elements is *necessary* and whether the unavailability of non-proprietary elements would *impair* a competitor's ability to provision service.[1967] These section 251 obligations are referenced and incorporated as obligations of BOCs under section 271(c)(2)(B)(ii) of the Act.[1968]

650. Section 271 establishes both the procedures by which a BOC may apply to provide interLATA services in one of its in-region states and the substantive standards by which that application must be judged. In particular, section 271(c)(2)(B) of the Act specifies the "competitive checklist" of access and interconnection requirements that BOCs must meet before they are allowed to offer in-region long-distance services.[1969] Four of these checklist items relate to network elements in earlier orders the Commission has deemed to be UNEs under the standards of section 251(c)(3). In particular, checklist items 4 through 6 and 10 require: "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services;"[1970] "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services;"[1971] "[l]ocal switching unbundled from transport, local loop transmission, or other services,"[1972] and "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."[1973]

651. In the *Triennial Review NPRM*, the Commission sought comment on how the access requirements specified in the section 271 competitive checklist relate to the unbundling requirements derived from sections 251(c)(3) and 251(d)(2). The Commission first noted its conclusion in the *UNE Remand Order* that BOCs must continue to provide access to those network elements described in checklist items 4-6 and 10, even if such access is not mandated under section 251 (and checklist item 2).[1974] The Commission also concluded, in that Order, that market prices should be permitted to prevail for such network elements, rather than requiring forward-looking prices.[1975] The *Triennial Review NPRM* sought additional comment on these conclusions, on "how to evaluate a checklist item where there is no unbundling requirement for

---

[1967] *Id.* § 252(d)(2). We note that to the extent an incumbent LEC is providing network elements pursuant to section 251(c)(3), section 252(d)(1) further requires that it provide such elements at rates that are nondiscriminatory and cost-based. *Id.* § 252(d)(1).

[1968] *Id.* § 271(c)(2)(B)(ii).

[1969] *Id.* § 271(c)(2)(B).

[1970] *Id.* § 271(c)(2)(B)(iv).

[1971] *Id.* § 271(c)(2)(B)(v).

[1972] *Id.* § 271(c)(2)(B)(vi).

[1973] *Id.* § 271(c)(2)(B)(x).

[1974] We note that section 271(c)(2)(B)(ii)'s requirement that BOCs provide nondiscriminatory access to network elements is referred to herein as checklist item 2.

[1975] *UNE Remand Order*, 15 FCC Rcd at 3906, para. 473, *see also Triennial Review NPRM*, 16 FCC Rcd at 22814, para. 72.

the network element that corresponds to that checklist item, and on the appropriateness of evaluating a tariffed service that corresponds to that network element."[1976]

652. Some commenters seek to alter the Commission's determination in the *UNE Remand Order* that section 271 establishes a separate BOC access obligation for network elements no longer listed under section 251(c)(3) and its conclusion that the marketplace, rather than our TELRIC methodology, should determine the price for delisted network elements under section 271. For example, Verizon argues that once the Commission has determined that a network element is not necessary under section 251(d)(2), the corresponding checklist item should be construed as being satisfied.[1977] Several competitive carriers counter that section 271 requires BOCs to provide access to loops, switching, transport, and signaling regardless of impairment under section 251.[1978] Z-Tel further argues that competitors are entitled to access to loops, switching, transport, and signaling at TELRIC rates, even if the Commission were to remove these items from the list of UNEs under section 251.[1979] For the reasons outlined below, we reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates.

2. Discussion

653. *Independent Access Obligation.* For reasons set forth below, we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

654. First, the plain language and the structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271. Checklist item 2 requires compliance with the general unbundling obligations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3).[1980] Checklist items 4, 5, 6, and 10 separately

---

[1976] *Triennial Review NPRM*, 16 FCC Rcd at 22814, para. 72; *see also Bell Atlantic New York 271 Order*, 15 FCC Rcd at 4126-27, para. 340.

[1977] Verizon Comments at 66-67. Verizon argues, in the alternative, that the Commission should forbear from applying checklist items (4) through (6) and (10) "once the corresponding elements no longer need to be unbundled under section 251(d)(2)." Verizon Petition for Forbearance of the Verizon Telephone Companies Pursuant to Section 160(c), CC Docket 01-338 at 3 (filed July 29, 2002). We do not address Verizon's forbearance petition in this *Triennial Review* proceeding. Rather, we will address the petition separately consistent with the procedures outlined in section 10 of the Act. At the time we address the forbearance petition we will also address Verizon's related argument that BOCs that offer access to delisted checklist items pursuant to section 271 alone are under no obligation to combine the elements for requesting carriers. Verizon Reply at 59.

[1978] ALTS *et al.* Comments at 117-18; NuVox *et al.* Comments at 115-16; CompTel Comments at 20; UNE-P Coalition Comments at 17; Z-Tel Comments at 4-15.

[1979] Z-Tel Comments at 7; *see also* UNE-P Coalition Reply at 37 (noting that the "Coalition agrees with Z-Tel . . .").

[1980] *See* 47 U.S.C. § 271(c)(2)(B)(ii).

impose access requirements regarding loop, transport, switching, and signaling,[1981] without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2.[1982] Moreover, were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and word of a statute.[1983] Verizon asserts that an interpretation of the Act that recognizes the independence of sections 271 and 251(d)(2) places these sections in conflict with each other.[1984] We disagree. Verizon's reading of section 271 would provide no reason for Congress to have enacted items 4, 5, 6, and 10 of the checklist because checklist item 2 would have sufficed.

655. Second, it is reasonable to interpret section 251 and 271 as operating independently. Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs.[1985] In fact, section 271 places specific requirements on BOCs that were not listed in section 251. These additional requirements reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market.[1986] Before the 1996 Act's passage, the BOCs, the local progeny of the once-integrated Bell system, were barred by the terms of the MFJ from entering certain lines of business, including providing interLATA services.[1987] The ban on BOC provision of long distance services was based on the MFJ court's determination that such a restriction was "clearly necessary to

[1981] *See* 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), (x).

[1982] *Bates v. U.S.*, 522 U.S. 23, 29-30 (1997) (stating that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). As such, our decision is entitled to deference because the interpretation involves matters about which the Act is silent. *Chevron*, 467 U.S. at 843.

[1983] *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

[1984] Verizon Comments at 67; Verizon Reply at 54-55.

[1985] This fact alone demonstrates that section 271 is not dependent on section 251 because a more limited set of carriers was made subject to the demands of section 271. It is consistent with norms of statutory construction that section 251 as a general statutory provision does not control the more specific section 271. *See Gozlon-Peretz v. United States*, 498 U.S. 395 (1991) (a specific provision controls over one of a more general application).

[1986] Section 271 is the direct progeny of the Modification of Final Judgment (MFJ) that contained the terms of the settlement of the Department of Justice's antitrust suit against AT&T. *See United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983). The MFJ sought to avoid the emergence of an unregulated telecommunications monopoly by imposing specific line-of-business restrictions that explicitly barred the BOCs from providing service for calls that occurred between LATAs. Although the Telecommunications Act of 1996 generally superseded the MFJ, section 271 conditionally continued the interLATA line-of-business restriction in the form of the competitive checklist.

[1987] The MFJ contained the terms of the settlement of the Department of Justice's antitrust suit against AT&T. *See id.*

preserve free competition in the interexchange market."[1988] The protection of the interexchange market is reflected in the fact that section 271 primarily places in each BOC's hands the ability to determine if and when it will enter the long distance market. If the BOC is unwilling to open its local telecommunications markets to competition or apply for relief, the interexchange market remains protected because the BOC will not receive section 271 authorization. The same historical underpinning, however, is not relevant to section 251, which is a mandatory provision designed to ensure a minimum level of openness in the local market. Therefore, we reject Verizon's claim that any interpretation of section 271 that recognizes its independence from section 251 would improperly single out BOCs for treatment different from other incumbent LECs.[1989] As explained above, recognizing an independent obligation on BOCs under section 271 would by no means be inconsistent with the structure of the statute. Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[1990]

656. *Prices, Terms and Conditions.* It is a different question, however, as to what pricing standard applies to network elements that are unbundled by BOCs solely because of the requirements set forth in section 271. Where there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements. Contrary to the claims of some commenters, TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 *where impairment is found to exist.* Here, however, we are discussing the appropriate pricing standard for these network elements where there is no impairment. Under the no impairment scenario, section 271 requires these elements to be unbundled, but not using the statutorily mandated rate under section 252. As set forth below, we find that the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202.[1991]

657. By their own terms, neither section 252(d)(1) nor section 271(c)(2)(B) requires that the section 252(d)(1) pricing standard be applied to checklist network elements. Section

---

[1988] *Id.* at 188.

[1989] Verizon Comments at 67; Verizon Reply at 54-55.

[1990] We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.

[1991] 47 U.S.C. §§ 201, 202.

252(d)(1) provides the pricing standard "for network elements for purposes of [section 251(c)(3)],"[1992] and does not, by its terms, apply to network elements that are required only under section 271. Indeed, section 252(d)(1) is quite specific that it only applies for the purposes of implementation of section 251(c)(3) – meaning only where there has been a finding of impairment with regard to a given network element. Moreover, as noted above, while checklist item 2 provides that a BOC must provide access to UNEs "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," the checklist items establishing the specific, separate network element obligations do not contain this language. We disagree with Z-Tel's argument that the cross-reference in checklist item 2 should be read into the later checklist items, and is implicit in them.[1993] Reading this language into these provisions would change their plain meaning, and Z-Tel offers no indication that this is what Congress intended. Moreover, we reject Z-Tel's argument that the cross-references were omitted simply to conserve space or to avoid repetition.[1994] To the contrary, we find Congress' decision to omit cross-references particularly meaningful in this instance: half of the checklist items contain explicit cross-references to other statutory provisions, and it is reasonable to conclude that Congress would have inserted a cross-reference into items 4-6 and 10 had that been its intention.

658. We also decline to use section 271, as suggested by Z-Tel, to broaden the unbundling obligations of section 251. Z-Tel notes that section 251(d)(2) directs the Commission to consider "impair[ment]" "at a minimum" in determining which network elements must be unbundled, and thus argues that the Commission may require unbundling pursuant to section 251 and 252 even in the absence of an impairment finding.[1995] In analyzing section 252(d)(2) the D.C. Circuit in *USTA* determined that the "at a minimum" language potentially could justify the imposition of unbundling obligations under that provision even in the "absence" of impairment.[1996] However, the *USTA* decision contained key limitations to the exercise of such authority. In order to apply the "at a minimum" language in the absence of impairment, the *USTA* court required that the Commission "point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible."[1997] Were we to accept Z-Tel's argument, we would again impose a virtually unlimited standard to unbundling, based on little more than faith that more unbundling is better, regardless of context. Checklist items 4 through 6 and 10 do not require us to impose unbundling pursuant to section 251(d)(2). Rather, the checklist independently imposes unbundling obligations, but simply does so with less rigid accompanying conditions.

[1992] *Id.* § 252(d)(1).

[1993] Letter from Christopher J. Wright, Counsel for Z-Tel, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 11 (filed Dec. 20, 2002) (Z-Tel Dec. 20, 2002 *Ex Parte* Letter).

[1994] Z-Tel Dec. 20, 2002 *Ex Parte* Letter at 11.

[1995] Z-Tel Comments at 17.

[1996] *USTA*, 290 F.3d at 425.

[1997] *Id.*

659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict.[1998] So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

660. We reject arguments by Z-Tel and certain other competitive LECs that the proper way to reconcile any such conflict is to find that our section 251 impairment determinations with respect to unbundled local loops, switching and transport would apply only to non-BOC incumbent LECs.[1999] Z-Tel's argument posits that particular network elements enumerated in the section 271 checklist are the "core" elements, and thus concludes that while the standards in section 251 would still apply to all carriers as to any network elements not mentioned in the checklist, section 271 requirements (as construed by Z-Tel) would supercede section 251 standards as to the most critical network elements delineated by Congress. We think that this reading of the two provisions is illogical. BOCs control 85.9 percent of incumbent LEC local switched access lines.[2000] Of the remaining lines, 11.6 percent of the lines are served by certain rural telephone companies that section 251(f) expressly exempts from the unbundling obligations set forth in 251(c). So, under the Z-Tel interpretation of sections 251 and 271, Z-Tel would have section 251(c), which is arguably the most important market-opening provision of the Act, apply to a mere 2.5 percent of incumbent LEC lines on the issues and facilities that matter most to local competition.[2001] The section 271 checklist cannot be read to have such a broad effect – while it does set forth particular conditions Congress wished to impose on entry into the in-region interLATA market, Congress could not have intended the checklist to render section 251 itself superfluous.

661. Our recognition that pricing pursuant to section 252 does not apply to network elements that are not required to be unbundled is consistent with the Commission's general approach in the *UNE Remand Order*, and has been applied –apparently with no adverse effect – with respect to access to directory assistance and operator services. The Commission removed directory assistance and operator services from the list of UNEs in the *UNE Remand Order*.[2002]

[1998] *See Washington Market Co. v. Hoffman*, 101 U.S. 112 (1879).

[1999] Z-Tel Comments at 7-8.

[2000] *Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter 2003*, Submitted by the Universal Service Administrative Company (filed Nov. 1, 2002).

[2001] *Id.*

[2002] *UNE Remand Order*, 15 FCC Rcd at 3891-92, paras. 441-42.

These network elements, like loops, transport, switching and signaling databases, are separately listed in the competitive checklist.[2003] Accordingly, as explained in subsequent section 271 Orders, access to directory assistance and operator services remains a condition of long distance entry – but the standard applicable to rates and conditions is not derived from sections 251 and 252.[2004] We note that no party has sought to overturn this aspect of the seventeen section 271 Orders that have applied this analysis since directory assistance and operator services were removed from the list of section 251 UNEs, and no party has suggested in this proceeding that the Commission's interpretation of the statute has produced a perverse policy impact with respect to a BOC's provision of these network elements.

662. We note, however, that in the *UNE Remand Order* the Commission stated that "[i]f 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)."[2005] We reach essentially the same result here, but we clarify our reasoning below.

663. The Supreme Court has held that the last sentence of section 201(b), which authorizes the Commission "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," empowers the Commission to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996.[2006] Section 271 is such a provision.[2007] Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act.[2008] Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.

[2003] *See* 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III).

[2004] *See, e.g.*, *SWBT Texas 271 Order*, 15 FCC Rcd at 18527, para. 348.

[2005] *UNE Remand Order*, 15 FCC Rcd at 3905, para. 470.

[2006] *Iowa Utils. Bd.*, 525 U.S. at 377-81.

[2007] The Court found that this grant of authority was "unaffected by" the jurisdictional limitation regarding intrastate matters that was contained in section 2(b) of the 1934 Act. *Id.* at 379. The Court found that since new sections 251 and 252 applied to interstate as well as intrastate matters, section 201(b) authorized the Commission to adopt rules implementing the full scope of those provisions. *Id.* at 379-81.

[2008] *See* 47 U.S.C. §§ 201(b), 202(a). Therefore, we reject the argument of Z-Tel that section 252(d)(1) is the only basis for the Commission to evaluate checklist elements not required to be unbundled under section 251.

664. Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.

665. *Post Entry Requirements.* In the event a BOC has already received section 271 authorization, section 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271. In particular, this section provides the Commission with enforcement authority where a BOC "has ceased to meet any of the conditions required for such approval."[2009] We conclude that for purposes of section 271(d)(6), BOCs must continue to comply with any conditions required for approval, consistent with changes in the law. While we believe that section 271(d)(6) established an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that the "conditions required for such approval" would not change with time. Absent such a reading, the Commission would be in a position where it was imposing different backsliding requirements on BOCs solely based on date of section 271 entry, rather than based on the law as it currently exists. We reject this approach as antithetical to public policy because it would require the enforcement of out-of-date or even vacated rules.

666. Two commenters in this proceeding ask the Commission to adopt special procedural vehicles for re-examining section 271 authorizations, in light of potential rule changes that would change a BOC's obligations under section 251. First, Z-Tel asserts that the Commission must revisit every section 271 authorization to consider "[a]ny significant change to the availability of the UNE platform."[2010] Second, Talk America asks the Commission to adopt a procedure that would freeze in place a BOC's unbundling obligations under section 251, at least pending a review of potential backsliding under section 271(d)(6).[2011] Specifically, Talk America contends that, for a BOC that has previously received section 271 authorization, the "anti-backsliding" requirements of section 271(d)(6) would require it to continue providing unbundled local switching (and UNE-P) at TELRIC prices in the event it is no longer required to do so under section 251. Talk America suggests that any rule change that lessens a BOC's obligation

[2009] 47 U.S.C. § 271(d)(6).

[2010] Z-Tel Comments at 83-84.

[2011] Letter from Brad A. Mutschelknaus, Counsel for Talk America and Broadview Networks, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 15 (filed Dec. 6, 2002) (Talk America/Broadview Networks Dec. 6, 2002 *Ex Parte* Letter); *see also* Letter from Brad A. Mutschelknaus, Counsel for Talk America, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 3 (filed Dec. 30, 2002) (Talk America Dec. 30, 2002 *Ex Parte* Letter).

to provide access to unbundled switching could decrease the level of facilities-based competition in either residential or business markets, thereby potentially causing a "backsliding" violation under section 271(d)(6) to the extent the BOC relied on UNE-P based competition to support its showing under section 271(c)(1)(A) (Track A). Accordingly, to address this risk of this type of "backsliding," Talk America would require BOCs to file a petition with the Commission – *before* they may be permitted to cease providing switching and UNE-P at TELRIC-based rates – demonstrating the existence of facilities-based competition from carriers that do not rely in any material part on the availability of unbundled local switching or UNE-P at TELRIC-based rates.[2012]

667. We decline to adopt the extraordinary procedural steps requested by Z-Tel and Talk America. With respect to Talk America's proposal, by reexamining whether a BOC continues to qualify for "Track A" *before* conditions change in the market ignores the reality that competitors may take steps to retain customers served by UNE-P. For example, it is entirely possible that a competitive LEC may transition customers from UNE-P to an arrangement using unbundled loops combined with its own switching – thereby retaining the same level of facilities-based competition. Accordingly, the before-the-fact review proposed by Talk America would necessarily require speculation and would hold a BOC to a higher standard than under its initial section 271 application. Finally, there is no suggestion that the procedure proposed by Talk America is necessary to detect discrimination or bad conduct – indeed, the harm alleged by Talk America would result from a BOC's *compliance with* federal unbundling rules. Accordingly, we do not believe the public interest warrants adoption of this special procedural step. For similar reasons, we decline Z-Tel's request to "revisit" every section 271 authorization to consider changes regarding UNE-P.

B. Clarification of TELRIC Rules

1. Background

668. Section 252(d)(1) of the Act provides that rates for interconnection and unbundled elements shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element" and "may include a reasonable profit."[2013] In the *Local Competition Order*, the Commission adopted guidelines to be applied by state commissions when they are called on to arbitrate disputes regarding the prices for interconnection and UNEs pursuant to section 252(d).[2014] Specifically, the Commission adopted a forward-looking economic cost methodology, which it called "Total Element Long

[2012] Talk America Dec. 30, 2002 *Ex Parte* Letter at 3.

[2013] 47 U.S.C. § 252(d)(1).

[2014] *Local Competition Order*, 11 FCC Rcd at 15515, para. 29. The Commission also concluded that rates for reciprocal compensation under section 252(d)(2) should be based on the same principles. *Id.* at 16023, para. 1054.

Run Incremental Cost" or "TELRIC." The Supreme Court affirmed the Commission's TELRIC rules in *Verizon v. FCC*.[2015]

669. Based on the Commission's finding that prices in a competitive market will tend towards long-run incremental cost,[2016] the TELRIC methodology is designed to derive prices for particular elements in the incumbent LEC's network that "replicate[], to the extent possible," what the incumbent LEC would be able to charge in a competitive market.[2017] Specifically, TELRIC equates the current market value of the existing network of an incumbent telecommunications provider with the cost the incumbent LEC would incur today if it built a local network that could provide all the services its current network provides, to meet reasonably foreseeable demand, using the least-cost, most-efficient technology currently available.[2018]

670. The Commission's decision to equate the current value of existing equipment with the forward-looking cost of currently available equipment "rests on the rational economic assumption that, as new, more efficient equipment becomes available, the value of older, less efficient equipment will be affected."[2019] TELRIC assumes that the value of an incumbent LEC's network is constrained by the most efficient technology available, even if the incumbent LEC itself does not deploy, or plan to deploy, that technology. In the competitive market assumed under TELRIC, we assume that the most efficient technology currently available will be deployed by at least one carrier, and that the value of all competing networks, and the prices for elements of those networks, will be constrained by the value of the more efficient network.[2020]

671. The TELRIC of a network element is the sum of three components – operating expenses, depreciation expense, and cost of capital.[2021] *Operating expenses* are the annual costs associated with operating a particular asset. Specifically, rates established under TELRIC should reflect the operating expenses associated with a network that uses the most efficient technology currently available.[2022] *Depreciation* is the mechanism by which the investment in an asset is

[2015] *Verizon*, 535 U.S. at 467.

[2016] *Local Competition Order*, 11 FCC Rcd at 15845, para. 675.

[2017] *Id.* at 15846, para. 679.

[2018] *Local Competition Order*, 11 FCC Rcd at 15848-49, para. 685; 47 C.F.R. §§ 51.501–51.511. The Commission added one additional constraint on the design of the network: the new network must take as given the existing wire center locations. *Local Competition Order*, 11 FCC Rcd at 15848-49, para. 685.

[2019] *Verizon v. FCC*, Reply Brief for Petitioners United States and FCC at 8 (FCC Reply Brief). As the Supreme Court noted, "what the incumbents call the 'hypothetical' element is simply the element valued in terms of a piece of equipment an incumbent may not own." *Verizon*, 535 U.S. at 501.

[2020] Although it is appropriate for a TELRIC analysis to consider existing technology that is not currently deployed by an incumbent LEC, it is not appropriate to consider technologies that may be available in the future but are not currently available.

[2021] *Local Competition Order*, 11 FCC Rcd at 15856, para. 703.

[2022] *Id.* at 15848-49, para. 685.

recovered over the life of the asset. In describing the TELRIC methodology, the Commission stated that depreciation expense should be based on "economic depreciation" that "reflects the true changes in economic value of an asset."[2023] *Cost of capital* reflects the rate of rate of return required to attract capital, *i.e.*, the rate of return that investors expect to receive from alternative investments that have the same risk. In the *Local Competition Order*, the Commission stated that regulators should adjust the cost of capital to reflect the risks faced by the incumbent LEC as competition is introduced into its local market.[2024]

672. In paragraph 24 of the *Triennial Review NPRM*, we sought comment on whether, "to encourage investment in new facilities, we might clarify or modify our pricing rules to allow incumbent LECs to recover for any unique costs and risks associated with such investment." In their comments and reply comments, both incumbent LECs and equipment manufacturers argue that a reexamination of TELRIC is necessary because our rules discourage carriers from investing in new facilities.[2025] Competitive LECs generally oppose any modification of our pricing rules on the ground that TELRIC-based rates are fully compensatory and higher rates would create inefficient investment incentives.[2026] Some parties, such as Covad, argue that, if the Commission decides that changes are needed to encourage investment, it is better to modify our pricing rules than to eliminate unbundling requirements.[2027]

673. Subsequently, in a series of *ex parte* letters, a number of incumbent LECs provided a more detailed analysis of their concerns about the effect of TELRIC pricing on their investment incentives.[2028] The incumbent LECs identify five specific aspects of TELRIC that they contend require clarification or modification to ensure that UNE pricing sends correct economic signals: network assumptions, cost of capital, depreciation, fill factors, and NRCs.[2029]

[2023] *Id.* at 15856, para. 703.

[2024] *Id.*

[2025] *See, e.g.*, Verizon Comments at 32-33; ACS Comments at 7-8; Alcatel Comments at 24-25.

[2026] *See, e.g.*, WorldCom Comments at 65-70.

[2027] Covad Comments at 63; *see also* Massachusetts Department Comments at 6-7.

[2028] *See* Letter from William P. Barr, Executive Vice President and General Counsel, Verizon, to Michael K. Powell, Chairman, FCC (dated July 16, 2002), *in* Letter from W. Scott Randolph, Director-Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed July 18, 2002) (Verizon July 18, 2002 TELRIC *Ex Parte* Letter); Letter from William M. Daley, President, SBC Communications, to Michael K. Powell, Chairman, FCC (dated Sept. 4, 2002), *in* Letter from Jim Lamoureux, Senior Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Sept. 9, 2002) (SBC Sept. 9, 2002 TELRIC *Ex Parte* Letter); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Oct. 28, 2002) (Qwest Oct. 28, 2002 TELRIC *Ex Parte* Letter).

[2029] Verizon July 18, 2002 TELRIC *Ex Parte* Letter at 2-5; Letter from William M. Daly, President, SBC, to Michael K. Powell, Chairman, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (dated Sept. 4, 2002) (SBC Sept. 9, 2002 TELRIC *Ex Parte* Letter), *in* Letter from Jim Lamoureux, Senior Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, 00-218, 00-249, 00-251 (filed Sept. 9, 2002).

Verizon argues that resolution of these issues is necessary so that UNE prices send "the best possible market signals to incumbent LECs, competitive LECs and intermodal competitors, a result that is critical to the continued investment by all competing providers."[2030] Similarly, SBC urges the Commission to "strive to ensure that the regulatory methodology for setting wholesale prices is economically rational and creates the right incentives for incumbent and new entrants alike."[2031] Qwest requests "restoration of TELRIC to its original purpose: the creation of economically appropriate price signals for competitive LECs as they choose between leasing facilities from incumbent LECs and procuring their own."[2032]

674. In response, competitive LECs contend that the TELRIC methodology, properly applied, does send appropriate pricing signals.[2033] AT&T challenges the notion that TELRIC pricing diminishes the investment incentives of the incumbent LECs. According to AT&T, "there is no reason why unbundling under the TELRIC standard, properly applied, should lead to underinvestment."[2034] Rather, existing TELRIC rules provide incumbent LECs the opportunity to "establish the UNE rates that are necessary to reflect the particular costs and risks they face."[2035] Similarly, McLeodUSA states that "current TELRIC rules can and do promote investment in the integrated network."[2036]

2. Discussion

675. We conclude that it is necessary to clarify the application of two components of TELRIC that have a major impact on UNE prices – cost of capital and depreciation. These two components of TELRIC are the primary vehicles by which any risks associated with new facilities and new services may be reflected in UNE prices, and therefore it is appropriate to consider these issues in response to the question presented in the *Triennial Review NPRM*. We believe the guidance we provide below is responsive to the concerns raised by the parties and will assist states in their efforts to establish UNE prices that appropriately reflect these risks.

[2030] Verizon July 18, 2002 TELRIC *Ex Parte* Letter at 5.

[2031] SBC Sept. 9, 2002 TELRIC *Ex Parte* Letter at 2.

[2032] Qwest Oct. 28, 2002 TELRIC *Ex Parte* Letter, Attach. at 3.

[2033] *See* Letter from James W. Cicconi, General Counsel and Executive Vice President, AT&T, to Michael K. Powell, Chairman, FCC, (dated July 26, 2002), *in* Letter from Joan Marsh, Director-Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed July 26, 2002) (AT&T July 26, 2002 TELRIC *Ex Parte* Letter); Letter from Chris Frentrup, Senior Economist, WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Oct. 23, 2002) (WorldCom Oct. 23, 2002 TELRIC *Ex Parte* Letter); McLeodUSA Jan. 8, 2003 TELRIC *Ex Parte* Letter.

[2034] AT&T July 26, 2002 TELRIC *Ex Parte* Letter at 2.

[2035] *Id.*

[2036] McLeodUSA Jan. 8, 2003 TELRIC *Ex Parte* Letter at 4.

676. In addition to clarification of our rules, some of the incumbent LECs have proposed fundamental changes to the theory underlying the TELRIC rules.[2037] These proposals go well beyond the single pricing issue identified in the *Triennial Review NPRM* – whether to modify or clarify our rules to encourage investment in new facilities. We find that the record in this proceeding does not support the type of dramatic changes proposed by the incumbent LECs.[2038] Rather, we find that issues related to modification of our TELRIC pricing framework are best addressed in a future proceeding dedicated to that topic. Accordingly, we will leave the general TELRIC framework intact at this time and consider the need for changes on a more complete record in a future review proceeding.

a. Cost of Capital

677. The cost of capital component of TELRIC is one mechanism by which risk is reflected in UNE prices. In the *Local Competition Order*, the Commission stated that the "currently authorized rate of return at the federal or state level is a reasonable starting point," and that incumbent LECs "bear the burden of demonstrating with specificity that the business risks that they face providing unbundled network elements and interconnection services would justify a different risk-adjusted cost of capital or depreciation rate."[2039] The Commission noted that 11.25 percent was the currently authorized rate of return at the federal level, but held that states may "adjust the cost of capital if a party demonstrates to a state commission that either a higher or lower level of cost of capital is warranted."[2040]

678. Verizon urges the Commission to clarify that, "because TELRIC requires that prices be set based on various competitive assumptions, the cost of capital calculated under TELRIC must reflect the risks associated with those assumptions."[2041] Both Verizon and SBC claim that the risks faced by incumbent LECs today are much greater than they were in 1996

[2037] Verizon, for example, suggests we establish prices based on the costs of its actual network, rather than a hypothetical network. *See* Verizon July 18, 2002 TELRIC *Ex Parte* Letter at 4 ("[T]he Commission should alter its methodology to eliminate the assumption that the existing network is completely 'reconstructed' to reflect a technology mix that goes beyond what likely will ever be in place in any real-world network.").

[2038] Both incumbent LECs and competitive LECs have presented some evidence attempting to establish the relationship between UNE prices and investment. *See, e.g.*, Qwest Reply, Attach. *UNE Prices and Telecommunications Investment*; AT&T Oct. 11, 2002 Willig Stimulating Investment; *The Role of Competition in Stimulating Telecommunications Investment*, Hassett and Kotlikoff (dated Oct. 2002), *in* Letter from Kevin A. Hassett, Resident Scholar, The American Enterprise Institute, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Nov. 15, 2002). The only conclusion that we can draw from these studies is that wholesale pricing may be one of the many factors that influence carriers' investment decisions, but that the relative importance of the wholesale pricing regime on investment incentives is uncertain.

[2039] *Local Competition Order*, 11 FCC Rcd at 15856, para. 702.

[2040] *Id.*

[2041] Verizon July 18, 2002 TELRIC *Ex Parte* Letter at 2.

when the Commission stated that 11.25 percent should be used as the starting point in calculating cost of capital.[2042]

679. In response, AT&T states that paragraph 702 of the *Local Competition Order* requires consideration of the *actual* competitive risks an incumbent LEC faces, not the risks it would face in the competitive market that TELRIC assumes.[2043] Specifically, AT&T emphasizes that incumbent LECs have to burden to "demonstrate with specificity" the business risks that "they face" in providing UNEs, not the risks "they might face" if the market were fully competitive.[2044] AT&T also challenges the assertion that an incumbent LEC's UNE business faces risks that are greater than they were in 1996, arguing that even Verizon's own witnesses have conceded in state proceedings that facilities-based competitive LECs are unlikely to make significant inroads in the foreseeable future.[2045]

680. To ensure that UNE prices set by the states appropriately reflect the risks associated with new facilities and new services, we think it would be helpful to clarify two types of risks that should be reflected in the cost of capital. First, we clarify that a TELRIC-based cost of capital should reflect the risks of a competitive market. The objective of TELRIC is to establish a price that replicates the price that would exist in a market in which there is facilities-based competition. In this type of competitive market, all facilities-based carriers would face the risk of losing customers to other facilities-based carriers, and that risk should be reflected in TELRIC prices.

681. We do not agree with AT&T that paragraph 702 of the *Local Competition Order* limits a state to considering only the actual competitive risk the incumbent LEC currently faces in providing UNEs. Because the objective of TELRIC pricing is to replicate pricing in a competitive market,[2046] and prices in a competitive market would reflect the competitive risks associated with participating in such a market, we now clarify that states should establish a cost of capital that reflects the competitive risks associated with participating in the type of market that TELRIC assumes. The Commission specifically recognized that increased competition would lead to increased risk, which would warrant an increased cost of capital.[2047] Although

[2042] SBC Sept. 9, 2002 TELRIC *Ex Parte* Letter at 3-4; Verizon July 18, 2002 TELRIC *Ex Parte* Letter at 2.

[2043] AT&T July 26, 2002 TELRIC *Ex Parte* Letter, Attach. at 1. AT&T's position on this issue appears to have evolved over the course of this proceeding. In a subsequent *ex parte* letter, AT&T states that TELRIC compensates incumbent LECs for investing in upgraded facilities, such as fiber loops, because a TELRIC-based price "fully compensates the incumbent for its *prospective risk*." Letter from David Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 16 (filed Dec. 23, 2002) (emphasis added) (AT&T Dec. 23, 2002 Lawson *Ex Parte* Letter).

[2044] AT&T July 26, 2002 TELRIC *Ex Parte* Letter, Attach. at 1 (citing *Local Competition Order*, 11 FCC Rcd at 15856, para. 702).

[2045] *Id.*

[2046] *Local Competition Order*, 11 FCC Rcd at 15846, para. 679.

[2047] *Id.* at 15856, para. 702.

paragraph 702 states that there was limited competition for network elements at the time, it is clear from our discussion of the TELRIC methodology that future competition must be considered in assessing risk.[2048]

682. The approach advocated by AT&T and WorldCom does not provide optimal incentives for investment. To calculate rates based on an assumption of a forward-looking network that uses the most efficient technology (*i.e.*, the network that would be deployed in a competitive market), without also compensating for the risks associated with investment in such a network, would reduce artificially the value of the incumbent LEC network and send improper pricing signals to competitors. Establishing UNE prices based on an unreasonably low cost of capital would discourage competitive LECs from investing in their own facilities and thus slow the development of facilities-based competition.

683. Second, we clarify that a TELRIC-based cost of capital should reflect any unique risks (above and beyond the competitive risks discussed above) associated with new services that might be provided over certain types of facilities.[2049] In the *Local Competition Order*, the Commission stated that different UNEs may have different costs of capital.[2050] We now clarify that the use of UNE-specific costs of capital is an acceptable method of reflecting in UNE prices any risk associated with new facilities that employ new technology and offer new services. A carrier in a TELRIC proceeding could, for example, attempt to demonstrate that the cost of capital associated with new services that might be provided over mixed copper/fiber loops is higher than the cost of capital used for voice services provided over other UNEs. We think this approach responds to the incumbent LECs' concern that our rules provide no opportunity for them to recover the cost of investing in facilities to provide services that are more advanced than those modeled under TELRIC.[2051]

[2048] *Id.* at 15848, para. 683 ("Forward-looking cost methodologies, like TELRIC, are intended to consider the costs that a carrier would incur in the future."); *see also id.* at 15854, para. 700 ("The concept of normal profit is embedded in forward-looking costs because the forward-looking cost of capital, *i.e.*, the cost of obtaining debt and equity financing, is one of the forward-looking costs of providing the network elements. This forward-looking cost of capital is equal to a normal profit."). Even if the *Local Competition Order* could be read to suggest that a TELRIC analysis should consider only the current competitive risk faced by an incumbent LEC, we now modify that requirement as described in the text. We think this modification is necessary to send appropriate economic signals as addressed in the next paragraph.

[2049] There seems to be some agreement among the parties on this point. In an *ex parte* filing, AT&T states that "TELRIC-based rates in this context would be calculated by including the potential risk that consumers would not purchase services provided over upgraded facilities." AT&T Dec. 23, 2002 Lawson *Ex Parte* Letter at 16. Similarly, McLeodUSA states that state commissions should "consider whether the risks associated with the equipment providing integrated (including broadband) services warrants an increase in the rate of return used to calculate the TELRIC price." McLeodUSA Jan. 8, 2003 TELRIC *Ex Parte* Letter at 4.

[2050] *Local Competition Order*, 11 FCC Rcd at 15856, para. 702 ("We note that the risk-adjusted cost of capital need not be uniform for all elements.").

[2051] *See, e.g.*, Verizon Oct. 16, 2002 *Ex Parte* Letter at 2 (stating that the current regime "permits telephone companies to earn back their costs (or less under TELRIC) and requires them to bear the full downside risk of investments that fail, while leaving others to capture any upside of investments that succeed.").

684. We are not aware of any state proceedings that have considered the use of different costs of capital for different elements. Moreover, the record in this proceeding does not specifically identify or quantify the additional risk that may be associated with investing in facilities to support advanced services. We cannot tell, therefore, whether the benefits of using multiple costs of capital will in all cases outweigh the possible increased administrative burden associated with establishing multiple costs of capital. Accordingly, we believe parties should continue to have the option to propose (and states should have the option to adopt) a single cost of capital for all UNEs that appropriately reflects the risks associated with competitive markets for the services provided over incumbent LEC networks. We think this approach provides incumbent LECs the opportunity to seek compensation for any additional risks associated with new services and facilities, while preserving flexibility for all parties and for state commissions with respect to implementation of our TELRIC rules.

b. Depreciation

685. Like cost of capital, the depreciation component of TELRIC provides a mechanism by which UNE prices will reflect certain risks associated with new facilities and new services. The *Local Competition Order* contains a very limited discussion of depreciation. Specifically, the Commission stated that properly designed depreciation schedules should take into account expected declines in the value of goods.[2052] Similarly, our rules require the use of "economic depreciation" but provide no additional detail.[2053] There appears to be general agreement among the parties that depreciation should reflect any factors that would cause a decline in asset values, such as competition or advances in technology.[2054]

686. There are two components of depreciation – the useful life of the asset, and the rate at which the asset is depreciated over the useful life. In their comments, the incumbent LECs address only the issue of asset lives. Verizon requests that, "at an absolute minimum, the Commission should make clear that the starting point should be the same lives that are used for financial reporting purposes in accordance with well-recognized accounting principles."[2055] These lives are "intrinsically forward-looking and are updated frequently to reflect technological and other changes that affect the length of an asset's economic life."[2056] SBC takes a similar approach, noting that Commission action is necessary because "virtually all states applying

[2052] *Local Competition Order*, 11 FCC Rcd at 15849, para. 686.

[2053] 47 C.F.R. § 51.505(b)(3).

[2054] AT&T, for example, states that "if a competitive environment makes it more likely that an incumbent's capital will be devalued (say by entry or by more rapid technical progress), TELRIC depreciation will reflect this." AT&T Dec. 23, 2002 Lawson *Ex Parte* Letter at 17. This statement appears to be consistent with the basic approach advocated by the incumbent LECs. *See, e.g.*, Verizon July 18, 2002 TELRIC *Ex Parte* Letter at 3 (advocating asset lives based on financial reporting because they are "updated frequently to reflect technological and other changes that affect the length of an asset's economic life.").

[2055] Verizon July 18, 2002 TELRIC *Ex Parte* Letter at 2-3.

[2056] *Id.* at 3.

TELRIC have applied historical, backward-looking legacy regulation depreciation rates devised years ago."[2057] SBC states that these legacy depreciation rates are "inconsistent with real depreciation lives of real telephony assets in the ground, and they are even more inconsistent with the forward-looking TELRIC methodology itself, which assumes, after all, a hypothetical competitor that maintains state-of-the-art equipment."[2058]

687. AT&T and WorldCom respond by arguing that no clarification of TELRIC is necessary. AT&T states that the incumbent LEC position "misrepresents the Commission-prescribed depreciation lives" because "those lives reflect a rigorous application of forward-looking principles."[2059] Depreciation lives based on financial accounting, on the other hand, are "biased towards the low (shorter) side because they are driven by corporate objectives, including the objective of protecting shareholders."[2060] WorldCom echoes these arguments, and notes that the Commission rejected the use of financial lives, and endorsed the use of Commission-prescribed regulatory lives, for use in the TELRIC model used to calculate universal service support.[2061]

688. We decline to adopt the incumbent LECs' suggestion that we mandate the use of financial lives in establishing depreciation expense under TELRIC. The incumbent LECs have not provided any empirical basis on which we could conclude that financial lives always will be more consistent with TELRIC than regulatory lives. Both financial lives and regulatory lives were developed for purposes other than, or in addition to, reflecting the actual useful life of an asset.[2062] We cannot conclude on this record that one set of lives or the other more closely reflects the actual useful life of an asset that would be anticipated in a competitive market. Accordingly, state commissions continue to have discretion with respect to the asset lives they use in calculating depreciation expense.

689. Although we decline to mandate a particular method of deciding the useful life of an asset, we believe that clarification of our rules is necessary with respect to the rate at which an asset is depreciated over its useful life. As noted above, the various components of TELRIC rates should be developed using a consistent set of assumptions about competition. In

---

[2057] SBC Sept. 9, 2002 TELRIC *Ex Parte* Letter at 3.

[2058] *Id.*

[2059] AT&T July 26, 2002 TELRIC *Ex Parte* Letter, Attach. at 2.

[2060] *Id.*

[2061] WorldCom Oct. 23, 2002 TELRIC *Ex Parte* Letter at 3 (citing *Federal-State Joint Board on Universal Service, Forward-Looking Mechanism For High Cost Support For Non-Rural LECs*, CC Docket Nos. 96-45, 97-160, Tenth Report and Order, 14 FCC Rcd 20156, 20344-46, paras. 426-29 (1999)).

[2062] *See 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, Report and Order in CC Docket No. 98-137 and Memorandum Opinion and Order in ASD 98-91, 15 FCC Rcd 242, 262-63, paras. 48-49 (1999) (noting that Generally Accepted Accounting Principles (GAAP) and other non-FCC regulatory safeguards are intended to protect investor interests, while the Commission's depreciation requirements are intended to protect ratepayer interests).

calculating depreciation expense, therefore, the rate of depreciation over the useful life should reflect the actual decline in value that would be anticipated in the competitive market TELRIC assumes. In this way our "economic depreciation" requirement is designed to replicate the results that would be anticipated in a competitive market.

690. We clarify that under our "economic depreciation" requirement, a carrier may accelerate recovery of the initial capital outlay for an asset over its life to reflect any anticipated decline in its value. For example, an approach that accelerates cost recovery based on an index showing that equipment prices are declining over time may be consistent with our requirement to use economic depreciation. Recovering more of the initial capital outlay for the asset in the early years would enable a carrier to recover less in later years, thereby allowing it to compete with carriers that have purchased new, lower-priced equipment in those later years.

691. To date, state commissions generally have used straight-line depreciation, rather than accelerated depreciation that reflects the anticipated decline in value of assets. Accordingly, the use of accelerated depreciation may raise issues that have not been addressed previously in state proceedings. Among the questions that would have to be addressed by regulators - either the Commission or the states - are how to measure the anticipated decline in value of assets, whether shorter asset lives represent an alternative method of capturing this decline, how UNE prices should be structured to reflect decreases in depreciation expense from one period to the next, and whether levelizing rates across periods, as most cost models do, diminishes, or even eliminates the intended effect of the acceleration. The record in this proceeding does not provide sufficient information for the Commission to resolve these questions at this time, but we encourage state commissions to consider these issues in future UNE pricing proceedings.[2063]

C. Fresh Look

692. In the *UNE Remand Order*, the Commission declined to grant relief for competitors from liability under contractual early termination clauses in the event that an incumbent LEC's carrier-customer converts a special access circuit to a UNE.[2064] Early termination clauses are provisions that are typically found in fixed term contracts that require payment of a fee if a customer terminates the contract prior to the end of the mutually agreed upon contract term. As a general matter, early termination provisions can be mutually beneficial. Providers are given a measure of certainty because such penalty provisions ensure that costs will be recouped in the event a customer fails to utilize the service for the stipulated period of time. On the other hand, customers enjoy discounted and stable priced services over the life of the contract term.

693. In the *Triennial Review NPRM*, the Commission sought comment on "what bases competitors should be able to obtain a 'fresh look' for long-term commitments."[2065] In response,

[2063] As noted above, the Commission plans to commence a proceeding to consider these and other issues related to TELRIC pricing in the near future.

[2064] *UNE Remand Order*, 15 FCC Rcd at 3912, para. 486 n.985.

[2065] *Triennial Review NPRM*, 16 FCC Rcd 22819, para. 83.

some competitive LECs have indicated that the Commission should not permit incumbent LECs to impose early termination liabilities on competitive LECs converting from special access to UNEs because the law requires such a result. Notably, they contend that: (1) no "termination" occurs because circuits are "converted" to EELs;[2066] (2) the Commission is obligated to correct the results of an erroneous decision by the Eighth Circuit;[2067] and (3) termination penalties constitute "restrictions" on access to UNEs, which is prohibited by section 251.[2068] Competitive LECs also contend that the Commission should exercise its discretion to adopt fresh look because: (1) incumbent LECs exercise market power to force competitive LECs to buy special access facilities which were only affordable with long-term discounts;[2069] and (2) in light of high special access charges and NRCs, termination penalties would be a windfall to incumbent LECs.[2070]

694. Despite these arguments, we will not disturb the Commission's earlier determination related to fresh look for special access to EEL conversions. As indicated below, there is no legal basis that requires the Commission to institute a fresh look policy for EEL conversions. Moreover, we conclude that restructuring these contracts may be unfair to both incumbent LECs and other competitors, disruptive to the market place, and ultimately inconsistent with the public interest. While we recognize that fresh look may have been granted in other circumstances, we nevertheless note that the grant of fresh look is a very rare occurrence.

695. As an initial matter, we remain unconvinced by the general argument advanced by several commenters that converting a special access circuit to a UNE does not constitute a termination within the meaning of the termination provisions of incumbent LEC tariffs. Globalcom suggests that such "conversions" do not constitute a termination if the competitive carrier would agree to maintain the UNE loop/transport combination for the remainder of the special access term.[2071] In support of this position, Globalcom noted that the Illinois Commerce Commission determined that termination charges should not apply under Ameritech's intrastate special access tariffs because the termination charges "were not designed for the situation . . .

[2066] *See, e.g.*, Letter from M. Gavin McCarty, Chief Legal Officer, Globalcom, to William Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1-2 (dated Nov. 11, 2002), *in* Letter from M. Gavin McCarty, Chief Legal Officer, Globalcom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Nov. 14, 2002) (Globalcom Nov. 14, 2002 *Ex Parte* Letter).

[2067] Globalcom Nov. 14, 2002 *Ex Parte* Letter at 2.

[2068] NuVox *et al.* Comments at 116.

[2069] *See* AT&T Reply at 297; *see also* ALTS *et al.* Comments at 128 (arguing that long-term special access arrangements prevent consumers from obtaining the benefits of competition); NuVox *et al.* Comments at 116-17 (arguing that conversion to UNEs was previously denied by incumbent LECs).

[2070] *See* ALTS *et al.* Comments at 129; *see also* Globalcom Nov. 14, 2002 *Ex Parte* Letter at 2 (arguing that after the termination penalty is assessed the competitive LEC will continue to pay TELRIC compensation).

[2071] Globalcom Nov. 14, 2002 *Ex Parte* Letter at 3.

where the provider-customer relationship continues."[2072] Globalcom, however, has not demonstrated that a similar interpretation is required under incumbent LECs' interstate special access tariffs.[2073] In essence, Globalcom claims that no termination has occurred during conversions because the continuation of some other service cancels out the fact that the original service under the tariff will be discontinued.[2074] While we do not foreclose this as a proper reading of a particular tariff provision, we also do not find support on this record for the conclusion that this reading necessarily is proper for all tariff provisions.

696. Globalcom also argues that "but for" the protracted litigation regarding UNE rules, competitive LECs would not have been forced to order special access circuits and incumbent LECs would not have been able to charge higher special access rates or cost prohibitive termination fees.[2075] Globalcom seeks to have the Commission go back in time to resolve the inequities that it claims resulted from the decision of the Eighth Circuit to vacate sections 51.315(c)-(f) of our rules, which required incumbent LECs to combine elements on behalf of competitive LECs on request.[2076] We decline to engage in such an exercise. We find that doing so would neither be in the public interest nor represent a competitively neutral approach to the rule changes that have affected both incumbent LECs and competitive LECs alike. Indeed, in overturning the Commission's unbundling rules the D.C. Circuit wrote that UNEs had been "available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment . . . ."[2077] In response to this judicial concern, we have revisited our unbundling requirements in this Order. However, we have not sought to establish rules that would retroactively resolve issues related to the issuance of the *UNE Remand Order*. Doing so would require a level of speculation and conjecture that does not forward the public interest. Moreover, to the extent that Globalcom seeks protection from regulatory and judicial uncertainty, it was free to negotiate to include a change of law provision that would have protected it against the Eighth Circuit's ruling.

697. NuVox *et al.* contends that the Commission is legally required to institute a fresh look policy, arguing that a denial of fresh look would be inconsistent with section 251, which does not permit the imposition of impediments to or restrictions on access to UNEs.[2078] We

---

[2072] Globalcom Nov. 14, 2002 *Ex Parte* Letter at 3 (citing *Globalcom v. Illinois Bell Telephone d/b/a Ameritech Illinois*, ICC Docket 02-0365 (Ill. C.C. Oct, 23, 2002)).

[2073] We note that Globalcom has not provided any specific information (including citations to specific provisions) from its interstate special access contracts.

[2074] *See also* NuVox *et al.* Comments at 116 (arguing that fresh look does not require a carrier to switch to another provider, but "to convert from one type of [incumbent] LEC service to another.").

[2075] Globalcom Nov. 14, 2002 *Ex Parte* Letter at 3.

[2076] *See Iowa Utils. Bd. v. FCC*, 120 F.3d at 813.

[2077] *Id.*

[2078] NuVox *et al.* Comments at 116.

disagree with the logic of NuVox. Nothing in section 251 mandates that the Commission deny incumbent LECs termination liability payments to which they are entitled under contracts in the event of an EEL conversion. As noted above, contracts that provide for term pricing and early termination penalties may benefit both parties and thus do not represent the type of impediment or restriction to access that section 251 prohibits. While we agree that incumbent LECs are not permitted to establish unilateral barriers that work to restrict access to UNEs, that is not the case here. The termination penalties were established by a process of bilateral negotiation or arbitration, not fiat.

698. Although we not persuaded that there are any legal requirements mandating that we adopt a fresh look for all special access contracts,[2079] the Commission may, in its discretion, take such action pursuant to its authority under sections 201 through 205 of the Act.[2080] We decline to pursue such a market-disrupting remedy in this instance because there is not sufficient evidence, in this record, of abuse of market power by the incumbent LECs or some other wrong that must be retroactively addressed here.[2081] We note that linking a price discount to a contractual term is a reasonable, accepted commercial practice, both inside and outside of the telecommunications industry. It is the specific application of such provisions, rather than the very existence, that could offend the Communications Act. Determining whether such provisions were applied unlawfully is a fact-intensive inquiry. In light of the likely marketplace disruption of adopting a fresh look policy along with the lack of specific evidence on the record, we are not convinced that the abrogation of negotiated terms will be in the public interest in this instance. We, nevertheless, caution incumbent LECs that their ability to apply termination penalties is not unfettered. We concur with the conclusion in the *UNE Remand Order* "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."[2082] Thus, to the extent a carrier can provide more specific evidence that incumbent LEC termination penalties are inappropriate, we will resolve such a matter through an enforcement proceeding.

699. Finally, although competitive carriers contend that incumbent LECs will receive a windfall in the absence of fresh look,[2083] we conclude that the inverse may be true as well. Competitive LECs that entered into long-term special access contracts benefited from term discount arrangements which allowed for lower costs. It may be unfair for these carriers to completely avoid costs they knowingly agreed to shoulder. Indeed, it would put them in a far

---

[2079] Globalcom Nov. 14, 2002 *Ex Parte* Letter at 3.

[2080] *See, e.g., Special Access Order*, 7 FCC Rcd at 7463, para. 40.

[2081] AT&T and Globalcom contend that long-term special access contracts were signed under the pressure of economic duress in order to provide economically feasible products to their customers. *See* AT&T Reply at 298; Globalcom Nov. 14, 2002 *Ex Parte* Letter at 2. On the record before us, we find insufficient evidence to demonstrate that carriers seeking long-term special access commitments were suffering under economic duress.

[2082] *UNE Remand Order*, 15 FCC Rcd at 3912, para. 486 n.985 (emphasis added).

[2083] *See, e.g.*, ALTS *et al.* Comments at 129.

better position than those competitive LECs that chose to avoid early termination provisions, and to select shorter contract periods with higher prices.

D. Transition Period

700. We recognize that many of our decisions in this Order will not be self-executing. Indeed, under the statutory construct of the Act, the unbundling provisions of section 251 are implemented to a large extent through interconnection agreements between individual carriers.[2084] The negotiation and arbitration of new agreements, and modification of existing agreements to reflect these new rules, cannot be accomplished overnight. We recognize that many interconnection agreements contain change of law provisions that allow for negotiation and some mechanism to resolve disputes about new agreement language implementing new rules. Although some parties believe that the contract modification process requires Commission intervention in this instance, we believe that individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules.

701. Thus, to the extent our decision in this Order changes carriers' obligations under section 251, we decline the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions.[2085] Permitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252. We do not believe that the lag involved in negotiating and implementing new contract language warrants the extraordinary step of the Commission interfering with the contract process. We also recognize that commenters have argued that a Commission-mandated transition period is needed so carriers have time to adjust their business practices, and to make arrangements to accommodate their customers. Except as expressly provided above in Parts VI.A.4.a.(v).(a) and VI.D.4.c.(iii).(d), we decline to establish such a transition period and find, instead, that contract arrangements should govern. We note, however, that the practical effect of this negotiation of new terms may be that parties are provided a transition period.

[2084] *See* 47 U.S.C. § 252.

[2085] *See* Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 10 (filed Nov. 21, 2002) (Qwest Nov. 21, 2002 *Ex Parte* Letter) (arguing that competitive LECs "typically claim that change of law provisions are not self-executing"); *see also* Letter from Michael K. Kellogg, Counsel for SBC, Qwest and BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 3-5 (filed Jan. 21, 2003) (SBC/Qwest/BellSouth Jan. 21, 2003 *Ex Parte* Letter) (arguing that the Commission may "negate" certain contract terms under the *Mobile-Sierra* doctrine). Competitive LECs, however, have forcefully argued that the *Mobile-Sierra* doctrine does not apply to interconnection agreements that are filed with the states. *See* Letter from Christopher J. Wright, Counsel for Z-Tel, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 5-9 (filed Jan. 30, 2003); *see also* AT&T Feb. 3, 2003 *Ex Parte* Letter; Letter from Broadview Networks *et al.* to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 (filed Feb. 3, 2003).

[2087] Section 252(a)(1) states that "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with (continued....)

702. While we decline to depart from the section 252 process, we believe that additional guidance is needed here to ensure that parties make the necessary changes to their interconnection agreements in response to this Order in a timely manner. We, therefore, provide some guidance below to give individual carrier negotiations a framework that will avoid undue delay or confusion.

703. First, we require incumbent and competitive LECs to use section 252(b) as a default timetable for modification of interconnection agreements that are silent concerning change of law and/or transition timing.[2087] We find that delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry. Therefore, to ensure that there is no undue delay in commencing the renegotiation of interconnection provisions, the effective date of the rules we adopt in this Order shall be deemed the notification or request date for contract amendment negotiations under this default approach. We believe that this requirement will ensure that carriers will begin immediately to negotiate in good faith pursuant to section 251(c)(1) of the Act to modify their interconnection agreements to the extent necessary in view of the rules we adopt today.[2088] Further, under the section 252(b) timetable, where a negotiated agreement cannot be reached, parties would submit their requests for state arbitration as soon as 135 days after the effective date of this Order but no longer than 160 days after this Order becomes effective.[2089] In turn, the state commissions would conclude their consideration of such disputes within nine months of the effective date of this Order.[2090] We will rely on state commissions to be vigilant in monitoring compliance with the provisions of sections 251 and 252. Although parties have sought to have the Commission intervene in this process, we believe that the statutory maximum transition period of nine months will ensure an orderly transition to

(Continued from previous page)

the requesting telecommunications carrier or carriers." If the parties cannot reach agreement, the party requesting interconnection, services, or network elements may petition the relevant state commission to arbitrate the dispute. *See* 47 U.S.C. § 252(b)(1). Such petitions must be submitted between the 135th to the 160th day (inclusive) after the date on which an incumbent LEC received the request for interconnection, services, or network elements. *Id.* The state Commission must resolve the dispute no later than nine months after the date on which the incumbent LEC received the request for interconnection, services, or network elements. *See* 47 U.S.C. § 252(b)(4)(C). Although section 252(a)(1) and section 252(b)(1) refer to requests that are made *to* incumbent LECs, we find that in the interconnection amendment context, either the incumbent or the competitive LEC may make such a request, consistent with the parties' duty to negotiate in good faith pursuant to section 251(c)(1).

[2088] For example, negotiation or modification requests received before the rules become effective would not start the negotiation clock. In addition, a party cannot contend that the negotiation time period did not begin because another party failed to send a request for negotiation because such actions do not constitute the trigger for negotiations. Instead, as indicated above, negotiations will be deemed to commence upon the effective date of this Order.

[2089] *See* 47 U.S.C. § 252(b)(1).

[2090] *See id.* § 252(b)(4).

the new rules. We further note that the nine-month period outlined by Congress is reasonably consistent with the transition periods sought by the parties.[2091]

704. Second, we believe that the section 252 process described above provides good guidance even in instances where a change of law provision exists. As under the default process described above, we expect that parties would begin their change of law process promptly. Once a contract change is requested by either party, we expect that negotiations and any timeframe for resolving the dispute would commence immediately. We also find that the section 251(c)(1) duty to negotiate in good faith applies to these contract modification discussions, as they do under the section 252 process. Accordingly, any refusal to negotiate or cooperate with the contractual dispute resolution process, including taking actions that unreasonably delay these processes, could be considered a failure to negotiate in good faith and a violation of section 251(c)(1).[2092] Finally, to the extent a contractual change of law provision envisions a state role, we believe a state commission should be able to resolve a dispute over contract language at least within the nine-month timeframe envisioned for new contract arbitrations under section 252.

705. Third, we recognize that some BOCs are concerned that the negotiation process may be unnecessarily delayed where a change of law provision provides for interconnection agreement modification pursuant to "legally binding intervening law or final and unappealable [judicial] orders."[2093] In essence, these companies contend that it would be inappropriate to read these provisions as being triggered only after all appeals of this Order become final and unappealable. Instead, the BOCs contend that the only logical reading of such provisions is that such provisions are triggered when the decision of the D.C. Circuit reversing the Commission's prior UNE rules becomes final and nonappealable.[2094] We believe that the BOCs' interpretation of such provisions is reasonable and that either a court or a state commission would agree with such a reading. Indeed, once the *USTA* decision is final and no longer subject to further review, or the new rules adopted in this Order become effective, the legal obligation upon which the existing interconnection agreements are based will no longer exist.[2095] Given that the prior UNE rules have been vacated and replaced today by new rules, we believe that it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order.

706. Finally, we reiterate that section 251(c) imposes a good faith negotiation requirement that applies to both incumbent LECs and competitive LECs. Based on past history,

---

[2091] *See, e.g.*, Eschelon Comments at 18-19.

[2092] 47 U.S.C. § 251(c)(1). As we have recognized in the past, a failure to engage in change of law negotiations may constitute a failure to negotiate in good faith under section 251(c)(1). *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 17806, 17825-26, paras. 34-36 (2000).

[2093] SBC/Qwest/BellSouth Jan. 21, 2003 *Ex Parte* Letter at 2.

[2094] *See USTA*, 290 F.3d at 415.

[2095] SBC/Qwest/BellSouth Jan. 21, 2003 *Ex Parte* Letter at 2.

we understand that parties may disagree significantly on what constitutes a breach of the good faith negotiation requirement. While we realize that whether a carrier violates its section 251(c)(1) is a fact-specific inquiry, we nevertheless admonish all parties to avoid gamesmanship and behavior that may reasonably lead to a finding of bad faith. For example, parties may not refuse to negotiate any subset of the rules we adopt herein. Once the rules established herein are effective, and any applicable change of law process has been triggered, a party's refusal to negotiate (or actions that would otherwise delay unnecessarily the resolution of) any single issue may be deemed a violation of section 251(c)(1).

E. Periodic Review of National Unbundling Rules

1. Background

707. Our decisions in this Order regarding the network elements that should be unbundled are consistent with the determination in the *UNE Remand Order* that rapid changes in technology, competition, and the economic conditions of the telecommunications market would require amendments to the list of UNEs that meet the standards of section 251(d)(2).[2096] To ensure that the list of UNEs is current and responsive to market and economic realities, the Commission further determined in the *UNE Remand Order* that it would periodically review its rules in this area.[2097]

708. At the time of the *UNE Remand Order*, three years had passed since the Commission first adopted unbundling requirements and considerable market changes had taken place that required the Commission to reassess the availability of elements outside the incumbent LECs' networks.[2098] While a constantly evolving marketplace makes such review necessary, the Commission wisely concluded that modifications to the list must be done systematically: "[e]ntertaining, on an *ad hoc* basis, numerous petitions to remove elements from the list, either generally or in particular circumstances, would threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers."[2099] In order to provide market certainty, the Commission declined to adopt an automatic sunset mechanism for removing unbundling obligations and instead chose a three-year review period.[2100]

709. In the *Triennial Review NPRM*, the Commission sought comment on whether the Commission should continue with a fixed-period review process that bars the filing of petitions to remove unbundling obligations between cycles, and whether the Commission should adopt a

[2096] *UNE Remand Order*, 15 FCC Rcd at 3765, paras. 148-49.

[2097] *Id.* at 3765, para. 148.

[2098] *Id.* at 3765, para. 149. The Commission explained that even as early as 1999, there was evidence that competition was developing in some geographic markets for certain customer groups.

[2099] *Id.* at 3765-66, para. 150.

[2100] *Id.* at 3766, para. 151.

sunset approach to removing unbundling obligations.[2101] In particular, the Commission sought comment on whether a sunset period for remaining unbundling obligations could create incentives for facilities deployment and investment.[2102] The Commission also invited parties to provide guiding principles that should be employed to determine whether and how existing unbundling rules should be modified on an ongoing basis.[2103] To the extent a periodic review period is retained the Commission also sought comment on whether three years is the appropriate length for the review cycle in light of competitors' experiences with network design, ability to attract investment, and execution of their business strategies.[2104] The *Triennial Review NPRM* also sought comment on whether triennial UNE review was consistent with the requirement of section 11 of the Act to review in even-numbered years whether regulations in effect continue to serve the public interest.[2105]

2. Discussion

710. We conclude that a commitment to a further *de novo* triennial review is not necessary at this time. Rather, as the Commission does with all of its other rules, we will rely on the biennial review mechanism established in section 11 of the Act.[2106] This is not *de novo* review. Instead, consistent with its biennial review procedures, the Commission's review will be limited to assessing whether documented market changes merit modifications in our rules. We conclude that reopening every issue on a biennial basis is not in the public interest because it would increase regulatory uncertainty unnecessarily in this area. We also note that in the period between biennial reviews, it will be the policy of this Commission not to entertain *ad hoc* motions or petitions to remove or add UNEs, and we will summarily dismiss such petitions to ensure certainty in the marketplace.

711. We specifically decline the suggestion of BellSouth and Verizon to adopt a sunset period for our UNE rules.[2107] Verizon argues that the Commission must set a firm sunset date no longer than three years for the elimination of all remaining UNEs to ensure that competitive LECs make prudent investments and to minimize obstacles to investment by the incumbent LECs.[2108] Several commenters oppose a sunset period for UNEs as unnecessary and inconsistent

---

[2101] *Triennial Review NPRM*, 16 FCC Rcd at 22817-18, para. 80.

[2102] *Id.*

[2103] *Id.*

[2104] *Id.* at 22818, para. 81.

[2105] *Id.* ("Although our completion of the instant review in 2002 satisfies both review cycles, we seek comment on whether the Commission could wait until 2005 for a subsequent UNE review, or whether section 11 requires a UNE review in 2004.").

[2106] 47 U.S.C. § 161.

[2107] BellSouth Comments at 66, 72; Verizon Reply at 62-63.

[2108] Verizon Reply at 60-61.

with key goals of the Act.[2109] We agree. We find that, considering the complexity of the analysis required to apply the impairment standard, a sunset provision would be arbitrary, would risk premature withdrawal of UNEs, and would be likely to undercut incumbent LEC incentives to comply as the sunset date approaches.[2110] Moreover, the adoption of a sunset provision is inconsistent with the requirements of the Act. Sections 251(c) and (d) require the Commission to use objective criteria to determine impairment.[2111] Notably, section 251(d) sets out the necessary and impair standard as the statutory floor for the Commission's UNE review.[2112] Thus, under the Act, UNEs remain so long as impairment remains. The mere passage of time cannot replace this statutory mandate.[2113]

F. Duty to Negotiate in Good Faith

712. We amend our duty-to-negotiate rule 51.301(c)(8)(ii) to make the rule conform to the text of the *Local Competition Order*. In that order the Commission stated a new entrant could reasonably withhold information about its own costs because the negotiations concern unbundling or leasing of the incumbent LECs' networks, not the new entrants' networks. Rule 51.301(c)(8)(ii) states that refusal by a requesting telecommunications carrier to furnish cost data that would be relevant to setting rates if the parties were in arbitration is among the actions or practices that violate the duty to negotiate in good faith.[2114] The text of the *Local Competition Order*, by contrast, states that it would *not* be unreasonable for a new entrant to withhold information about its own costs because the negotiations do not concern unbundling or leasing the new entrants' networks.[2115] We therefore amend rule 51.301(c)(8)(ii) to correct this typographical error and replace the word "requesting telecommunications carrier" with "incumbent LEC."

[2109] ASCENT Comments at 50; CompTel Comments at 87; ALTS *et al.* Comments at 124; WorldCom Comments at 64-65; Eschelon Comments at 17-18; LDMI Comments at 13.

[2110] ALTS *et al.* Comments at 124; ASCENT Comments at 50; CompTel Comments at 87; Eschelon Comments at 17-18; WorldCom Comments at 64-65.

[2111] 47 U.S.C. §§ 251(c), 251(d).

[2112] "In determining what network elements should be made available for purposes of subsection (c)(3), the Commission should consider *at a minimum*, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2) (emphasis added).

[2113] Eschelon Comments at 17-18.

[2114] 47 C.F.R. § 51.301(c)(8)(ii). The rule 51.301 states in relevant part that: "(c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith: . . . (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to: . . . (ii) Refusal by a requesting telecommunications carrier to furnish cost data that would be relevant to setting rates if the parties were in arbitration."

[2115] *Local Competition Order*, 11 FCC Rcd at 15577-78, para. 155 (emphasis added).

IX. FURTHER NOTICE OF PROPOSED RULEMAKING

713. In this proceeding and in comments filed in response to a related Petition for Forbearance and Rulemaking filed by Mpower Communications (Mpower May 25, 2001 Petition),[2116] several parties have argued that the Commission should reconsider its current rules implementing section 252(i) (*i.e.*, "pick-and-choose rule"), under which requesting carriers are permitted to opt into individual portions of interconnection agreements without accepting all the terms and conditions of such agreements.[2117] In the view of Mpower, a competitive LEC, and several incumbent LECs, this regime has impeded the type of marketplace negotiations that Congress intended to make a centerpiece of the transition from regulated monopolies to competition. In this section, we seek comment on whether the Commission should alter its interpretation of section 252(i) to promote more meaningful commercial negotiations. We tentatively conclude that a modified approach would better serve the goals embodied in section 252(i) and sections 251-252 generally. As discussed more fully below, once an incumbent LEC obtains state approval of a statement of generally available terms and conditions (SGAT) pursuant to section 252(f) – which essentially functions as a standardized interconnection agreement – the incumbent LEC and competitive carriers then would be permitted to negotiate alternative agreements that third parties could opt into only in their entirety or not at all.

714. We hereby incorporate the Mpower May 25, 2001 Petition and the comments and *ex parte* presentations in CC Docket No. 01-117 into this docket. Commenters need not resubmit material previously filed in these proceedings.

A. Background

715. Section 252(i) of the Act provides that a "local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under [Section 252] to which it is a party to any other requesting carrier upon the same terms and conditions as those provided in the agreement."[2118] When the Commission initially sought comment on the appropriate interpretation of section 252(i), competitive LECs generally argued that they should be entitled to opt into each distinct term and condition in an interconnection agreement approved pursuant to section 252.[2119] Incumbent LECs, by contrast, argued that such an approach would deter meaningful negotiations, because an incumbent LEC would be reluctant to make any significant concession (in exchange for some benefit) for fear that the concession would, without all of the bargained-for considerations, become available to every potential entrant in the market.[2120] In the *Local Competition Order*, the Commission adopted the

[2116] Mpower Communications Corp. Petition for Forbearance and Rulemaking, CC Docket No. 01-117 (filed May 25, 2001) (Mpower May 25, 2001 Petition).

[2117] 47 C.F.R. §§ 51.809(a)-(c).

[2118] 47 U.S.C. § 252(i).

[2119] *Local Competition Order*, 11 FCC Rcd at 16135-36, paras. 1304-05.

[2120] *Id.* at 16134, para. 1303.