denial of unbundled access to packet switching and DSLAMs impairs CLECs’ ability to provide mass market advanced services in competition with ILECs. Without a restriction on anticompetitive tying requirements, ILECs will leverage — and already are leveraging — their resulting power over advanced services to impede competitive provision of voice services by refusing to sell advanced services to customers who purchase voice services from CLECs using UNE-platform. The Commission should end this discriminatory, anticompetitive, and unlawful practice.

The Commission itself found that CLECs cannot fully compete against ILECs to provide advanced services without the unbundled access to ILEC advanced services capabilities that the Commission generally denied.⁶ As a result, unless ILECs offer advanced services on a

⁴ 11/3/99 SBC News Release at p. 1.

⁵ See Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, released Dec. 23, 1999 (“Advanced Services Remand Order”), at paragraph 12.

⁶ Order at paragraph 309.

nondiscriminatory, stand-alone basis to mass market retail customers, CLECs cannot compete effectively to provide UNE-based voice services to customers who also want advanced capability. Quick to seize on any opportunity to further entrench themselves in voice services, ILECs have been unwilling to provide broadband services to customers who do not also buy voice services from them.⁷ Only ILECs can, as a practical matter, meet the surging demand for broadband services over local telephone networks, and customers who want broadband service over local loops must therefore buy ILEC voice service as well. ILEC refusal to sell broadband service to CLEC voice customers means that CLECs cannot sell UNE-based voice services to customers who also want broadband services that CLECs cannot practicably provide.

This anticompetitive ILEC practice is unlawful. It violates section 251(c)(3), which requires access to UNEs to be provided on “rates, terms and conditions that are just, reasonable and nondiscriminatory.” The Commission has interpreted this unbundling obligation to facilitate the rapid introduction of local competition, including competition through use of the UNE-platform.⁸ CLECs are denied just, reasonable, and nondiscriminatory access to UNEs when prospective customers of UNE-based voice services must give up the ability to purchase broadband services from the only carrier — the ILEC — that can ubiquitously provide these services in the mass market. Moreover, to the extent that advanced services are used to provide interstate access,⁹ ILEC

⁷ See Petition of AT&T Corp. For Expedited Clarification or, in the Alternative, for Reconsideration, In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, dated Feb. 9, 2000, p. 6.

⁸ See Order at paragraph 273.

⁹ Advanced Services Remand Order at paragraphs 35-45.

tying of voice and broadband services constitutes an unjust and unreasonable practice that violates section 201(b) and an unreasonably discriminatory practice that violates section 202(a).

The Commission has prohibited bundling or tying of telecommunications services that limits competition.¹⁰ Voice and xDSL-based services are “two distinct services that are otherwise technologically and operationally distinct.”¹¹ Denying customers the ability to purchase UNE-based CLEC voice services and ILEC broadband services prevents competition by CLECs for voice customers by deterring customers from switching to CLEC voice services, and thereby frustrates the Commission’s policy to facilitate competition to provide voice service through UNE-platform.¹²

ILECs have no legitimate basis to refuse to provide any xDSL-based service on a stand-alone basis to any customer who wishes to subscribe to it. This arrangement is straightforward to implement from a technical standpoint. If an ILEC were providing broadband service to an end-user, the voice traffic could simply be separated at the splitter and looped back to the CFA on the MDF and then routed to the CLEC’s collocation space to go over the CLEC’s voice network.

¹⁰ See Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880, 5904-06 (1991) 7 FCC Rcd. 2677, 2679-83 (1992); See generally Policy and Rules Concerning the Interstate, Interexchange Marketplace, 13 F.C.C.R. 21531 ¶¶ 1-2 (1999) (summarizing Commission’s current anti-bundling rules). The unreasonableness of anticompetitive bundling practices is confirmed by the fact that tying arrangements by firms with market power violate the antitrust laws. Tying arrangements are unlawful *per se*, without further proof of anticompetitive effects, “when the seller has some special ability — usually called ‘market power’ — to force a purchaser to do something that he would not do in a competitive market.” Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984). When a customer is forced to buy a product that she “might have preferred to purchase elsewhere or on different terms . . . , competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.” *Id.* at 12; Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 795 (1st Cir. 1988) (Breyer, J.).

¹¹ Line Sharing Order at paragraph 56.

¹² See Order at paragraph 273.

Because the physical arrangements are basically the same whether the ILEC or a CLEC provides voice service to a customer that purchases advanced services from the ILEC or an ILEC advanced services affiliate, there is no technical impediment.

C. The Commission should clarify and reconfirm the applicability of Rule 51.315(b) to ordinary combinations.

The Commission should make clear that Rule 51.315(b), as definitively construed by the Commission in the First Report and Order, and affirmed by the United States Supreme Court, continues to have the same meaning and effect it had when the Commission adopted the rule in 1996. In the First Report and Order, the Commission concluded that ILECs should be required to combine elements when technically feasible to do so at the request of CLECs, because CLECs often are not able to combine them for themselves.¹³ The rules enforcing this obligation clarified that this obligation existed in two distinct situations: when the elements are “ordinarily combined” in the ILEC network, and when the elements are not ordinarily combined.¹⁴ The former obligation is set out in Rule 51.315(b), and the latter, which potentially involved claims that the requested combinations were not technically feasible, in Rules 51.315(c)-(f). The actual language used in Rule 51.315(b) was that ILEC combination was required of elements that the ILEC “currently combines.”

In paragraph 296 of the First Report and Order, the Commission first explained that “currently” was intended to mean “ordinarily.” That explanation was hardly necessary; this understanding of “currently combines” is clear enough from the context of the rule itself. On its face, Rule 51.315 distinguishes between the types of combinations that ILEC “currently combine,

¹³ First Report and Order at paragraphs 292-297.

¹⁴ Id.

see Rule 51.315(b), and those the ILECs do not “ordinarily” combine, see Rule 51.315(c). The Commission distinguished between these two types of combinations because only the latter raised issues of technical feasibility — there is no question that a combination that currently or ordinarily exists in the ILECs’ networks is technically feasible. Therefore only truly new types of combinations were intended to be addressed in Rules 51.315(c)-(f), which contain the rules to address claims of technical infeasibility.

As the Commission is well aware, currently Rule 51.315(b) has been reinstated by the Supreme Court, and the legality of Rules 51.315(c)-(f) is currently being addressed by the Eighth Circuit. MCI WorldCom agrees with the Commission that any disputes about the proper interpretation of Rules 51.315(c)-(f) should be considered only after the Eighth Circuit has addressed the legality of that provision.

However, several ILECs continue to challenge Rule 51.315(b), arguing that the term “currently” in Rule 51.315(b) refers to individual customer situations and means “preexisting” or “as is.”¹⁵ In other words, ILECs seek to limit available combinations to specific customer combinations that are presently in place, rather than the type of combinations that ILECs currently provide to themselves and customers as a matter of course. Such a narrow interpretation of Rule 51.315(b) would make no sense in light of the Commission’s previous regulatory scheme and the sound policies behind it. Combining elements that are currently or normally combined in the ILEC network (a loop and a port, for example) raises no issues of technical feasibility, and plainly is

¹⁵ See, for example, Reply Comments of U S WEST Communications, Inc., In re Federal Court Remand of Issues Proceeding from the Interconnection Agreement between U S WEST Communications, Inc., And AT&T, MCI, MFS and AT&T Wireless, Minnesota Public Utilities Commission Docket No. P421/CI-99-786 (August 16, 1999) (“U S WEST Minnesota Reply Comments”), at p. 4.

meant to be addressed in Rule 51.315(b), and not in the technical feasibility Rules 51.315(c)-(f).

Whether CLECs have access to this technically feasible combination should not depend on whether a particular customer previously has had the combination installed with the ILEC and now wants to change carriers. Rather, for all of the policy reasons behind the rule's initial adoption, ILECs should provide the type of combinations that ILECs currently provide to themselves and customers as a matter of course. If adopted, the ILEC's narrow construction would mean that in a great many situations the CLECs' right to access to unbundled network elements would be meaningless, as they would have no practical means of putting the leased elements to use to provide telecommunications services. Of course, that is the very reason the Commission enacted Rule 51.315(b) in the first place, and expended extraordinary efforts successfully to defend the rule's legality, all the way to the Supreme Court.

Additionally, the ILECs' narrow construction produces discriminatory results. For example, an ILEC so interpreting Rule 51.315(b) could deny a CLEC's request to provide a platform order to provide a new line to a customer who just moved to the area on the grounds that the elements requested by the CLEC are not currently combined for that particular customer. The ILEC, however, could provide the same combination of elements for itself to serve the same customer on the same day. This is discriminatory. The Commission recognized in paragraph 481 of the Order that the Supreme Court upheld Rule 51.315(b) "based on the nondiscrimination language of section 251(c)(3)" of the Act. Therefore, any interpretation of Rule 51.315(b) that produces such discriminatory results should be expressly rejected.

The Commission needs to reiterate its earlier interpretation of Rule 51.315(b) to avoid this result, particularly because this issue is not before the Eighth Circuit. That court is addressing only the legality of Rules 51.315(c)-(f), concerning novel combinations of elements and the issues of

technical feasibility that arise when CLECs' request such combinations.¹⁶ It is not addressing Rule 51.315(b), the legality of which has been definitively established by the Supreme Court.

Nonetheless, in the Order, while the Commission did not accept the ILECs' interpretation of Rule 51.315(b), neither did it reject it out of hand, as it should have. Instead, the Commission acknowledged the ILECs' arguments, and stated: "because this matter is currently pending before the Eighth Circuit we decline to address these arguments at this time."¹⁷ This statement suggest that the Commission may not have realized the extent to which ILECs are attempting to limit the scope of Rule 51.315(b), because the issue of availability of combinations that ILECs currently or ordinarily combine in their networks has been settled. Therefore, the Commission should withdraw this statement, and make clear that it has reinstated Rule 51.315(b) as it has consistently understood that provision.

D. The Commission should clarify that when a CLEC purchases an unbundled loop, by itself or as part of UNE-platform, the CLEC can use all the functionalities of that loop to provide both voice and high-speed data services, either by collocating its own DSLAM at the ILEC central office or by sharing that loop with a data CLEC that collocates a DSLAM at the ILEC central office. The Commission also should clarify that the ILEC must perform all the cross-connections and other activities required for the CLEC to fully utilize the functionalities of the loop and set non-recurring charges for these activities that are consistent with the Commission's pricing rules and principles.

The Commission has determined that requesting carriers are entitled to all the functionalities

¹⁶ See First Report and Order at paragraph 296 (explaining the purpose of Rules 51.315(c)-(f) as follows: "ILECs are also required to perform the functions necessary to combine elements, even if they are not ordinarily combined . . . in the ILECs' network, provided that such combination is technically feasible.").

¹⁷ Order at paragraph 479.

of the ILECs' unbundled network elements.¹⁸ In its Line Sharing Order,¹⁹ the Commission stated:

although we conclude that to the extent section 251(d) is satisfied requesting carriers may access unbundled loop functionalities, such as non-voiceband transmission frequencies, separate from other loop functions, they are also "entitled," at their option, to exclusive use of the entire unbundled loop facility.

At the same time, while the Commission has required the ILECs to provide as unbundled elements all the facilities required to provide mass markets voice services, it has decided to require CLECs to provide facilities other than the loop required to provide high-speed services, even while recognizing that CLECs will be impaired in their ability to offer high-speed services without access to such facilities. The distinction between its treatment of voice and high-speed data services is based on the Commission's overriding desire to foster the facilities-based provision of high-speed services. While MCI WorldCom disagrees with the latter decision, it clearly was the intent of the Commission to foster facilities-based provision of high-speed services and to remove all constraints to CLEC facilities-based provision of those services. Thus, any attempt to restrict CLECs' abilities to deploy and utilize DSLAMs and provide facilities-based high-speed services surely is inconsistent with Commission policy.

MCI WorldCom seeks clarification that if a requesting carrier leases an unbundled ILEC loop, by itself or as part of UNE-platform, that carrier is entitled to use both the voice and high-speed data functionalities of that loop, either by providing its own collocated DSLAM at the ILEC

¹⁸ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, released August 8, 1996, at paragraph 262.

¹⁹ In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, Released December 9, 1999, at paragraph 18.

central office or by “sharing the line” by cooperating with a third party data CLEC that provides a collocated DSLAM at the ILEC central office.²⁰ MCI WorldCom also seeks clarification that an ILEC cannot refuse to perform the cross-connections and other activities required to allow the requesting carrier to efficiently utilize both the voice and high-speed data functionalities of the unbundled loop or UNE-platform and that charges for those activities must be based on the pricing rules and principles already set out by the Commission.

In addition, MCI WorldCom seeks clarification that, where an ILEC sets up a separate subsidiary to provide high-speed services to end-user customers, a CLEC and that separate subsidiary must have exactly the same access to the functionalities of the loop (as an unbundled loop or as part of UNE-platform) and the ILEC must perform all the related cross-connection and other activities for the CLEC that it performs for its separate subsidiary. Further, MCI WorldCom seeks clarification that if an ILEC does not create a separate subsidiary for the provision of high-speed services to end-user customers, then the CLEC and the ILEC must have exactly the same access to the functionalities of the loop (as an unbundled loop or as UNE-platform) and the ILEC must perform all the related cross-connections and other activities for the CLEC that it performs for itself.

MCI WorldCom requests these clarifications because it is MCI WorldCom’s experience that in order to make UNE functionalities available to requesting carriers in practice, and not just in principle, it is necessary to identify the activities that ILECs are required to perform upon request and to set limitations on the terms and conditions the ILECs can impose for performing these activities.

²⁰ For example in the New York State Public Service Commission’s collaborative proceeding, Bell Atlantic has taken the “legal” position that if a voice CLEC using UNEs engages in line sharing, that CLEC is no longer providing service via UNE-platform.

In the Order, the Commission readopted its finding from the Local Competition First Report and Order that ILECs “must provide cross-connect facilities between an unbundled loop and a requesting carrier’s collocated equipment.”²¹ This requirement applies “at any technically feasible point that a requesting carrier seeks access to the loop.”²²

While it is beyond doubt that this interconnection obligation applies when a CLEC seeks to utilize an unbundled local loop, it is not entirely clear whether the Order intends for this obligation to apply when a CLEC utilizing UNE-platform seeks to interconnect the loop with the CLEC’s advanced services equipment collocated in the ILEC’s central office or to another CLEC’s advanced services equipment collocated in the ILEC’s central office. It also is unclear whether other ILEC obligations, such as OSS, trouble shooting, and trouble reporting, can be invoked for these network configurations.²³ This is not simply an academic issue: industry discussions with at least one ILEC have indicated that it may not permit UNE-platform CLEC line-sharing or the ability to provide data over the UNE-platform loop.

Because similar questions concerning ILEC obligations arose in the Commission’s line sharing proceeding, MCI WorldCom filed a petition for clarification of the Line Sharing Order.²⁴ Given the obvious overlap of these issues, it remains unclear which of these two proceedings is the proper forum to seek clarification of these issues. Accordingly, and to the extent necessary, MCI WorldCom incorporates by reference those arguments contained in the Petition for Clarification of

²¹ Order at paragraph 178, citing Local Competition First Report and Order at paragraph 386.

²² Order at paragraph 179.

²³ See, for example, Order at paragraph 427, discussing ILEC OSS obligations.

²⁴ Petition for Clarification of MCI WorldCom, Inc., CC Docket No. 98-147 and CC Docket No. 96-98, dated February 9, 2000.

the Line Sharing Order.

- E. The Commission should make clear that an ILEC must unbundle packet switching in any location where it places advanced services equipment when a requesting carrier cannot collocate advanced services equipment in that location.**

The Commission's intent in enacting Rule 51.319(c)(3)(B) is clear: to require ILECs to make unbundled packet switching available to CLECs when there are technical or space constraints that keep those CLECs from collocating their DSLAMs. The Rule, however, refers only to those situations in which the ILEC has deployed digital loop carrier or any other system in which fiber optic facilities replace copper facilities in the distribution section, and thus the technical or space constraint occurs at the remote terminal, pedestal, or environmentally controlled vault. An exactly analogous situation occurs if the ILEC has deployed home-run copper to the central office switch, but there is space exhaust at the central office that renders it impossible for a CLEC to collocate its DSLAM there. Thus, Rule 51.319(c)(3)(B) should be clarified and modified to read as follows:

(B) An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capability in any location where it places advanced services equipment when a requesting carrier cannot collocate advanced services equipment in that location.

Clarification of the Rule also should reduce the burden on CLECs and on state regulatory commissions having to convene an arbitration proceeding to settle collocation disputes that arise between ILECs and CLECs. If an ILEC were to claim that there were space or technical feasibility constraints that rendered CLEC collocation impossible, the CLEC would automatically have the right to gain access to the ILEC's advanced services equipment as UNEs at TELRIC rates.

- F. The Commission should make clear that states have the authority to determine rates for line conditioning as long as their methodology is consistent with the FCC's forward-looking pricing rules.**

States have the responsibility for setting line conditioning charges since the Commission

chose to “defer to the states to ensure that the costs incumbents impose on competitors for line conditioning are in compliance with our pricing rules for nonrecurring costs.”²⁵ Rule 51.319(a)(3) requires ILECs to recover the cost of line conditioning from the requesting telecommunications carrier in accordance with both “the Commission’s forward-looking pricing principles promulgated pursuant to section 252(d)(1) of the Act”²⁶ and “rules governing nonrecurring costs in § 51.507(e).”²⁷

The Commission should make clear that in giving this responsibility to the states it did not intend to preempt state rulings that the appropriate charge for loop conditioning is zero, so long as those rulings are consistent with the Commission’s forward-looking costing and pricing rules. Several states have declined to impose any line conditioning-specific charges on CLECs when ILECs are asked to bring their loop plant up to industry standards and make it DSL-compatible. These states already have made the determination that (1) the costs associated with removing load coils and other costs associated with conditioning loops that do not meet industry standards should not be included in recurring or nonrecurring loop charges based on forward looking costing and pricing principles,²⁸ or (2) the costs associated with removing load coils and other costs associated

²⁵ Order at paragraph 194.

²⁶ Rule 51.319(a)(3)(B).

²⁷ Rule 51.319(a)(3)(C).

²⁸ For example, in D. 99-11-050, the OANAD pricing decision, the California Public Service Commission (“CA PSC”) found that Pacific Bell’s proposed conditioning charges were based on embedded, not forward-looking costs. The CA PSC then rejected Pacific’s line conditioning charge, finding such charges should be based on forward-looking costs. Slip Opinion at 94-95.

with conditioning loops already are included in the recurring charge for loops,²⁹ or (3) a combination of those two.³⁰

In its Rules and the First Report and Order,³¹ as well as in this Order,³² the Commission has given broad deference to the states to implement its rules. Therefore, the Commission should clarify that it did not intend to preempt those states that have made the determination that ILECs should not be allowed to impose recurring or non-recurring charges to recover those line conditioning costs. This is critical because already state arbitrators in Texas have erroneously “overruled” their own decision on line conditioning charges based on the presumption of FCC pre-emption.³³

²⁹ For example, in Oregon Public Utilities Commission (“OPUC”) Order No. 98-444, issued in UT 138/139, at pp. 93-94, the OPUC found that the costs associated with unloading loops were recovered in the recurring charges already adopted by the Commission. Moreover, the OPUC opined that costs associated with loop conditioning, like costs associated with other outside plant activities, are properly recovered in recurring, as opposed to nonrecurring, rates.

³⁰ For example, in Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540, In the Matter of a Generic Investigation of U S West Communications, Inc.’s Cost of Providing Interconnection and Unbundled Network Elements, the Minnesota Public Utilities Commission (“MN PUC”) adopted the option “Do not allow a separate price for loop conditioning,” based on the staff recommendation, which states: “In this proceeding, the [MN PUC] chose the HAI model and the AT&T/MCI NRMC. Both of these models are forward looking models which assume the deployment of the most forward looking technology. As such, bridge taps and load coils are not a part of this forward looking network. The forward looking technology eliminates the need for bridge taps and load coils in providing quality service over longer loops. As such, approval of separate charges for loop conditioning will allow USWC to over recover its costs. This is possible given that the [MN PUC] approved cost model accounts for loop conditioning by assuming the most forward looking technology eliminating the need for loop conditioning. USWC is getting compensated for loop conditioning as part of the prices charged to CLECs for unbundled loops.”

³¹ Rule 51.507(e); First Report and Order at paragraph 749-751.

³² Order at paragraph 194.

³³ Arbitration Award, Petition of Rhythms, Inc. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company; Petition of DIECA Communications, Inc., dba Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone

In construing the 1996 Act's "anti-preemption" provision,³⁴ the Commission has correctly recognized that the states have broad discretion to implement rules that take procompetitive steps beyond those ordered by the FCC.³⁵ Should the Commission decline to reconsider its determination that ILECs may impose line conditioning charges that are not based on forward looking costing and pricing principles, a state's decision to base line conditioning charges on such principles would represent a paradigmatic example of an occasion in which a state enacts regulations that are more pro-competitive than the FCC's rules.

G. The Commission should make clear that unless an ILEC that leases unbundled local switching to a requesting carrier provides a non-discriminatory, technically feasible, and efficient method for that requesting carrier to combine that switching with the requesting carrier's own OS/DA platform or with an available third-party OS/DA platform, the ILEC must make its own OS/DA platform available to the requesting carrier as an unbundled network element.

In the Order,³⁶ the Commission identifies a problem that MCI WorldCom and other parties raised in comments and in ex partes³⁷ — that currently, because of incompatibilities between the ILEC (and AT&T) networks that use the legacy Bell System MOSS signaling protocol and the CLEC networks that use more current Feature Group D ("FGD") signaling protocol, when CLECs use the ILECs' unbundled switching element (usually as part of the UNE-platform) they are not able to connect to their own OS/DA platform or to a third party OS/DA platform, and therefore they

Company, Docket Nos. 20226 and 20272, pp. 96-121 (November 31, 1999).

³⁴ Section 251(d)(3).

³⁵ Order at paragraphs 153-154.

³⁶ Order at paragraph 463.

³⁷ Comments of MCI WorldCom at pp. 76-77 and attached Declaration of Stuart H. Miller at paragraphs 14-17; ex parte letter dated September 8, 1999 from Lori Wright, Senior Manager, Regulatory Affairs, MCI WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission.

must rely on unbundled ILEC OS/DA.

In addressing this problem, the Commission, we believe, intended to set forth a straightforward solution, i.e., unless and until an ILEC that leases unbundled local switching to a CLEC is able to provide a non-discriminatory, technically feasible, and efficient method for that CLEC to combine the ILEC's switching with the CLEC's OS/DA platform or with an available third-party OS/DA platform, the ILEC must make its own OS/DA platform available to the CLEC as an unbundled network element.

Unfortunately, the Commission's formulation of this principle was less than clear because it referred to a particular proposed solution rather than providing general guidance. Specifically, the Order refers to a BellSouth ex parte filing dated July 26, 1999, in which "BellSouth...offers a technical solution to MCI WorldCom's concern..."³⁸ Clearly the Commission's intent was to rely on that (or another) technical solution to solve the problem, and to require ILECs to provide unbundled OS/DA where they do not provide a solution. The Order states:

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 ILECs, to the extent they have not accommodated technologies used for customized routing, to offer OS/DA as an unbundled network element.³⁹

Similarly, Rule 51.319(f) states that ILECs must provide unbundled OS/DA:

where the incumbent ILEC does not provide the requesting telecommunications carrier with customized routing or a compatible signaling protocol.

We seek clarification that the Commission intended the rule to cover all situations in which

³⁸ Order at paragraph 463.

³⁹ Id.

it is not viable for CLECs to use their own or third party OS/DA platforms when using unbundled ILEC switching. Such clarification is needed because the language in paragraph 463 and Rule 51.319(f) inadvertently fails to provide sufficient guidance. As a result ILECs, already have begun to exploit the ambiguity in the language in ways that will deprive CLECs of cost-based access to this critical network element.

Some ILECs have cited the language in paragraph 463, which refers to customized routing, while ignoring the language in Rule 51.319(f), which also requires the provision of a compatible signaling protocol, to support their position that if they provide customized routing they need not provide unbundled OS/DA even if they fail to provide a compatible signaling protocol. They place the burden on the requesting CLEC to make its network and signaling protocol compatible with the ILEC signaling protocol.⁴⁰ Under Bell Atlantic's interpretation, for example, CLECs effectively cannot use their own OS/DA platforms or third party OS/DA platforms when they use Bell Atlantic's unbundled switching as part of the UNE-platform, yet Bell Atlantic nonetheless claims that it is under no obligation to lease its OS/DA platform as an unbundled network element. The

⁴⁰ See, for example, Bell Atlantic's Comments on Unbundled Network Element Provisioning, dated December 1, 1999, filed with the Commonwealth of Massachusetts Department of Telecommunications and Energy, in D.P.U. Cases 96-73/74, 96-75, 96-80/81, 96-83, and 96-94, in which Bell Atlantic states "BA-MA offers customized routing in connection with its local switching offering, and therefore, OS/DA is not subject to the unbundling requirement of § 251(c)(3)." Bell Atlantic, however, does not provide the protocol conversion required by CLECs. Based on this same misinterpretation of the Rule, Bell Atlantic has argued to the New York State Public Service Commission that there is no need to determine a cost-based price for its OS/DA platform, since it is under no obligation to unbundle OS/DA. Specifically, Bell Atlantic argues that the New York Commission should not address OS/DA pricing issues at this time because:

In the *UNE Remand Order*, the FCC concluded that incumbent LECs should not be required to provide unbundled access to OS/DA pursuant to § 251(c)(3) of the 1996 Act. Accordingly, OS/DA is not subject to the pricing requirements of § 252(d) of the Act, or to the TELRIC regulations promulgated by the FCC pursuant to that section.

Commission should clarify that the burden is on the ILEC to provide a technical solution that is compatible with the FGD protocol used by most CLECs.

Specifically, the Commission should clarify that ILECs have the obligation to provide unbundled OS/DA unless they provide customized routing and a compatible signaling protocol in a fashion that gives CLECs just as efficient access to their own OS/DA platforms (or third party platforms) as the ILECs have to their own OS/DA platforms. That is the only way to meet the just, reasonable, and non-discriminatory access obligations of sections 251(c)(3) of the 1996 Act and Rule 51.311.

It is unreasonable for an ILEC not to provide access using an industry-standard protocol that has been widely adopted by the CLECs, but rather to insist on using its own antiquated protocol. Moreover, as shall be explained more fully below, it is important that the Commission clarify that the provision of customized routing and a compatible signaling protocol are not sufficient if they are provided in a fashion that does not allow a CLEC efficiently to access its OS/DA platform or a third-party OS/DA platform.

ILECs route operator services and directory assistance calls from the point of origination to their OS and DA platforms. CLECs should have the same ability to route their traffic from the point of origination to their own OS and DA platforms, and to do so efficiently also requires conversion of the signaling protocol at the point of origination.

In sum, in order to carve out the proper exception to the ILEC requirement of providing unbundled OS/DA, it is essential that the rule make it clear that to take advantage of the exception the ILEC must provide customized routing and a compatible signaling protocol in a fashion that gives CLECs just as efficient access to their own OS/DA platforms (or third party platforms) as the ILECs have to their own OS/DA platforms. This requires both the customized routing and the

signaling protocol conversion to occur at the point of origination so that the CLECs need not create an overlay trunking network.

The Commission therefore should clarify its OS/DA discussion in the Order to ensure that it accomplishes its intended purpose. MCI WorldCom proposes the first sentence of Rule 51.319(f) should be changed to read as follows:

An incumbent LEC shall provide nondiscriminatory access in accordance with § 51.311 and section 251(c)(3) of the Act to operator services and directory assistance on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service where the incumbent LEC does not provide the requesting telecommunications carrier with customized routing and conversion of signaling protocols to an industry-standard protocol in a fashion that allows CLECs just as efficient access to their own OS/DA platforms (or third party platforms) as the ILECs have to their own platforms.

H. The Commission should make clear that when ILECs challenge rebuttable presumptions relating to the technical feasibility of unbundling the subloop, this can be done within any acceptable state process, such as a collaborative process, not only in the context of a section 252 arbitration proceeding.

Rules 51.319(2)(B) and (C) create rebuttable presumptions that place the burden of proof on ILECs to demonstrate that subloop unbundling is not technically feasible. The Commission's intent that these rules have broad application is clear, but because the rules specify that these presumptions apply in state arbitration proceedings, they will be subject to misinterpretation. ILECs will wrongly claim that the presumptions should apply only in state arbitration proceedings. In implementing the provisions of the 1996 Act and Commission rules, many states have commenced collaborative processes or other processes that are fully consistent with the 1996 Act but are not arbitration proceedings. Subloop unbundling issues often are resolved in these or other state-created processes that are not formally section 252 arbitration proceedings. It would be contrary to the intent of the Commission to give the presumptions such an artificially narrow scope and preclude otherwise effective means of dispute resolution. In order to avoid needless disputes over this issue,

this Commission should make clear that its reference to state arbitrations proceedings was not meant to be exclusive.

MCI WorldCom therefore proposes that the phrase “pursuant to state arbitration proceedings under section 252 of the Act” in both rules be modified to read “pursuant to a state process consistent with the Act.”

I. The Commission should make clear that requesting carriers are entitled to access to unbundled network elements in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, for the efficient provision of telecommunications services.

In the Order, the Commission identified a number of unbundled network elements that ILECs must make available to requesting telecommunications carriers at TELRIC rates and determined that the ILECs must construct the operations support systems and other mechanisms needed for the requesting carriers to have efficient and nondiscriminatory access to these elements. In response, the ILECs have taken a number of actions to restrict the ability of requesting carriers to gain efficient access to these UNEs. One of the most invidious ILEC tactics has been to refuse to provide requesting carriers access to UNEs in a fashion that allows them to commingle local and access traffic, or local and interstate traffic. This illegal use restriction denies CLECs the ability to enjoy the same sorts of scale and scope economies that ILECs obtain by moving local and access traffic over the same facilities. It forces CLECs to pursue one of two inferior options that artificially raise costs: either use separate overlay networks for local and access traffic, with excess capacity on each or purchase transport and multiplexing used for local service through the ILECs’ above-cost access tariffs rather than at the cost-based rates statutorily mandated for UNEs. Of course, each of these options often lead to a third result — lost business due to artificially high costs that must be passed through in prices.

For example, Bell Atlantic-Massachusetts' ("BA-MA") proposed extended link ("EEL") tariff restricts CLECs from commingling any amount of special access traffic with local traffic over its T-1s that are obtained under UNE-EEL pricing. This restriction is discriminatory: BA-MA itself commingle access traffic and local traffic over the same facilities. Although the Commission has chosen temporarily not to allow CLECs to use UNEs for special access, it still is consistent with the Commission's Supplemental UNE Remand Order⁴¹ for CLECs to be able to commingle local and access circuits on the same facilities to allow them to take advantage of economies of scale and scope, so long as CLECs pay access rates for that portion of the facility that carries access traffic. The proposed BA-MA tariff violates Sections 202(a) and 201(b) of the 1996 Act in that it constitutes unjust and unreasonable discrimination in the provision of like communications services.⁴²

ILECs have attempted to restrict other types of efficient commingling of traffic in other efforts illegally to impose use restrictions on UNEs. In California, MCI WorldCom tried to order a UNE DS-1 on behalf of one of its wholesale customers who provides DSL services to end users, in order to provide transport for that customer between Pacific Bell's central offices. MCI WorldCom sought to provide a metropolitan private line application from one collocation to another, not an interstate service. The intention was to transport the customer's traffic as far as possible on the MCI WorldCom network, using DS-3s, and then leasing PacBell DS-1s to get the traffic to the customer's choice of destinations. To do this required multiplexing at our furthest collocation point. PacBell refused to let MCI WorldCom use the interstate multiplexer for the local

⁴¹ CC Docket No. 96-98, FCC 99-370 (released November 24, 1999).

⁴² MCI WorldCom has filed a complaint challenging Bell Atlantic's conduct, but the Commission has declined to address it.

traffic going over the DS-1 UNE — or MCI WorldCom could treat that traffic as interstate and pay the far higher interstate access rates rather than UNE-transport rates. Thus, MCI WorldCom was put in the position of maintaining separate local and interstate networks, with all the attendant inefficiencies, or accepting the higher access rates for all of our traffic. As a result of PacBell's restrictions on how MCI WorldCom could connect and use UNEs, MCI WorldCom is not able to serve that customer and like customers.

The Commission must make clear that ILECs must make UNEs available in a fashion that allows them to be used efficiently and does not impose use restrictions. In particular, the Commission should implement a rule requiring ILECs to allow requesting carriers to access UNEs in fashion that allows them to commingle local and access traffic, and local and interstate traffic, to optimize their network efficiency.

J. The Commission should make clear that requesting carriers are entitled to access to combinations of unbundled elements in a fashion that allows them to use those elements efficiently in the provision of telecommunications services and that creates minimum disruption to end-user customers.

In addition to refusing requesting carriers access to UNEs in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, ILECs have taken a number of actions to restrict the ability of requesting carriers to gain efficient access to the UNEs — again pursuing tactics that effectively impose use restrictions on UNEs.

In the Supplemental Order,⁴³ the Commission explicitly stated that ILECs must allow CLECs to purchase unbundled EELs to provide local exchange service. Prior to that decision, many ILECs refused to make EELs available to CLECs at UNE rates, instead requiring the CLECs to purchase

⁴³ Supplemental Order in the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No, 96-98, released November 24, 1999, at paragraph 5.

the loop-transport combinations out of access tariffs. Now that CLECs have the right to purchase UNE-EELs, ILECs are attempting to impose unlawful restrictions on CLEC access to UNE-EELs.

Two such restrictions in BA-MA's proposed tariff are typical of these unlawful restrictions. MCI WorldCom wants to convert its existing loop-transport arrangements used for the provision of local services to EEL arrangements. BA-MA has proposed numerous barriers to an orderly and efficient transition from BA-MA imposed access arrangements to EEL arrangements.

Under BA-MA's proposal, a CLEC having an existing loop-transport arrangement under the access tariff and wanting to convert to EEL pricing for that arrangement must (1) disconnect its existing loop-transport arrangement, (2) separate those facilities from existing multiplexing equipment and transport, and (3) then purchase separate multiplexing and transport equipment out of the EEL tariff, in order to provide the same combination. CLECs should not be required to uncombine the facilities that are currently being used to serve local exchange customers. Each time a CLEC were to convert a T-1 to EEL pricing, the CLEC would be required to disconnect the combination from its existing multiplexing, and then reconnect it again, incurring wasteful cost and almost certain disruption to its customers' service. Since the proposed tariff as written precludes loops purchased out of the EEL tariff from being combined with the transport and multiplexing purchased from the access tariff, this would be the result even if 100 percent of the traffic provided over the DS-1 loop transport is local. This limitation is not necessary as the access multiplexing and transport services associated with access are identical to the facilities used for local service. BA-MA's proposed restriction is especially unreasonable in light of the fact that it has been BA-MA's refusal to make available the EEL arrangement that forced CLECs like MCI WorldCom to obtain the same facilities under the BA-MA access tariffs (at substantially higher cost) in order to provide local exchange service. The Commission should issue a Rule explicitly stating that ILECs cannot

impose disconnect-reconnect requirements when no physical changes are required.

A second improper restriction proposed by BA-MA is the discriminatory, unnecessary, and costly requirement that CLECs collocate in order to access new EEL combinations. While a CLEC may choose to terminate a new EEL to a CLEC collocation, there is no technical reason why CLECs should be forced to terminate an EEL in a CLEC collocation. Indeed, BA-MA's sister company, BA-New York, does not impose this collocation requirement on CLECs in New York. Nor does it impose that requirement upon a CLEC that converts an existing access arrangement to an EEL arrangement. Collocation is not technically required either to convert existing T-1 arrangements to EEL or to provision new EEL arrangements.

The Commission should issue a Rule explicitly stating that ILECs cannot require CLECs to collocate in order to obtain EELs.

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I, Mark D. Schneider, hereby certify that I have this 17th day of February, 2000, caused a true copy of Motion for Clarification of MCI WORLDCOM, Inc. to be served on the parties listed below via first class mail postage pre-paid:

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