BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	Docket No. 01-00964
COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM V, INC.	)	
Against	)	
UNITED TELEPHONE SOUTHEAST, INC.	)	

COMPLAINT OF KMC TELECOM III, INC. AND
KMC TELECOM V, INC.

Complainants, KMC Telecom III, Inc. and KMC Telecom V, Inc. (hereinafter collectively "KMC"), by their counsel, for its complaint against United Telephone Southeast, Inc. ("Sprint") pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), Tenn. Code Ann. §§ 65-4-123, 65-5-210, 65-4-117, and 65-4-124, and for breach of the Interconnection Agreement between the parties, state as follows:

I. INTRODUCTION

1. KMC Telecom III, Inc. and KMC Telecom V, Inc. are Delaware corporations, both of which are wholly-owned subsidiaries of KMC Telecom Holdings, Inc., a publicly-held Delaware corporation. The Tennessee Regulatory Authority ("TRA") granted KMC Telecom III, Inc. authority to provide resold and facilities-based local exchange and resold interexchange telecommunications services throughout the State of Tennessee on September 16, 1999 in Docket No. 99-00211. Additionally, the TRA granted KMC Telecom V, Inc. authority to provide resold and facilities-based local exchange and resold interexchange telecommunications services throughout the State of Tennessee on April 19, 2001 in Docket No. 00-01123.

2. The facts upon which this complaint is based are set forth more fully in the body of the complaint and exhibits attached hereto. In summary, KMC alleges that Sprint has engaged in illegal, discriminatory, and anti-competitive behavior in violation of Sections 251 and 252 of the Act, Tenn. Code Ann. §§ 65-4-123 and 65-4-124, and/or various provisions of the Interconnection Agreement between the parties, through Sprint's:

- damaging of and/or providing inadequate security for KMC-collocated equipment;
- consistent and willful provision of poor service to KMC, including but not limited to:
  - o failure to provide and meet reasonable, LCUG-based ordering, provisioning, maintenance and repair intervals and benchmarks; and
  - o failure to provide KMC with performance data which would allow it to determine whether Sprint is providing service to KMC at parity with Sprint's retail customers;
- failure to provide reasonable, cost-effective solutions to its deployment of Integrated Digital Loop Carriers ("IDLC"), thereby impeding KMC's ability to serve customers on Sprint's network; and
- inappropriate contact with current and prospective KMC customers, including slanderous remarks made by Sprint service technicians against KMC in an effort to win back lost business.

3. Despite several attempts at negotiation, KMC has been unable to resolve these and related issues and, therefore, has no choice but to file the instant complaint.

4. Therefore, KMC respectfully requests that the TRA commence a contested case against Sprint and provide KMC with the following relief:

- Set performance metrics and remedies to ensure Sprint's implementation of the parity requirements set forth by Chapter 408 of the Public Acts of 1995 and codified at Tenn. Code Ann. §§ 65-4-123 and 124, in part, and the Act;
- Resolve a number of contractual and other disputes that threaten KMC's ability to profitably provide high quality telephone services to Tennessee Customers including, but not limited to, the establishing of firm intervals, a trouble ticket policy, and a written circuit acceptance policy;

- Implement collocation intervals consistent with the 90-day interval established in the FCC's collocation order;[1]
- Set wholesale rates for Unbundled Network Elements (including but not limited to sub-loop elements) that reflect today's technology and Sprint's deployment of an "efficient" IDLC network; and
- Fine Sprint and/or award damages to KMC for Sprint's willful and flagrant discriminatory and anti-competitive behavior.

II. JURISDICTION

5. KMC is a competitive local exchange carrier ("CLEC") authorized to provide local exchange services in Tennessee and other states. KMC currently provides service in Johnson City, Kingsport, Bristol, and Chattanooga through the use of its Lucent 5ESS switch and fiber network.

6. Sprint is an incumbent local exchange carrier ("ILEC"), as defined in Section 251(h) of the Act, that provides local exchange and other telecommunications services in several states throughout the country, including Tennessee. Sprint is authorized by the TRA to provide local exchange services in, among other areas, Johnson City, Kingsport, and Bristol, all of which are also served by KMC.

7. Section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b), confers jurisdiction on the TRA by providing that "... nothing in th[e] Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. ..."

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[1] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Recd. 4761 (1999) ("Advance Services First Report and Order"), *affirmed in part and remanded in part sub nom.* GTE Service Corp v. FCC, 205 F.3d 416 (D.C. Cir. 2000); Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 2000 FCC Lexis 4208 (2000) ("Advance Services Order on Reconsideration").

8. The TRA also has jurisdiction to consider the instant complaint pursuant to Tenn. Code Ann. §§ 65-1-213, 65-4-117, 65-4-124, and 65-5-210 which give the TRA both the power and duty to enforce the 1995 Tennessee Telecommunications Act and "other laws ... over which they have jurisdiction"; investigate and hold hearings regarding a complaint; insure that telecommunications carriers "provide non-discriminatory interconnections to their public networks under reasonable terms and conditions"; and "original jurisdiction ... to resolve all contested issues of fact or law as a result of the application of [the 1995 Telecommunications Act]."

III. ARGUMENT

SPRINT HAS FAILED TO MAINTAIN SECURITY WHICH HAS RESULTED IN DAMAGE TO KMC'S COLLOCATED EQUIPMENT.

A. Applicable Law

9. Tenn. Code Ann. §§ 65-35-102 and 39-14-411 provide, in pertinent part, that "it shall be unlawful for a person to... knowingly tap, cut, burn, break down, injure, destroy or otherwise interrupt or interfere with the current, lines, cables, poles, towers, fixtures or appliances utilized to furnish service to the general public by any telephone or telegraph company...."[2]

B. Factual Background

10. KMC is currently collocated at Sprint's Johnson City tandem and central office, Kingsport central office, and Bristol central office. These collocations are cageless, physical collocations and as such, can be easily accessed by both Sprint and KMC personnel, Sprint contractors and other parties collocating at these locations inside Sprint's offices. During the past year or so, there have been at least three instances where KMC has experienced damage to its equipment in Sprint's tandem offices that would not ordinarily occur in the absence of illegal, willful, malicious, and anticompetitive conduct. KMC has discovered wires that have been

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[2] Tenn. Code Ann. §§ 65-35-102, 39-14-411 (2000).

intentionally cut, damage to equipment shelves, and vertical blocks that have been altogether removed from the wall of the collocation space.[3] A former contractor of Sprint who provided operations technician services, advised KMC that Sprint technicians are bragging about their organized efforts "to destroy KMC." This contractor went even further to note that the Sprint technicians were going as far as to name specific KMC customers whose service has been damaged. Upon information and belief, Sprint technicians, employees, or agents damaged KMC's collocated equipment. Alternatively, Sprint failed to provide adequate security for KMC's collocation equipment, allowing such equipment to be damaged by third parties.

11. In order to prevent future damage to KMC's collocated equipment, Sprint recommended that KMC augment its collocation space by caging its equipment. Such a move would vastly increase KMC's cost of serving customers in Tennessee.. This increased cost is precisely what Sprint is attempting to achieve. Accordingly, KMC should not be forced to use caged collocations in response to Sprint's anti-competitive conduct and/or inadequate security of its cageless collocations. The more appropriate response would be for the TRA to take action against Sprint by: (1) finding that Sprint has discriminated against KMC through its illegal and anticompetitive behavior; (2) compelling Sprint to immediately maintain adequate security to prevent further tampering with KMC's collocated equipment; (3) awarding KMC damages for the replacement or repair of its equipment, including labor and interest; (4) levying a fine against Sprint in an amount sufficient to compel its lawful behavior going forward.

SPRINT HAS VIOLATED ITS DUTY UNDER THE ACT, THE TENNESSEE CODE, AND ITS INTERCONNECTION AGREEMENT TO PROVIDE JUST, REASONABLE, AND NON-DISCRIMINATORY INTERCONNECTION THAT IS AT LEAST EQUAL IN QUALITY TO THAT PROVIDED BY SPRINT TO ITSELF.

A. Applicable Law

12. Section 251(c)(2)(C) of the Act requires that all ILECs provide requesting telecommunications carriers interconnection "that is at least equal in quality to that provided by

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[3] *See* attached photographs depicting damage to KMC equipment (Exhibit A).

the local exchange company to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[4] Further, Section 251(c)(2)(D) provides that the "rates, terms, and conditions" of such interconnection must be "just, reasonable, and non-discriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[5]

13. In addition to the provisions of the Act, Tenn. Code Ann. § 65-4-124(a) requires that "all telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications service providers."

14. Furthermore, there are numerous provisions of the parties' Interconnection Agreement[6] that directly bear on the issue of service quality, including but not limited to the following:

(a) Attachment VIII – General Business Requirements – Section 2.1 Ordering and Provisioning Parity. Pursuant to § 2.1.1 of the Agreement, "Sprint shall make necessary ordering and processing business support as well as those technical and systems interfaces as may be required to enable [CLEC] to provide the same level and quality of service for all resale services, functions, features, capabilities and unbundled Network Elements at Parity."[7]

(b) Attachment X – Reporting Standards – Section 1 General. Section 1.1 provides, in pertinent part, that "Sprint shall satisfy all service standards, intervals, measurements, specifications, performance requirements, technical requirements, and performance standards, that are specified in this Agreement or are required by law or regulation. In addition, Sprint's

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[4] 47 U.S.C. § 251(c)(2)(C).

[5] 47 U.S.C. § 251(c)(2)(D).

[6] The Master Network Interconnection and Resale Agreement between the parties which became effective on September 29, 2000 and was approved by the TRA on January 23, 2001, Docket No. 00-01004 (Exhibit B).

[7] *Id.* at p. 116.

performance under this Agreement shall be provided to [CLEC] will be (sic) at Parity with the performance Sprint provides itself for like services."[8]

(c) Attachment VIII – General Business Requirements – Section 2.1 Ordering and Provisioning Parity. Pursuant to § 2.1.4 of the Agreement, "The NEAC [National Exchange Access Center] shall provide to CLEC a nationwide telephone number (available from 6 a.m. to 8 p.m. Eastern Standard Time, Monday through Friday, and 8 a.m. through 5 p.m. Eastern Standard Time on Saturday) answered by competent, knowledgeable personnel and trained to answer questions and resolve problems in connection with the ordering and provisioning of unbundled Network Elements ... features, functions, capabilities, and resale services."

B. Factual Background

15. KMC has had service quality problems with Sprint in Tennessee since the inception of the companies' business relationship in 1999. Sprint's performance has only deteriorated since that time, degenerating to the point that KMC can no longer attempt to resolve these matters at the business table. It is not difficult to understand why KMC's numerous attempts to voluntarily negotiate solutions to these problems have borne little or no fruit; for Sprint's abuse of its monopoly power, through its sustained campaign of illegal, anticompetitive, and discriminatory practices, is clearly and purposefully intended to prevent KMC and other CLECs from effectively competing in Tennessee.

16. Indeed, KMC is intimately acquainted with Sprint's "uncoordinated" coordinated cuts, which include botched translations, missed appointments, and premature and unwanted disconnects, not to mention Sprint's "no facilities" available responses, lack of escalation procedures, inadequate circuit acceptance testing policy, maintenance and repair problems that include repeat troubles, and unnecessarily long ordering and provision, and maintenance and repair intervals.

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[8] *Id.* at p. 156.

Coordinated Cuts

17. Concerning Sprint's coordinated cut performance, there have been numerous occasions where KMC and Sprint have scheduled a coordinated cut, only to have Sprint's technicians fail to show up at Sprint's central office to perform the cut. Such actions essentially hold subscribers hostage, despite their choice to receive local service from KMC. In addition, valuable KMC resources are wasted, thereby increasing KMC's cost of doing business. Only recently has Sprint agreed to change its methods and procedures to "pre-wire" the customer's loop to KMC 24 hours in advance of the scheduled cut, leaving only the translations to be performed at the scheduled time. However, Sprint has yet to implement this process change. Additionally, Sprint requires KMC to resubmit and reschedule the coordinated cut when Sprint technicians fail to show up to perform the cut.

18. Also, several scheduled cuts have been missed because Sprint's firm order confirmation ("FOC") interval is excessively long, which results in KMC's orders being cancelled for "non-concurrence" with the Number Portability Administration Center. KMC believes the TRA should review Sprint's FOC policy and concurrence process to ensure it facilitates competition.

19. Further, several Sprint translation errors have translated into lost business for KMC's customers and, in turn, a loss of customers and revenue for KMC. In one particular instance, a local dentist who ported her service to KMC was unable to receive calls from her patients on Sprint's network, resulting in dental patients unable to receive much needed care, as well as an economic loss for the small business. KMC ultimately lost this customer to Sprint, the customer believing KMC's service inferior to Sprint's, despite the fact that Sprint caused the customer's problem.

20. KMC has lost numerous customers due to service problems caused by Sprint in Tennessee.

21. Inadequately trained Sprint technicians or lack of following procedures are also to blame for much of the poor service that Sprint provides to KMC. Sprint technicians also make inaccurate and anti-competitive statements to customers wishing to switch to KMC. At a coordinated cut scheduled for 10:00 a.m. on December 28, 2000, Sprint did not have its personnel in place until 2:30 p.m. Once all of the Sprint technicians were in place, one technician, Mr. Moody, claimed there was no such thing as a coordinated cut and that KMC could not use the existing phone number because it belonged to Sprint. When KMC personnel corrected Mr. Moody, he retorted something to the effect of, "We've never been trained to do any of this stuff."[9] Such ineptitude is typical of the service Sprint provides to KMC. Sprint assigns it best technicians to serve its own customers, while relegating less experienced technicians to serve KMC.

Disconnections

22. Sprint has also prematurely disconnected customers that have chosen to port their service to KMC, and has even conveyed to some customers, either expressly or impliedly, that the fault lay with KMC. One example of such behavior is the disconnection of B & C Computing. B & C Computing was to be ported to KMC on September 25, 2001. KMC called Sprint that morning to confirm the cut, only to be told by Sprint that the order had to go back to Sprint's engineering department. Two days later, Sprint disconnected B & C Computing's service. B & C called Sprint to determine the source of the disconnection, the Sprint technician advised B & C that it was a KMC problem. To exacerbate matters, when KMC conferenced B & C Computing into a telephone call with Sprint and asked the Sprint representative to tell B & C the source of the disconnect, Sprint told KMC that they could not talk to a KMC customer. KMC reminded the Sprint representative that B & C was still a Sprint customer because the port had not actually taken place. Rather than admit its fault, however, Sprint continued to let the

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[9] The Sprint technician later informed the *former* Sprint customer that the service provided by KMC would be unreliable and that the customer would need a new phone number.

customer believe KMC was at fault by maintaining its position that it could not talk to the customer. KMC has asked Sprint to institute a "call before disconnect policy" similar to that used by BellSouth. To date, Sprint has refused to change its disconnect methods and procedures. Unfortunately, this type of treatment is pervasive. KMC can and will provide documentation on numerous accounts of Sprint's flagrant violations of the Act.

23. Sprint's severely flawed circuit acceptance policy also contributes to the number of customer disconnects experienced by KMC. The gravamen of the problem is that Sprint's circuit acceptance policy offers no method by which CLECs are able to affirmatively accept circuits.[10] The result is that Sprint claims KMC hasn't accepted a circuit and disconnects KMC's customer. Common sense would militate against disconnecting a circuit for supposed non-acceptance upon a finding of traffic on that circuit. Sprint's circuit acceptance policy is not grounded in common sense, however. Rather, its policy is grounded in its monopoly power and, as such, serves only to perpetuate its discriminatory and anticompetitive behavior. Further, Sprint's policy addresses only access circuits and does not provide for testing of UNE circuits, resulting in inferior quality UNE facilities being foisted upon KMC.

Trouble Reports

24. KMC is experiencing an inordinate number of repeat troubles. First, KMC maintains that Sprint incorrectly reports an unusually high number of troubles as if a "no dial tone" had been reported.[11] KMC believes that most of these troubles should be more accurately reported as "level" type troubles, such as static or noise on a circuit. The result of Sprint's inaccurate troubleshooting is that Sprint technicians report "no trouble found," and close the

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[10] *See* Sprint "Circuit Acceptance Procedure (Access)" (Exhibit C).

[11] *See* Attachment 1 to September 6, 2001 letter from Michael E. Solon, Regional Director, Sprint Carrier Markets, to Frank Boscarillo, Sr., VP, KMC Network Operations, summarizing Sprint's trouble ticket data for two, two-week periods (Exhibit D). Please note that KMC questions the veracity of Sprint's data and contends that there are at least 15 trouble tickets missing from Sprint's Attachment 1 matrix, for a total of 30 trouble tickets opened between July 17 and August 1, 2000, *see* FN No. 11, *infra*.

trouble ticket without fixing the problem. Thus, KMC is required to re-submit a trouble ticket and start the process again from the beginning. After several conversations with Sprint regarding this matter, KMC posits that Sprint technicians should be required to receive additional training to more accurately diagnose and cure KMC troubles. The TRA should require Sprint to implement a performance metric for trouble tickets.

25. Sprint's inadequate process of closing trouble tickets also fuels the problem of repeat troubles. Currently, Sprint sends CLECs notification that it has closed a trouble ticket via fax. Faxed notifications are often sent outside of normal business hours, long after technicians for both companies have gone home. More importantly, that the notifications are sent via fax does not allow KMC and other CLECs the opportunity to respond either by disputing or concurring that the trouble was actually fixed. So when Sprint inaccurately reports "no dial tone" and "no trouble found" and closes the trouble ticket via its standard operating procedure, KMC must re-submit a trouble ticket and start again from scratch. Such a policy impedes KMC's ability to provide its customers with the level of service they expect and wastes valuable KMC resources.

26. On two separate occasions KMC requested, in writing, that Sprint implement a process change by implementing a real-time, technician-to-technician trouble notification management process. Sprint rejected both requests.[12] Sprint has a standard business practice of calling its customers prior to closing out trouble tickets; KMC does not have the privilege of providing that level of customer service as Sprint restricts KMC's access to critical information needed to manage customer troubles.

Performance Data

27. Lastly, Sprint has continually failed to provide KMC with performance data that would allow KMC to determine whether Sprint is providing service at parity. At the heart of this

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[12] *See* September 6, 2001 letter from Michael E. Solon, Regional Director, Sprint Carrier Markets, to Frank Boscarillo, Sr., VP, KMC Network Operations, in which Sprint issues its second and final rejection (Exhibit E).

issue is Sprint's non-disclosure agreement ("NDA"), which Sprint requires CLECs to sign before providing access to its performance data Web site. Sprint's position is that its performance data "may not be disclosed to *any* person or entity without the prior authorization of Sprint or with regard to the CLEC aggregate data, as otherwise directed by the State Regulatory Agency."[13] This requirement adds an additional burden to competition and makes it difficult to ascertain if Sprint performs at parity.

28. In light of the foregoing related to Sprint's level of service to KMC, including but not limited to problems related to coordinated cuts, disconnects, trouble reports, circuit acceptance, KMC requests, in addition to that specifically requested above, that the TRA (1) initiate a proceeding to investigate Sprint's poor service performance and establish a set of comprehensive performance metrics and remedies governing Sprint's service performance; (2) levy fines against Sprint for its patently anti-competitive and discriminatory behavior; and (3) compel Sprint to release its performance data to KMC.

"No Facilities"/"Pending Facilities"

29. Sprint's rejection of KMC orders for "no facilities" or "pending facilities" also seriously threatens KMC's ability to compete in Tennessee. In January and February of this year alone, at least 12 KMC orders were rejected by Sprint for "no facilities." [14] Indeed, KMC has even received "pending facilities" responses from Sprint on days that coordinated cuts were to be performed. In each of these cases, estimated due dates were never provided to KMC. Further, Sprint has never defined exactly what part of the "facility" was unavailable, e.g., copper, line card, multiplexer, etc. In fact, Sprint has not formally supplied KMC with its "no facilities" policy, to the extent that Sprint actually has a formal "no facilities" policy. For

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[13] Sprint's CLEC Report & Website Request Form (Exhibit F).

[14] Because KMC orders have been rejected without any reason, one may assume that the amount of "no facilities" rejects may actually be greater than originally thought.

example, when a KMC customer's complaint reached the TRA about Sprint's failure to provide service, Sprint found facilities available in response to the TRA inquiry.

30. KMC contends that Sprint is one of a growing number of ILECs using the "no facilities" available excuse to "game the system," circumventing their responsibility to provision UNE loops and thereby thwarting CLECs' ability to provide a host of competitive voice and data services. In fact, in some cases, Sprint has completely denied KMC customers' local service orders because of alleged lack of facilities and indicated that it would never provision the necessary facilities to provide service to those KMC customers. A Sprint representative stated that these KMC customers' local service orders are "denied forever," completely eliminating KMC's ability to compete against Sprint for these customers. Further, Sprint's unwillingness to provision facilities to KMC stands in stark contrast to what Sprint provides to its retail customers. Indeed, Sprint favors its retail customers at KMC's expense; Sprint customers get first bite at the apple, while KMC gets only what is left over (which is nothing according to Sprint), regardless of when the respective orders were placed.[15]

31. Both the Illinois and Michigan Commission have rejected the notion that ILECs are not required to provide a network element as a UNE where the ILEC must engage in construction activities in order to do so.[16] Similarly, KMC requests that the TRA: (1) compel Sprint to disclose its "pending" and "no facilities" policies; (2) compel Sprint to truthfully disclose where IDLC is deployed in its network; and (3) compel Sprint to provide UNEs to KMC customers in a non-discriminatory manner and at parity with Sprint's customers.

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[15] Sprint's provision of IDLC also contributes to the problem of "no facilities," *see infra.*

[16] *BRE Communications, L.L.C. d/b/a Phone Michigan v. Ameritech*, Opinion and Order, Case No. U-11735, p. 8 (Mich. PSC February 9, 1999) (Exhibit G); *Illinois Bell Tel. Co. Investigation of Construction Charges*, Order, 99-0593, (ICC August 15, 2000) (Exhibit H).

Ineffective/Lack of Escalation Procedures

32. Sprint fails to respond in a reasonable and timely manner to KMC inquiries regarding troubles or provisioning. Further, the escalation procedures that Sprint has provided to KMC are not being properly implemented. When KMC contacts persons listed on the escalation list provided, Sprint often fails to respond to KMC, especially on weekends.

33. In summary, Sprint has violated the Act, the Tennessee Code Annotated, and the Interconnection Agreement through the acts set forth in paragraphs 12 through 32 of the Complaint and through other acts as may be proven at the hearing of this matter.

SPRINT'S DEPLOYMENT OF ITS IDLC NETWORK ARCHITECTURE IS A PER SE VIOLATION OF ITS DUTIES, UNDER BOTH THE ACT AND THE TRA, TO PROVIDE INTERCONNECTION AND ACCESS TO UNBUNDLED NETWORK ELEMENTS AT RATES, TERMS AND CONDITIONS FOR WHOLESALE TELECOMMUNICATIONS SERVICES THAT ARE JUST, REASONABLE AND NONDISCRIMINATORY.

A. Applicable Law

34. Section 251 of the Act[17] requires all LECs to interconnect their networks with the networks of CLEC upon request. In furtherance of the ILEC's Section 251(c) obligations, the Act clearly sets forth requirements to ensure service quality parity among all carriers by requiring that all ILECs provide requesting telecommunications carriers interconnection "that is at least equal in quality to that provided by the local exchange company to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[18]

35. State commissions have also been granted authority under the Act to enforce the service quality parity. Pursuant to the TRA's authority under the Act, Tenn. Code Ann. § 65-4-123 has established Tennessee's policy to "foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting

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17 47 U.S.C. § 251.

18 47 U.S.C. § 251(2)(C).

competition in all telecommunications markets." Such code section goes further by providing that, "[T]he regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider. ..."

36. ILECs have additional obligations under Section 251(c),[19] including the duty to provide interconnection and access to unbundled network elements at rates, terms and conditions that are just, reasonable, and non-discriminatory.[20] The ILEC's obligations also require a duty to offer CLECs the opportunity to purchase, at wholesale rates, the ILEC's telecommunications services.[21]

37. The Act's wholesale rate requirements are perpetuated via the grant of authority to the state commissions to determine wholesale rates pursuant to Section 252 (d)(3).[22] The state commission's jurisdiction provides that "a state commission shall determine wholesale rates on the basis of retail rates charged to the subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." In addition, the Tennessee legislature has granted the TRA the power to fix just and reasonable rates, "whenever the [TRA] shall determine any existing individual rate, joint rate ... To be unjust, unreasonable, excessive... or unjustly discriminatory... howsoever the same may have heretofore been fixed or established." Tenn. Code Ann. § 65-5-201.

38. Thus far, the applicable law has clarified the ILEC's duty to (a) provide non-discriminatory interconnection; (b) provide parity of service; (c) provide non-discriminatory access to unbundled network elements; and (d) provide reasonable wholesale rates. Another

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19 47 U.S.C. § 252.

20 47 U.S.C. § 252(d)(3).

21 47 U.S.C. § 252(c)(4).

22 47 U.S.C. § 252(d)(3).

important issue addressed in the Act is the types of services that ILECs must make available. It is clear that ILECs have a duty to provide CLECs access to unbundled loops. However, deployment of Integrated Digital Loop Carrier (IDLC) devices throughout the ILEC networks has caused the need for clarity regarding the FCC's expectation of the ILEC's unbundling obligation.

39. The FCC held that ILECs must unbundle dark fiber facilities for any CLEC,[23] as well as those "portion[s] of the loop that can be accessed at remote access terminals in the incumbent's outside plant (i.e. sub-loops)."[24] The Interconnection Agreement recognizes Sprint's obligations and explicitly requires that when Sprint uses IDLC or other similar remote concentration devices, Sprint is required to make alternative arrangements, at the request and expense of KMC, to provide an unbundled local loop. Alternative arrangements may include copper facilities, dedicated transmission equipment or the deployment of newer devices providing for multiple hosting.[25]

40. While the Interconnection Agreement recognizes Sprint's obligation to unbundle sub-loops, it falls short of delivering on the requirements under the Act and the Tennessee Code Annotated by allowing Sprint to set sub-loop rates that are "individual case basis" (ICB). ICB rates require the CLEC to utilize the Network Element Bona Fide Request (BFR) process.[26] The BFR process calls for mediation or arbitration of disputes arising under the BFR. Specifically, the Interconnection Agreement states that if a Party to a Network Element Bona Fide Request believes that the other Party is not requesting, negotiating or processing the Network Element

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23 UNE Remand Order, ¶ 196; 47 C.F.R. § 51.319(a)(1).

24 UNE Remand Order ¶ 206; 47 C.F.R. § 51,319(a)(1).

25 KMC/Sprint Tennessee Interconnection Agreement, Network Elements, Section 4.3.

26 KMC/Sprint Tennessee Interconnection Agreement, Exhibit B.

Bona Fide Request in good faith, or disputes a determination, or price or cost quote, such Party may seek mediation or arbitration by the Authority pursuant to Section 252.[27]

41. Taken as a whole, the applicable laws outline how the Act not only ensures parity regarding service quality, but goes even further to ensure a level playing field regarding the types of loops, rates, and terms under which ILECs must offer their services.

B. Factual Background

42. It has been argued that CLEC access to the last mile connectivity is the *sine qua non* of telecommunications competition. To that end, the Act sets forth three methods for CLECs to provide service to customers: (1) resale of the ILEC's services; (2) overbuild the ILEC's facilities; and (3) the leasing of unbundled network elements from the ILEC's network.[28]

43. KMC is primarily a facilities based service provider; however, KMC does rely upon leased facilities (UNEs) in order to complement its service offerings. Delays and complications associated with obtaining UNE loops is one of the greatest challenges KMC faces in the market place. Consumers have come to expect and demand expeditious provisioning of telecommunications services. Service provisioning delays are not acceptable in the telecommunications market place; the consumer should not, and will not, accept slow service delivery intervals.

44. As noted previously, access to the local loop is tantamount to access to the end user. Yet, this last mile access is the greatest impediment to competition. To complicate matters further, many ILECs have introduced a technology coined as IDLCs in their network architecture. Netting it out, the use of IDLC-based network configuration extends the typically distance-restricted services such as ISDN farther away from the central office and pushes the switch-based functionality farther into the field to remote terminals. This results in a more

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[27] KMC/Sprint Tennessee Interconnection Agreement, Network Elements, Section 3.10.

[28] 47 U.S.C. 251.

efficient deployment of technology in the ILEC's network. An unfortunate byproduct is that the use of IDLC also results in the retirement of the ILEC's copper facilities and as such limits CLEC's access to copper UNE loops. As such, the side effect of the ILEC's IDLC network is that it cripples competition.

45. Consistent with the FCC's requirements, Sprint has made efforts to unbundle their IDLC network. However, the "alternative arrangements" the IDLC network requires CLECs to implement, is tantamount to requiring CLECs to deploy additional collocations at the remote terminals where the DLC equipment is located to access copper sub-loops (UNEs). In the case in point, KMC and Sprint have discussed an "adjacent collocation/sub-loop" arrangement.[29]

SPRINT USES DEPLOYMENT OF ITS IDLC NETWORK TO AVOID ITS OBLIGATION TO PROVIDE ACCESS TO UNE LOOPS AND SUB-LOOPS AT SERVICE INTERVAL, QUALITY, AND PERFORMANCE PARITY.

46. KMC experiences service provisioning delays in areas where Sprint has deployed the "efficient" IDLC Network Architectures. Sprint's processes for provisioning UNEs in instances where they have deployed IDLC are encumbered by delays. In fact, given that KMC's current "alternative" is to follow the provisioning processes prescribed by Sprint, there are virtually no cases where KMC obtains loops in the same period of time that Sprint could deploy the same loops for itself. Sprint uses deployment of IDLC technology to systematically discriminate against competitive carriers in violation of Section 251 of the Act.

47. IDLC networks require CLECs to use sub-loops to get access to copper UNEs. Sub-loops include that portion of the loop extending from a remote access terminal to the customer's premises. As a matter of law, Sprint's obligation to provide KMC with any type of local loop is unquestionable. As a matter of fact, however, Sprint is attempting to evade their

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[29] *See* Adjacent Collocation/Sub-Loop Arrangements (Exhibit I).

responsibility to provide access to sub-loops by forcing KMC to utilize a cumbersome process and long intervals for sub-loops in an IDLC environment.

THE TRA SHOULD REQUIRE SPRINT TO PROVIDE UNE LOOPS, INCLUDING SUB-LOOPS, WITHIN SPECIFIC INTERVALS CONSISTENT WITH SPRINT'S PARITY OBLIGATION UNDER THE ACT.

48. While Sprint recognizes its obligation to provide KMC access to UNE loops, even in the IDLC environment, KMC's greatest obstacle to obtaining these loops in a timely manner is Sprint's ordering process.

49. Sprint's present ordering process drives KMC to make a Bona Fide Request ("BFR") in order to obtain "alternative arrangements" in collocations where Sprint has deployed IDLC.[30] The BFR process forces KMC to endure sequential provisioning intervals, needlessly delaying KMC's ability to serve customers. For example, Sprint's collocation tariff in Tennessee imposes a 90-calendar day collocation interval marked from the date on which it processes a CLEC Application for Collocation. The tariffed process allows for approximately 90-calendar days from the time of the initial application to the time of Sprint's delivery of the requested collocation space. Though Sprint has not stipulated to specific ordering intervals for the state of Tennessee, the current Sprint stated DS-1 interval is 11 days.

50. Because CLECs can not order any loops until completion and turnover of collocation facilities, the collocation interval and the DS-1 loop provisioning interval must be combined in order to yield a total service interval for a DS-1 loop of, at minimum, 101 calendar days. This is a best case scenario. In situations where Sprint has deployed IDLC technology, Sprint subjects the CLECs to a service provisioning interval of 190 days in order to finalize the order. There is not a clearly defined upper limit to the BFR provisioning interval pursuant to the Interconnection Agreement. To add to the absurdity, KMC's "remedy" is to subject the

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[30] Per the terms of the Sprint/KMC Tennessee Interconnection Agreement, the rates for sub-loop elements are "ICB" (individual case basis). As also provided in the Interconnection Agreement, all requests for products with IBC rates are to be made via the BFR process.

customer to even further service delays by enforcing an arbitration or mediation provision in situations where it feels that Sprint is not negotiating or processing the BFR in good faith or that the price or price quotes are not reasonable.

TIME	Day 1	10 Business Days	30 Calendar Days	40 Calendar Days	70 Calendar Days	90 Calendar Days	111 Calendar Days	160 Calendar Days	190 Calendar Days
BFP PROCESS PER SPRINT/ KMC ICA	Submit BFR	ILEC acknow-ledge receipt			ILEC provides prelimi-nary analysis - request to proceed			Price quote from ILEC	CLEC final analysis and final request to proceed
COLLOCATION PROCESS PER THE SPRINT TENNESSEE TARIFF	CLEC written application submitted to Sprint		CLEC application processed by Sprint			Sprint will provide CLEC collocation space	Customer's DS-1 installation complete		

51. While it is unlikely that Sprint customers wait 111 calendar days for Sprint to install DS-1 services, it is completely unfathomable that Sprint requires or that Sprint's customers wait a minimum of 190 days to receive Sprint's DS-1 services.

52. As noted in the time line above, any assertions that Sprint may have that Sprint is comporting with the service quality parity requirements of the Act are completely untenable.

SPRINT'S DEPLOYMENT OF AN IDLC NETWORK RESULTS IN GREATER NETWORK EFFICIENCY FOR SPRINT; THE COMMISSION SHOULD ENSURE THAT SPRINT PASSES THESE LOWER SERVICE COSTS ON TO THE CONSUMER VIA OVERALL LOWER PRICES.

53. Sprint has been very aggressive in its deployment of IDLC equipment. IDLC equipment is significantly cheaper than copper or universal digital loop carrier (UDLC) equipment. Given these factors, it would stand to reason that the efficiencies Sprint gained in its mass scale deployment of IDLC equipment should result in a more efficient and less costly network. Yet, when comparing Sprint's UNE rates to the UNE rates of other ILECs in similar territories, it is obvious that these network "efficiencies" are not recognized is Sprint's application of the TELRIC methodology.

54. Despite Sprint's use of the efficient IDLC network, Sprint's rates for UNEs in Tennessee are an average of 37% higher than the UNE rates for the other major ILEC, BellSouth, in the State of Tennessee:

Figure 1A: Comparison of UNE Loop Rates Sprint vs. BellSouth (Tennessee)

LOOP	BAND/ZONE	SPRINT	BELLSOUTH	%
2 Wire	B1/Z1	$ 22.69	$ 13.19	72.02%
	B2/Z2	$ 28.27	$ 17.23	64.07%
	B3/Z3	$ 33.73	$ 22.53	49.71%
4 Wire	B1/Z1	$ 38.79	$ 24.70	57.04%
	B2/Z2	$ 48.35	$ 32.25	49.92%
	B3/Z3	$ 57.67	$ 42.17	36.76%
2 Wire	B1/Z1	$ 24.03	$ 22.00	9.23%
	B2/Z2	$ 29.61	$ 29.02	2.03%
	B3/Z3	$ 35.07	$ 37.95	-7.59%
4 Wire	B1/Z1	$ 93.12	$ 57.73	61.30%
	B2/Z2	$ 102.97	$ 75.40	36.56%
	B3/Z3	$ 113.01	$ 98.59	14.63%

THE TRA SHOULD OPEN A RATE DOCKET FOR SPRINT IN TENNESSEE TO ENSURE THAT ALL UNE LOOPS, INCLUDING SUB-LOOPS, ARE PRICED IN ACCORDANCE WITH TELRIC STANDARDS

55. The price for obtaining a UNE loop must be "based on the cost (determined without reference to a rate of return or other rate based proceeding) of providing the... network element... and it must be non-discriminatory[.]"[31] This cost based requirement governs all activities necessary to provision the loop. Yet, Sprint seeks to impose prohibitive charges on KMC.

56. Sprint is further frustrating the opportunity for competition by refusing to offer access to these sub-loops at TELRIC rates. Sprint's selection to deploy an IDLC network eliminates the opportunity for facilities-based competition.

57. The TRA should be mindful that KMC has already borne the expense of preparing collocation space with Sprint in Tennessee. This cost was borne with the expectation

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[31] 47 U.S.C. § 252 (d)(1)(A).

that KMC would be able to provision UNEs via a cross connect at the main distribution frame (MDF) that is typically located at the ILEC's central office. However, given Sprint's deployment of the IDLC architecture, the MDF has been "moved" from the central office to a remote terminal. This "movement" of the MDF requires KMC to bear additional costs to access the facilities at the remote terminal.

58. In normal scenarios, once collocation expenses are covered, KMC's additional cost to gain access to copper UNE loops is simply the cost of a cross connect. Yet, where Sprint has deployed IDLC, Sprint would force KMC to incur collocation costs in addition to the sunk collocation costs at the end office and tandem This unbelievable additional costs burden has a chilling effect on KMC's ability to deploy services to end users. In fact, the goal of competition is to drive end user prices down, thus providing value to the end consumers. However, as evidenced in the costs set forth herein, no CLEC could recover the added loop charges in an IDLC environment in its end user rates. As a consequence, the result would be higher prices for the consumers or no competition.

59. To prevent Sprint from pricing sub-loops in this anti-competitive manner, the TRA should hold a UNE rate case hearing for Sprint in Tennessee and examine Sprint's compliance with TELRIC rules, which require forward looking, cost based pricing for all UNEs.

60. The TRA should explicitly hold that all sub-loop charges, recurring and non-recurring, must adhere to Total Element Long Run Incremental Cost ("TELRIC") pricing principles as a matter of federal law.[32] In its Order, the TRA should require that Sprint conduct a UNE Rate Proceeding in the State of Tennessee.

61. Sprint cannot avoid its federal obligations to provide UNE loops to KMC at cost-based rates simply by building a new IDLC network.

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32 *Iowa Utils Bd. v. FCC*, Cases No. 96-3321, et al., Order (June 10, 1999).

SPRINT HAS ENGAGED IN A PATTERN OF DISCRIMINATORY, ANTI-COMPETITIVE AND TORTIOUS CONDUCT IN AN ATTEMPT TO STYMIE COMPETITION AND WIN BACK CUSTOMERS

A. Applicable Law

62. It is the duty of the local exchange carrier to provide interconnection which "is at least equal in quality to that provided ... to itself or to any subsidiary .... and on rates, terms and conditions that are just, reasonable and nondiscriminatory." 47 U.S.C. § 251(c)(2). Under Section 251(c) of the Act, Sprint has the obligation to provide KMC with interconnection and access to unbundled network elements under rates terms and conditions that are just, reasonable and non-discriminatory. The FCC has interpreted this obligation to mean that ILECs, such as Sprint, must provide service to competitors, such as KMC, in a manner that is equal to the level of service that the ILEC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness. Sprint has failed to comply with its obligations under the Act and the parties' Interconnection Agreement.

63. Pursuant to the Interconnection Agreement between the parties, each party has a responsibility to engage in non-discriminatory behavior when interacting with subscribers. Specifically, the Interconnection Agreements requires the parties to "ensure that any of its personnel who may receive subscriber inquiries, or otherwise have opportunity for subscriber contact from the other Party's subscribers regarding the other Party's services: (i) provide appropriate referrals to subscribers who inquire about the other Party's services or products; (ii) do not in any way disparage or discriminate against the other Party, or its products or services; and (iii) do not provide information about its products or services during the same inquiry or subscriber contact."[33]

64. The parties are also subject to the common law related to tort claims. Specifically, there are three tort concepts that apply: (1) slander; (2) tortious interference with

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[33] KMC/Sprint Tennessee Interconnection Agreement, Attachment VIII, General Business Requirements, 1. Procedures, Contact With Subscribers 1.1.2.

contracts; and (3) interference with perspective business relations. According to *Black's Law Dictionary*, slander is "the speaking of false or malicious words concerning another whereby injury results to his reputation." Additionally, *Black's* defines slander per se as "tending to prejudice another in his ... trade, business, office or means of livelihood."[34]

65. Further, the common law tort of "Interference with Contract Relations" is met by establishing the following elements: (1) a valid contract between plaintiff and third party; (2) defendant's knowledge of this contact; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; (5) resulting damage.[35]

66. Finally, interference with prospective business relations may be established upon a showing of: (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) defendant's knowledge of the existence of the relationship, (4) actual disruption of the relationship and (5) damages to the plaintiff proximately caused by the acts of the defendant.[36]

67. To the extent the TRA does not have jurisdiction to adjudicate the specific tort claims set forth above, KMC reserves its rights to bring suit on the tort issues claims in a court of competent jurisdiction.

B. Factual Background

68. KMC has tracked numerous instances of Sprint's use of disparaging comments regarding KMC Telecom.[37] One such record notes an incident on February 6, 2001 relating to a

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[34] *Little Stores v. Isenberg*, 26 Tenn. App. 357, 172 S.W.2d 13 at 16; *Black's Law Dictionary* 1559 (4th. ed. 1968).

[35] *Wegman v. Dairy lea Cooperative, Inc.*, 50 A.D.2d 108, 376 N.Y.S.2d 728, 736.

[36] *Gerber v. Keyes Co.*, Fla. App. 3Dist., 443 So.2d 199, 200.

[37] As a business practice, KMC tracks issues related to ILEC performance and the services provided under the Act. KMC maintains this business practice as it relates to Sprint. See relevant Exhibits referenced.

prospective KMC customer, who phoned Sprint, to discuss billing issues.[38] During the course of the conversation, the customer indicated that they planned to switch their local service from Sprint to KMC. Thereafter, the Sprint representative made the following comments:

(1) "KMC could not make Johnson City to Kingsport a local call and if KMC did, it would only be free month then he will get billed for the service claimed to be free;"

(2) "Customers are leaving KMC and are happy to be back with Sprint;"

(3) "KMC buys service from Sprint and resales it and KMC owes Sprint money and is not paying;"

(4) "KMC rents lines from Sprint and Sprint has to cut off customers because KMC doesn't pay their bills;" lastly,

(5) "When Sprint has to cut off KMC for nonpayment the customers cannot get their service turned back on by calling Sprint."

69. Sprint has consistently exhibited a blatant disregard for standard business acumen, the terms of the Interconnection Agreement, the Act, and basic tort law. In addition to the instance noted above, KMC has also documented other instances where Sprint has made slanderous statements to third parties regarding KMC. For example, a Sprint technician performing a port-out to KMC told the subscriber that "KMC does not have a clue, I've been on the phone for two hours and this is all messed up." In yet another example, a KMC customer was told that it was a mistake to switch to KMC and that Sprint technicians would be the only one the customer should call if they don't receive a dial tone.

70. It is clear that Sprint has no respect for the spirit of competition or letter of the law as set forth by the Act and the Interconnection Agreement and therefore should be fined and/or ordered to pay damages to KMC.

71. KMC officers and customers as well as Sprint officers and personnel are located in the Tri-Cities area. KMC's witnesses, including its personnel and former and present customers, reside and work in the Tri-Cities area. In the interest of justice and prevention of

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[38] Sprint was, at the time, the customer's local service provider.

extensive travel and expense for these numerous witnesses, a hearing should be held in Johnson City. Pursuant to Tenn. Code Ann. §65-1-203(a) and TRA Rule 1220-1-1-.06(3), the TRA has the power to set the place of a hearing for the convenience of the parties and as the TRA deems appropriate.

REQUEST FOR RELIEF

For all these reasons, KMC requests that the TRA:

1. Commence a contested case against Sprint to be held in Johnson City, Tennessee;

2. Initiate a proceeding to investigate Sprint's poor service performance, adopt a set of comprehensive performance metrics, and establish remedies governing Sprint's service performance to ensure Sprint's implementation of the parity requirements of the Act and of Tenn. Code Ann. § 65-4-124;

3. Resolve a number of contractual and other disputes, including, but not limited to, establishing firm intervals, a trouble ticket policy, and a written circuit acceptance policy;

4. Implement collocation intervals consistent with the 90-day interval established in the FCC's collocation order;

5. Set wholesale rates for Unbundled Network Elements (including but not limited to sub-loop elements) that reflect today's technology and Sprint's deployment of an "efficient"" IDLC network and initiate a UNE rate case hearing for Sprint and examine Sprint's compliance with TELRIC rules;

6. Find that Sprint has discriminated against KMC through its illegal and anti-competitive behavior;

7. Compel Sprint to immediately maintain adequate security to prevent further tampering with KMC's collocated equipment;

8. Award KMC damages for the replacement or repair of its equipment, including labor and interest;

9. Levy a fine against Sprint for damages to its equipment in violation of Tenn. Code Ann. § 65-3-102(1)(A) in an amount sufficient to compel its lawful behavior going forward;

10. Require Sprint to institute a "call before disconnect policy" similar to that used by BellSouth;

11. (a) Require Sprint technicians to receive additional training to more accurately diagnose and cure KMC troubles; and

(b) Require Sprint to implement a performance metric to accurately diagnose and cure KMC troubles;

12. Address Sprint's inadequate process of closing trouble tickets by requiring Sprint to adopt a process change by implementing a real-time, technician-to-technician trouble notification management process;

13. Compel Sprint to disclose its "pending" and "no facilities" policies;

14. Order Sprint to provide loops and associated equipment to KMC customers at parity with Sprint's customers;

15. Fine Sprint $50.00/day/violation since the date of execution of the Interconnection Agreement (September 29, 2000) for failure to comply with Tenn. Code Ann. §§ 65-4-123 and 65-4-124(a) and other lawful requirements of the Tennessee Code Annotated;

16. Fine Sprint $2,000.00 for each instance of discrimination and unreasonable preference under Tenn. Code Ann. § 65-40122;

17. Compel Sprint to release its performance data to KMC;

18. Fine Sprint any penalties which may be imposed under the Sprint/Hyperion Master Interconnection Agreement which is the agreement between KMC and Sprint;

19. Review Sprint's firm order confirmation policy and concurrence process to ensure it facilitates competition; and

20. Grant such other and further relief to which it may be entitled, including awarding KMC damages, reasonable attorney's fees, and costs.

Respectfully submitted,

H. LaDon Baltimore, BPR #003836
FARRAR & BATES, L.L.P.
211 Seventh Avenue North, Suite 420
Nashville, TN 37219
(615) 254-3060
(615) 254-9835 FAX
Counsel to KMC Telecom Holdings, Inc.

John D. McLaughlin, Jr.
Marva Brown Johnson, Esq.
Scott A. Kassman, Esq.
David Sered
KMC TELECOM HOLDINGS, INC.
1755 North Brown Road
Lawrenceville, GA 30043
(678) 985-7900
(678) 985-6213 FAX

Certificate of Service

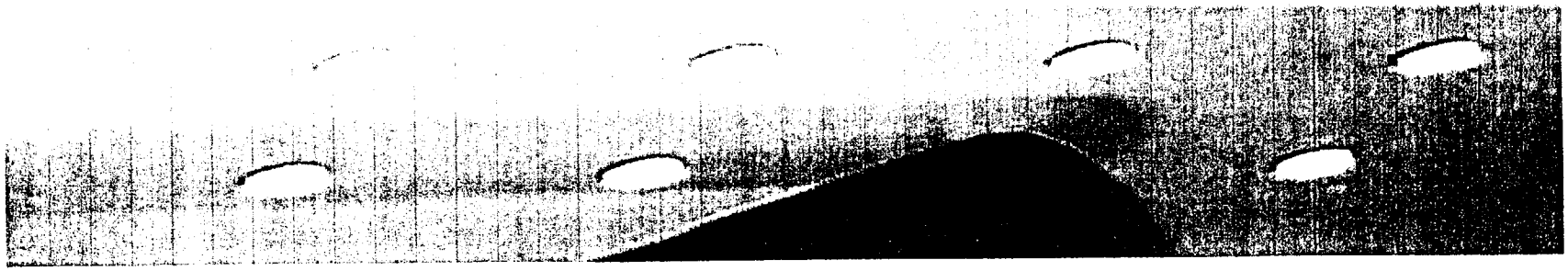
The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via overnight delivery to the following, this 2nd day of November, 2001.

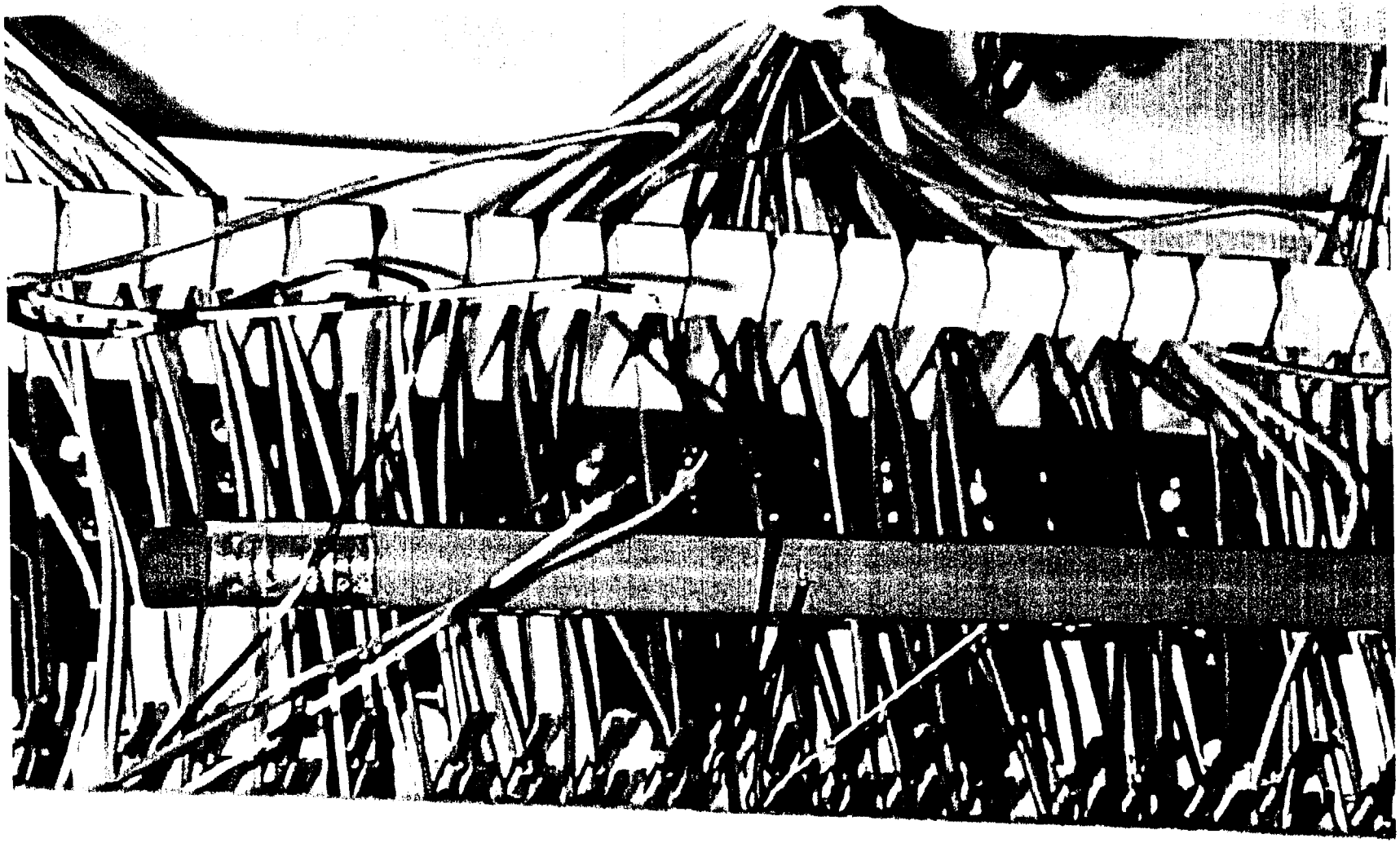
James Wright, Esq.
United Telephone Southeast, Inc.
14111 Capitol Blvd.
Wake Forest, NC 27587-5900

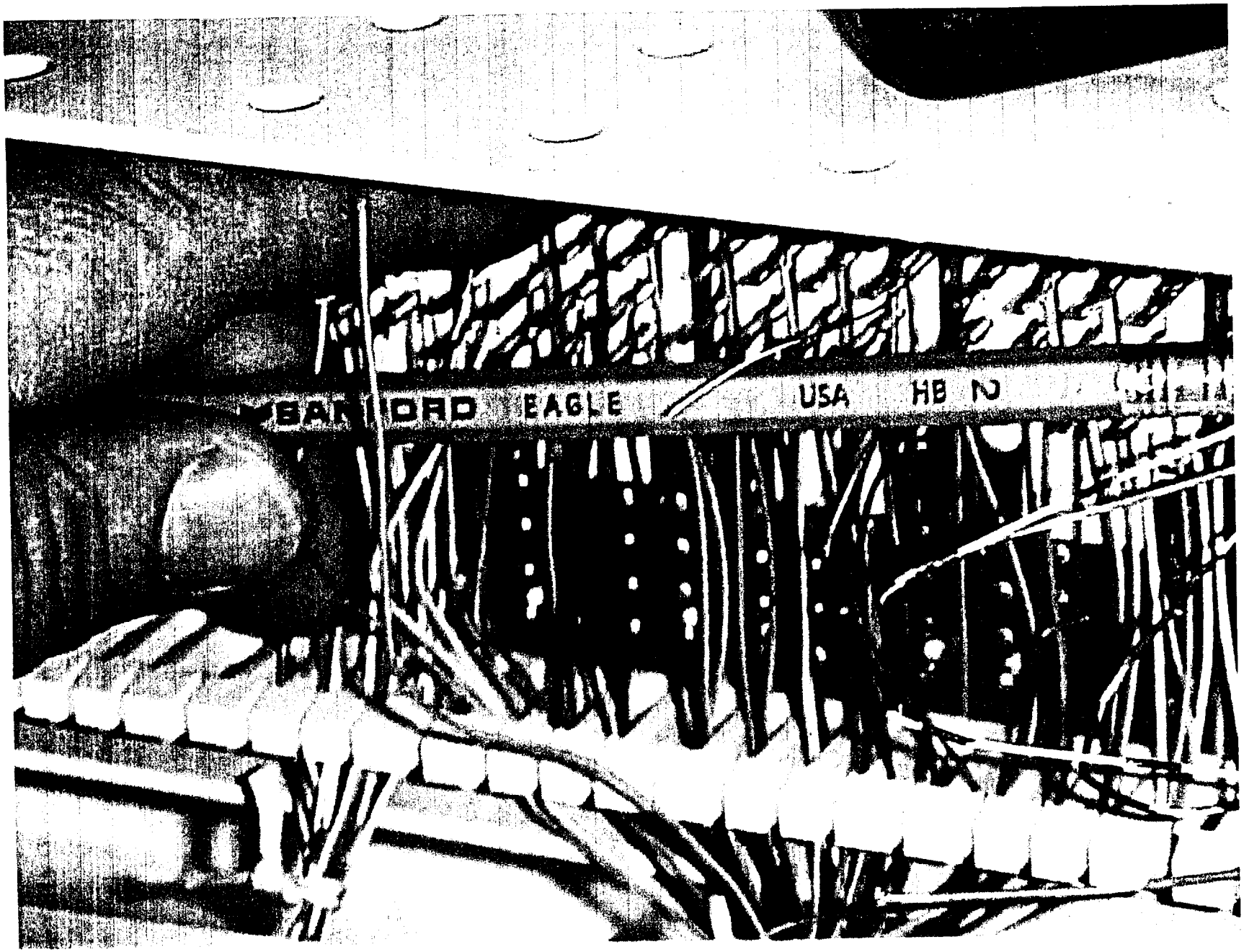
H. LaDon Baltimore

EXHIBIT A

TO COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM IV, INC. AGAINST UNITED TELEPHONE SOUTHEAST, INC.



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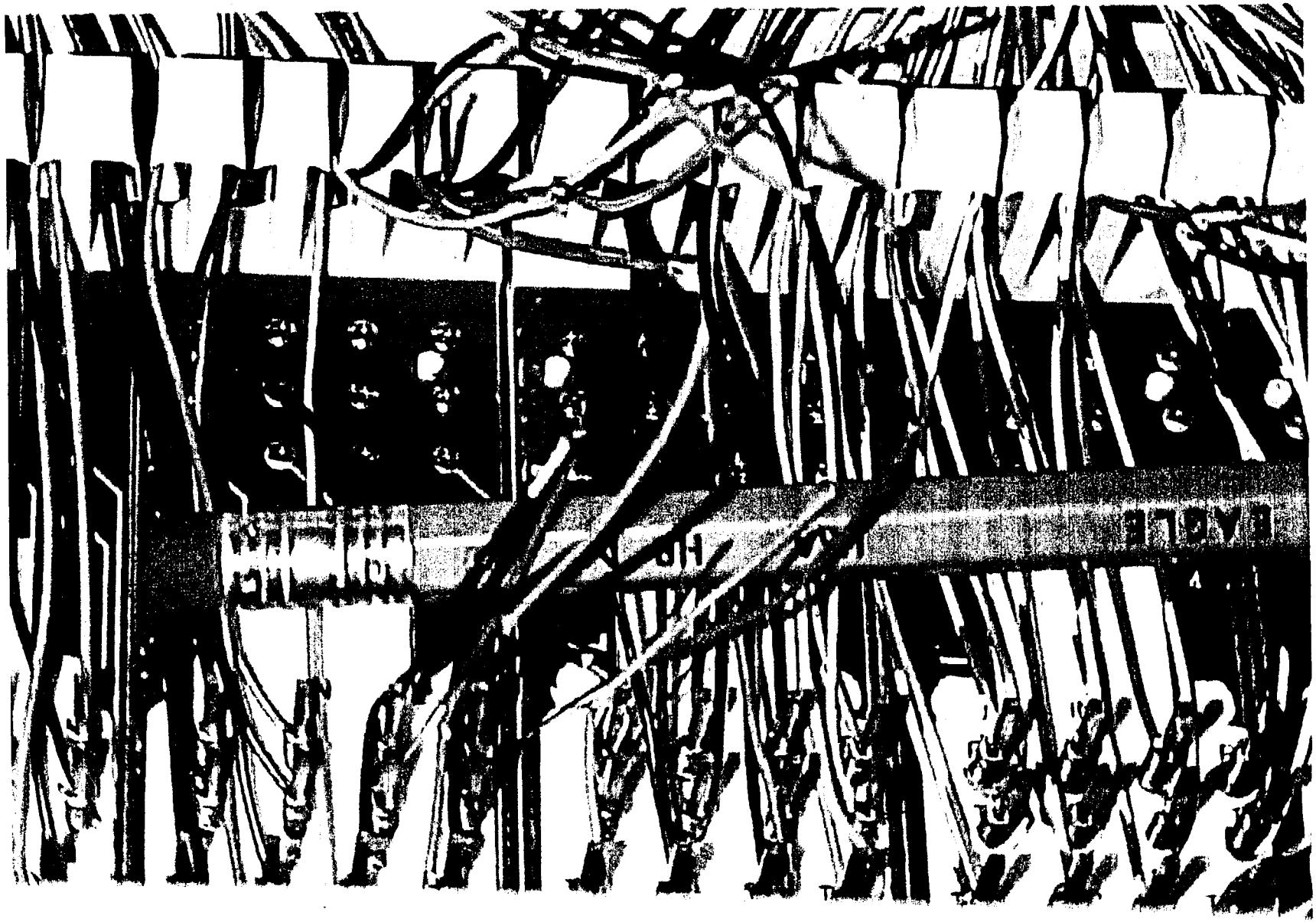

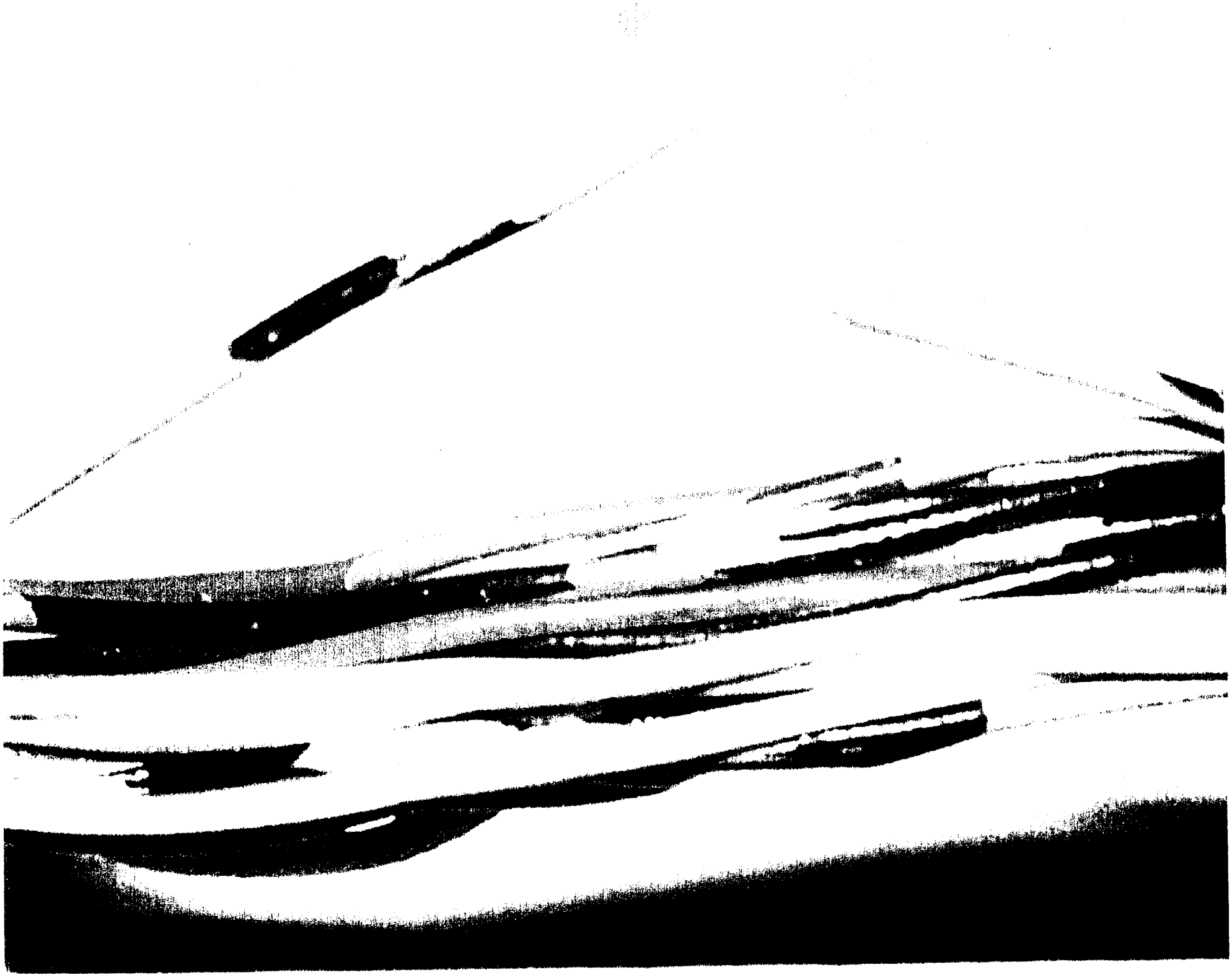

EXHIBIT B

TO COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM IV, INC. AGAINST UNITED TELEPHONE SOUTHEAST, INC.

Master Network Interconnection and Resale Agreement

This Master Network Interconnection and Resale Agreement ("Agreement") between KMC Telecom III, Inc. and KMC Telecom V, Inc. (collectively "KMC") (here in referred to as "CLEC") and United Telephone-Southeast, Incorporated ("Sprint"), herein collectively, "the Parties", is entered into and effective this 29th day of September, 2000 for the State of Tennessee.

NOW THEREFORE, the Parties agree as follows:

The Parties agree that the Agreement between the Parties shall consist of the Interconnection and Resale Agreement for the State of Tennessee entered into by and between United Telephone-Southeast, Incorporated ("Sprint") and Hyperion Communications of Tennessee, L.P. ("Hyperion Comm") including any amendments entered into as of the date hereof, amended as follows:

TERM:

This agreement shall be in force until April 20, 2001.

CONDITIONS:

All services provided under this Agreement will be consistent with the decisions of courts having jurisdiction over this Agreement, including but not limited to the decisions of the Court of Appeals and the United States Supreme Court.

On July 18, 2000, the United States Court of Appeals for the Eighth Circuit issued a decision in Iowa Utilities Board v. FCC, Case No. 96-3321 (the "Eighth Circuit Decision") which, among other things, vacated FCC rules 47 CFR §51.505(b)(1) and 51.609. The Eighth Circuit Decision affects certain provisions of the Adopted Agreement, including many of the rates and the wholesale discount(s) contained in the Adopted Agreement.

Pursuant to the Adopted Agreement, either Party may require that the affected provisions of the Adopted Agreement be renegotiated in good faith and amended to reflect the Eighth Circuit Decision, effective as of the effective date of such Decision. Since the Agreement consists of the same terms as the Adopted Agreement, the Parties hereto acknowledge that the rates and terms in the Agreement that are likewise affected by the Eighth Circuit Decision shall be treated as interim, subject to true-up to the effective date of the Eighth Circuit Decision.

NOTICES:

Except as otherwise provided, all notices and other communication hereunder shall be deemed to have been duly given when made in writing and delivered in person or deposited in the United States mail, certified mail, postage paid, return receipt requested and addressed as follows:

To KMC:

Charlene H. Keys
Vice President – Carrier Management
KMC Telecom Holdings
1755 North Brown Road
Lawrenceville, GA 30043

To Sprint:

Director – Local Carrier Services
Sprint
6480 Sprint Parkway
Mailstop: KSOPHM0310-3A453
Overland Park, KS 66251

PARTIES

KMC Telecom II, Inc. "KMC" is hereby substituted in the Adopted Agreement for Hyperion Communications of Tennessee, L.P. ("Hyperion Comm") and United Telephone-Southeast, Incorporated ("Sprint") shall remain as the other Party to the Agreement. Except as modified above, the Agreement shall in all other respects reflect the same terms as the Adopted Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly respective authorized representatives.

SPRINT	KMC Telecom Holdings, Inc.
By: _____	By: _____
Name: William E. Cheek	Name: Charlene H. Keys
Title: VP-Sales & Account Mgmt	Title: Vice President – Carrier Management
Date: 10/19/00	Date: 10/3/00

EXHIBIT C

TO COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM IV, INC. AGAINST UNITED TELEPHONE SOUTHEAST, INC.

Attachment Listing

Attachment #3 Circuit Acceptance Procedure (Access)

ACCEPTANCE TESTING (ASR)

Acceptance testing is conducted on the Plant Test Date (PTD). The Plant Test Date is the scheduled date for testing Sprint's portion of the requested service.

The Sprint technician will install, option and adjust all necessary equipment at the customer location according to engineering specifications.

Where remote test access is available the Sprint installation technician will contact the NOC test technician by calling the NOC Special Services, Provisioning/ Test and Turn Up Group. The NOC tester will then bridge the Access Customer on the line to perform cooperative testing of the complete circuit using the appropriate tests. Testing will be completed between the remote test access point closest to the Access Service Customer (ASC) equipment and the End User to obtain an "End-to-End" test of Sprint provided equipment and facilities. Upon completion the NOC will complete or jeopardize the PTD in CIRAS.

Where remote test access is not available, the Sprint installation technician will contact a technician in the controlling office who will then bridge the Access Customer on the line to perform cooperative testing of the complete circuit using the appropriate tests. Testing will be completed between the closest point of termination of the ASC facility as possible to the End User to obtain an "end-to-end" test of Sprint provided equipment and facilities. Upon completion the Sprint Technician will complete or jeopardize the PTD by contacting the NOC Provisioning .

Acceptance Test on Due Date

Cooperative Acceptance Testing by the ASC on Due Date (DD) will normally be performed remotely with the NOC without a technician dispatch to the End User's premises unless the service is not equipped with a loopback device or the test fails to meet acceptance criteria. Upon completion the NOC will complete the Due Date in CIRAS.

EXHIBIT D

TO COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM IV, INC. AGAINST UNITED TELEPHONE SOUTHEAST, INC.

Attachment Listing

Attachment 1 Trouble Ticket Summary

Region	District	Phone	Ticket	RecDte	TypRpt	TypRpt Description	Trouble Disposition	Trouble Cause
May 17 to June 1								
JOHNSON CITY	JOCY	4231822215	9790301	52301	11	No Dial Tone	Remote term	defective
JOHNSON CITY	JOCY	4231822215	9795997	52301	11	No Dial Tone	span repeater	settings
						No Dial Tone	2	100%
July17 to August 1								
JOHNSON CITY	JOCY	4231822215	**859467 ***	71701	11	No Dial Tone	HighSpeed data	other
JOHNSON CITY	JOCY	4231822215	892514	71901	32	Can't be heard	Referred Clec	No trbl Found
JOHNSON CITY	JOCY	4231822215	892610	71901	31	Can't Hear	Referred Clec	No trbl Found
JOHNSON CITY	JOCY	4231822215	892682	71901	31	Can't Hear	Referred Clec	No trbl Found
JOHNSON CITY	JOCY	4231822215	871908	71801	11	No Dial Tone	No Trbl Found	
JOHNSON CITY	JOCY	4231822215	893520	71901	32	Can't be heard	Referred Clec	No trbl Found
JOHNSON CITY	JOCY	4231822215	1254880	72701	33	Noisy	Cable Terminal	open/grd
JOHNSON CITY	JOCY	4231822215	1259252	72701	33	Noisy	Aerial cable	open/grd
JOHNSON CITY	JOCY	4231822215	1291441	73001	81	Can't S/R data	Frame	wiring
JOHNSON CITY	JOCY	4231822215	**1255614 ***	72701	33	Noisy	No Trbl Found	NTF
JOHNSON CITY	JOCY	4231822215	1320484	80101	81	Can't S/R data	No Trbl Found	NTF
JOHNSON CITY	JOCY	4231822215	1320421	80101	11	No Dial Tone	CO Equipment	other
JOHNSON CITY	JOCY	4231822215	1320464	80101	11	No Dial Tone	CO Equipment	other
JOHNSON CITY	JOCY	4231822215	1320485	80101	11	No Dial Tone	CO Equipment	other
JOHNSON CITY	JOCY	4231822215	1301890	73101	33	Noisy	Aerial cable	damaged

Note: * Repeat Report

No Dial Tone	5	33%
Can't be heard	2	13%
Can't Hear	2	13%
Can't S/R data	2	13%
Noisy	4	27%
	15	

EXHIBIT E

TO COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM IV, INC. AGAINST UNITED TELEPHONE SOUTHEAST, INC.

Sprint.

Michael E. Solon
Regional Director –
Carrier Markets

900 Springmill Street
Mansfield, OH 44906-2055
Voice 419-755-7441
Fax 419-522-1060
michael.e.solon@mail.sprint.com

September 6, 2001

SENT VIA FASCIMILE
ADDITIONAL PAPER COPY BEING MAILED

Mr. Frank Boscarillo
Senior Vice President
Network Operations
1755 North Brown Road
Lawrenceville, GA 30043

Dear Frank:

I am writing to provide a status report for action items arising from our meeting on August 23rd in Johnson City, TN. Please also reference correspondence from Jim Wright to Don Baltimore dated September 4, 2001.

As stated in our meeting, Sprint is committed to resolving any service issues that arise with providing service to KMC. As you will note in the following, a good deal of effort is occurring to fix or mitigate any process issues identified in our discussions. Our intent is that each will result in improved service.

Action Item Status

1. Sprint to provide information on trouble ticket mix for May 17 to June 1. Repeats should be noted if data available.

2. Sprint to add actual closure code/disposition to July 17 – August 1 sample information discussed in the August 23 meeting.

   Status/Response: The trouble ticket mix samples for the period of May 17 through June 1 are provided in Attachment #1. The trouble report type, cause and disposition codes are included in the report. It should be noted that the May 17 through June 1 data includes only two trouble tickets.

   The trouble ticket data sample for the period of July 17 through August 1 is also provided in Attachment #1. This sample includes 15 trouble tickets reported and closed during the period. It should be noted that the trouble report type distribution percentage provided here varies from those percentages stated during the meeting. It was determined that the sample used during the meeting was incomplete.

3. Contact Tina General again regarding access to non-stipulated state measurement (LCUG-like) information.

   Status/Response: Stipulated and non-stipulated state measurement documentation has been previously discussed and provided to KMC on March 28, 2001.

   Following that meeting, KMC submitted the documentation to establish electronic access to the Sprint measurement reporting. The reporting for stipulated and non-stipulated states is available on line to KMC.

   Sprint is ready to arrange training on its approach to LCUG and LCUG-like (non-stipulated states) information.

   For your information, Attachment #2 provides a summary of measures provided for a non-stipulated state. Web-site access to this data is currently available; additional access will be provided as KMC completes the appropriate form to set up access for specific individuals within its organization.

4. Any available information on "fail after install" to be noted in data for item 1.

   Status/Response: See Attachment #1.

5. Sprint to review technician workload level, respond to examples provided by Chris Garland [KMC].

6. Review missed appointment quantity.

   Status/Response: Sprint's analysis continues.

   Ronnie Baker has not yet received examples from KMC's Chris Garland for additional analysis.

7. How Sprint will communicate to KMC that appointment will be missed.

   Status/Response: Sprint's normal approach is for the Coordination Desk to provide a "may miss" notice via a phone call to the CLEC local coordinator.

8. Sprint to explore setting new commit time without re-order due to Sprint miss.

   Status/Response: Sprint's normal approach is to attempt to complete the order within the same day should the initial appointment be missed.

   If the appointment cannot be completed that day, the order is returned to the CLEC to set a new date. While on its face the idea of Sprint simply setting a new date/time seemed appealing in the meeting, after further discussion, the likelihood of Sprint setting a date/time that is acceptable to both the CLEC and its customer is slim. It will be most efficient for the CLEC to contact its customer to set a new date.

   Regarding the function of a "miss," the process is not that the CLEC "goes to the back of the line" to reset a new lead time for the installation. The process is that the order is placed in jeopardy pending selection of a new due date by the CLEC.

This is an area that Sprint suggests warrants a SME-to-SME discussion to ensure that both parties have a common understanding of the process. The notice process described in item 7 may also warrant dialogue in this same discussion.

9. Sprint will "joint test" a few orders with KMC after new "remote" M&P deployed.

   Status/Response: Open item pending release of the new M&P.

10. Sprint to provide date as to when bulletin regarding D4 channel bank levels was released.

    Status/Response: Sprint's internal bulletin was released on July 2, 2001. The content of the bulletin will also be included in any future M&Ps that address issues with channel banks.

11. Sprint to provide information regarding level to be used with D4 card.

    Status/Response: Sprint's approach is to engineer the card setting according to industry standards for the type of service ordered, i.e., 2W voice-grade, and the length of any copper facilities involved with the provision of the circuit.

12. Provide documentation describing circuit acceptance procedure.

    Status/Response: Attachment #3 provides an overview of the acceptance procedure used for access circuits.

13. Provide example of acknowledgement provided via IRES for UNE DS1 loops.

    Status/Response: Once a completion date is entered on an SOE order, ARC (Automatic Routing & Completions) routes the order status back to IRES and the LSR is changed into CS (completed SOE) status just like any other completed order.

    The issues identified in this item and item 12 may be another area warranting a SME-to-SME discussion. There are differences in the approach for an access tariffed-ordered DS1 (NOC involvement) and UNE DS1 loops (completion provided via IRES).

14. Respond to KMC request that a "Call before disconnect" policy be instituted to match that provided by Bell South.

    Status/Response: Sprint's approach to disconnection of facilities, at a technician level, is as follows:

    If the technician finds a working jumper in place, the technician does place a call into the appropriate work group to verify the facility and request a new assignment. The circuit is not removed from service.

    If the technician receives a true D – disconnect – order, the circuit is removed.

    Given that there were only two inconclusive instances reported to date, Sprint does not see the need to modify its practices at this time.

15. Close Classic Flooring issue.

    Status/Response: An appointment was scheduled for 9/05 for Sprint and Sandi Milan to visit the person reporting the issue.

    As discussed in the meeting, Sprint's practice is that no information regarding payment status is disclosed to any third party.

16. Examine example provided by KMC regarding pending facilities.

    Status/Response: No examples yet provided. Our notes do not reflect which of the KMC team was to provide the information.

17. Pending facility issues. Training issue; refresher to be provided to appropriate staff for normal order and CIRAS order.

    Status/Response: Refresher training started via local supervisory staff. Additional formalized training to occur with implementation of new M&Ps.

18. Sprint to review examples provided by KMC regarding pending facility orders returned to engineering.

    Status/Response: Unfortunately, the example provided did not illustrate an order that went through engineering multiple times. Sprint invites KMC to provide pertinent examples for further analysis.

19. Sprint to provide information regarding IRES notation for pending facilities.

    Status/Response: During LSR processing, the Service Order Assignment Group, (Assignment), or the Field Installation Forces, (Installation), makes the determination if the LSR should be placed in a Jeopardy or No Facilities Status. The Jeopardy Status means that the LSR cannot be worked in its present state and may be in jeopardy of missing the due date. The Jeopardy Status requires that additional action be taken by assignment and/or engineering. The No Facilities Status means there are no physical facilities available to complete the LSR.

    To initiate the Jeopardy or No Facility Status on an LSR, the Assignment or Installation employee will enter an appropriate field code in the Service Order Entry (SOE) system. SOE reads the field codes and routes the LSR as appropriate to either assignment or engineering. This LSR status is also reported to IRES where the LSR is updated.

    When a new due date is established in SOE, the information is routed to IRES. The LSR status in IRES will be changed to the Confirmed status and a revised due date will be provided.

    However, Sprint has realized a system issue with pending facility treatment. Occasionally other entries driven by Sprint or the CLEC, such as adding a trip charge or supplementing an order once it is confirmed, could change the status. A fix is under development. No estimate of a completion date is currently available.

20. Sprint to provide answers to outstanding questions on the BFR.

    Status/Response: Don Horton responded to Tina General via e-mail on September 6, 2001.

21. Respond to KMC request regarding trouble ticket management.

    Status/Response: While Sprint is committed to working with KMC to reduce any instances of incorrect no-trouble-found instances, due to parity and cost concerns Sprint does not presently intend to institute what was described as a "coordinated testing procedure" for trouble ticket closure during our August 23 meeting.

    However, should KMC wish to pursue this further, Sprint will accept a BFR to develop a cost for such a coordinated testing arrangement.

22. Provide update regarding placement dates for camera and swipe card in Johnson City central office.

    Status/Response: Sprint completed installation of proximity card security access and CCTV equipment in February 2001.

As stated above, Sprint is committed to working through any service issues at an operational level. After review of this status report, let's plan on a follow-up conference call to address any of these action items.

Sincerely,

Michael E. Solon

Attachments

c: Tina General
John McLaughlin, Jr.
James Wright
Don Horton

EXHIBIT F

TO COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM IV, INC. AGAINST UNITED TELEPHONE SOUTHEAST, INC.

Sprint

CLEC REPORT & WEBSITE REQUEST FORM

Application for Individual CLEC Service Performance Measurement Report(s) and access to Sprint Performance Measurement Reporting website (parity.sprint.com)

All information must be filled out for the request to be processed.

Today's Date: _____

CLEC Name: _____
(Name as to be printed on the reports)

CLEC CONTACT:
First Name: _____ **MI:** _____ **Last Name:** _____

CLEC Business Phone: _____ **CLEC Business Fax:** _____

CLEC Identifying Codes: **Operating Company Number (OCN)** _____
National Emergency Number Code (911 NENA Code) _____
Service Provider Identification (SPID) _____

CLEC Reports to be Created for the Following State(s)*:

_____

_____

**** CLEC reports will only be generated for states in which the CLEC currently has activity and in states where Sprint is considered the ILEC.***

Access Request: **NEW** ☐ **CHANGE** ☐ **DELETE** ☐ **ACCESS RENEWED** ☐

- **CLEC Company Approval:** _____ **Title:** _____
  (Company Executive Signature)
- **PLEASE PRINT NAME:** _____

_____

This Section to be Completed by Sprint
CLEC Username: _____ **CLEC Password:** _____
Username to be completed by Sprint *Password to be completed by Sprint*
Sprint Field Service Manager Business Phone: _____

Sprint Field Service Manager Business Fax: _____

Sprint Field Service Manager E-mail Address: _____

Sprint Carrier Market's Approval: _____
(*Sprint Account Management Representative*)

****NON-DISCLOSURE AGREEMENT:**
The Sprint specific performance measurement results and the CLEC aggregate data contained in the Sprint Parity Reporting and your CLEC ID/password are highly sensitive information and are to be afforded confidential treatment as described in NRS 703.190(2),49325,600A.010 et.seq. and NAC 703.527-703.5282. Accordingly, this information may not be disclosed to any person or entity without the prior authorization of Sprint or with regard to the CLEC aggregate data, as otherwise directed by the State Regulatory Agency. ***Be advised that divulging any Sprint-specific performance measurement results contained in the reports or your CLEC ID/password, is a violation of the non-disclosure agreement and could result in loss of access to parity.sprint.com. In addition, Sprint reserves the right to pursue any and all remedies available to it for any violation of this agreement.***

CLEC: Completed forms may be returned to your Sprint Account Management Representative. It is important to note that your password will change every 6 months for protection purposes. If you need more information or have any questions, please contact your Sprint Account Management Representative.

_____

Warning:
UPON COMPLETION, THIS FORM CONTAINS SPRINT RESTRICTED INFORMATION!

EXHIBIT G

TO COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM IV, INC. AGAINST UNITED TELEPHONE SOUTHEAST, INC.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **BRE COMMUNICATIONS, L.L.C.,** d/b/a **PHONE MICHIGAN,** against **AMERITECH MICHIGAN** for violations of the Michigan Telecommunications Act.	))))))	Case No. U-11735

At the February 9, 1999 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On July 16, 1998, BRE Communications, L.L.C., d/b/a Phone Michigan, (BRE) filed a complaint against Ameritech Michigan, with prefiled testimony and exhibits. BRE alleged, among other things, that Ameritech Michigan violated their interconnection agreement by imposing special line construction charges, in addition to tariffed nonrecurring and recurring charges, for unbundled loops. Attempts to resolve the dispute through mediation, as provided for by Section 203a of the Michigan Telecommunications Act (MTA), MCL 484.2203a; MSA 22.1469(203a), were unsuccessful and contested case proceedings were initiated.

Pursuant to due notice, a prehearing conference was conducted on September 21, 1998 before Administrative Law Judge James N. Rigas (ALJ). In the course of that prehearing conference, the ALJ established a schedule for this case and denied the petition for leave to intervene filed by MCImetro Access Transmission Services, Inc., and MCI Telecommunications Corporation (collectively, MCI). On September 28, 1998, MCI filed an application for leave to appeal the ALJ's ruling denying MCI's petition to intervene. On December 7, 1998, the Commission denied MCI's application for leave to appeal. Thus, only BRE, Ameritech Michigan, and the Commission Staff (Staff) participated in the proceedings.

An evidentiary hearing was conducted on November 12 and 13, 1998. Nine witnesses testified and 55 exhibits were received into evidence.[1] The transcript contains five volumes of testimony and argument covering 813 pages.

On November 25 and December 11, 1998, briefs and reply briefs were submitted by BRE, Ameritech Michigan, and the Staff, respectively.

On January 7, 1999, the ALJ issued his Proposal for Decision (PFD). On January 14, 1999, exceptions to the PFD were filed by BRE and Ameritech Michigan.[2] Replies to exceptions were filed by BRE, Ameritech Michigan[3], and the Staff.

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[1] Exhibits R-12 and R-13 were not admitted.

[2]On January 22, 1999, Ameritech Michigan submitted a corrected version of its exceptions. Because BRE and the Staff have not objected, the Commission finds that the corrected version of Ameritech Michigan's exceptions should be received.

[3]Ameritech Michigan's reply to exceptions was received for filing one day late. Under the circumstances, the Commission finds that Ameritech Michigan's reply to exceptions should be accepted.

II.

FACTS

BRE and Ameritech Michigan are competing providers of basic local exchange service in Michigan. In late 1996, Ameritech Michigan entered into negotiations with BRE that led to their execution of an interconnection agreement pursuant to the federal Telecommunications Act of 1996 (FTA), 47 USC 151 et seq. The interconnection agreement, which was signed on February 3, 1997, was approved by the Commission's June 5, 1997 order in Case No. U-11326 and appears in the record as Exhibit J-11.

In June 1997, BRE commenced offering basic local exchange service in Michigan through the acquisition of unbundled loops from Ameritech Michigan pursuant to Section 9.6.1 of the interconnection agreement.[4] In most instances, when BRE has ordered an access line from Ameritech Michigan, it was provided without controversy.[5] However, on 65 occasions that were documented prior to the filing of the complaint, Ameritech Michigan refused to provision access lines for BRE without imposition of special construction charges. These orders are contained in Exhibit C-21 and arranged in table format in Exhibit C-22. While the parties focus on these 65 orders, it is uncontested that Ameritech Michigan continued the practice of making special construction charge demands subsequent to the filing of the complaint.

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[4]Section 9.6.1 specifies that BRE may request unbundled loops from Ameritech Michigan by submitting a valid electronic transmittal service order on Ameritech Michigan's electronic ordering system. Within 48 hours of Ameritech Michigan's receipt of a service order, Ameritech Michigan is obligated to provide BRE with a firm order commitment date by which the loop covered by the service order will be installed.

[5]As of the date of hearing, BRE had between 26,000 and 27,000 access lines in Michigan.

The 65 orders fit into two broad categories. The first group involves the incidents wherein BRE agreed to pay the special construction charges subject to its right under the interconnection agreement to dispute them at a later time. This group involves a collective amount of $60,690.68 in special construction charges accrued as of the filing of the complaint.[6]

The second group involves the orders that were cancelled. It is BRE's position that, as of the date of the complaint, it had lost 15 customers having an aggregate of 85 access lines. BRE valued each of the access lines at $29,971, which collectively amounts to a $2.5 million loss.

The 65 orders[7] may be categorized as follows:

Incidents as listed on Exhibit C-22.	**General reasons for additional charges.**
4/67, 18, 19, 23, 30, 66	Remote switching deployed as loop concentrator.
2, 8, 9, 11, 13, 17, 24, 29, 31, 32, 38, 46, 51, 54, 63	Integrated Digital Loop Carrier with no spare physical loop.
1, 3, 7, 10, 36, 37, 39, 41, 45, 52, 53, 62, 65	Request for conditioned high capacity digital loop.
5, 6, 12, 14, 15, 16, 20, 21, 22, 25, 26, 27, 28, 33, 34, 35, 40, 42, 43, 44/58, 47, 48, 49, 50, 55, 56, 57, 59, 60, 61, 64	Lack of facilities (resolved by dead lug throws, wire out of limits, etc.)

[6]Apparently, BRE has refused to pay any of the special construction charges to Ameritech Michigan.

[7]Because one of BRE's witnesses duplicated 2 of the orders and because 1 of Ameritech Michigan's witnesses also omitted several orders in categorizing them, the references to the number of orders fluctuates between 64 to 67. The Commission is persuaded that the correct number of orders is 65.

III.

POSITIONS OF THE PARTIES

BRE

To BRE, the key issue involves a determination of the circumstances under which an unbundled loop is available under the terms of the interconnection agreement or Ameritech Michigan's tariffs.[8] BRE contends that a loop is available without imposition of a special construction charge whenever one of Ameritech Michigan's customers could obtain use of the loop without paying a special construction charge. According to BRE, a loop is unavailable only in a new, unassigned territory where facilities do not exist or when major facilities would have to be constructed.

Citing the Commission's October 2, 1998 order in Case No. U-11654, another complaint by BRE against Ameritech Michigan, BRE insists that the Commission previously addressed the issue of the availability of unbundled loops under the interconnection agreement and determined that a loop is unavailable "if it is located in an area not presently served by Ameritech Michigan, not when an area is served, but for some reason the order requires a field dispatch." Order, Case No. U-11654, p. 8.

BRE insists that in all 65 instances where Ameritech Michigan requested payment of special construction charges to provide unbundled loops, the loops must be considered to have been available at the time each order was received. According to BRE, the majority of the incidents involve situations where the tasks necessary to provide the loop involved a simple field dispatch for a dead lug throw, a splice, a wire out-of-limits, or other similar activity that Ameritech Michigan

[8]Section 9.4.2 of the interconnection agreement requires Ameritech Michigan to provision loops and ports "where such loops and ports are available." Under Ameritech Michigan's Tariff M.P.S.C. No. 20R, Part 19, Section 2, Sheet 1, loops under tariff may be obtained by carriers "where facilities are available."

routinely performs without charge to provide service to its own customers. As for the rest, BRE asserts that none of them are covered by Section 9.4.4 of the interconnection agreement, which indicates that Ameritech Michigan's provisioning of an unbundled loop through the demultiplexing of an integrated digitized loop may be accomplished only through use of the bona fide request (BFR) process described in the interconnection agreement. According to BRE, at no time did Ameritech Michigan notify BRE as required by Section 9.4.4 of the interconnection agreement that a spare physical loop was not available, which would have triggered BRE's option of submitting a BFR to Ameritech Michigan.

BRE also argues that digital loops are purchased out of Ameritech Michigan's tariff, which does not provide for special construction charges. Additionally, BRE maintains that allowance of the special construction charges in any of the 65 incidents will result in double recovery of costs by Ameritech Michigan because the rates approved by the Commission in the July 14, 1997 order in Case No. U-11280 already allow Ameritech Michigan to recover the costs of providing unbundled loops. In this regard, BRE contends that the total service long run incremental cost (TSLRIC) methodology embodied in the MTA specifically ignores the embedded network and focuses on long run, forward-looking costs. Accordingly, BRE argues that it would be inappropriate to allow Ameritech Michigan to recover any marginal costs associated with revision of its existing network to provision individual unbundled loops.

BRE maintains that Ameritech Michigan's practice of imposing special construction charges on BRE in situations where Ameritech Michigan does not charge its own retail customers for similar services constitutes unlawful discrimination under Sections 8.4 and 9.0 of the interconnection agreement, Section 355 of the MTA, MCL 484.2355, MSA 22.1469 (355), and Section 251(c)(3) of the FTA, 47 USC 251(c)(3). BRE requests that the Commission order Ameritech Michigan to cease

and desist from imposing special construction charges under similar circumstances in the future. It also requests the Commission to direct that Ameritech Michigan stop the practice of including language on its order forms that purports to require BRE to waive its rights to challenge special construction charges.

BRE also contends that under Section 601 of the MTA, MCL 484.2601; MSA 22.1469(601), it is entitled to damages for its economic losses. First, BRE requests that the Commission order Ameritech Michigan to cancel or to refund, if paid, the special construction charges imposed on the occasions where BRE approved the charges. Second, BRE states that in several situations the special construction charges were so high that they resulted in the cancellation of orders, which cost BRE a total of 15 customers representing 85 access lines. Asserting that the average value of one of its access lines was shown to be $29,971, BRE maintains that its economic loss totals $2,547,535 for the 85 lost access lines.[9] BRE also contends that it suffered economic losses in the form of attorney fees, consultant fees, and the costs of bringing this action before the Commission. Accordingly, BRE asks that the Commission award it a reasonable amount for these costs. Finally, BRE requests that the Commission impose fines under Section 601 of the MTA of not less than $1,000 nor more than $20,000 per day for each day that Ameritech Michigan is found to have violated the MTA.

Ameritech Michigan

Ameritech Michigan insists that the Commission should dismiss BRE's complaint in its entirety. According to Ameritech Michigan, its provisioning of unbundled loops to BRE is fully consistent

[9]In the alternative, BRE suggests that the record also supports the award of economic damages on the basis of several lower per access line valuations.

with the letter and the spirit of their interconnection agreement. Ameritech Michigan argues that the interconnection agreement contemplates that it should be allowed to recover special construction charges from BRE in the situations covered by the 65 orders at issue in this proceeding, which represent only 1.15% of BRE's total unbundled loop orders.

Ameritech Michigan contends that an unbundled loop is only available within the meaning of the interconnection agreement if all required loop components exist in a contiguous fashion and provide a complete transmission path that can be assigned at the time that the loop request is processed. In other words, it is Ameritech Michigan's position that a loop is available if the required components already exist in a fully connected fashion, Ameritech Michigan describes as a connected through (CT) facility, or if all of the required contiguous components exist and are terminated at the appropriate outside plant interfaces so that the components can be connected by the simple dispatch of an Ameritech Michigan technician, the cost of which is covered by the normal line connection charge.

However, Ameritech Michigan maintains that if the loop components exist, but are not contiguous, the loop is not available within the meaning of the interconnection agreement because engineering or construction is involved, which necessitates the imposition of special construction charges. According to Ameritech Michigan, if a CT facility is not available to assign as an unbundled loop, Ameritech Michigan will endeavor to assemble a loop using existing, available component parts that are contiguous. However, if one or more of the required loop components do not exist or cannot be provisioned by a simple dispatch, pursuant to Sections 1.4 and 9.4.2 of the interconnection agreement, a loop is not available. While Ameritech Michigan is willing to provision an unbundled loop by assembling noncontiguous components, it insists that the extra engineering and construction intervention necessary to do so requires BRE to pay special construction charges.

Ameritech Michigan maintains that six of the orders involve situations where BRE's request for an unbundled loop involved remote switching. In each of those incidents, Ameritech Michigan maintains that BRE requested an unbundled loop in an area served by Ameritech Michigan's Saginaw main wire center. According to Ameritech Michigan, it provides service to its retail customers in that area through a remote switch deployed as a loop concentrator. In each case, there was no spare, existing physical loop. Ameritech Michigan contends that this situation requires the placement of a non-integrated digital loop carrier system between the remote location and the host central office to haul the unbundled loops back to the Saginaw main central office. Ameritech Michigan states that it quoted a charge of approximately $28,000 to accomplish the required special construction in each instance because the orders were submitted separately. According to Ameritech Michigan, had BRE bundled these six orders, Ameritech Michigan would have quoted a charge of $28,000 for the placement of the non-integrated digital loop carrier system for the initial loop with any additional loops costing only $100 per loop.

Ameritech Michigan contends that 15 of the orders involve situations where the integrated digital loop carrier system had no spare physical loop available. According to Ameritech Michigan, Section 9.4.4 of the interconnection agreement specifically governs these situations. Ameritech Michigan states that if BRE requests an unbundled loop where the existing facility used to provide retail service to the end-user is served by an integrated digital loop carrier and there is no spare loop that could be used to provision the unbundled loop requested by BRE at no additional charge, Ameritech Michigan first attempts to move the end-user's service off of the integrated digital loop carrier system and to reconnect it to a non-integrated digital loop carrier system or to an existing copper facility that connects to the main distribution frame at the central office. If no such facilities are available, Ameritech Michigan will search for another existing Ameritech Michigan customer

that is served by a copper loop or a non-integrated digital loop carrier facility in the same area so that its customer can be transferred to the integrated digital loop carrier, which will free the copper loop for the non-integrated digital loop carrier facility for use by BRE's customers. Other potential solutions include using a Litespan integrated digital loop carrier system to provide the requested loop on a demultiplexed basis or to install a new, non-integrated digital loop carrier system to provision the unbundled loop in a demultiplexed fashion, which would cost approximately $18,000 for the first unbundled loop and substantially less for each subsequent loop ordered by BRE.

According to Ameritech Michigan, 13 of the orders involved loop conditioning or requests for conditioned digital loops. According to Ameritech Michigan, these types of loops are not covered by the interconnection agreement and are provisioned in the manner described in its unbundled network element tariff, Tariff M.P.S.C. No. 20R, Part 19, Section 2. Ameritech Michigan states that the tariff requires the requesting carrier to pay for any special conditioning required for digital loops.

Ameritech Michigan maintains that the remainder of the orders involve situations where special construction charges were appropriate due to a lack of facilities. Further, Ameritech Michigan believes that a number of these situations could have been avoided had BRE coordinated unbundled loop orders with corresponding disconnect orders for the residential customers involved, which would have permitted Ameritech Michigan to reuse the existing loops without the necessity of provisioning a new loop. Indeed, Ameritech Michigan argues that if BRE is not required to absorb special construction charges under these circumstances, BRE will have no incentive to coordinate conversion requests with disconnect orders.

Ameritech Michigan also maintains that it has not discriminated against BRE. According to Ameritech Michigan, it is not appropriate to equate the provisioning of unbundled loops to com-

peting local exchange carriers (CLECs) with Ameritech Michigan's service offerings to its own retail customers. Ameritech Michigan insists that the cost recovery for retail basic local exchange service is different from the cost recovery for provisioning of unbundled loops. Further, Ameritech Michigan argues that the Commission recognized in Case No. U-10647 that Ameritech Michigan must treat CLECs differently than its retail end-users, which demonstrates that a distinction exists between the provisioning of services to CLECs and retail customers.

Ameritech Michigan concedes that it is required to treat BRE and all other CLECs in the same manner that it treats itself. However, Ameritech Michigan argues that it is not required to treat CLECs in the same manner as it treats retail customers. Ameritech Michigan contends that it is only required to provide BRE with unbundled loops in the same manner that it provides such facilities to itself for the purpose of providing retail service to end-users. According to Ameritech Michigan, it is neither discriminatory nor unreasonable for Ameritech Michigan to recover special construction charges under Sections 9.4.2 and 9.4.4 of the interconnection agreement for only 1.15% of BRE's unbundled loop orders.

Ameritech Michigan also analogizes the situation to the essential facilities doctrine.[10] Ameritech Michigan contends that if a facility does not exist, it cannot be considered essential, and is therefore unavailable. Moreover, Ameritech Michigan insists that nothing in the FTA or the MTA requires an incumbent local exchange carrier (ILEC) to construct new facilities for a CLEC without compensation.

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[10]Under antitrust law, courts have recognized that when one dominant company controls a facility deemed essential for competition in a relevant market, the company with control over the facility may be obligated to provide its competitors with access to that facility, if feasible, on terms that are reasonable and nondiscriminatory. See, Olympia Equip Leasing Co v Western Union Telegraph Co, 797 F2d 370 (7CA 1986); Berkey Photo, Inc v Eastman Kodak Co, 603 F2d 263 (2CA 1979), cert don, 444 US 1093 (1980).

Ameritech Michigan also stresses that failure to adopt its interpretation of the interconnection agreement constitutes rejection of the cost causer doctrine.[11] Ameritech Michigan asserts that BRE should be required to bear the costs it causes in order to ensure efficient investment incentives and correct risk assessments regarding its decision to compete in the telecommunications marketplace as a facilities-based provider. Indeed, Ameritech Michigan contends that the cost causer doctrine is embodied in the FTA and the MTA, which was recognized by the Staff in Case No. U-10647.

Ameritech Michigan also contends that the special construction costs at issue are not already included in its current rates. According to Ameritech Michigan, its TSLRIC studies assume that the existing location of switches, facility routes, and the customer locations are fixed and that the technology that the costs are based upon is the least cost, most efficient technology available. Ameritech Michigan asserts that these costs reflect theoretical, broad, average, idealized perspectives and do not include special situations arising in real world situations. Accordingly, Ameritech Michigan maintains that when special situations arise, special construction charges are appropriate and necessary to capture extra costs from the cost causer.

With regard to the relief requested by BRE, Ameritech Michigan argues that the MTA does not grant the Commission authority to award monetary damages. In the alternative, Ameritech Michigan maintains that if BRE has the right to claim damages under Section 601 of the MTA, Ameritech Michigan is entitled to a jury trial as provided by Article I, Section 14 of the Michigan Constitution of 1963. In any event, Ameritech Michigan contends that BRE's claim for monetary damages is barred by the interconnection agreement. Citing Section 23.6 of the interconnection

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[11]The cost causer doctrine derives from the economic concept that society's resources should be allocated to their highest value, which occurs when prices are based on the cost caused by providing a particular service or element.

agreement, Ameritech Michigan maintains that indirect, special, consequential, incidental, and punitive damages, including anticipated profits or revenues and other economic losses, cannot be recovered by BRE. Ameritech Michigan also attacks the foundation for BRE's contention that it suffered economic losses. Ameritech Michigan asserts that BRE's witness on this issue lacked expertise to offer an opinion on the valuation of access lines. Ameritech Michigan further argues that the data relied on by BRE to support its damage claim lack probative value because there are substantial distinctions between BRE and the CLECs referenced in that data. Ameritech Michigan also criticizes BRE's calculation of its alleged damages due to its failure to account for unrealized costs or its obligation to mitigate damages. Finally, Ameritech Michigan contends that the Commission may not award attorney fees under Section 601 of the MTA.

The Staff

It is the Staff's position that Ameritech Michigan, as an ILEC, must provide nondiscriminatory service to CLECs of at least the same quality that it provides to itself. Citing Section 251(c)(3) of the FTA, 47 USC 251(c)(3), the Staff argues that Ameritech Michigan is prohibited from assessing special construction charges to BRE if, under similar circumstances, it does not assess such charges to its own customers. Moreover, the Staff insists that the Federal Communications Commission (FCC) has interpreted the FTA as requiring ILECs to provide efficient competitors with a meaningful opportunity to compete. According to the Staff, Ameritech Michigan's treatment of BRE does not constitute a meaningful opportunity to compete.

With regard to Ameritech Michigan's special construction tariff, which was submitted as Exhibit S-47, the Staff insists that special construction charges are only appropriate in very unique and highly unusual circumstances. It is the Staff's position that normal work that is required to

provide service to a customer should not be subject to these charges because the costs associated with such work are recovered in Ameritech Michigan's monthly recurring and nonrecurring charges for unbundled loops. Citing TSLRIC information submitted by Ameritech Michigan in Case No. U-11280, the Staff asserts that most, if not all, of the charges being imposed on BRE as special construction charges are routine costs already reflected in the costs and rates approved by the Commission. Further, in the event that some of the charges at issue are not reflected in the TSLRIC studies filed in Case No. U-11280, the Staff maintains that they nevertheless fail to meet the conditions set forth in Ameritech Michigan's special construction tariff.

The Staff also maintains that Ameritech Michigan's unbundled loop tariff and its interconnection agreement do not support the imposition of special construction charges. With respect to the unbundled loop tariff, the Staff states that special construction charges are appropriate for loop conditioning, but not for remote switching deployed as a loop concentrator, integrated digital loop carrier systems with no spare physical loop available, or lack of facilities. Further, citing Section 9.6.7 of the interconnection agreement, the Staff contends that only reasonable charges for labor may be assessed. Accordingly, the Staff concludes that there is no authority in Ameritech Michigan's loop tariff or the interconnection agreement to justify the special construction charges at issue in this proceeding.

The Staff recommends that the Commission direct Ameritech Michigan to cease and desist from imposing special construction charges under the conditions cited in the complaint, to stop requiring BRE to waive its rights to dispute special construction charges as a condition of provisioning loops,

to reimburse BRE for any special construction charges it may have paid, and to pay a fine of $170,000.[12]

IV.

PROPOSAL FOR DECISION

The ALJ first addressed the issue of the circumstances under which a loop is available within the meaning of the interconnection agreement and Ameritech Michigan's tariffs. Noting that available is not specifically defined in either the interconnection agreement or Ameritech Michigan's Tariff M.P.S.C. No. 20R, Part 19, Section 2, Sheet 1, the ALJ relied upon the Commission's discussion of the issue of availability in its October 2, 1998 order in Case No. U-11654, wherein the Commission stated:

> The Commission agrees with the ALJ and the Staff that a loop is unavailable, within the meaning of that term in the interconnection agreement, if it is located in an area not presently served by Ameritech Michigan, not when the area is served, but for some reason the order requires a field dispatch. Unless the order requires a bona fide request for new or different facilities, the time for completion should be governed by the performance standards in Section 27.

Order, Case No. U-11654, p. 8.

Although acknowledging that the discussion in Case No. U-11654 concerned contract performance standards for installing unbundled loops, the ALJ found that the Commission's determination was directly relevant to this proceeding, which addresses the cost of installing unbundled loops.

The ALJ next found that the conditions contained in Ameritech Michigan's special constructions tariff demonstrate that Ameritech Michigan is allowed to impose special construction charges

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[12]The Staff suggests that a fine of $2,000 for each of the 65 instances cited in the complaint would be appropriate. In addition, the Staff recommends a $20,000 fine be imposed for Ameritech Michigan's violation of Section 305 of the MTA as well as another $20,000 fine for its violation of Section 355.

in only very unique and highly unusual circumstances. In so doing, the ALJ agreed with BRE and the Staff that normal work required to provide service to a customer should not be subject to special construction charges. Further, he found that no unique or unusual circumstances were present in this proceeding to support the imposition of special construction charges. Indeed, the ALJ concluded that the construction charges at issue in this case are normal costs that properly belong in, and are reflected in, Ameritech Michigan's tariffed rates.

The ALJ also agreed with BRE and the Staff that Ameritech Michigan is obligated to treat CLECs as its treats itself. Accordingly, the ALJ determined that a loop is available as an unbundled loop, and not subject to special construction charges, if Ameritech Michigan can use the loop to connect one of its customers without imposing additional costs.

The ALJ was also persuaded that loops were available within the meaning of the interconnection agreement under all of the circumstances described in the 65 incidents shown on Exhibits C-21 and C-22 because the record established that Ameritech Michigan would have provided service to retail customers without imposing special construction charges.

The ALJ also agreed that the special construction charges assessed against BRE by Ameritech Michigan are also recovered in Ameritech Michigan's monthly recurring and nonrecurring charges for unbundled loops. In reaching this conclusion, the ALJ observed that Ameritech Michigan's TSLRIC studies approved in Case No. U-11280 determined the cost of providing unbundled loops on a long run, forward-looking basis. He also noted that the TSLRIC developed for unbundled network elements contemplated a wide range of circumstances and included all costs to prepare the investment for the provision of service to a customer. Furthermore, he concluded that the TSLRIC information demonstrated that most, if not all, of the special construction charges are routine types of costs already reflected in the costs and rates approved by the Commission. Further, the ALJ

expressed agreement with the Staff's position that if any of the components of the special construction costs are not already reflected in the TSLRIC studies filed in Case No. U-11280, then Ameritech Michigan's remedy is to revise the methodology used to identify its costs in its next biennial cost study.

Based on his findings, the ALJ concluded that Ameritech Michigan violated the interconnection agreement and the MTA by requiring BRE to pay special construction charges. The ALJ recommended that the Commission order Ameritech Michigan to cease and desist demanding special construction charges under similar circumstances in the future. Additionally, the ALJ found that Ameritech Michigan's requirement that BRE waive its right to dispute the special construction charges as a condition of provisioning loops violated the dispute resolution provision of the interconnection agreement. Accordingly, he also recommended that the Commission order Ameritech Michigan to cease and desist from requiring BRE to execute such waivers in the future.

With regard to the damages requested by BRE, the ALJ found that Section 601 of the MTA authorizes the Commission to fashion a monetary award that would make BRE whole for any economic losses that it may have suffered as a result of Ameritech Michigan's actions. While the ALJ concluded that the record did not support BRE's claim that it suffered an economic loss with respect to lost customers, he found that the Commission should order Ameritech Michigan to cancel any special construction charges that have not yet been paid and to order Ameritech Michigan to refund any charges already paid. In addition, the ALJ recommended that the Commission award BRE its attorney fees and costs for bringing this complaint. Finally, the ALJ recommended that the Commission impose a fine of $170,000 as proposed by the Staff.

V.

DISCUSSION

Availability of Loops

The key issue in this proceeding involves a determination of whether the loops requested in the 65 orders in dispute were available within the meaning of the interconnection agreement. Citing Section 9.4.2 of the interconnection agreement, Ameritech Michigan insists that the ALJ erred in concluding that the unbundled loops were available at the time that BRE's orders were processed. According to Ameritech Michigan, it is obligated under the interconnection agreement only to make available unbundled loops that exist, not loops that must be constructed in order to function. It is Ameritech Michigan's contention that, if allowed to stand, the PFD effectively eliminates the term available from the interconnection agreement with regard to the provisioning of unbundled loops. Ameritech Michigan argues that acceptance of the PFD's interpretation means that a loop will always be available without regard to (1) the cost of building new facilities, (2) whether the loop is for a new facility within the area, (3) whether there is a complete transmission path, (4) whether there are contiguous facilities, (5) whether the order involves a simple loop or a high speed digital loop that might require conditioning, or (6) whether service to the area had been provided through use of remote switching or an integrated digital loop carrier system.

Ameritech Michigan argues that the commonly understood meaning of available is that an item is present or ready for immediate use. In the context of the interconnection agreement, Ameritech Michigan maintains that for an unbundled loop to be considered available, the required facilities must exist and must be spare (not in use by another customer). Ameritech Michigan insists that a loop is available in only two scenarios. First, if the required component parts exist in a fully con-

nected fashion so as to provide a complete transmission path that can be assigned at the time the loop request is processed. Second, Ameritech Michigan considers a loop to be available if all the required contiguous components exist and are terminated at appropriate outside plant interfaces so that the components can be readily connected by a simple dispatch of an Ameritech Michigan technician. Ameritech Michigan insists that these two types of loop systems are routinely assigned on a nondiscriminatory basis without regard to the identity of the requesting party and without imposition of special construction charges.

Ameritech Michigan maintains that it was inappropriate for the ALJ to rely exclusively on the Commission's prior interpretation of availability in Case No. U-11654. Ameritech Michigan stresses that Case No. U-11654 involved calculation of performance intervals and had nothing to do with pricing of unbundled loops or the imposition of special construction charges. Moreover, Ameritech Michigan maintains that the Commission wrongly decided Case No. U-11654. Further, Ameritech Michigan maintains that the ALJ compounded the Commission's misinterpretation in Case No. U-11654 by incorrectly asserting that the same type of unbundled loops are at issue in this proceeding. Ameritech Michigan argues that it is inappropriate to extend the holding in Case No. U-11654 to this proceeding because the issues presented and the types of loops involved are completely different.

Ameritech Michigan also contends that the Commission implicitly observed in Case No. U-11654 that some of BRE's orders could involve unbundled loops that are not available. Stressing that the Commission expressly noted that no remote switching or integrated digital loop carrier orders were at issue in Case No. U-11654, Ameritech Michigan insists that it logically follows that a loop is not available under such circumstances and that Section 9.4.4 of the interconnection agreement should be understood as allowing for the recovery of additional costs associated

with providing such loops by other means. Finally, Ameritech Michigan maintains that the ALJ's decision to extend the holding in Case No. U-11654 to this case will lead to further disputes between the parties.

For these reasons, Ameritech Michigan requests that the Commission reject the ALJ's findings that (1) loops are always available in areas served by Ameritech Michigan, (2) the disputed assessment of special charges by Ameritech Michigan violates the MTA and the interconnection agreement, (3) Ameritech Michigan should be directed to cease and desist from demanding special construction charges under similar circumstances in the future, and (4) that the special construction charges should be refunded if paid or cancelled if unpaid.

In response, BRE insists that the ALJ correctly interpreted the provisions regarding the availability of loops in the interconnection agreement and Ameritech Michigan's tariffs. Further, BRE maintains that the ALJ's reliance on Case No. U-11654 is appropriate.

According to BRE, Ameritech Michigan has a ubiquitous network in place, and unless competitors can access that network in a nondiscriminatory manner, they will never achieve a sufficient foothold for competition to thrive in the local marketplace.

BRE disputes Ameritech Michigan's claim that the ALJ's interpretation of available is too broad. BRE argues that the ALJ's definition is not all-inclusive and does not cover new territories or newly constructed buildings. Moreover, BRE insists that under the circumstances at issue in this case, it is abundantly clear that Ameritech Michigan did have loops available that could have served BRE's customers. Indeed, BRE stresses that Ameritech Michigan actually provided service to several of the customers who cancelled their orders after Ameritech Michigan imposed the unlawful special construction charges.

BRE contends that Ameritech Michigan's restrictive definition of available is not supported by the interconnection agreement, the FTA, or the MTA. Rather, BRE insists that Ameritech Michigan has engaged in a semantical exercise to unilaterally rewrite the interconnection agreement in order to thwart competition. According to BRE, Ameritech Michigan's attack on the Commission's decision in Case No. U-11654 conveniently ignores the fact that Ameritech Michigan raised the same issues about availability in that case and that the same provision of the interconnection agreement, Section 9.4.2, was at issue. Accordingly, BRE maintains that the ALJ correctly decided that the interpretation of "available" in Case No. U-11654 controls the outcome of this proceeding.

BRE also maintains that none of the 65 instances cited in the complaint involves any of the criteria listed in Ameritech Michigan's special construction tariff that trigger imposition of special construction charges. Additionally, BRE maintains that digital loops, which are purchased out of Ameritech Michigan's tariffs, are priced significantly higher to allow Ameritech Michigan to recover the costs associated with providing digital service. For this reason, BRE insists that special construction charges are neither necessary nor appropriate in conjunction with the provisioning of digital loops.

The Staff agrees with BRE that Ameritech Michigan is contesting the same availability issue in this proceeding that it failed to prevail on in Case No. U-11654. According to the Staff, the Commission need not revisit the issue other than to reaffirm its previous decision as recommended by the ALJ. The Staff maintains that Ameritech Michigan violated its tariffs 65 times over a five-month period and engaged in discriminatory conduct in violation of the FTA and the MTA. Moreover, the Staff insists that Ameritech Michigan's various rationales for imposing additional charges are flawed. Arguing that Ameritech Michigan's TSLRIC studies approved in Case No. U-11280 reflect all of the costs of provisioning unbundled loops on a long run, forward looking basis, the Staff

insists that the utilization of remote switching deployed as a loop concentrator is a short run approach to costing certain installations. According to the Staff, allowing Ameritech Michigan to establish costs and rates on a long run, forward looking basis and also to collect special construction charges determined on a short run basis necessarily involves some overlap of costs and would likely result in a double recovery.

Likewise, the Staff maintains that the generous utilization factors in Ameritech Michigan's TSLRIC studies should provide for adequate spare facilities. Consequently, the Staff argues that Ameritech Michigan's reliance on the excuse that no spare facilities were available for the provisioning of unbundled loops served by integrated digital loop carrier systems is simply inconsistent with the TSLRIC methodology. Accordingly, the Staff maintains that spare facilities are adequately accounted for in Ameritech Michigan's TSLRIC studies and that there should be no additional costs associated with provisioning unbundled loops through use of integrated digital loop carrier systems.

The Staff also maintains that Ameritech Michigan's attempts to impose additional charges for loop conditioning were not appropriate. The Staff maintains that although Section 9.4.5 of the interconnection agreement contemplates the payment of additional charges in situations where BRE orders a loop of a distance that exceeds the transmission characteristics for that loop type, the Staff contends that BRE's orders do not involve this circumstance. Rather, the Staff insists that it would

be more accurate to characterize BRE's requests as involving loop conversion rather than loop conditioning.[13]

The Staff argues that Ameritech Michigan's attempt to charge BRE for special construction charges due to the lack of facilities is entirely bogus. According to the Staff, Ameritech Michigan's rates and charges for unbundled loops, which are based on its current TSLRIC studies, include all capital costs necessary for the provision of service, including raw materials, all costs associated with installation, and all other required activities.

The Commission is empowered by Section 204 of the MTA, MCL 484.2204; MSA 22.1469(204), to resolve disputes between telecommunications providers unable to agree on a matter related to a regulated telecommunications issue. In resolving the dispute between BRE and Ameritech Michigan over interpretation of the interconnection agreement, the Commission bears in mind that the objectives enumerated in Section 101 of the MTA, MCL 484.2101; MSA 22.1469(101), include the encouragement of competition and the entry of new providers. In so doing, the Commission finds that the ALJ's interpretation of the term "available" does not effectively eliminate Section 9.4.2 of the interconnection agreement.[14] Rather, the Commission finds that Ameritech Michigan's interpretation of the term is unduly restrictive and inconsistent with past Commission decisions.

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[13]According to the Staff, BRE's orders involved simple requests for unbundled digital loops and that the charges assessed by Ameritech Michigan are associated with the cost of converting an analog loop to a digital loop. The Staff insists that BRE should not be forced to pay the conversion costs because (1) such costs are recovered through the higher monthly rate for the digital loop, and (2) Ameritech Michigan is solely responsible for deciding whether BRE will be served through a new digital loop or whether the loop will be provisioned by converting an existing analog loop to a digital loop.

[14]Section 9.4.2 provides that "Ameritech shall only be required to make available Loops and Ports where such Loops and Ports are available."

Ameritech Michigan's definition of available was derived from a dictionary and was modified through addition of conditions associated with Ameritech Michigan's belief that BRE, as a cost causer, must be held responsible for any incremental costs associated with the conversion of Ameritech Michigan's actual network to serve BRE's customers. The Commission finds that Ameritech Michigan's position is flawed because its approach totally ignores the requirement in the MTA that Ameritech Michigan's costs are to be based on a TSLRIC methodology and are to reflect long run, forward-looking costs. In its September 8, 1994 order in Case No. U-10620, the Commission identified nine principles to be followed in preparing TSLRIC studies. Among other things, the Commission directed that the increment being studied should be the entire quantity of the service provided, not some small increase in demand (Principle No. 3), and that any function necessary to produce a service must have an associated cost (Principle No. 4).

The record and the pleadings in this proceeding are burdened with elaborate and conflicting assertions made by the parties concerning whether Ameritech Michigan's TSLRIC-based costs and rates already include none, some, or all of the costs that are covered by the additional activities that gave rise to Ameritech Michigan's imposition of special construction charges. The ALJ specifically found that most, if not all, of the special construction charges at issue in this proceeding relate to normal, routine types of costs that are already reflected in the costs and rates determined and approved by the Commission. The Commission agrees.

Cost Principles Nos. 3 and 4 from Case No. U-10620 indicate that long run, forward looking costs should incorporate normal, routine activities associated with the task of providing unbundled loops. Further, the Commission finds that it is unreasonable for Ameritech Michigan to suggest that a network constructed on the basis of long run, forward looking costs would not have sufficient spare capacity to permit the provisioning of unbundled loops as normal, routine work. In any event,

the Commission agrees with the ALJ that, to the extent that the costs associated with the work that Ameritech Michigan insists is necessary to connect BRE's unbundled loops are not reflected in its TSLRIC studies filed in Case No. U-11280, the remedy is for Ameritech Michigan to re-evaluate the methodology used in its next biennial filing.

The Commission finds that Ameritech Michigan's argument that the October 2, 1998 order in Case No. U-11654 should not control the outcome of this proceeding is not well taken. Although Case No. U-11654 involved a complaint by BRE against Ameritech Michigan regarding performance standards in the interconnection agreement, both Case No. U-11654 and the present proceeding involve interpretation of the term "available" in Section 9.4.2 of the interconnection agreement. It is ludicrous for Ameritech Michigan to suggest that the term should have two widely different meanings in the same section of the interconnection agreement. Accordingly, the Commission finds that the ALJ cannot be faulted for applying the Commission's determination in Case No. U-11654 to this case to resolve the issue of availability.

For these reasons, the Commission is persuaded that Ameritech Michigan's exceptions regarding the issue of availability should be rejected.

Special Construction Tariff

Ameritech Michigan's next three exceptions relate to the ALJ's findings regarding its special construction tariff and the nature of the work underlying the special construction charges.[15]

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[15]Ameritech Michigan maintains that there is some confusion in the record because its tariffs do not explicitly contain a special construction tariff, but rather have a construction charges tariff (Tariff M.P.S.C. No. 20R, Part 2, Section 5, Sheet 1) and a uniform extension tariff (Tariff M.P.S.C. No. 20R, Part 2, Section 5, Sheets 4-6). However, the Commission is not persuaded that any imprecision in the description of the tariffs regarding special construction charges has any bearing on the outcome of this proceeding.

Ameritech Michigan maintains that its uniform extension tariff does not apply to this situation and, to the extent that its construction charge tariff may be applicable, it was properly applied by Ameritech Michigan to recover unusual investment or expenses incurred in the provisioning of loops to BRE. According to Ameritech Michigan, this tariff provision may be applied to the 65 incidences of special construction because, in each case, Ameritech Michigan encountered problems that caused unusual investment or expense associated with the provisioning of the requested unbundled loops. Ameritech Michigan insists that this work cannot be considered normal or routine because it is not necessary to provide service to Ameritech Michigan's own customers.

In response, BRE and the Staff maintain that Ameritech Michigan's attempt to disavow application of its tariff involving special construction charges is entirely disingenuous because the record clearly demonstrates that when queried about its authority to impose such charges, Ameritech Michigan cited BRE to Tariff 20R, Part 2, Section 5, as shown on Exhibit C-1. Indeed, both BRE and the Staff chastised Ameritech Michigan for its inconsistency on this issue.

The Commission is not persuaded by Ameritech Michigan's arguments regarding its tariff provisions. Rather, the Commission finds that the ALJ correctly determined that additional charges should not be assessed by Ameritech Michigan for normal or routine work required to provision loops. The Commission agrees with the ALJ's determination that the record does not establish any unique or unusual circumstances to justify the imposition of special construction charges in this case. Accordingly, Ameritech Michigan's exceptions are rejected.

Discrimination

In its next exception, Ameritech Michigan maintains that it cannot be required to treat BRE in the same manner as it treats its own customers. Ameritech Michigan asserts that its retail customers

and CLECs are not similarly situated. According to Ameritech Michigan, its retail customers purchase basic local exchange service, which is functionally and physically different from the provisioning of unbundled loops to CLECs. Further, Ameritech Michigan maintains that the rates for basic local exchange service and unbundled loops have different components and that the opportunities for revenue generation are different. Additionally, citing Case No. U-10647, Ameritech Michigan maintains that the Commission previously recognized that CLECs should be treated differently than Ameritech Michigan's retail customers. Indeed, Ameritech Michigan suggests it would be unfair for BRE to be treated as a retail end-user for some purposes, but to enjoy the advantages of being a competing provider for other purposes, such as the acquisition of network elements at TSLRIC-based rates.

Ameritech Michigan also states that its provisioning of unbundled loops to BRE, including the assessment of special construction charges, is just, reasonable, and nondiscriminatory within the meaning of Section 251(c)(3) of the FTA, 47 USC 251(c)(3), because Ameritech Michigan is under no obligation to treat BRE in the same manner as it treats its own customers. Citing its use of an automated loop assignment system and the nondiscriminatory assignment of technicians, Ameritech Michigan insists that it treats all CLECs in the same manner as it treats itself, which is all that is required under the FTA. Ameritech Michigan also argues that the ALJ's finding that Ameritech Michigan must provide loops to BRE in the same manner that it provides loops to its retail customers renders Section 9.4.4 of the interconnection agreement completely superfluous. Ameritech Michigan argues that it is neither discriminatory nor unreasonable for it to seek recovery for loop conditioning, which is clearly allowed under the applicable tariff, or to recover for special construction when there is a lack of facilities necessary to provision a loop.

Moreover, Ameritech Michigan insists that BRE has been provided with a meaningful opportunity to compete. Citing BRE's growth of 22,000 access lines in its first 14 months of operation, Ameritech Michigan argues that imposition of just and reasonable special construction charges on only 1.15% of BRE's orders simply does not give rise to a claim for discrimination.

Finally, Ameritech Michigan argues that when it has no available facilities to serve a new customer, Ameritech Michigan and BRE are facing the same circumstances. Because Ameritech Michigan would have to build new facilities to add a new customer, it argues that BRE should be required to bear the same economic burdens and face the same economic risks. According to Ameritech Michigan, if it is forced to pay for the construction of a new loop for a BRE customer, it, not BRE, faces the risk of loss if the customer cancels its service. Indeed, Ameritech Michigan insists that adoption of the ALJ's findings would shift significant costs and risks that should be borne by BRE to Ameritech Michigan and result in a significant competitive advantage for BRE that was not intended by Section 251(c)(3) of the FTA.

In its response, BRE argues that it is not seeking the same status as one of Ameritech Michigan's retail customers. Rather, BRE argues that it merely wants to ensure that when Ameritech Michigan determines the extent to which it will assess special construction charges for making a loop available for sale, the fact that the loop will be sold to an Ameritech Michigan retail customer or to an interconnecting carrier should not determine whether special construction charges are imposed. BRE stresses that at least half of the orders under dispute involve a lack of facilities under circumstances where Ameritech Michigan routinely corrects the lack of facilities on behalf of its own customers without charge. According to BRE, such disparate treatment is clearly illegal.

The Commission finds that Ameritech Michigan's exception should be rejected. Ameritech Michigan's flawed understanding of its obligation to provide nondiscriminatory treatment of com-

peting providers is set forth in the direct testimony of Kelly Ann Fennell, its Director of Regulatory Policy, as follows:

> Q. Does "non-discriminatory" mean that [unbundled network elements] must be provisioned to [BRE] in the same manner that Ameritech Michigan provisions retail services to its end users?
>
> A. No. "Non-discriminatory" means that Ameritech Michigan must treat [BRE] in the same manner as it treats all CLECs.

4 Tr. 430.

Ameritech Michigan's view of nondiscrimination suggests that any type of treatment is appropriate so long as Ameritech Michigan applies such treatment equally to all CLECs. However, if Ms. Fennell's description of nondiscriminatory treatment were to be adopted, Ameritech Michigan would be free to treat all CLECs in an anticompetitive manner so long as it applies such treatment equally to all CLECs, irrespective of how it treats itself or its end-user customers. This is certainly not what was envisioned by the drafters of the FTA and MTA.

Section 305(1) of the MTA, MCL 484.2305(1); MSA 22.1469(305)(1), prohibits Ameritech Michigan from discriminating against other providers in the provision of basic local exchange service. Further, Section 355 of the MTA, MCL 484.2355; MSA 22.1469(355), explicitly requires Ameritech Michigan to allow other providers to purchase unbundled service offerings on a nondiscriminatory basis. Moreover, under Section 251(c)(2)(C) of the FTA, 47 USC 251(c)(2)(C), ILECs are required to provide interconnection to CLECs at least equal in quality to that which the ILEC provides to itself. In addition, Ameritech Michigan is obligated by Sections 251(c)(2)(B) and 251(c)(3) of the FTA, 47 USC 251(c)(2)(B) and 47 USC 251(c)(3), respectively, to provide interconnection and access to unbundled network elements on terms that are just, reasonable, and nondiscriminatory. Indeed, the FCC interpreted the provisions of the FTA in its August 19, 1996 order

in CC Docket No. 96-98 not only to require that interconnection and unbundled network elements be offered equally to all requesting carriers in the same manner that the ILEC provisions such elements to itself, but also to require that the provision of unbundled network elements be done in a manner that permits an efficient competitor to have a meaningful opportunity to compete. Finally, the Commission notes that numerous provisions of the interconnection agreement obligate Ameritech Michigan to deal with BRE in a nondiscriminatory manner.

In this proceeding, the event that precipitates a finding of discrimination is Ameritech Michigan's determination that under certain circumstances it can require BRE to pay special construction charges in connection with the provisioning of an unbundled loop when, under identical circumstances, it routinely foregoes the collection of such charges from its own customers to whom it is provisioning unbundled loops. Having rejected Ameritech Michigan's interpretation of the term "available" in the interconnection agreement, the Commission finds that Ameritech Michigan has no basis for imposing special construction costs on BRE when, under similar circumstances it foregoes recovery of these costs on its own behalf. Accordingly, Ameritech Michigan's exception is rejected.

Double Recovery

Ameritech Michigan also challenges the ALJ's determination that imposition of special construction charges constitutes a double recovery because the same types of activities that underlie these costs are already incorporated into Ameritech Michigan's rates. Ameritech Michigan's arguments in this regard were implicitly rejected in the Commission's discussion of the availability issue. Accordingly, further discussion of the merits of Ameritech Michigan's exception regarding double recovery serves no purpose.

Waiver

Ameritech Michigan contends that the waiver issue arose because BRE initiated the practice of authorizing special construction work and then refusing to pay for it. According to Ameritech Michigan, had BRE paid for the work it ordered, this issue would not have arisen.

In response, BRE maintains that Ameritech Michigan's interpretation of this dispute is flawed. According to BRE, the waiver language conflicts with the dispute resolution process contained in Section 29.19 of the interconnection agreement. Further, BRE insists that its refusal to waive its rights under Section 29.19 should not constitute an excuse for Ameritech Michigan to refuse to provision a loop.

The Commission agrees with the ALJ that Ameritech Michigan should be ordered to cease and desist from demanding that BRE waive its right to dispute the special construction charges as a condition of providing loops. The parties negotiated Section 29.19 of the interconnection agreement to provide for a dispute resolution process. It is improper for Ameritech Michigan to effectively amend Section 29.19 by imposing a waiver requirement as a condition for provisioning loops. Accordingly, Ameritech Michigan's exception should be rejected.

Attorney Fees

The ALJ recommended that the Commission order Ameritech Michigan to reimburse BRE for its reasonable attorney fees and costs. Ameritech Michigan excepts. In so doing, Ameritech Michigan references arguments that were previously considered and rejected by the Commission in a number of prior proceedings including the September 30, 1997 order in Case No. U-11229, the December 17, 1997 order in Case No. U-11412, the March 24, 1998 order in Case No. U-11507, the May 11, 1998 in Case No. U-11550, and the October 2, 1998 order in Case No. U-11654. In

this case, as in the cases cited above, the Commission finds that an award of costs and attorney fees is appropriate.

Fines

The ALJ recommended that the Commission fine Ameritech Michigan a total of $170,000.[16] In its exception, Ameritech Michigan maintains that the purpose of Section 601 is not to punish a wrongdoer, but to make an innocent party whole for actual harm sustained. Because the ALJ recommended that BRE not be awarded any amount for economic losses, Ameritech Michigan believes that imposition of a fine would be inappropriate. Additionally, Ameritech Michigan argues that there are other factors that mitigate against the imposition of a penalty. Citing the lack of a definition of "available" in the interconnection agreement, Ameritech Michigan maintains that the fine recommended in the PFD should be rejected.

The Commission disagrees with Ameritech Michigan regarding the purpose of Section 601 of the MTA. The Commission finds that the Legislature's intent to create a civil penalty for violation of the MTA is clear and unmistakable from the language used in Section 601(a) and (b). Further, the Commission finds that the amount of the fine recommended by the ALJ is appropriate in light of the violations proven in this proceeding.

Damages

BRE excepts to the ALJ's refusal to recommend an award of damages for the violations established by the evidence. According to BRE, Ameritech Michigan's illegal activities caused BRE to

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[16]The fine consists of $2,000 fines for each of the 65 incidents, a $20,000 fine for the violation of Section 305(1) of the MTA, and another $20,000 fine for the violation of Section 355(1) of the MTA.

lose 15 customers and 85 access lines. BRE contends that its original estimate of the value of the 85 lines is accurate and supports an award of $2.5 million. However, in the event that the Commission agrees with the ALJ that its supporting documentation lacks probative value, BRE insists that evidence of its actual sale price of $70 million contained in Exhibit R-17, when divided by BRE's 22,000 access lines, justifies imposition of monetary damages in the amount of $3,181.82 per access line for each of the 85 lines lost, or a total of $270,454.70.

In response, Ameritech Michigan maintains that BRE clearly failed to carry its burden of proving damages as required by Section 203 of the MTA. The Commission agrees.

The Commission finds that the record does not support BRE's assertion that the loss of 15 customers necessarily reflects the loss of 85 access lines. Rather, the Commission finds that, at most, BRE has established that the loss of 15 customers resulted in the loss of 16 access lines. Moreover, the Commission is persuaded that BRE's support for imposition of damages on a per line basis of $29,971 is simply not credible. Further, the Commission finds that even using the sale price to calculate a per line damage amount is too speculative because it relies on the assumption that 100% of the sales price resulted from the purchaser's desire to obtain BRE's access lines. The Commission finds that there is no evidence to support that assumption. Accordingly, the Commission is persuaded that BRE's exception should be rejected.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Ameritech Michigan violated the interconnection agreement and the MTA by imposing special construction charges against BRE as alleged in the complaint.

c. Ameritech Michigan violated the interconnection agreement by requiring BRE to waive its rights under the interconnection agreement in order to purchase unbundled loops.

d. Ameritech Michigan should be ordered to cease and desist from imposing special construction charges against BRE under the circumstances presented by the complaint.

e. Ameritech Michigan should be ordered to cease and desist from requiring BRE to waive its rights under the interconnection agreement in order to purchase unbundled loops.

f. Ameritech Michigan should be ordered to refund, if paid, or cancel, if not paid, the special construction charges imposed on BRE.

g. Ameritech Michigan should pay the reasonable costs and attorney fees incurred by BRE in connection with this case.

h. Ameritech Michigan should pay a fine of $170,000 to the State of Michigan in connection with this case.

i. BRE's request for money damages should be denied.

THEREFORE, IT IS ORDERED that:

A. Ameritech Michigan shall cease and desist from violating the interconnection agreement and the Michigan Telecommunication Act, 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., by imposing special construction charges against BRE Communications, L.L.C., d/b/a Phone Michigan, of the nature complained of in the complaint.

B. Ameritech Michigan shall cease and desist from the practice of requiring BRE Communications, L.L.C., d/b/a Phone Michigan, to execute a waiver of its rights in violation of Section 29.19 of the interconnection agreement in order to purchase unbundled loops.

C. Ameritech Michigan shall refund, if paid, or cancel, if not paid, the amounts imposed on BRE Communications, L.L.C., d/b/a Phone Michigan, in violation of this order.

D. Ameritech Michigan shall pay the reasonable costs, including attorney fees, incurred by BRE Communications, L.L.C., d/b/a Phone Michigan, in connection with this case.

E. Ameritech Michigan shall pay the State of Michigan a fine in the amount of $170,000 as provided by this order.

F. The request for money damages made by BRE Communications, L.L.C., d/b/a Phone Michigan, is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

By its action of February 9, 1999.

/s/ Dorothy Wideman
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

Chairman

_____

Commissioner

By its action of February 9, 1999.

_____

Its Executive Secretary

In the matter of the complaint of **BRE COMMUNICATIONS, L.L.C.**, d/b/a **PHONE MICHIGAN**, against **AMERITECH MICHIGAN** for violations of the Michigan Telecommunications Act.	))))))	Case No. U-11735

Suggested Minute:

"Adopt and issue order dated February 9, 1999 finding that Ameritech Michigan violated its interconnection agreement with BRE Communications, L.L.C., d/b/a Phone Michigan, and the Michigan Telecommunications Act, ordering Ameritech Michigan to cease and desist from further violations, and directing Ameritech Michigan to pay fines, costs, and attorney fees, as set forth in the order."

EXHIBIT H

TO COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM IV, INC. AGAINST UNITED TELEPHONE SOUTHEAST, INC.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	**99-0593**
Illinois Bell Telephone Company	:	
	:	
Investigation of construction charges	:	

ORDER

DATED: August 15, 2000

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	**99-0593**
Illinois Bell Telephone Company	:	
	:	
Investigation of construction charges	:	

ORDER

By the Commission:

I. PROCEDURAL HISTORY

On November 3, 1999, the Illinois Commerce Commission ("Commission"), on its own motion, initiated an investigation into Illinois Bell Telephone Company's ("Ameritech") application of its tariff governing special construction charges, pursuant to Section 9-250 of the Public Utilities Act ("Act"), 220 ILCS 5/1-101 et seq. The Commission opened the investigation in light of pleadings submitted in Docket No. 99-0525, which concerned a complaint filed on October 4, 1999 under Sections 13-514 and 13-515 of the Act against Ameritech by McLeodUSA Telecommunications Services, Inc. ("McLeod") and Ovation Communications, Inc. d/b/a McLeodUSA ("Ovation"). The allegations contained in the complaint in Docket No. 99-0525 and Ameritech's response raised the question of whether Ameritech is applying special construction charges in a discriminatory or preferential manner with regard to its retail customers and competitive local exchange carriers ("CLEC") purchasing unbundled network elements ("UNE").

Pursuant to due notice, status hearings were held in this matter before a duly authorized Hearing Examiner of the Commission at its offices in Springfield, Illinois on November 24, 1999, January 6, and January 25, 2000. Active parties submitted prepared direct testimony on February 17, rebuttal testimony on March 8, and surrebuttal testimony on March 22, 2000. Evidentiary hearings were held on April 3 and 4, 2000. The following entities filed petitions to intervene: MCI WorldCom, Inc. ("MCI WorldCom"), AT&T Communications of Illinois, Inc., McLeod, NextLink Illinois, Inc. ("NextLink"), Sprint Communications Company d/b/a Sprint Communications L.P., Allegiance Telecom of Illinois, Inc. ("Allegiance"), CoreComm Illinois, Inc., US Xchange of Illinois, L.L.C., Rhythms Links Inc. ("Rhythms"), Ovation, Covad Communications Company ("Covad"), NorthPoint Communications ("NorthPoint"), MGC Communications Inc., d.b.a Mpower Communications Inc., @Link Networks, Inc., d/b/a Dakota Services Ltd., Vectris Telecom, Inc., DSLnet Communications, LLC, and the Attorney General on

behalf of the People of the State of Illinois. All of the petitions to intervene were granted. Commission Staff ("Staff") also participated in this proceeding.

Several parties offered testimony at the evidentiary hearing: Michael Suthers and Richard Florence testified on behalf of Ameritech; Christopher Graves and Patrick Phipps offered testimony on behalf of Staff; Michael Starkey testified on behalf of McLeod, Ovation, MCI WorldCom, and Allegiance; Scott Jennings testified on behalf of McLeod and Ovation; Valerie Evans offered testimony on behalf of Covad; Terry Murray and Joseph Riolo testified on behalf of Covad and Rhythms; and Ann Lopez offered testimony on behalf of Rhythms.

The record was marked "Heard and Taken" at the end of the April 4 hearing. Ameritech and Staff each filed an Initial Brief and Reply Brief. McLeod, Ovation, MCI WorldCom, and Allegiance also filed a joint Initial Brief and Reply Brief. Covad and Rhythms filed a joint Initial Brief and Reply Brief as well. The Hearing Examiner's Proposed Order was served on the parties. Ameritech filed a Brief on Exceptions. Covad and Rythms filed a joint Brief on Exceptions. Ameritech and Staff each filed a Brief in Reply to Exceptions. McLeod, Ovation, MCI WorldCom, and Allegience filed a joint Brief in Reply to Exceptions. Covad and Rhythms filed a joint Brief in Reply to Exceptions as well. The Briefs on Exceptions and Briefs in Reply to Exceptions have been considered in the preparation of this Order.

II. BACKGROUND

Section 251(c)(3) of the federal Telecommunication Act of 1996 ("TA96"), 47 U.S.C. 151 et seq., requires incumbent local exchange carriers ("ILEC"), such as Ameritech, to provide to any requesting CLEC, for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The Federal Communications Commission ("FCC") has identified a minimum set of network elements that must be provided on an unbundled basis. The list of such elements, or UNEs, includes: local loops, local and tandem switches, interoffice transmission facilities, network interface devices ("NID"), signaling and call related database facilities, operations support systems functions, and operator and directory assistance facilities. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, FCC 96-325 (August 1, 1997), ¶27. ("First Report and Order") Paragraph 27 of the First Report and Order also indicates that states may require ILECs to provide additional UNEs. Subsequent to the First Report and Order, the FCC added dark fiber, loop conditioning, and subloops to the list of UNEs. In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, FCC 99-238 (November 5, 1999), ¶¶167, 173, and 205. ("UNE Remand Order")

Purchasing UNEs from ILECs is one means by which CLECs can compete with ILECs. Another means of competition is resale by CLECs of services purchased from ILECs. Many CLECs prefer purchasing UNEs over reselling services because they can make more use out of, and hence make more money from, a purchased UNE. An unbundled loop may be used to demonstrate this idea. An unbundled loop consists of three basic components. The first component is feeder cable, which is connected at one end to either the main distribution frame ("MDF") or the digital switch, depending on the type of technology in place, in a central office and at the other end to the serving area interface ("SAI"). The SAI is the cross-connect point, often a cross-connect box, between the first component, the feeder portion, and second component, the distribution portion, of the unbundled loop. Distribution cable typically runs from a SAI to a pedestal or distribution terminal near the end user's premises. From the pedestal, the third basic component, drop cable, extends to the NID outside of the end user's premises. The NID marks the end of the unbundled loop and the beginning of the end user's inside wiring. A CLEC purchasing an unbundled loop from an ILEC can decide for itself what types of services it will offer and deliver over that loop. On the other hand, a CLEC reselling a service purchased from an ILEC is limited to reselling only the purchased service.

At the heart of this matter are charges assessed by Ameritech on CLECs when they request particular UNEs and Ameritech determines that the requested UNEs can not be made available without additional construction activities. Such charges are known as special construction charges. Staff and those CLECs that are active in this proceeding contend that Ameritech, to at least some extent, is (1) already recovering its costs associated with making UNEs available through the recurring rates it charges for UNEs and (2) assessing special construction charges on CLECs but not retail customers in similar circumstances, resulting in end user customers being deterred from taking service from a CLEC. Ameritech maintains that its special construction policies are lawful and reasonable.

III. AMERITECH'S SPECIAL CONSTRUCTION TARIFF AND POLICIES

To evaluate the propriety of Ameritech's special construction charges and the manner in which they are assessed on retail customers and CLECs, it necessary to understand Ameritech's special construction tariff and policies. Since this docket was initiated, Ameritech's special construction charge policy concerning CLECs has changed considerably. The following discussion describes Ameritech's tariff and policies as they relate to Ameritech's retail customers and CLECs, and identifies the changes to Ameritech's policy regarding CLECs as well.

A. Special Construction and Retail Customers

Ameritech asserts that special construction charges for its retail customers are governed by Ill. C. C. No. 20, Part 2, Section 5, Original Sheets Nos. 1 through 6 of its tariff. Ameritech refers to this tariff as its "retail special construction tariff." These

sheets became effective on December 8, 1995 and apply to the provision of noncompetitive telecommunication services. Paragraph 1 on Original Sheet No. 1 states:

> All rates and charges quoted elsewhere in this tariff provide for the furnishing of service when (1) suitable facilities are available, and (2) the revenue to be derived from the service is sufficient to warrant [Ameritech] assuming the usual cost of providing the necessary facilities. If these conditions are not met, the provisions of this section apply in addition to those quoted elsewhere in this tariff.
>
> Special construction charges are applicable for work performed, at the request of the customer, on the central office side of the NETPOP, the location of which is described in Section 2 of this Part.

Paragraph 2 beginning on Original Sheet No. 1 then proceeds to list nine conditions under which special construction charges are applicable. The list reads as follows:

2. SCOPE

2.1 Special Construction Charges as specified are applicable for each of the following conditions:

A. When, at the request of the customer, the Company constructs facilities to provide service where there is no other requirement for the facilities so constructed, the customer shall pay the cost of such construction except as outlined in 5.1 following.

B. When, at the request of the customer, the Company constructs facilities of a type other than that which the Company would otherwise construct in order to provide service, the customer shall pay the excess construction cost over that which the Company would have ordinarily incurred.

C. When, at the request of the customer, construction by the Company involves a routing for facilities other than that which the Company would normally use in order to provide service, the customer shall pay the excess construction cost over that which the Company would have ordinarily incurred.

D. When, at the request of the customer, the Company constructs temporary facilities to provide service for a period during which permanent facilities are under construction, the

customer shall pay the cost of constructing the temporary facilities.

E. When, at the request of the customer, the Company constructs a greater quantity of facilities than that which the Company would otherwise construct in order to fulfill the customer's initial requirements for service, the customer shall pay the excess construction cost over that which the Company would have ordinarily incurred.

F. When, at the request of the customer, the Company expedites construction of facilities at a greater expense than would otherwise be incurred, the customer shall pay the excess construction cost over that which the Company would have ordinarily incurred.

G. When, at the request of the customer, a rearrangement, move or replacement of existing facilities is made, the Customer shall pay the charges outlined in 5.3 following.

H. When, at the request of the customer, a service is required where the revenue to be derived is not sufficient to warrant the Company assuming the unusual cost of providing the necessary service, the customer may be required to pay all or a portion of such cost.

I. When, at the request of the customer, service is required at locations that may present hazards to personnel or communications equipment, the customer shall pay the full cost of providing any protection equipment required to minimize such hazard.

Ameritech's "retail special construction tariff" does not define the term "available," nor does it contain any language restricting applicability to retail customers.

B. Special Construction and CLECs

1. Ameritech's tariff provisions

a. Ameritech's "UNE special construction tariff"

Ill. C. C. No. 20, Part 19, which is the part of Ameritech's tariff that addresses UNEs, references special construction charges in the context of providing UNEs. Specifically, Section 1, Original Sheet No. 4.4 contains language stating:

> [Ameritech] shall be required to make available Network Elements only where such Network Elements, including facilities and software necessary to provide such Network Elements, are available. If [Ameritech] makes available Network Elements that require special construction, the [CLEC] shall pay to [Ameritech] any applicable special construction charges.

This language, according to Ameritech, preempts its aforementioned "retail special construction tariff." Ameritech relies on the following sentence from Ill. C. C. No. 20, Part 19, Section 1, Original Sheet No. 1 as the basis for this assertion: "General Regulations as found in Part 2 of this tariff apply to this Part unless otherwise specified in this Part." This "UNE special construction tariff" does not define the term "available."

b. Unbundled loops in the presence of IDLCs and RSUs

Also found on Ill. C. C. No. 20, Part 19, Section 1, Original Sheet No. 4.4 is tariff language regarding the provisioning of unbundled loops in areas served by integrated digital loop carriers ("IDLC") and remote switching units ("RSU"). The relevant portion of Ameritech's tariff reads as:

> [Ameritech] shall provide the [CLEC] access to its unbundled Loops at each of [Ameritech's] Wire Centers. In addition, if the [CLEC] requests one or more Loops serviced by Integrated Digital Loop Carrier or Remote Switching technology deployed as a Loop concentrator, [sic] shall, where available, move the requested Loop(s) to a spare, existing physical Loop at no charge to the [CLEC]. If, however, no spare physical Loop is available, [Ameritech] shall within forty-eight (48) hours of the [CLEC's] request notify the [CLEC] of the lack of available facilities. The [CLEC] may then at its discretion make a Bona Fide Request for [Ameritech] to provide the unbundled Loop through the demultiplexing of the integrated digitized Loop(s). Notwithstanding anything to the contrary in this tariff, the provisioning intervals set forth under Network Element Performance Benchmarks shall not apply to unbundled Loops provided under this paragraph.

The provisioning of unbundled loops in the presence of IDLCs and RSUs is a significant issue in this docket, which will become apparent below where IDLCs and RSUs are discussed in the context of Ameritech's special construction policies. The technical aspects of IDLCs and RSUs will also be discussed below. From the testimony, however, it appears that Ameritech may not have always adhered to the quoted tariff language to the benefit of CLECs. Ameritech also indicates that substantially similar language appears in each of its interconnection agreements with CLECs.

2. Ameritech's Policy as of November 3, 1999

When this docket was initiated, the availability of unbundled loops was a significant concern. At that time, Ameritech considered a loop to be "available" only if the entire transmission path from the customer to the wire center was in place at the time of the order. If an unbundled loop was not "available" to fill a CLEC's order, according to Covad witness Evans, Ameritech would assess special construction charges if it determined that one or more of seven types of activity needed to be performed to make that UNE available: (1) disaggregating IDLCs or RSUs, which required a Bona Fide Request ("BFR") to provide an unbundled loop, (2) purchasing and installing plug-in equipment, (3) "break connect through," (4) repairing a defective pair, (5) unloading a pair, (6) placing and splicing cable, or (7) other types of work that do not fit in one of the other categories. The source of Ms. Evans list is an e-mail dated November 8, 1999 from Ameritech responding to Covad's request for a list of special construction categories. That e-mail has been marked as VRE 1.2 and attached to Covad Ex. 1.0. If making an unbundled loop available required the transfer of existing "connected through" loops from Ameritech to a CLEC or a simple dispatch to connect existing loops that were contiguous but unconnected, Ameritech did not assess special construction charges.[1] Ameritech required the payment of any special construction charges in toto before any construction would begin.[2]

In those situations where a BFR was required by Ameritech, Ms. Evans testifies that Ameritech's written policies require Covad to submit a BFR form to Ameritech along with a nonrefundable $2,000 deposit to cover Ameritech's development of a price quote for the facilities. Ameritech witness Suthers adds that as an option to paying the $2,000 deposit, CLECs may submit a BFR without any deposit and agree to pay whatever costs Ameritech incurs to prepare the preliminary analysis. Regardless of the option selected, within 30 days of its receipt of a complete BFR form, Ameritech provides Covad with a preliminary assessment of the request, which includes: (1) whether Ameritech is required to fulfill the request under applicable regulatory requirements; (2) whether the request is technically feasible; and (3) whether the request is currently available from Ameritech in the form of another product or service offering. Thus, Ms. Evans reports that submission of a BFR does not guarantee that Ameritech will even provide the UNE. In the event that Ameritech intends to provide the UNE, Ms. Evans indicates that Ameritech then may take an additional 90 calendar days to develop a price quote for the requested product or service. In the end, she states that, under the BFR process, it may take approximately four months to even receive a price quote from Ameritech for the desired product or service. Additional time will be necessary to actually provide the requested UNE. If after five days from

[1] Descriptions of some of the referenced technical activities will be provided below.

[2] Since the focus of this proceeding has been Ameritech's present special construction policy, the record is sketchy regarding Ameritech's special construction policy as it existed when this docket was initiated. In any event, however, the discussion of the policy as of November 3, 1999 is merely provided to demonstrate on a basic level how Ameritech's special construction policy has changed since this investigation began.

providing a quote for special construction work the CLEC does not agree to pay the special construction charges, Mr. Suthers testifies that Ameritech will cancel the loop order. Based on the testimony of the parties, however, it would appear that Ameritech did not always follow its official BFR process and on at least some occasions waived the $2,000 nonrefundable deposit and provided special construction cost estimates in far less time than four months. Under what circumstances and how frequently Ameritech deviated from its written BFR process is unclear.

3. Ameritech's policy as of January 1, 2000

Effective January 1, 2000, approximately two months after this investigation began, Ameritech revised its special construction policy applicable to CLECs on its TCNet. Ameritech witness Suthers testifies that the revisions are the result of Ameritech's new interpretation of its "UNE special construction tariff" in light of SBC Communications, Inc.'s ("SBC") policies concerning loop availability and construction and the FCC's UNE Remand Order.

Mr. Suthers describes TCNet as a password-accessible web site created and maintained by Ameritech for the purpose of communicating general Ameritech policies on a variety of issues to CLECs. He states that all CLECs that have signed a non-disclosure agreement with Ameritech, the FCC, and the regulatory agencies in the five Ameritech region states have access to TCNet. CLECs logging onto TCNet are shown the date of the last update and can obtain a list of items changed by that update, according to Mr. Suthers. In addition, he indicates that CLECs that provide Ameritech will an e-mail address receive an e-mail notifying them that a change has been made on TCNet. Mr. Suthers contends that policy statements on TCNet deal with administrative matters and implementation issues at a level of detail beyond what would be appropriate or practical in an interconnection agreement. In the event of a conflict between an interconnection agreement and TCNet, Mr. Suthers states that the agreement would control. He argues that TCNet needs to remain free of Commission oversight because Ameritech is constantly developing and revising its policy positions on the implementation and interpretation of issues arising in interconnection agreements.

Among the January 1, 2000 revisions to Ameritech's special construction policy is a new definition of "available." As of January 1, Ameritech witness Suthers indicates that a loop, or other UNE, is "available" if all of its major components are physically present. Such a UNE is "available" even if modifications are necessary to provide the UNE or make it compatible with the CLEC's requirements, such as conditioning. TCNet also relates that Ameritech may agree to provide UNEs that are not "available" through a BFR, but is not required to do so. Ameritech's official written BFR process did not change on January 1, although it appears that Ameritech began to adhere more closely to its official BFR process.

TCNet divides available loops into three different categories: (1) Loop Available - No Modifications, (2) Loop Available - Modifications to be Included in Loop Charges, and (3) Loop Available - Modifications Provided at Additional Charges. Under the first category, available loops are provided without modification since all major components of the loop are both physically present and contiguous.

Under the second category, TCNet indicated that six specific modifications would automatically be performed where necessary to provision a loop and a flat-rate interim charge would be assessed on the CLEC. In Illinois, the interim charge would be $224.07 per modification. Ameritech plans for the costs associated with these modification-related activities to be reflected in the applicable total element long-run incremental cost ("TELRIC") studies as filed in future state cost proceedings and recovered through UNE nonrecurring rates. The six activities may be characterized as "complex work" and include: (1) line station transfers, (2) clearing (repairing) a defective pair, (3) installing plug-in cards, (4) wire out of limits, (5) break and connect through, and (6) installing pair gain devices.[3] What distinguishes complex work from a simple dispatch, according to Mr. Florence, is the amount of labor involved. While there is no definitive cut-off in terms of hours involved, Mr. Florence testifies that Ameritech's cost studies reveal that complex work requires more time to complete than a simple dispatch. Since, according to Ameritech, the costs associated with complex work are not included in the monthly rates that CLECs pay for unbundled loops, Ameritech decided to recover those costs through special construction charges.

Mr. Suthers and Staff witness Phipps both provide descriptions of the six types of complex work activities. Since the descriptions offered by the latter are clearer than those offered by the former, Mr. Phipps' descriptions have been relied upon. He begins by stating that a line station transfer involves converting an Ameritech end user from non-integrated facilities to integrated facilities for the purpose of freeing up a copper loop for a CLEC's use. He states that Ameritech would attempt a line station transfer when a CLEC requests a loop in an integrated environment where no unused copper loops are available for the CLEC's use. Mr. Phipps testifies that clearing a defective pair occurs when a problem with a loop renders it unusable. In such an instance, he reports that an Ameritech technician would identify the problem with the loop and fix it. Ameritech would install plug-in cards in a remote terminal ("RT") and central office terminal ("COT"), according to Mr. Phipps, to unbundle a loop in an IDLC environment. If, however, Ameritech finds that there are not enough plug-in cards in the COT and RT for a CLEC to use, Mr. Phipps testifies that Ameritech often assesses additional charges to recover the cost of the plug-in cards as well as installing them. COT and RT technology will be discussed in greater detail in the context of IDLCs and RSUs below. Mr. Phipps indicates that Ameritech will perform the fourth type of complex work, wire out of limits, when a CLEC requests a loop at a terminal where no spare copper facilities exist. Performing a wire out of limits, he states, entails connecting the

[3] TCNet actually identifies seven activities. For purposes of this proceeding, however, the sixth and seventh (PG Plus and Universal Digital Carrier, respectively) have been combined and described as installing pair gain devices.

requested loop to an adjacent terminal with spare facilities. Mr. Phipps adds that wire out of limits is very similar to item C of Ameritech's tariff Ill. C. C. No. 20, Part 2, Section 5, Original Sheet No. 1. Breaking and connect through, as Mr. Phipps understands it, involves breaking a connected circuit at a terminal where no service is being provided at that customer location, and connecting that circuit to a different customer location. The final type of complex work activity consists of installing pair gain devices. When no spare copper loops are available, Mr. Phipps asserts that Ameritech can use a pair gain device to expand the capacity of single copper loop by six times by deriving six pairs from a single pair.

Under the third category of available loops, such loops will be provided in conjunction with loop conditioning and modifications to IDLCs and RSUs. TCNet relates that loop conditioning and such modifications will be provided at an additional TELRIC based charge, which will be developed and implemented on a state-by-state basis. Loop conditioning and IDLCs and RSUs will be addressed separately.

a. Loop Conditioning

The term "conditioning" refers to the addition or removal of equipment on a loop to improve its transmission characteristics for a particular purpose. In the context of this docket, conditioning refers to the removal of equipment on a voice grade loop to enhance the loop's ability to carry data transmissions. Many CLECs seek to provide digital subscriber line ("DSL") service and/or integrated services digital network ("ISDN") service over unbundled loops acquired from Ameritech. Many types of DSL service exist; when referred to generally, however, it is known as "xDSL." For the purposes of this proceeding, xDSL and ISDN services are substantially similar; the only difference being transmission speed. In order to provide xDSL or ISDN services, load coils, range extenders, bridged taps, low pass filters, and repeaters must be removed from a voice grade loop. This is true regardless of whether it is Ameritech or a CLEC using the loop to provide xDSL or ISDN services. TCNet indicates that an additional TELRIC based charge will be assessed for the removal of such equipment. Ameritech argues that an additional charge is justified because the cost of loop conditioning is not included in the monthly rates that CLECs pay for unbundled loops and because the FCC requires Ameritech to recover its costs. Accordingly, Ameritech asserts that it should be allowed to recover any costs associated with loop conditioning as special construction charges until TELRIC based rates are approved by the Commission.[4]

b. IDLCs and RSUs

To understand the technology involved with the disaggregation of RSUs and IDLCs, it is helpful to be familiar with digital loop carrier ("DLC") technology generally. With advances in digital technology, it became possible to improve efficiency and service with DLC systems. A DLC system serves multiple customers with fewer copper

[4] The development of TELRIC based rates for loop conditioning will be addressed further below in the context of FCC's merger order approving the reorganization of SBC and Ameritech's parent company.

feeder facilities. For example, it is possible to electronically aggregate, or multiplex, the analog loops serving 24 remotely located customers (i.e., 24 distribution pairs) onto a single high capacity digital facility for transmission back to the central office. The DLC consists of a RT located near the cross-connect box, which multiplexes the distribution pairs, and a COT, which demultiplexes the digital signal back into individual analog channels which are connected to the MDF and then connected to the central office switch. The switch provides the link to the rest of the network. The RT and COT are connected by high-capacity digital circuits. For loops purchased by a CLEC, after being individually demultiplexed at the COT and sent on to the MDF, such unbundled loops are then routed to the CLEC's collocated switch rather than to Ameritech's central office switch. This type of DLC is referred to as non-integrated or universal DLC ("UDLC").

IDLC facilities differ from UDLC facilities in that no demultiplexing occurs at the central office. Instead, analog loop signals are converted to digital signals and integrated at the RT. The integrated loops then lead into Ameritech's digital central office switch, eliminating the need to convert the signal from digital to analog and bypassing the MDF. In some situations, however, where a LiteSpan DLC is employed, loops can still be unbundled from IDLCs. With LiteSpan DLC, a RT sends digital signals to a LiteSpan DLC COT equipped with the appropriate plug-in cards in a central office. There, the plug-in cards route the demultiplexed unbundled individual loops to the MDF, which then sends the signal on to the collocated switch of the CLEC paying for the unbundled loop. Those loops still utilized by Ameritech are routed from the LiteSpan DLC COT to Ameritech's digital switch. Without the appropriate plug-in cards, LiteSpan DLC facilities can not be used to unbundle a loop. When LiteSpan DLC facilities are not present, Ameritech maintains that such loops can not be unbundled without additional special construction and the associated charges since the integrated loops connect directly to its switch.

RSUs present the same issues as IDLCs. Ameritech describes RSUs as "mini-switches." They function like loop integrators but also provide dial tone to the end users served by the RSU, thus permitting some localized calling even in the event of a central office malfunction. RSUs have limited stand-alone capability, since most of the intelligence resides at the central office host switch. RSUs are connected to the host switch by fiber optic facilities and associated circuit equipment commonly called host-remote umbilicals. Ameritech witness Florence states that the umbilical is used to carry control signals between the host and remote switch and to connect calls to any location not served by that RSU. According to Mr. Florence, the engineering of the host-remote umbilical does not allow it to be unbundled. Therefore, whenever a CLEC requests that a loop served by an RSU be unbundled, Ameritech asserts that special construction must be performed and charges assessed.

The special construction that Ameritech's TCNet maintains must be performed to unbundle a loop in the presence of IDLCs and RSUs consists of installing new COTs or RTs or the construction of a parallel facility. Such activities will be performed at

additional charges, according to TCNet. As an alternative to constructing new COTs, RTs, or parallel facilities, TCNet states that Ameritech will offer unbundled sub-loops consistent with currently effective FCC rules. Paragraph 206 of the UNE Remand Order defines subloops as portions of a loop that can be accessed at terminals in the ILEC's outside plant. TCNet further indicates that unbundled loops served via IDLC or RSU will be unbundled at no extra charge "where such loops can be provisioned though a Line and Station Transfer (LST) or the addition or replacement of [plug-in cards] in an existing COT/RT will be provided pursuant to Section 5.4.1,..." (McLeod Ex. 1.1)

Because, according to Ameritech, the costs associated with installing new COTs or RTs or the construction of a parallel facility are not included in the monthly TELRIC rates that CLECs pay for unbundled loops, and because Ameritech understands the FCC to require it to recover its costs, Ameritech's witnesses argue that it is proper to recover the alleged costs through special construction charges. Notably, neither Mr. Suthers nor Mr. Florence discuss any efforts to develop TELRIC based charges for providing loops from IDLCs and RSUs, which is what Ameritech intends to do according to TCNet.

4. Ameritech's policy as of February 2, 2000

On or about February 2, 2000, Ameritech again revised its special construction policy as it relates to CLECs. It is this version of Ameritech's policy which will be addressed in this proceeding. Although the BFR process and definition of "available" remain unchanged from the January 1 version of the policy, TCNet indicates that orders received by Ameritech that are found to have no facilities "available" will be cancelled and sent back to the CLEC. TCNet reports that Ameritech may agree to provide loops that are not "available" through a BFR, but is not required to do so. The other significant revision to the policy is that there is no longer a flat-rate interim charge for the complex work activities. Ameritech still maintains that it incurs costs for these activities that are not currently recovered in its TELRIC rates. Rather than assess special construction charges to recover these costs, however, Ameritech intends to add the alleged unrecovered costs to its TELRIC rates in Docket No. 98-0396. Because it no longer seeks to recover the costs it allegedly incurs when it performs complex work through special construction charges, Ameritech maintains that such costs are beyond the scope of this docket.

5. Determining the need for special construction and calculating charges

Upon receiving a request for an unbundled loop, Ameritech witness Suthers testifies that Ameritech engineers determine whether a loop is available. Although he believes the procedures followed by the engineers in making this determination are in writing, he is not certain. Mr. Suthers states that at any time while Ameritech is preparing to fill a CLEC order for a loop, it may determine that special construction

charges are necessary and then cancel the order. Once it determines that special construction is necessary, he indicates that Ameritech notifies the CLEC of such. The CLEC must then request that Ameritech calculate the amount of the special construction charges through the BFR process, according to Mr. Suthers. He further states that time and materials are the primary cost factors in special construction charges; but again, is not sure if there are any particular written procedures governing how to calculate special construction charges.

In some instances where CLECs have requested an unbundled loop, CLEC witnesses testify that they have received notices from Ameritech that specific special construction charges must be paid before the loop is provisioned. For one reason or another, the order for the particular unbundled loop is cancelled and resubmitted by the same CLEC. The second time, however, the CLEC witnesses report that Ameritech demands a different amount of special construction charges for the same loop. Mr. Suthers confirms that this outcome is possible, but attributes it to new information becoming available or the chance that different engineers may make different assessments of what needs to be done to fill a UNE order.

IV. AVAILABILITY

Section 251(c)(3) of the TA96 and the FCC's First Report and Order direct ILECs to provide to CLECs nondiscriminatory access to certain facilities. How Ameritech defines the term "available," as it is used in its tariff, is very significant since it establishes the particular facilities to which Ameritech must provide CLECs access. (*See* Ill. C. C. No. 20, Part 19, Section 1, Original Sheet 4.4) It is important to distinguish that it is the availability of facilities that is the focus of this section, and not the services provided over those facilities to Ameritech's retail customer and CLECs' end users.

A. Ameritech's Position

As indicated above, Ameritech considers a UNE available when all major components are physically present, even where modifications are required to provide the UNE or make it compatible with the CLEC's requirements. Ameritech argues that this definition is consistent with the TA96 and relies on Iowa Utilities Board v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), for the proposition that Section 251(c)(3) implicitly requires unbundled access only to an ILEC's *existing* network. Ameritech goes a step further and claims that it has no duty to provide a UNE unless "it is physically connected to [Ameritech's] network and is easily called into service." (UNE Remand Order, ¶174, fn.323 and ¶328) Ameritech quotes this language from the FCC's discussion of dark fiber and why it is distinguishable from unused copper wire stored in a spool in a warehouse. In light of his reading of the UNE Remand Order, Ameritech witness Suthers finds the definitions offered by Mr. Graves and Mr. Starkey to be without practical limits. Both definitions are described in full below.

B. Staff's Position

Staff recognizes the importance of how "available" is defined and asserts that Ameritech has an incentive to interpret this term in ways that limit its obligation to provide UNEs. Staff witness Graves urges the Commission to reject Ameritech's definition of "available." He argues that Ameritech's current position does not adequately resolve when a loop is available. Specifically, he states that Ameritech's definition does not address the issue of when Ameritech can deny CLECs access to loops or require a BFR to obtain a loop. In addition, Staff maintains that permitting Ameritech to impose its own definitions allows it to unilaterally alter its obligation to provide unbundled loops. Any revisions to this policy should be memorialized in Ameritech's tariff in order to assure the Commission and CLECs of some reasonable continuity in the definition, according to Mr. Graves. He testifies further that the section describing "facility availability" in Ameritech's "Unbundled Loops Ordering Guide" has changed five times since December, 1999.

Mr. Graves also contends that Ameritech's current definition does not adequately address how Ameritech defines "no spare loops." After reviewing the list of UNE orders for which Ameritech assessed special construction charges, he observes that "no spare loops" seems to appear quite often as a justification for charges. Mr. Graves testifies that it would be very unusual for a company with the size and resources of Ameritech to run out of loops. After citing proprietary language from Ameritech's Cost Analysis Resource ("ACAR") in his direct testimony, he concludes that "no spare loops" should be an extremely rare occurrence. Staff states that Ameritech's cost and engineering guidelines are designed to avoid instances were facilities are exhausted. Mr. Graves notes that Staff witness Phipps reports that Ameritech's fiber optic utilization rates are typically 33%.

In light of these concerns, Mr. Graves recommends that the Commission adopt an alternative definition of "available." He asserts that the definition used by the Michigan Public Service Commission ("MPSC") in In the matter of the complaint of BRE Communications, L.L.C., d/b/a Phone Michigan, against Ameritech Michigan for violations of the Michigan Telecommunications Act, Case No. U-11735 (February 9, 1999), is appropriate. This definition is as follows:

> the Commission agrees with the ALJ and Staff that a loop is unavailable, within the meaning of that term in the interconnection agreements, if it is located in an area not presently served by Ameritech Michigan, not when the area is served, but for some reason the order requires a field dispatch. (Id., p. 15)

Mr. Graves maintains that the Commission should adopt this definition because it will discourage inefficient network management where Ameritech may label facilities "unavailable" in order to make loops unavailable to CLECs or to force CLECs to go through an expensive and time consuming BFR process. The BFR process, according

to Staff, has important anti-competitive effects. First, Mr. Graves states that it requires a CLEC to either come up with a $2,000 deposit or agree to promptly pay the total preliminary costs that will be assessed by Ameritech without third-party review or Commission approval. Such costs, he contends, may be a barrier to entry. In addition, Mr. Graves observes that the BFR process can also lead to delays in provisioning service, since Ameritech may take up to 90 days just to quote a price for special construction.

Staff does not respond to Ameritech's assertions that the "MPSC" definition fails to limit the provision of UNEs to items that are currently "physically connected" to its network and are "easily called into service," as Ameritech believes the UNE Remand Order requires. Nor does Staff comment on the fact that the FCC issued the UNE Remand Order after the MPSC adopted the definition supported by Staff, as noted by Ameritech. Mr. Starkey, testifying on behalf of McLeod, Ovation, MCI WorldCom, and Allegiance, however, testifies in support of the MPSC's definition as an alternative to the definition that he offers.

C. McLeod, Ovation, MCI WorldCom, and Allegiance's Position

Mr. Starkey argues that Ameritech's definition of "available" discriminates against CLECs by allowing Ameritech to charge CLECs for special construction far more often than it charges its own retail customers for special construction. Mr. Starkey recommends that the Commission adopt the following definition:

> Available Facility. An *available facility* is a facility, or combination of facilities, that can be made to provision a Network Element. While a facility or combination of facilities will be considered to be available even when some modification, construction or other manipulation of Ameritech's network is required to provision the facility as a retail service or an unbundled network element, a facility may not meet the definition of an *available facility* if activities consistent with those specifically identified in Ameritech's Tariff Ill. C.C. No. 20, Part 2, Section 5 must be undertaken so as to ready the facility for use.

Mr. Starkey argues that this definition is consistent with the definition of "available" adopted by the MPSC, and is in a form which could be inserted in Ameritech's UNE tariff and its interconnection agreements.

McLeod, Ovation, MCI WorldCom, and Allegiance argue that making clear the meaning of the term "available" for purposes of Ameritech's interconnection agreements and UNE tariff is important. Regardless of the specific definition ultimately chosen, however, they insist that the most important requirement is that the term be defined in the same manner for all users of the Ameritech network to avoid discrimination. In other words, if a network element is considered to be "available," and can be provisioned without delay and without special construction charges, it must be

equally "available" for retail customers, Ameritech affiliates, and CLECs alike. Thus, if Ameritech does not assess special construction charges for a particular activity pursuant to its retail tariff (which will govern the charges assessed to its retail customers), McLeod, Ovation, MCI WorldCom, and Allegiance aver that Ameritech would have no right to assess charges to a CLEC under similar circumstances. Through such a policy, they believe that the Commission can help to ensure that competing carriers are treated similarly to retail customers.

Moreover, McLeod, Ovation, MCI WorldCom, and Allegiance assert that the Commission must prevent Ameritech from redefining "available" whenever it wants. By doing so, they contend that Ameritech is effectively rewriting its interconnection agreements and UNE tariff in a manner that would allow it to charge special construction charges whenever it desires, in violation of the TA96. While Ameritech's motivation is clear -- as its witness Suthers admitted, Ameritech would prefer its competitors not purchase UNEs, but instead buy wholesale services, and preferably not compete at all (Tr. 166-67) -- McLeod, Ovation, MCI WorldCom, and Allegiance aver that CLECs are entitled to compete, and to choose the method by which they will enter the market. Ameritech must not be allowed, they maintain, to make it cost prohibitive for CLECs to compete using UNEs by imposing unwarranted special construction charges. According to McLeod, Ovation, MCI WorldCom, and Allegiance, the Commission can prevent this from happening by defining "available" in the same manner as the MPSC to mean that facilities are available in all areas except those "not presently served by Ameritech," and require Ameritech to provision unbundled elements without assessing special construction charges unless Ameritech would charge its retail customer for the same "special construction" under its tariff.

Mr. Starkey also asserts that Mr. Suthers' criticisms of his proposed definition are unjustified. Mr. Suthers testifies that his principal objection to Mr. Starkey's definition is that the word "construction" has no limits. Mr. Suthers claims that Mr. Starkey's definition could require Ameritech to build an entire new network where none currently exists; which would eviscerate the notion that Ameritech is only required to unbundle its existing network. Even the "construction" of a new loop would violate the FCC's standard, as Mr. Suthers understands the UNE Remand Order. Mr. Suthers also objects to Mr. Starkey's reference to Ameritech's "retail special construction tariff" in his definition. He argues that such a reference is inappropriate because UNEs and retail services are not comparable and Ameritech's tariff reflects such.

With regard to the assertion that his definition is without limits, Mr. Starkey contends that his reference to Ameritech's "retail special construction tariff" does in fact limit the scope of his definition. The entire rationale behind his definition, he maintains, is that it would limit Ameritech's ability to assess special construction charges on CLECs to only those circumstances wherein Ameritech assessed similar charges on its retail customers. Hence, according to Mr. Starkey, Ameritech, pursuant to his definition, would be required to make a facility available as a UNE without additional charge, including the need for any "construction or other manipulation," if Ameritech

generally undertook the same type of construction or network manipulation on behalf of its retail customer at no additional charge.

In response to Mr. Suthers' argument that Ameritech is only obligated to provide access to its existing network, Mr. Starkey asserts that CLECs have not asked Ameritech to construct a "new" or "superior" network for purposes of gaining access to that network via UNEs. Mr. Starkey avers that none of the circumstances within which Ameritech has attempted to assess special construction charges pertain to doing anything other than provisioning facilities using Ameritech's *existing* network, just as Ameritech would do to provision service to its own retail customers. The issue at hand, he contends, is not whether Ameritech should be required to build a new or improved network for use by its competitors, but whether Ameritech should provide nondiscriminatory access to the network it currently owns and manages. Mr. Starkey states that the United States District Court for the Eastern District of Michigan, Southern Division, supports his position, as may be ascertained from its decision affirming the aforementioned MPSC order. (*See* Michigan Bell v. Strand, et al., Case No. 99-CV-71180-DT (E.D. Mich. Jan. 4, 2000))

Mr. Starkey further asserts that the alleged "physically connected" and "easily called into service" standard that Ameritech relies upon has been taken out of context and that the FCC never meant to impose such a standard for UNEs. He contends that this "standard" is a prime example of how Mr. Suthers picks and chooses phrases and words to construct a policy that Ameritech prefers, instead of the policy that the FCC actually adopted. Although Ameritech cites paragraph 328 of the UNE Remand Order as the source of its standard, Mr. Starkey urges the Commission to review paragraphs 327 through 330 to put Ameritech's standard in the proper context. These paragraphs concern the FCC's conclusion that ILECs must offer interconnectors access to dark fiber because it is a network element. Mr. Starkey specifically points to paragraph 327 where the FCC states its agreement with this Commission that the phrase "used in the provision of a telecommunications service" in Section 153(29) of the TA96 refers to network facilities or equipment that is customarily employed for the purpose of providing a telecommunications service. The obvious intent of this portion of the UNE Remand Order, according to Mr. Starkey, is to more expansively define Ameritech's unbundling obligation, not, as Mr. Suthers contends, to limit that obligation.

D. Rhythm and Covad's Position

Rhythms and Covad also assert that Ameritech's definition of "available" is unreasonable. Specifically, Rhythms and Covad argue that Ameritech's definition is problematic for at least two reasons. First, they contend that the definition gives Ameritech no incentive to plan for growing demand in its network. Because demand will increase over time and will require installation of new facilities, Rhythms and Covad maintain that Ameritech's current definition of "available" allows Ameritech to deny a CLEC's request for a UNE simply because Ameritech has failed to keep up with that demand. Second, Rhythms and Covad claim that Ameritech's new definition of

"available" has undermined CLECs' ability to compete in Illinois. They cite a sharp increase in the number of their orders that were cancelled by Ameritech because of an alleged lack of facilities following the implementation of Ameritech's new definition. Rhythms and Covad assert that Ameritech's actions constitute discrimination because Ameritech denies CLECs access to these facilities, but does not deny service to retail customers under such circumstances.

Rhythms and Covad argue that the definition of "available" is important because it is used both in Ameritech's interconnection agreements and its UNE tariff to define the circumstances under which Ameritech will provide access to UNEs and assess special construction charges on a CLEC. Section 9.1.3 of Ameritech's interconnection agreement with Rhythms requires Ameritech to make available access to its network elements where such network elements are "available." Where a network element is not available, section 9.1.3 calls for Rhythms to pay Ameritech "any applicable special construction charges" if Ameritech makes available access to a network element requiring special construction. *(Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act Of 1996, Dated as of August 18, 1998, by and between Ameritech Information Industry Services, and Accelerated Connections, Inc.)* Ameritech's interconnection agreement with Covad contains similar language.

Covad witness Evans and Rhythms witness Lopez note that Ameritech has repeatedly made fundamental changes to its special construction charges policy. Ameritech implemented such changes unilaterally, without Commission approval, by posting its new policy on TCNet. Rhythms and Covad state that such changes essentially amount to a unilateral modification of a critical term in Ameritech's UNE tariff and interconnection agreements, without prior notice to the affected CLECs or review by the Commission.

E. Commission Conclusion

As indicated above, the definition of "available" is crucial to the determination of when Ameritech is obligated to provide a CLEC access to particular UNE facilities. If particular facilities are determined not to be "available," ILECs have no duty to provide CLECs access to such facilities. As a general proposition, it may be said that the narrower the definition, the fewer opportunities CLECs will have to compete. Accordingly, Ameritech has an incentive to narrowly define "available" so as to impair CLEC's ability to compete.

Ameritech does not define "available" in its tariff, nor is there any indication that any of its interconnection agreements define the term. The only place where Ameritech is known to post its definition of "available" is TCNet. Ameritech witness Suthers asserts that TCNet is meant to deal with administrative matters and implementation issues and must remain free from Commission oversight because Ameritech is constantly developing and revising its policy positions on the implementation and interpretation of issues arising in interconnection agreements. The Commission rejects

this approach to defining such a crucial term as entirely inappropriate and discriminatory in its effect on CLECs.

While the Commission does not criticize Ameritech's use of TCNet in general and does not at this time seek to exercise oversight of the content of TCNet, the Commission does not believe that it is appropriate to relegate the definition of such an important term to an instrument subject to regular revision without oversight. Clearly, when a UNE facility is available is not an administrative matter or implementation issue. The fact that Ameritech's most recent revision of its definition of "available" is to the benefit of CLECs does not mitigate the Commission's concern. Furthermore, the record is devoid of any legitimate reason why Ameritech must be free to revise the definition of "available" as it sees fit. On the contrary, Ameritech's unilateral revisions of the definition of "available" on TCNet suggest that this definition belongs in Ameritech's tariff. If included in the tariff, interested entities may count on the continuity of the definition and will have an opportunity to comment on any proposed revisions. Accordingly, the Commission orders Ameritech to place the definition of "available," as it pertains to facilities, in its tariff. Ameritech is free to post the same definition on TCNet as well, with the understanding that the tariff overrides TCNet.

The Commission also notes that the TCNet discussion of available loops derived from IDLCs and RSUs appears to be inconsistent with Ameritech's tariff language concerning unbundled loops in the presence of IDLCs and RSUs. (*See* Ill. C. C. No. 20, Part 19, Section 1, Original Sheet No. 4.4) While TCNet characterizes loops from IDLCs and RSUs as being available, Ameritech's tariff suggests that such loops are not available. Specifically, the tariff states that a CLEC must make a BFR for an unbundled loop served by an IDLC or RSU if no spare physical loops exist and the CLEC still wants the loop. Since under its BFR process, Ameritech is not obligated to provide the requested unbundled loop, the tariff is understood to mean that loops served by IDLCs and RSUs are not "available." TCNet, on the other hand, describes the same situation and states that additional charges will be assessed to provide the loop without ever mentioning the BFR process. Thus, TCNet implies that an unbundled loop is always available and no BFR is necessary. Although the tariff clearly overrides TCNet, Ameritech's own position on loop availability is internally inconsistent.

TCNet's discussion of when unbundled loops served via IDLC or RSU will be unbundled at no extra charge is also difficult to understand. Ameritech seems to indicate that a line station transfer or the addition/replacement of plug-in cards will be performed to unbundle an available loop served by an IDLC or RSU at no extra charge pursuant to TCNet's first category of available loops, which require no modifications. Yet under TCNet's second category of available loops, Ameritech identifies these two types of activities as modifications having unrecovered costs associated with them, necessitating their recovery as special construction charges or as part of the monthly TELRIC rates paid by CLECs. The Commission can not determine what Ameritech intends to convey through this portion of TCNet.

In any event, the Commission finds merit in Staff's and the CLECs' concerns regarding Ameritech's definition of "available" and concludes that Ameritech's current definition does not provide (1) adequate parameters for determining in advance whether a UNE will be available and (2) sufficient safeguard against discriminatory implementation. Under Ameritech's definition, a CLEC will not know if a UNE is available until it told so by Ameritech. With regard to Ameritech's contention that its definition is consistent with the Eighth Circuit's determination that it is only obligated to provide unbundled access to its existing network, the Commission agrees with Mr. Starkey that the evidence presented indicates that CLECs have not sought access to a new or superior network, but only access to the network that Ameritech presently owns and manages on a nondiscriminatory basis.

As for Ameritech's alleged "physically connected" and "easily called into service" standard, the Commission agrees with Mr. Starkey that such language has been taken out of context. The language that Ameritech relies upon appears in the FCC's discussion of why some facilities, which may be considered similar in nature to dark fiber, that an ILEC customarily uses to provide service, such as unused copper wire stored on a spool in a warehouse, should not constitute network elements. The Commission does not understand the FCC to mean that an ILEC has no duty to provide a UNE unless "it is physically connected to the incumbent's network and is easily called into service." Rather, the Commission views the quoted language as a means to distinguish the type of UNE known as dark fiber. Had the FCC intended such a significant standard to apply to all UNEs, the Commission believes that the FCC would have clearly done so. In addition, it is not clear that Ameritech's current definition would comply with the alleged standard since its definition only requires the physical presence of all major components and does not mention anything about being "physically connected."

In adopting a new definition of "available," the Commission is not convinced that Mr. Starkey's proposed definition properly conveys the manner in which special construction charges should be assessed. Mr. Starkey's definition indicates that a facility may not be available if special construction is necessary under Ameritech's tariff Ill. C. C. No. 20, Part 2, Section 5. Contrary to Mr. Starkey's opinion, the determination of whether special construction must occur should not influence the determination of whether a facility is available.

Mr. Starkey also urges the Commission to adopt a definition of "available" applicable to all users of Ameritech's network in order to avoid discrimination. This suggestion has merit. By adopting a uniform definition for CLECs, retail customers, and Ameritech's affiliates, all will begin the process of obtaining service at the same point. This conclusion is separate from a discussion of whether UNEs requested by CLECs are comparable to the services requested by Ameritech's retail customers. The comparability of UNEs and services to retail customers will be addressed below.

The remaining proposed definition is the one offered by Staff. The Commission concurs with Staff's arguments in support of the MPSC's definition, but believes that the it should be modified to read more clearly. Therefore, consistent with the TA96 and the FCC's order, a facility is available if it "is located in an area presently[5] served by" Ameritech. This definition, applicable to CLECs, retail customers, and Ameritech's affiliates, will discourage inefficient network management and enable those requesting facilities to more accurately predict whether such facilities will be available. Accordingly, Ameritech is directed to modify its tariff to reflect this conclusion.

V. APPLICABILITY OF SPECIAL CONSTRUCTION TARIFF

With the knowledge of what constitutes an available facility, it must now be determined when it is appropriate to assess special construction charges. As indicated above, Ameritech assesses special construction charges on its retail customers when the conditions of its "retail special construction tariff" have been met. Ameritech's "UNE special construction tariff" only indicates that Ameritech will assess special construction charges when special construction is required. The aforementioned TCNet policy states that such charges will be assessed on CLECs whenever loop conditioning and/or modifications to IDLCs and/or RSUs are necessary to provision a loop. The issue has been raised in this proceeding whether the conditions listed in Ameritech's "retail special construction tariff" should govern when special construction charges are assessed on CLECs.

A. Ameritech's Position

As discussed in Section III.B.1.a., Ameritech argues that its "UNE special construction tariff" preempts its "retail special construction tariff." The latter is more specific, according to Ameritech witness Suthers, because it is intended to be more restrictive while the former is intentionally not limited to any specific circumstances. Mr. Suthers testifies that the differences between these two portions of Ameritech's tariff are substantive because retail (or wholesale/resale) services are not comparable to UNEs.

Ameritech's arguments as to why UNEs and retail services are not comparable will be discussed in greater detail in the context of discrimination in Section VII, below. For the purpose of determining which portion of Ameritech's tariff should govern the assessment of special construction charges on CLECs, a summary of Ameritech's arguments differentiating UNEs and retail services will suffice. First, Mr. Suthers asserts that a UNE is not functionally comparable because it does not have any functionality on its own. Retail service, on the other hand, is a bundled end-to-end telecommunications service. Second, Mr. Suthers states that CLECs order UNEs with particular specifications while Ameritech decides exactly how it will provision the service requested by the retail or wholesale/resale customer. Third, Ameritech argues

[5] The term "presently" refers to the time at which a facility is requested.

that the rate structure behind UNEs and retail service is different. Retail rates, according to Ameritech witness Florence, recover more of Ameritech's special construction costs, via contribution from all retail customers, than do Ameritech's UNE rates. Mr. Suthers argues that Ameritech's tariff is written in recognition of the different rate structures. Fourth, Mr. Suthers contends that the FCC and this Commission have recognized that UNEs are not comparable to retail services and that CLECs are not comparable to retail end users. Finally, he claims that equating the purchase of UNEs with the purchase of retail services would not be sound policy because it would lead to absurd results—CLECs could order service at retail costs and/or retail customers would pay TELRIC rates. In summary, Mr. Suthers argues that the proper comparison is between how Ameritech treats a CLEC and how its treats other CLECs, itself, and its affiliates with respect to UNEs.

B. Staff's Position

Staff witness Graves favors the application of the nine conditions in Ill. C. C. No. 20, Part 2, Section 5, Original Sheets Nos. 1 and 2 to CLECs requesting UNEs. Specifically, he disagrees with Mr. Suthers that Ameritech's "UNE special construction tariff," Ill. C. C. No. 20, Part 19, Section 1, overrides the special construction language in Part 2 of Ameritech's tariffs. The language in Part 19, according to Mr. Graves, does not exclude the application of the terms and conditions in Part 2. In fact, he continues, the language of Part 19 relies on the terms and conditions in Part 2. The former expressly refers to "special construction" and "applicable special construction charges," which Mr. Graves states are defined in Ill. C. C. No. 20, Part 2, Section 5. Because these terms are defined in Part 2, he asserts that Ameritech's only basis for charging CLECs nonrecurring charges for construction related to local loops is if those charges are permissible under Part 2 of Ameritech's tariffs.

Mr. Graves also objects to Mr. Suthers' position that special construction charges for CLECs should not be limited to any specific circumstances. This position, according to Mr. Graves, violates Section 9-104 of the Act, which states:

> No public utility shall undertake to perform any service or to furnish any product or commodity unless or until the rates and other charges and classifications, rules and regulations relating thereto, applicable to such services, product or commodity, have been filed and published in accordance with the provisions of this Act: Provided, that in cases of emergency, a service, product or commodity not specifically covered by the schedules filed, may be performed or furnished at a reasonable rate, which rate shall forthwith be filed and shall be subject to review in accordance with the provisions of this Act.

If Ameritech performs special construction for any customer, Mr. Graves believes that the Act requires Ameritech to do so in accordance with charges, classifications, rules, and regulations that have been filed and approved by the Commission. In the absence

of any specifics in Ill. C. C. No. 20, Part 19, Section 1, he maintains that Ill. C. C. No. 20, Part 2, Section 5 is the only authority under which Ameritech may assess special construction charges on CLECs.

Staff witness Phipps echoes Mr. Graves concerns when he states that Ameritech's policy is very subjective because there are no official guidelines to follow, which leads to many inconsistencies in administering special construction charges. Mr. Phipps relates that in response to data requests, CLECs report that sometimes Ameritech meets the 48 hour time-frame in Ill. C. C. No 20, Part 19, Section 1 for notifying CLECs of the availability of facilities and sometimes it exceeds the time-frame, sometimes Ameritech provides its notice in writing and sometimes notice is provided verbally, and sometimes Ameritech explains why the charges are necessary and sometimes it provides no explanation. He also indicates that special construction charges vary greatly for similar activities.

C. McLeod, Ovation, MCI WorldCom, and Allegiance's Position

Mr. Starkey concurs with Mr. Graves on this issue. In his aforementioned proposed definition of "available," Mr. Starkey recommends relying upon Ameritech tariff Ill. C. C. No. 20, Part 2, Section 5 to determine when a facility should be deemed available. McLeod, Ovation, MCI WorldCom, and Allegiance also strongly disagree with Ameritech's arguments that UNEs and retail services are not comparable. They argue in part that the fact that Ameritech has a "retail special construction tariff" and a "UNE special construction tariff" demonstrates that comparisons can be made. Not only is it reasonable to use the "retail special construction tariff" as a tool to interpret the UNE tariff (in terms of determining when special construction charges will be assessed), but use of the retail tariff ensures that Ameritech assesses special construction charges in a nondiscriminatory manner between its retail customers and UNE customers, according to the four CLECs.

D. Commission Conclusion

As described above, Ameritech primarily sets forth when CLECs will pay special construction charges on TCNet.[6] Just as the Commission finds defining "available" on TCNet inappropriate, the Commission also concludes that it is not proper to establish through TCNet situations under which CLECs must pay special constructions charges. A determination with such a potentially significant impact on CLECs is not merely an administrative or implementation issue and should not be left to an instrument subject to regular revision without oversight.

Ameritech's initial objection to using Ill. C. C. No. 20, Part 2, Section 5 of its tariff for determining when CLEC's should pay special construction charges for available UNEs is based on its interpretation and application of the following statement from Ill.

[6] The exception being the discussion in Ameritech's "UNE special construction tariff" of the BFR process in the context of providing an unbundled loop served by IDLCs or RSUs.

C. C. No. 20, Part 19, Section 1, Original Sheet No. 1: "General Regulations as found in Part 2 of this tariff apply to this Part unless otherwise specified in this Part." In short, Ameritech believes that the language that follows this statement on Original Sheet No. 4.4 of Part 19, Section 1 sufficiently "specifies" that Part 2, Section 5 does not apply to Part 19. The Commission is not persuaded by this argument. The Commission first notes that Ameritech's "UNE tariff" at no point expressly states that the list found on Original Sheet Nos. 1 and 2 of Ill. C. C. No. 20, Part 2, Section 5 shall not apply to Part 19. Nor does Ill. C. C. No. 20, Part 2, Section 5 contain any language restricting its applicability to retail customers.

The only manner in which Ameritech's "UNE tariff" possibly "specifies" that Part 2 does not apply to Part 19 is if one adopts Ameritech's arguments as to why UNEs and retail service are not comparable. These arguments, however, do not persuade the Commission that Part 2 is inapplicable to Part 19. Moreover, these arguments are more relevant to a discussion of whether Ameritech's special construction practices are discriminatory. At hand is the determination of whether the situations delineated on Original Sheet Nos. 1 and 2 of Ill. C. C. No. 20, Part 2, Section 5 should govern when CLECs must pay special construction charges for available UNE facilities. Although Ameritech may be correct and UNEs and retail service may not be comparable in every respect, the emphasis here is on the assessment of special construction charges and providing telecommunications service through a Commission approved tariff consistent with the Commission's rules, the Act, FCC rules, and federal law. The Commission would also note that the record lacks sufficient evidence demonstrating that the nine conditions listed in Ill. C. C. No. 20, Part 2, Section 5 would not arise in the context of special construction performed for CLECs in the provisioning of UNE.

Furthermore, Section 9-104 of Act supports the notion that Ameritech must have some parameters on its assessment of special construction charges on CLECs for the provisioning of UNE facilities. Given its practice of posting on TCNet its definition of "available" and under what circumstances such charges will be assessed, Ameritech has given itself free reign to determine when charges are due. Such discretion lends itself to abuse and prevents the Commission from exercising oversight to ensure that all CLECs are treated equally regardless of how Ameritech treats its retail customers.

Finally, in Docket Nos. 96-0486/0569 (Consolidated),[7] where the Commission set prices for unbundled elements, the Commission stated:

> We are also concerned that the tariff Ameritech Illinois has proposed in this proceeding makes it impossible for the Commission, new entrants and even Ameritech Illinois itself, to cogently determine how and when nonrecurring charges apply. The Commission, therefore, orders that all

[7] Docket Nos. 96-0486/0569 (Consolidated) Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic.

> tariff provisions relating to any nonrecurring charges be specific and clear as to how and when those charges apply.[8]

Hence, requiring Ameritech to modify its tariff language concerning special construction as described below is consistent with prior Commission determinations.

Accordingly, the Commission concludes that Ameritech may assess special construction charges on CLECs for the provisioning of an available facility if one or more of the nine conditions found on Original Sheet Nos. 1 and 2 of Ill. C. C. No. 20, Part 2, Section 5 are met. If a facility is not "available," a CLEC still desiring the unavailable UNE facility must follow Ameritech's BFR process. The same nine conditions will also be used to determine if one of Ameritech's retail customers must pay special construction charges. Ameritech must adopt specific policies for determining and notifying, in writing, CLECs, retail customers, and its affiliates that special construction charges are required. CLECs, retail customers, and Ameritech's affiliates must receive notice of the amount of special construction charges that will be necessary within 48 hours of their submission of an order. Ameritech shall modify its tariff to reflect this conclusion.

To the extent that the Commission's definition of "available" or determination of when special construction charges may be assessed is inconsistent with the terms of an interconnection agreement, the Commission makes no finding as to what impact its conclusions have on the terms of such interconnection agreement. Such a finding would involve the resolution of legal issues which have not been addressed in this record. Interconnection agreements that rely solely on Ameritech's tariff to determine when special construction charges apply, however, can not be said to be inconsistent with the Commission's conclusions in these matters. Notably, in situations where an interconnection agreement references "available" network elements yet does not define "available," the Commission's definition shall apply.

VI. DOUBLE RECOVERY

Among the allegations made during this investigation is that Ameritech is already recovering through the recurring rates that it charges for UNEs the costs that it seeks to recover through special construction charges. Such double recovery is not permissible. Even if one or more of the nine conditions in Ill. C. C. No. 20, Part 2, Section 5, Original Sheet Nos. 1 and 2 are satisfied, Ameritech may not assess special construction charges if the costs allegedly recovered through such charges are recovered elsewhere in Ameritech's rates. To resolve this issue it will be helpful to discuss the premise upon which Ameritech's rates are based: rates for UNEs are based on TELRIC studies while rates for retail service are based on long-run service incremental costs ("LRSIC") studies.

[8] Second Interim Order, (February 17, 1998), at p. 90.

A. TELRIC

TELRIC is the methodology prescribed by the FCC and adopted by this Commission for pricing UNEs. Specifically, TELRIC is a forward-looking, cost-based pricing approach, comprised of operating expenses (reflecting the use of all resources), depreciation cost (reflecting the true changes in the economic value of an asset), and risk-adjusted cost of capital (reflecting risks incurred by investors). Section 252(d)(1) of the TA96 set forth general guidelines for pricing UNEs. This section states that in order for UNE rates to be just and reasonable, they "(A) shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit."

The FCC interpreted these guidelines in further detail in its First Report and Order, making several important determinations with regard to TELRIC. First, the FCC explained that TELRIC is based on total service long-run incremental cost ("TSLRIC"). TSLRIC indicates that the relevant increment, when determining cost, is the entire quantity of the service that a firm produces, rather than just a marginal increment over and above a given level of production.[9] Likewise, "total element," in the context of TELRIC, indicates that the relevant increment, when determining cost, is the entire quantity of an element, rather than a marginal increment.

Second, the FCC stated that the "long-run" referred to in TELRIC assumes a time period in which all costs are variable and all sunk inputs or costs are eliminated. The long run approach ensures that rates recover not only the operating costs that vary in the short run, but also fixed investment costs that, while not variable in the short term, are necessary inputs directly attributable to providing the element.[10]

Third, the FCC concluded that, "all costs associated with the [sic] providing the element shall be included in the incremental cost,"[11] and more specifically, an ILEC's prices for UNEs "shall recover the forward-looking costs directly attributable to the specified element..."[12] Additionally, the FCC concluded that TELRIC should be "based on costs that assume that wire centers will be placed at the incumbent LEC's current wire center locations, but that the reconstructed local network will employ the most efficient technology for reasonably foreseeable capacity requirements."[13] Stated differently, TELRIC reflects all costs of building a network today with the most efficient technology, given the current central office, customer locations, and reasonable capacity forecasts.[14]

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[9] First Report and Order, ¶677.
[10] First Report and Order, ¶692.
[11] First Report and Order, ¶690.
[12] First Report and Order, ¶682.
[13] First Report and Order, ¶685.
[14] As will be described in further detail below, TELRIC capacity projections are based on the extent to which equipment will actually be utilized, and not based on a theoretical maximum.

The FCC further concluded that depreciation should reflect the true changes in economic value of an asset and the cost of capital should appropriately reflect the risks incurred by an investor. Thus, even in the presence of sunk costs, TELRIC-based prices are an appropriate pricing methodology. The FCC also determined that the forward looking cost of capital is equivalent to a normal profit.[15] Therefore, TELRIC complies with the TA96, in that it includes a reasonable profit.

The FCC also concluded, in its First Report and Order, that the price for UNEs should include a reasonable allocation of forward-looking joint and common costs.[16] Therefore, once the cost components and operating expenses of the TELRIC of an element are identified and summed, a specific level of shared (joint) and common costs are added (Tariffed Rate of Element = TELRIC + shared cost + common cost). Shared costs are defined as costs incurred to provide two or more UNEs but are unrelated to products and services that are not UNEs. Shared costs include, but are not limited to, expenses associated with product management, sales, and advertising. Common costs are defined as costs incurred to operate the business as a whole and are not directly associated with individual UNEs, products or services or any groups thereof. Common costs include, but are not limited to, network support expenses (i.e., engineering plant operations administration and network administration) and general support expenses (i.e., motor vehicles, office equipment, and computers).

In Illinois, the Commission's Order in Docket Nos. 96-0486/0569 (Consolidated) designated the allowable "pool" of shared and common cost to be applied to UNEs. These costs originated from four sources within Ameritech: (i) Ameritech Information Industry Services, the business unit that is responsible for offering resale local exchange service and UNEs to wholesale customers; (ii) Network Services, the business unit responsible for managing Ameritech's telecommunications network which is used to provide both retail and wholesale services; (iii) Centralized Services, the business unit responsible for providing information technology, real estate, purchasing, etc. for Ameritech; and (iv) Corporate, Ameritech's headquarters which performs finance, legal, and investor relations functions for Ameritech.[17]

In addition, this Commission has made other significant conclusions regarding TERLIC. Specifically, in its order in Docket Nos. 96-0486/0569 (Consolidated), the Commission came to important conclusions concerning the cost of capital, depreciation, and utilization (or fill) factors with regard to Illinois-specific TELRICs. With respect to cost of capital, the Commission adopted a forward-looking cost of capital based on the incremental cost of debt and equity. This led to the Commission concluding that Ameritech should use a weighted average cost of capital of 9.52% in its TELRIC studies.[18] In comparison, the cost of capital used in LRSIC studies is 10.07%.

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[15] First Report and Order, ¶700.
[16] First Report and Order, ¶672.
[17] Docket No. 96-0486, Ameritech Illinois Exhibit 4.0 (Broadhurst) at 4.
[18] Docket Nos. 96-0486/0569 (Consolidated), Order at 23.

As for depreciation, the Commission adopted forward-looking depreciation rates based on the economic lives of plant and equipment. Specifically, in Docket Nos. 96-0486/0569 (Consolidated), the Commission adopted, for TELRIC, the projected lives and future net salvage percentages underlying the depreciation rates prescribed for Ameritech by the FCC as set forth in the FCC's annual update of depreciation rates. These lives were deemed to be forward-looking and more reasonable than the economic lives adopted by the Commission in Docket No. 92-0448 for LRSIC studies. Since the economic lives determined in Docket Nos. 96-0486/0569 (Consolidated) are shorter than the economic lives determined in Docket No. 92-0448, Ameritech's LRSIC studies reflect longer economic lives than do its TELRIC studies. This results in higher depreciation rates for TELRIC, as opposed to LRSIC.

Finally, the Commission recognized that utilization factors, or fill factors, are a vital input into a cost study because they derive unit costs from total costs.[19] All else being equal, a lower fill factor would increase the unit cost of an element. The fill factors adopted for Illinois-specific TELRIC studies are "target fill factors." A target fill factor is based on the optimal usage level above which it is more effective to add plant and capacity rather than incur the costs associated with increased utilization of existing plant.[20] In short, if Ameritech does not add capacity once the target fill is reached, it is probably utilizing its resources inefficiently. In comparison, Ameritech's LRSIC studies are based on "usable capacity," which represents available capacity at an individual facility level.[21] This results in lower fill factors for TELRIC studies as opposed to LRSIC studies. According to Staff witness Phipps, the following provides a fill factor comparison between TELRIC and LRSIC for feeder and distribution and drop facilities:

	TELRIC (target fill)	LRSIC (usable capacity)
FEEDER		
Copper (aerial, buried, underground)	85%	90%
Fiber (aerial, buried, underground)	33%	33%
LiteSpan (COT, RT, and circuit cards)	90%	96%
DISTRIBUTION AND DROP		
Copper (aerial, buried, underground, building)	80%	85%

[19] Docket Nos. 96-0486/0569 (Consolidated), Order at 30.

[20] Ameritech witness Palmer identifies these additional costs as maintenance and network administration costs. Docket No. 96-0486, Ameritech Illinois Exhibit 3.1 (Palmer) at 40.

[21] According to Staff witness Phipps, usable capacity is determined based on a theoretical maximum usage level less capacity for defective circuits, administrative circuits, or other circuits which would render a capacity unavailable for service on a permanent basis. Ameritech witness Florence, however, relies upon 83 Ill. Adm. Code 791.20(n) to define usable capacity as the maximum physical capacity of the equipment or resource less any capacity required for maintenance, testing, or administrative purposes.

The TELRIC rates that were developed for unbundled loops include recurring and nonrecurring charges. Generally, the recurring charges recover costs that will recur throughout the economic life of the service and the investment in a facility, while nonrecurring charges recover costs which will occur only once during the economic life of a facility, such as the service order charge and line connection charge. Because no party has specifically objected to Ameritech's service order charge or line connection charge for CLECs, they will not be addressed further.

B. LRSIC

When ordering basic local service from Ameritech, a retail customer must pay initial nonrecurring charges and a monthly recurring charge. These charges are very similar in nature to what a CLEC pays to Ameritech to lease an unbundled loop. Regardless of whether a retail service is classified as competitive or noncompetitive, it must be priced above its associated LRSIC.[22] In short, the LRSIC is a price floor for the associated service. LRSIC is defined in 83 Ill. Adm. Code Part 791.20(a) as:

> the forward-looking additional cost(s) incurred by the telecommunications carrier to provide the entire output of a service, including additional resources such as labor, plant, and equipment. Long-run service incremental cost excludes any costs, including common costs, that would be incurred if the service is not produced.

The margin between the retail rate established by Ameritech and the LRSIC of the service is referred to as the contribution (Retail rate - LRSIC = Contribution). Factors such as profit, retail shared and common costs, and residual[23] are included within the contribution. The basic principles, methodologies, and cost models for Ameritech's LRSICs and TELRICs are the same. The major distinctions between the two methodologies is the different assumptions used for cost of capital, depreciation, and network utilization described above.

Ameritech's recurring retail rate for local service recovers the following cost components: (i) central office termination, (ii) local loop, (iii) administration, (iv) billing, (v) telephone number, and (vi) field connection. Material differences exist between the recurring costs incurred by Ameritech when providing service to CLECs as opposed to retail customers. Two notable factors lead to cost differences between CLECs and retail customers: the least cost technology assumed in the TELRIC and LRSIC studies and the central office termination. Although both TELRIC and LRSIC are designed to reflect the forward-looking, least-cost technology, the technology differs between the

[22] The flexibility that Ameritech has when setting its prices is determined by the classification of the service. If a service is classified as non-competitive, Ameritech's flexibility of setting the price is restricted by the price cap mechanism of the Alternative Regulation Plan. If a service is classified as competitive, Ameritech possesses the flexibility to set the price as it sees fit. If a service is truly competitive, market pressures should push Ameritech's rates downward towards LRSIC.

[23] The "residual" is an economic concept that, as applied to UNEs, was rejected by the Commission in Docket No. 96-0486. The residual will be discussed in further detail below.

two methodologies. According to Ameritech, the least-cost technology for Ameritech to provision service to a retail customer is via IDLC technology. This technology allows Ameritech to multiplex copper loops at a terminal, convert the analog signals to digital signals, and send the signals to the central office switch on a single fiber facility. However, since, according to Ameritech, an unbundled loop generally can not be "unbundled" in an IDLC environment, the least-cost technology to provision service to a CLEC is via UDLC technology. The cost differences between integrated and non-integrated facilities results in cost differences in the LRSIC and TELRIC studies.

As for the other difference in costs, the central office termination, IDLCs are terminated at the central office by a connection directly into the switch at a DSX cross-connect equipment bay. Non-integrated facilities, on the other hand, are terminated at the MDF. Therefore, due to the different technology assumptions between LRSIC and TELRIC studies, the termination cost component will differ as well.

The specific nonrecurring charges that a retail customer pays are the service order charge and line connection charge. These charges are very similar in nature to the nonrecurring charges that apply to UNEs, with certain exceptions. With regard to the former, there are two primary drivers that cause differences in the service order costs between requesting CLECs and retail customers. First, the Business Service Center ("BSC") that handles loop orders is separate from the Residence BSC that handles retail orders. This produces differences in cost. Second, while the TELRIC study assumes that requesting carriers order unbundled loops electronically, the LRSIC assumptions differ. This distinction yields different work activities, time, and probabilities of occurrence, which also produces differences in cost.

The line connection charge also has two primary drivers that cause differences in the charges between requesting CLECs and retail customers. First, the Unbundled Service Center ("USC") which coordinates the order activity for an unbundled loop has no retail counterpart. Second, work activities, labor time, and probabilities of occurrence differ for the two methods, which results in different costs.

C. Parties' Positions on Costs Recovered by TELRIC and LRSIC Rates

Each of the parties present different arguments on whether Ameritech's current rates recover any of its costs associated with special construction.

1. Ameritech's Position

According to Ameritech witness Florence, both the existing TELRIC and LRSIC studies are based on the principle that the existing switches and feeder routes in the network would be instantaneously and entirely reconstructed using the least-cost, most efficient, forward-looking, best available technology and provisioning processes. He testifies that this instantaneous network placement assumption does not permit costs for a variety of special construction situations that arise in the real world to be reflected.

Costs related to these special situations, he claims, are not included in the TELRIC and LRSIC studies. As an example, Mr. Florence states that the TELRIC cost studies did not take into account costs related to unbundling a loop where an unbundleable loop facility does not exist. He asserts that this situation can arise when the current service is provided via an RSU or IDLC. In addition, since the TELRIC studies for unbundled loops are based on a forward looking, least cost design using a meld of fiber and non-loaded copper facilities, Mr. Florence states that the costs related to the removal of load coils are not included in the cost studies. He further indicates that the costs reflected in the current TELRIC studies reflect only a normal distribution of "simple dispatch" situations. Costs for complex dispatches required, at times, to perform facility modification in excess of simple dispatch are not reflected in these TELRIC studies, according to Mr. Florence.

Mr. Florence uses loops to support his claim that the assumptions used in the TELRIC and LRSIC studies do not reflect the actual conditions and facilities in Ameritech's network. In a LRSIC study, he states that the assumption is that every loop served by fiber feeder facilities is integrated and served by 100% LiteSpan technology. In a TELRIC study, he indicates that the assumption for unbundled loops is that every loop served by fiber feeder facilities is non-integrated and served by 100% LiteSpan technology. In contrast to these assumptions, Mr. Florence claims that network facilities and conditions are much different in the real world. The existing network, he asserts, contains a mix of integrated, non-integrated, LiteSpan, and pre-LiteSpan technology. Neither TELRIC nor LRSIC studies, however, account for these real-world conditions since, according to Mr. Florence, the cost studies are based upon a least cost, forward looking network, not the existing network.

Ameritech agrees that the prices for UNEs should be set equal to the UNE's TELRIC, plus a reasonable portion of shared and common costs. Mr. Florence also concurs that the Commission rejected the inclusion of any residual cost component in UNE prices. He describes residual costs as representing the "gap" between overall retail revenues (or UNE revenues, in the case of UNEs) and the sum of the LRSIC rates (or TELRIC rates) plus shared costs plus common costs of Ameritech's retail services (or UNEs). Ameritech's residual will be discussed further in the context of discrimination below.

From a network perspective, Mr. Florence states that the components of a basic residence or business unbundled loop reflected in monthly UNE rates are the feeder, distribution, drop (including the NID), and termination on the MDF in the serving central office. In the cost studies approved in Docket Nos. 96-0486/0569 (Consolidated), he reports that the costs for the feeder reflect a combination of copper and fiber facilities. This combination, he adds, varies over the three density bands. The Ameritech Feeder Analysis Model (now enhanced to the Ameritech Facility Analysis Model) ("AFAM"), used to develop the feeder costs, begins with an inventory or snapshot of existing facilities and redesigns and resizes them, using forward-looking technologies and assumptions, according to Mr. Florence. For loops more than twelve thousand feet in

length, he states that fiber is used exclusively in the feeder. For loops less than nine thousand feet in length, he indicates that copper is used exclusively in the feeder. Between those lengths, Mr. Florence reports that the technology varies depending on the number of voice grade loops on the cable route.

For feeder provided via fiber, Mr. Florence testifies that the forward-looking design is based on the use of contiguous optical fiber in combination with non-integrated LiteSpan DLC transmission equipment. For those cases where the feeder is provided over copper facilities, he states that the forward-looking design reflects the use of 26 gauge, non-loaded contiguous copper facilities. Because the cost study assumes that the feeder facilities are contiguous, Mr. Florence claims that any costs incurred in special construction situations, such as additional splicing work necessary to rearrange the feeder facilities in order to provide this contiguous path, are over and above the monthly costs developed in the TELRIC study.

Mr. Florence testifies that the TELRIC study includes costs for the COT, RT, and plug-in circuit cards used in each terminal that allow the unbundled loops to be terminated on a non-integrated basis. He adds that the costs for the cabinet or hut housing this equipment are also included. These costs, Mr. Florence maintains, are based on Ameritech's existing network configuration and existing customer locations; and do not attempt to account for growth or expansion of the network. The plug-in circuit cards are sometimes referred to as C-POTS and R-POTS cards, which plug into the COT and RT, respectively. Mr. Florence states that because one C-POTS or R-POTS card can accommodate up to four basic business or residence unbundled loops, each loop is assigned one-fourth of the cost of each card.

With only one exception, the LRSIC study for a loop used for basic local exchange service reflects the same LiteSpan equipment and fiber/copper meld as the unbundled loop, according to Mr. Florence. For retail services such as basic local exchange services, Mr. Florence repeats that the forward-looking LiteSpan equipment configuration is based on the use of IDLC technology. In this situation, he states, the connection to the central office switch is made at a digital level and integrated directly into the switch. The integrated arrangement, he contends, is the one that is normally used to serve retail customers; which is accomplished by using a different plug-in card at the LiteSpan COT. To unbundle a loop that is being served in this manner, Mr. Florence maintains that additional work needs to be performed. He argues that existing UNE rates do not include the costs of the additional construction associated with switching the plug-in cards to go from an integrated to a non-integrated configuration. Mr. Florence attributes the additional construction costs to labor and engineering necessary to change the cards. He also contends that the costs of providing a new COT or RT where no spare facilities are available are not included in TELRIC rates.

In the context of the distribution and drop components, Mr. Florence relates that TELRIC assumes that they are 100% 26 gauge contiguous non-loaded copper facilities.
The plant mix (buried, underground, aerial), cable sizes, and lengths reflected in TELRIC are based on data obtained from a sample of loops taken at a "snapshot in time," according to Mr. Florence. He contends that this means that the unbundled loop study, although it assumes the use of only forward-looking technology, is also based upon existing facility routes to existing customer premises. As is the case for the feeder, he insists that any costs incurred for additional construction, such as additional splicing work necessary to provide a contiguous path to a new location or an existing location requiring new facilities, are not reflected in the present TELRIC study. Mr. Florence states that the LRSIC study for the loop portion of basic local exchange service reflect the same distribution and drop characteristics as those reflected in the TELRIC study.

Mr. Florence indicates further that the LRSIC study also includes a cost for the termination of a loop in the central office. The costs used for loop termination in connection with basic local exchange service, he maintains, however, are not the same as those developed for unbundled loops. For a loop used in a retail service, such as basic local exchange service, he once again states that loops served by fiber facilities are assumed to use an IDLC and not terminate on the MDF. Instead, Mr. Florence relates they are connected directly into the switch at a DS-1 level (24 voice-grade channels) at a DSX cross-connect equipment bay.

In contrast, for unbundled loops served by fiber facilities, he repeats that TELRIC assumes that LiteSpan non-integrated DLC is used. As a result, he states, termination on the MDF is required for an unbundled loop 100% of the time. The existing TELRIC study for unbundled loops does not include any additional costs for those instances where integrated loops, which are already terminated on a DSX cross-connect bay, must be un-integrated and moved to the MDF to make them available on an unbundled basis, according to Ameritech.

Turning to RSUs, it was previously noted that a host-remote umbilical connects a RSU to its host switch. With regard to that umbilical, Mr. Florence claims that neither TELRIC nor LRSIC studies include any of the costs associated with the umbilical. According to Mr. Florence, the TELRIC study only takes into account those costs incurred from the customer location to the RSU. When a CLEC is collocated at the host rather than the remote switch, Mr. Florence states that a discrete path is necessary to make such a loop available on an unbundled basis. In those instances, he testifies that Ameritech incurs additional costs to extend the loop from the remote location to the host switch. He contends that examples of additional costs include the construction of a parallel copper facility from the remote to the host switch or the costs of placing both the RT portion of a DLC system at the remote location and the related COT at the host central office switch, plus the necessary plug-in cards. Any necessary fiber transport facility used to connect the RT and COT, he notes, would add additional

costs. Mr. Florence claims that none of these costs are reflected in the existing TELRIC study, which is why Ameritech seeks to assess special construction charges to recover these costs.

In addition to the network components described above, Mr. Florence testifies that there are other items included in the monthly costs for an unbundled loop. Expenses related to maintenance, marketing, billing system development, methods and procedures development unique to the provision of unbundled loops, and reports processing are also included in the monthly costs, according to Mr. Florence. Additionally, he asserts that the monthly costs include certain forward-looking shared and common overhead loadings. These specific expenses are unique to unbundled loops, and therefore, he contends, are not included in the LRSIC cost study for the loop portion of basic local exchange service. Mr. Florence further claims that the monthly costs for an unbundled loop include the non-volume sensitive and the forward-looking shared and common cost loading approved by the Commission. Finally, he avers that the monthly costs for both bundled and unbundled loops include, on an amortized basis, the field installation costs incurred in simple dispatch situations.

Ameritech insists that the existing TELRIC study methodology does not account for any growth in the feeder, distribution, or drop portions of the unbundled loop for new end users. The TELRIC starting point is a "snapshot in time" of the network, according to Mr. Florence, and is based on existing routes and existing customer locations. He argues that no attempt was made to account for changes that might result from new customer locations that did not exist at the time of the cost study, or from any additions to, or rearrangement of, that network.

Mr. Florence also maintains that since the TELRIC study is based on a forward looking meld of fiber optic and non-loaded copper facilities, Ameritech's costs associated with loop conditioning are not included in the TELRIC rates. In the future, he testifies that Ameritech intends to recover loop conditioning costs through a separate nonrecurring TELRIC based charge. On April 5, 2000, Ameritech filed with the Commission cost studies geared toward that end, in compliance with the FCC merger conditions (V), paragraph 21, appendix C. In addition, as noted earlier, Ameritech witness Suthers is proposing that the alleged costs associated with complex dispatch situations be melded into the recurring or nonrecurring unbundled loop costs in Docket No. 98-0396 since they are supposedly not recovered in existing TELRIC rates.

Mr. Florence also points out that Ameritech offsets its booked expenses with special construction revenues received in accordance with Part 32.5999(g) of the FCC's Uniform System of Accounts, which states that "reimbursements of actual costs incurred in conjunction with joint operations or projects, repairing plant due to damages by others, and obligations to make changes in telecommunications plant shall be credited to the accounts originally charged." He further states that Ameritech offsets the booked construction costs with special construction revenues received in

accordance with Part 32.2000(a)(2). Mr. Florence reports that Part 32.2000(a)(2) states that "Contributions in the form of money or its equivalent toward the construction of telecommunications plant shall be credited to the accounts charged with the cost of such construction. Amounts of nonrecurring reimbursements based on the cost of plant or equipment furnished in rendering service to a customer shall be credited to the accounts charged with the cost of the plant or equipment."

In response to assertions that Ameritech's special construction charges constitute double recovery of its costs, Mr. Suthers points to paragraphs 382 and 384 of the FCC's First Report and Order and paragraphs 190 through 194 and footnote 418 of the UNE Remand Order for the proposition that Ameritech is entitled to recover its costs associated with line conditioning and unbundling IDLC and RSU facilities. He further observes that Terry Murray, who testified on behalf of Rhythms and Covad, agrees that the costs of loop conditioning are not included in Ameritech's cost studies because, for example, load coils are not part of Ameritech's forward-looking cost structure. From the context of her testimony, Mr. Suthers infers that Ms. Murray intends that the same arguments apply to the costs of unbundling loops from integrated facilities.

Mr. Florence also takes issue with Mr. Phipps' argument that Ameritech is already recovering the cost of removing defective circuits within its fill factor assumptions. First, Mr. Florence argues that Mr. Phipps' definition of usable capacity, as represented on page 12 of his direct testimony, incorrectly interprets the definition of "usable capacity" as set forth in Section 791.20(n) of the Commission's rules. Mr. Phipps, he claims, has erroneously equated "maintenance" terminology with "defective circuits." In Mr. Florence's opinion, the fill factors described by Mr. Phipps account for additional investments in feeder and distribution facilities required for needs related to areas such as maintenance, testing, and administrative purposes. These facility investments do not include the additional labor costs for clearing defective pairs, according to Mr. Florence.

Mr. Florence further objects to Staff witness Phipps' allegation that Ameritech is double recovering costs for cable splicing when it assesses special construction charges for this activity. As will be discussed further below, Mr. Phipps claims that Ameritech is already recovering such costs since they are accounted for in its unbundled loop cost study by the use of installation factors. Mr. Florence contends that in TELRIC studies, installation factors are applied to the material investment associated with the forward looking, least cost network equipment and facilities used to provision, for example, unbundled loops. To the extent the TELRIC assumptions exclude the costs of certain activities (e.g., loop conditioning or unbundling from integrated facilities), Mr. Florence maintains that the installation factors also exclude the same costs.

In addition, Ameritech argues that Staff's position on cost recovery for IDLC/RSU unbundling should be rejected because it is inconsistent with the position that Staff took

in Docket No. 99-0525. In that docket, Ameritech states that Staff supported Ameritech's recovery of the labor costs required to provision an unbundled loop from an integrated facility. According to Ameritech, both Mr. Graves and Mr. Phipps testified that when an IDLC or RSU must be modified by providing a new COT or RT, separate charges in that instance would be consistent with item C of Ill. C. C. No. 20, Part 2, Section 5, Original Sheet No.1 since such situations may necessitate a routing of facilities other than that which Ameritech would have normally done. In the present docket, however, Ameritech relates that Mr. Graves has taken the position that because routing around the IDLC or RSU is the only way to provide an unbundled loop in some situations, there is no routing other than what Ameritech would normally have done to provide an unbundled loop. Mr. Suthers counters that construction of a new COT or RT is not "normal" routing for anyone, whether that would be a retail customer or a purchaser of an unbundled loop.

As for Mr. Starkey's assertion that UNE rates should be based on an IDLC, as opposed to UDLC, network, Mr. Florence contends that such a network would not function because unbundled loops can not be extracted from an IDLC system. The suggestion that GR-303[24] compatible Next Generation IDLC ("NGIDLC") may be used to provision unbundled loops from an IDLC system is irrelevant, according to Mr. Florence, because Ameritech does not intend to deploy such technology in its region in the foreseeable future. Mr. Florence suggests that the NGIDLC that SBC and Ameritech intend to install under Project Pronto will not be GR-303 compatible and that "NGIDLC" is merely a generic term that encompasses a whole host of existing and developing DLC technologies. The thrust of Project Pronto, he states, is to simply offer a cost effective way to provide xDSL services. Later, however, Mr. Florence admitted that Ameritech is installing GR-303 compatible NGIDLCs as part of Project Pronto.

2. Staff's Position

Staff witness Phipps relies upon the testimony of Ameritech witness Palmer in Docket No. 96-0486 to explain how Ameritech developed its TELRIC rates for unbundled loops. Mr. Phipps reports that Ameritech first identified the resources (i.e., material, software, labor) required to satisfy demand for particular services. Investments in resources that were to be used over a long period of time (i.e., outside plant), he states, were capitalized; thus, converting the investment to annual charges (consisting of depreciation, cost of capital, and income taxes). Investments in resources that involved a one-time cost (i.e., labor required to process a service order)

[24] Staff witness Graves describes GR-303 as a generic standard for transporting signals over an access system like Ameritech's DLCs. In the past, he reports, such standards were unique to each manufacturer of DLC equipment. This open standard allows manufacturers to use the same standard and allows different manufacturers' equipment to communicate with each other, according to Mr. Graves. He states that GR-303 are Generic Requirements developed by Telcordia Technologies. According to Telcordia Technologies, the GR-303 family of requirements specifies a set of NGIDLC generic criteria that creates an integrated access system supporting multiple distribution technologies and architectures, and a wide range of services on single access platform. For additional information on GR-303, see Staff Ex. 1.2, p.9.

were converted to nonrecurring expenses, according to Mr. Phipps. Other costs (i.e., maintenance costs), he observes, were converted to recurring operating expenses. Mr. Phipps testifies that this process resulted in Ameritech developing TELRIC-based recurring and nonrecurring rates for an unbundled loop. The recurring rate, he relates, consists of the capital investment and recurring operating expenses (as well as a shared and common cost loading, as previously discussed), while the nonrecurring rates consist of one-time costs.

More specifically, to develop the recurring TELRIC rate for an unbundled loop, Mr. Phipps asserts that Ameritech relied heavily on its loop cost model, better known as AFAM. The purpose of AFAM, he maintains, is to create a model of a simplified, efficiently run network based on forward-looking engineering practices, guidelines, technologies, and investments. According to Mr. Phipps, it develops average network investments and characteristics using forward-looking, optimally re-designed feeder and distribution routes.

Mr. Phipps contends that facility investments in AFAM are adjusted to include the cost of installation by applying installation factors and therefore represent total installed investments. Installation factors, he states, are cost study parameters that are taken from ACAR. This should not only recover the labor cost of installing the cable, but should also recover the cost of material to install the cable, such as the cross-connects between the drop and the NID and between the distribution and drop portions of the network, according to Mr. Phipps. He then states that Ameritech sums the total installed costs for the entire route and all routes (according to Bands A, B, or C). Mr. Phipps testifies that this total is divided by the quantity of circuits to develop an average investment by account by band. To yield annual costs, he reports that the investments are multiplied by an annual charge factor ("ACF")[25] to capture factors such as cost of money, income tax, depreciation, ad valorem taxes, maintenance, power, and floor space. Mr. Phipps adds that ACFs, under TELRIC, are generally higher than LRSIC ACFs due to the different assumptions for cost of money, economic lives, cost of removal, and salvage.

In short, Mr. Phipps argues that the feeder module of AFAM computes costs associated with COT common equipment, feeder cable (aerial, buried, underground), RT common equipment, and copper extension feeder. The distribution and drop module of AFAM, he asserts, computes costs associated with the SAI, copper distribution cable (aerial, buried, underground), interior terminal or the drop, and NID.

But Mr. Phipps acknowledges that the feeder and distribution and drop modules of AFAM do not recover all costs of the unbundled loop; external adders are added to AFAM modules to recover additional loop costs. He testifies that these external adders include costs associated with the following: MDF and protector, COT and RT plug-in

[25] Mr. Phipps states that annual charge factors are derived from the ECONS/CAPCOST models.

cards, central office entrance facility, huts and cabinets for RT, structures (poles and conduits), and DSX-1 cross connect (for a DS1).

By relying on a proprietary Ameritech cost summary depicting the TELRIC components of an unbundled analog loop in Access Area C, Mr. Phipps attempts to provide a specific detailed example of the cost components that are included in Ameritech's recurring TELRIC rate for such an unbundled loop.[26] As he previously noted, a majority of the feeder investment is derived by using AFAM. Mr. Phipps indicates that the feeder averages investments to reflect a combination of fiber and copper as well as averages investments to account for aerial, buried, and underground cable.[27] He further states that feeder also includes costs for the COT and the RT.[28] The LiteSpan plug-in cards for the COT and RT are also added into the TELRIC rate,[29] as are cost for supporting structures (poles and conduit),[30] according to Mr. Phipps.

With regard to the distribution and drop component, Mr. Phipps testifies that a majority of the investments for distribution and drop are also developed in AFAM. Although copper cable is assumed throughout the distribution and drop in Access Area C, he asserts that average investments are used to account for the following types of cable: underground, buried, aerial, and building.[31] Mr. Phipps further argues that the distribution and drop not only recovers the cost of the cable, but also includes costs associated with the SAI and the copper drop and NID at the customer's premises. He adds that the distribution and drop includes a cost element for supporting structures (poles and conduit).[32] As for MDF and protector investment, Mr. Phipps states that associated costs are included in TELRIC as developed in the Switching Cost Information System.[33]

Ameritech's proprietary cost summary also includes four additional loop expense items: report process and maintenance expense, billing expense, field connection expense, and other expenses. Mr. Phipps states that report processing and maintenance[34] is designed to recover the cost of processing trouble reports and the additional maintenance labor costs associated with each trouble report. He adds that the additional maintenance involves the Central Office and Unbundled Service Center workgroups. The billing expense[35] component, according to Mr. Phipps, was included to recover the billing expense incurred by Ameritech when provisioning an unbundled loop to a CLEC. He testifies that the third expense, field connection expense,[36] is

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[26] The cost summary has been marked as Proprietary Attachment 1 and attached to Staff Ex. 2.0.
[27] Staff Ex. 2.0, Proprietary Attachment 1, lines 1-6.
[28] Staff Ex. 2.0, Proprietary Attachment 1, lines 9-10.
[29] Staff Ex. 2.0, Proprietary Attachment 1, line 11.
[30] Staff Ex. 2.0, Proprietary Attachment 1, lines 7-8.
[31] Staff Ex. 2.0, Proprietary Attachment 1, lines 18-21.
[32] Staff Ex. 2.0, Proprietary Attachment 1, lines 22-23.
[33] Staff Ex. 2.0, Proprietary Attachment 1, line 26.
[34] Staff Ex. 2.0, Proprietary Attachment 1, line 29.
[35] Staff Ex. 2.0, Proprietary Attachment 1, line 30.
[36] Staff Ex. 2.0, Proprietary Attachment 1, line 31.

meant to recover costs associated with the Engineering Work Order ("EWO") and Customer Provisioning and Maintenance ("CP&M") work groups. He states that the EWO portion recovers the cost of a field visit and dispatching a field technician for field connection activities, and the CP&M portion recovers the cost of assisting with outside plant facilities. Mr. Phipps asserts that the other expenses[37] component consists of billing system programming (outside contractor), methods and procedures (development training for network and service center), and integrated testing.

Mr. Phipps concludes that his testimony and attachments thereto demonstrate that every portion of the unbundled loop facility is included within the TELRIC rate. These costs, he argues, represent installed investments that connect the entire route from the central office to the customer's premises.

As indicated above, in those instances where a CLEC requests an unbundled loop served via IDLC/RSU and no spare copper loops are available, Ameritech argues that it is entitled to charge for special construction to provision the unbundled loop. Relying on his aforementioned analysis, Mr. Phipps disagrees and begins his double recovery inquiry by observing that there are two possible scenarios in such instances: either the IDLC/RSU is utilized in conjunction with COT technology, or it is not. The key difference between these two scenarios, he avers, is that if COT technology is utilized, loops can be provisioned by utilizing "plug-in" cards at the RT and COT. If COT technology is not utilized, however, Mr. Phipps understands that loops may be unbundled only by a line station transfer or building separate non-integrated facilities.

If COT technology is present, Mr. Phipps maintains that Ameritech should be able to provision a loop to a CLEC by segregating a loop utilizing the plug-in cards. In light of Ameritech's position that special construction charges should apply when plug-in cards are not present in the RT and COT, however, Mr. Phipps contends that double recovery is still a concern but refrains from addressing plug-in cards in the context of IDLCs and RSUs since plug-in cards fall into Ameritech's category of complex work, which he discusses later. On the other hand, if COT technology is not present and no spare copper exists for a requesting carrier, Mr. Phipps states that Ameritech will attempt a line station transfer. If a line station transfer can not be performed, he asserts that Ameritech would assess special construction charges on the CLEC to recover the costs of building and installing an entirely new non-integrated system for the CLEC. Such charges, Mr. Phipps insists, are not appropriate.

According to Staff witness Phipps, Ameritech should not be allowed to recover the cost of building and installing an entirely new non-integrated system for the CLEC for several reasons. First, Mr. Phipps argues that Ameritech would be double-recovering the costs of the new system by recovering the entire cost in an up-front payment and, as described above, continuing to assess monthly recurring charges on all customers using the facility to recover the cost of the facility over time. In addition,

[37] Staff Ex. 2.0, Proprietary Attachment 1, line 32.

by Ameritech forcing CLECs to incur costly up-front charges, Staff asserts that it is effectively removing UNEs as a cost efficient way to compete with Ameritech. Mr. Phipps further states that this problem is exacerbated by the fact that Ameritech could use any spare capacity on the new facility to provision service to other CLECs as well as its own retail customers. As an example, he notes that the capacity of a LiteSpan 2000 (the brand-name of the multiplexing equipment Ameritech utilizes) system is 2,016 voice-grade circuits. Therefore, he continues, if Ameritech constructed a new LiteSpan system for a CLEC for the purposes of provisioning 16 unbundled loops, Ameritech could use the remaining 2,000 voice-grade circuits to provision service to its own customers (retail or wholesale). In short, Mr. Phipps observes that although the first CLEC would have already paid for the entire system in an initial up-front payment, Ameritech would retain possession of the equipment and manage it as it sees fit.

One likely way in which Ameritech could provision a loop to a CLEC through the construction of new non-integrated facilities is by installing a COT and RT. Mr. Phipps rejects Mr. Suthers' argument that Ameritech's cost studies only account for existing COT and RT facilities, and that therefore special construction charges are appropriate in such situations. As illustrated by his earlier testimony, Mr. Phipps maintains that the costs of a COT and RT are already being recovered in the TELRIC loop rate. If Ameritech must build additional COT and RT facilities, he avers that the TELRIC rate will allow the CLECs that lease loops from that facility to compensate Ameritech for such facilities over time, rather than incurring a costly up-front charge; which is the exact purpose of TELRIC based rates, according to Mr. Phipps.

As for loop conditioning, while Mr. Phipps finds Ameritech's method for assessing special construction charges for loop conditioning troublesome, he testifies that he is not aware of any recovery of loop conditioning costs through the UNE rate for an unbundled loop. Mr. Graves testifies that loop conditioning would constitute routing for facilities other than that which Ameritech would normally use to provide service. Specifically, he states that loop conditioning falls under item C of Ameritech tariff Ill. C. C. No. 20, Part 2, Section 5, Original Sheet No. 1.

With regard to Ameritech's list of complex work activities, Mr. Phipps disagrees that these costs are no longer within the scope of this proceeding simply because Ameritech now intends to include the allegedly unrecovered associated costs in its recurring TELRIC rates for UNEs. As for line station transfers, Mr. Phipps testifies that Ameritech is essentially charging CLECs for costs incurred to convert the "real world" network (integrated) to the least cost, most efficient network assumed in the TELRIC study (non-integrated). Mr. Phipps states that such a charge is contrary to the intent of the Commission's order in Docket No. 99-0525. Following Ameritech's reasoning a step further, he asserts that retail customers should also bear a portion of the cost of the line station transfer because a retail customer is also being converted from the "real world" network (non-integrated) to the least cost, most efficient network assumed in the LRSIC study (integrated). As it does not appear that Ameritech charges retail

customers for line station transfers, Mr. Phipps argues that it should not be allowed to charge CLECs for this activity.

Regardless of the recovery mechanism, Mr. Phipps also maintains that Ameritech should not be allowed to recover additional costs of defective loop recovery from a CLEC because these activities should occur as part of the routine maintenance of plant equipment, which is already recovered in the TELRIC rate. ACAR, he observes, explains that maintenance costs are incurred "in order to keep telephone plant and equipment resources in usable condition."[38] Defective pair recovery, Mr. Phipps insists, should be included in the maintenance expense because a defective pair is not in usable condition. As he explained previously, investments are multiplied by annual charge factors to account for, among other things, maintenance expenses. This, in turn, is included in the annual cost of the facility, according to Mr. Phipps. He further notes that Ameritech's fill factors, in part, account for defective circuits by assuming levels lower than the maximum fill.[39] Since a lower fill increases the unit cost of an element, Mr. Phipps contends that Ameritech is recovering the cost of removing defective circuits from the network within its fill factor assumptions. Therefore, he concludes, any attempt to recover the cost of defective pair recovery outside the current TELRIC rate for a loop would constitute double-recovery.

Moreover, Mr. Phipps asserts that the FCC has recognized that CLECs should not be responsible for maintaining the ILEC's facilities. In paragraph 268 of its First Report and Order, Staff witness Phipps relates that the FCC stated, "the ability of other carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element." Therefore, Mr. Phipps believes that it is the ILECs' duty to not only repair a network element, but to replace it if necessary.

In response to Mr. Florence's argument that he has incorrectly interpreted the definition of usable capacity, Mr. Phipps first asserts that since Part 791, the Cost of Service Rules, apply to LRSIC studies as opposed to TELRIC studies, his interpretation of the Cost of Service Rules is important only in comparing the fill factors used in TELRIC studies to those used in LRSIC studies. With that said, Mr. Phipps then takes issue with Mr. Florence's criticism that he has "erroneously equated 'maintenance' terminology with 'defective circuits;'" criticism which is more appropriately directed at Ameritech itself, according to Mr. Phipps. Mr. Phipps indicates that his interpretation of usable capacity came directly from ACAR which states that, "Usable Capacity represents available capacity at an individual facility level. This is technical capacity minus defective circuits, administrative circuits and/or any other type of circuits which would render a capacity unavailable for service on a permanent basis."[40] ACAR, he

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[38] ACAR, Tab 17, Description.
[39] Staff indicates that LRSIC fill factors are based on usable capacity, which is the theoretical maximum fill minus defective circuits minus administrative circuits minus other circuits, while TELRIC fill factors are based on "target fill," which is lower than usable fill.
[40] See Proprietary Attachment 1 to Staff Ex. 2.2.

continues, also defines maintenance expenses as costs "incurred in order to keep telephone plant and equipment resources in usable condition."[41] Since defective loops can not be assigned to a CLEC, Mr. Phipps asserts that the loops are not in usable condition. Therefore, based on Ameritech's own interpretations of "usable capacity" and "maintenance costs," Mr. Phipps avers that the cost incurred with defective loop recovery should be included in either the maintenance expense factor applied to the facility investments, or the cost of spare capacity inherent in the fill factors applied to derive unit costs from total costs (but not both). Additionally, since LRSIC fill factors are set above TELRIC fill factors, Mr. Phipps states that TELRIC fill factors provide for a greater amount of spare capacity than do LRSIC fill factors (and CLECs pay for this extra capacity through relatively higher TELRIC rates).

With regard to the third type of complex work, Staff contends that Ameritech's proposal to assess additional charges for plug-in cards is flawed. As indicated above, Mr. Phipps avers that Ameritech's TELRIC rate for an unbundled loop includes the cost of plug-in cards, as well as the installation cost. By applying the in-plant/investment factor to the price of the plug-in card, Mr. Phipps maintains that Ameritech converts the material price into installed component unit investments (material price plus all costs necessary to make the equipment operational). This includes engineering, installation, and supply expenses, among other costs, according to Mr. Phipps. Thus, he states that it appears that Ameritech is recovering all costs associated with plug-in cards in its TELRIC rates. He argues that assessing additional charges for plug-in cards as well as installing them is inappropriate and constitutes double-recovery; Ameritech should simply install the plug-in card at no additional cost.

As for the fourth type of complex work, Staff initially stated that it is conceivable that Ameritech might have to perform a wire out of limits for a retail customer, and might therefore assess special construction charges on that retail customer pursuant to item C on Ill. C. C. No. 20, Part 2, Section 5, Original Sheet No. 1. Assuming that such a charge on retail customers is proper under its tariff, Mr. Phipps observed, however, that Ameritech intends to meld this cost into the TELRIC rate for CLECs. Since Ameritech intends to recover this cost differently from CLECs and retail customers, Staff found this proposal problematic. Mr. Phipps argues that it is preferable that special construction charges for wire out of limits remain an up-front nonrecurring TELRIC based charge for CLECs. Even if this problem were resolved, Mr. Phipps would still be concerned that Ameritech would not seek to assess special construction charges for wire out of limits on CLECs and retail customers in similar situations. If his concerns were resolved to his satisfaction, Mr. Phipps proposed a nonrecurring TELRIC based charge of $103.33 for each instance where Ameritech must perform wire out of limits.[42] Following the hearing, however, Staff changed its position after Ameritech witness Florence offered additional information under cross-examination on wire out of limits. Staff reports that Mr. Florence stated that it was his understanding that Ameritech performs a wire out of

[41] See Proprietary Attachment 2 to Staff Ex. 2.2.
[42] See Proprietary Attachment 10 to Staff Ex. 2.0 and pages 12-14 of Staff Ex. 2.2 for the development of Mr. Phipps' charge for wire out of limits.

limits when the customer's serving terminal runs out of excess capacity. (Tr. at 485). Since Staff does not view this type of instance as meeting the requirements of Ill. C. C. No. 20, Part 2, Section 5, Staff asserts that Ameritech should not be allowed additional cost recovery above what is afforded in its current TELRIC rates, which already recover the cost of a contiguous loop from the central office to the customer's premises. Staff also claims that Ameritech failed to provide proof that it would, in the future, assess special construction charges for wire out of limits on a similarly situated retail customer. In any event, Mr. Phipps observes that it is doubtful that wire out of limits occurs very frequently since of the total of 1,949 known special construction instances shown in Proprietary Attachment 9 to Staff Ex. 2.0,[43] only 12 (0.62%) of them included wire out of limits.

Mr. Phipps does not find the next type of complex dispatch activity, break and connect through, to be very different from simple dispatch activities which Ameritech performs at no additional charge. Ameritech's own description, he contends, suggests that it charges CLECs for connecting them to a vacant facility (a facility that is not currently in use). According to the Ameritech policy utilized when this investigation was initiated, Mr. Phipps recalls that Ameritech would not assess special construction charges for simple dispatch situations, or situations "in which all loop components exist and are terminated at the appropriate outside plant cross-connect interfaces so the components can be readily assembled via a simple dispatch by an Ameritech technician." This description, according to Mr. Phipps, includes the activities performed in the break and connect through. Although he is unclear why Ameritech now proposes to recover these costs through the TELRIC rate, he nevertheless urges the Commission to reject Ameritech's proposal pertaining to this complex dispatch situation.

The final type of complex work activity is installing pair gain devices. Mr. Phipps finds Ameritech proposal to include the costs of equipment and installation of the device within the nonrecurring TELRIC rate for a UNE loop problematic for several reasons. First, after a CLEC pays for installing the device, he asserts that it is possible that Ameritech could use the spare copper loops to provision service to other CLECs or its retail customers; thereby, forcing CLECs to pay for expanding Ameritech's copper capacity. Further, Mr. Phipps maintains that Ameritech will continue to recover the revenue from each line added by the pair gain device. If a CLEC pays for Ameritech to construct a six line pair gain device and utilizes one line, he points out that Ameritech could utilize the remaining five lines as it sees fit. Additionally, Mr. Phipps observes that Ameritech will have six revenue producing lines, rather than one, at no additional cost to itself. He urges the Commission to reject Ameritech's proposal to recover the cost of pair gain equipment or installation through the TELRIC rate.

In addition to the three categories of activities which Ameritech has identified as causing it incur additional costs not recovered by TELRIC rates, Mr. Phipps notes a fourth type of activity which does not fit within any of Ameritech's categories: placing

[43] Mr. Phipps notes that the earliest recorded special construction assessment on Proprietary Attachment 9 to Staff Ex. 2.0 is dated January 8, 1998 while the most recent is dated January 6, 2000.

and splicing additional cable. Mr. Phipps states that placing and splicing additional cable appears on Proprietary Attachment 9 to Staff Ex. 2.0 162 times, representing 8.3% of the 1,949 known special construction assessments. With that said, he believes that it should be a very rare occurrence that Ameritech runs out of cable capacity to serve customers. To support this assertion, Mr. Phipps first observes that fill factors, under TELRIC, assume that the facilities are being utilized at the optimal usage level, as opposed to a theoretical maximum. Beyond this point, he avers, it would be more efficient to add additional capacity rather than continue to use existing plant. Therefore, according to Mr. Phipps, Ameritech should, theoretically, never run out of spare cable capacity. If Ameritech reaches the point where no spare capacity exists, he contends that Ameritech must be utilizing its network inefficiently. In addition, since installation factors are applied to cable investments to determine a total installed investment, he maintains that no additional charges for splicing should be necessary because it is already being recovered. Furthermore, as he explained earlier, CLECs pay a TELRIC rate to recover the cost of a contiguous loop from the central office to the customer premises; when CLECs pay special construction charges for Ameritech placing and splicing additional cable to connect the CLECs customer to the central office and then pay a monthly recurring rate to Ameritech for continued use of the facility (a contiguous path from the central office to the customer's premises), Mr. Phipps argues that Ameritech is double-recovering the cost of the cable and splicing.

In response to Mr. Florence's criticisms of his position on cable placing and splicing, Mr. Phipps notes as an initial matter that Mr. Florence disagrees with only a portion of his testimony on this issue. The portion of his direct testimony to which Mr. Florence refers, Mr. Phipps observes, not only asserts that Ameritech should not charge for the splicing of additional cable, but should not charge special construction for the cable itself. As he described in his direct testimony, Ameritech should not be allowed to charge for additional cable because CLECs already pay a TELRIC rate that includes the cost of spare cable capacity. Assessing special construction charges for additional cable, therefore, would result in Ameritech double-recovering these cable costs, according to Mr. Phipps.

Although he does not question Mr. Florence's characterization of how installation factors are applied to investments, Mr. Phipps states that Mr. Florence's testimony avoids the true issue at hand. Mr. Phipps asserts that the special construction instance of placing and splicing additional cable does not pertain to loop conditioning or unbundling an integrated facility, as Mr. Florence's testimony suggests. Rather, Mr. Phipps argues that these special construction instances refer to costs incurred in placing and splicing additional cable that are already recovered through the monthly recurring rate for a loop. As examples of such instances, Mr. Phipps references items 1 and 5 on Proprietary Attachment 9 to Staff Exhibit 2.0. He reports that special construction instance number 1 is for "placing and splicing UG [underground] and aerial cable" while special construction instance number 5 is to "place 100' of 16 pr. aerial service wire for F-2 [or distribution] cables." Relying on Proprietary Attachment 1 to Staff Exhibit 2.0, Mr. Phipps avers that Ameritech's monthly

recurring cost for a loop includes costs for underground and aerial feeder and distribution and drop cables. Additionally, as he explains in his direct testimony, and as Mr. Florence acknowledges, Mr. Phipps states that installation factors have been applied to the cable investments to derive total installed costs (including splicing) for this cable. Thus, Mr. Phipps repeats, CLECs already pay for placing and splicing additional cable, and assessing special construction charges for either the cable or the splicing would constitute double-recovery.

As for Ameritech's claim that federal law entitles it to recover the costs governed by its special construction policy, Staff agrees with Ameritech that, pursuant to federal law, it is entitled to recover certain costs that are caused by CLECs. Staff argues, however, that the recovery of these costs is limited by federal law, the Act, the Commission's Order in Docket 96-0486, and Ameritech's special construction tariff. Staff reports that the relevant federal policies governing nonrecurring expenses are found in paragraphs 745 through 751 of the FCC's First Report and Order. Those paragraphs, according to Staff, lay out three principles for nonrecurring charges: 1) nonrecurring charges should not recover recurring costs such as income taxes, maintenance expenses, and administrative expenses;[44] 2) nonrecurring charges should not double recover costs;[45] and 3) nonrecurring charges should be imposed equitably among entrants.[46]

Paragraph 750 of the First Report and Order also, Staff reports, places on the Commission the burden of ensuring that Ameritech does not recover nonrecurring costs twice. Staff argues that because it has demonstrated that certain of Ameritech's special construction charges represent costs already recovered through TELRIC rates, the Commission should adopt Staff's position. Staff notes that Ameritech has even conceded that it was double-recovering the cost of plug-in cards because it was recovering those costs through the TELRIC rate as well as through special construction charges. (Tr. pp.475-476 and 490). For the exact same reason, Staff asserts that Ameritech double-recovers the cost of a COT and RT if it assesses special construction charges for those facilities as well as includes them in the TELRIC rate.

Concerning Ameritech's claim that unbundling a loop in an IDLC/RSU environment and loop conditioning are equivalent and should be treated similarly, Staff contends that prior to making this claim, Ameritech defined the term "loop conditioning," as the "removal from the loop of any devices that may diminish the capability of the loop to deliver high-speed switched wireline telecommunications capability, including DSL. Such devices include, but are not limited to, bridged taps, low pass filters, and range extenders." (Ameritech Initial Brief at 2). Given this definition, Staff maintains that loop conditioning is a separate and distinct activity from unbundling a loop from an IDLC/RSU and should, therefore, be addressed separately. Nevertheless, based on the assumption that IDLC/RSU and loop conditioning are equivalent, Staff observes

[44] First Report and Order, ¶745.
[45] First Report and Order, ¶750.
[46] First Report and Order, ¶¶750-751.

that Ameritech relies on language from the UNE Remand Order that applies to loop conditioning only to make the argument that an ILEC's right to cost recovery for unbundling costs is not limited by the assumptions that apply to TELRIC studies. Since IDLC/RSU and loop conditioning are not equivalent and the UNE Remand Order language pertains only to loop conditioning, Staff insists that Ameritech can not convincingly use this language to support its argument with respect to IDLCs and RSUs.

Mr. Phipps also rejects Rhythms and Covad witness Riolo's interpretation of a forward looking design. Mr. Riolo argues that under a forward looking design, Ameritech's network should not include bridge taps, load coils, or any other digital service inhibiting elements. Although he agrees with Mr. Riolo that TELRIC is based on forward looking least cost technology, he disagrees with the conclusion that Mr. Riolo draws. According to Mr. Phipps, the FCC states that TELRIC is based on a reconstructed network that assumes that the ILEC's wire centers are at their current locations, but that the reconstructed network connecting the wire centers and customers will employ the most efficient technology. Stated differently, the FCC bases TELRIC on the cost an ILEC would incur today if it re-built its current network using least cost technology. Since Ameritech primarily provides so-called plain old telephone service ("POTS") to end users, and load coils are necessary to provision POTS, Mr. Phipps asserts that the network that Ameritech would build today would include a certain amount of load coils among its components. Accordingly, he finds misleading Mr. Riolo's assertion that a forward-looking network design and loop conditioning are contradictory.

3. McLeod, Ovation, MCI WorldCom, and Allegiance's Position

McLeod, Ovation, MCI WorldCom, and Allegiance assert that Ameritech should not be allowed to recover special construction charges when it provisions loops served via IDLC or RSU since Ameritech is precluded by the FCC's TELRIC rules from recovering these costs. Recovery of these charges, they claim, would result in an over-recovery by Ameritech.

Special construction charges associated with providing unbundled loops in areas served by IDLC and RSU technology, according to McLeod, Ovation, MCI WorldCom, and Allegiance, are not consistent with the FCC's or the Commission's requirement that rates established for accessing UNEs be set to recover only the TELRIC costs of providing access to the element. Ameritech's special construction charges in this circumstance, they argue, actually recover expenses incurred in modifying its existing network (not a forward looking network required by the FCC's TELRIC standard) so as to allow it to provision UNEs. According to these parties, such expenses are not forward looking costs, but are instead short-run marginal costs associated specifically with modifying Ameritech's current, embedded network technology. If the Commission allows Ameritech to recover both monthly recurring TELRIC costs associated with a forward looking network, and then also recover special

construction charges to cover the cost of modifying its existing network to a point where it mimics the forward looking network assumed within the TELRIC studies, they claim that the Commission will have effectively adopted embedded pricing, and Ameritech will be allowed to recover revenues in excess of its TELRIC costs. Ameritech can not, they argue, have it both ways -- it can not charge both TELRIC long run costs and short run marginal costs because to do so is not only inconsistent with the TA96 as it has been interpreted by the FCC, but it also results in a double recovery.

Ameritech's cost studies approved by the Commission in Docket Nos. 96-0486/0569 (Consolidated) generate unbundled loop costs that exceed the costs identified for providing bundled loops, according to McLeod, Ovation, MCI WorldCom, and Allegiance. This is because, they argue, the studies assumed a forward looking network that provisioned loops generally using two different network architectures. They report that Ameritech assumed that in some circumstances (i.e., shorter loops), a loop would be provided using a 100% copper facility stretching from the Ameritech central office to the customer's premises. For longer loops, they indicate that Ameritech assumed an architecture employing a combination of fiber optic feeder cable, DLC electronics, and copper distribution cable. McLeod, Ovation, MCI WorldCom, and Allegiance state that Ameritech further assumed that longer loops serving its retail customer base would be provisioned using IDLC while loops used to provision service to CLECs would use more expensive UDLC. They argue that as a result of Ameritech's assumption, its TELRIC studies generate unbundled loop costs that exceed the costs identified for provisioning bundled loops.

McLeod, Ovation, MCI WorldCom, and Allegiance claim that Ameritech inappropriately assumes, for purposes of developing unbundled loop costs, that it is deploying two different networks, (1) one network using cheaper, more efficient IDLC systems for its retail customers and (2) another network using more expensive, less efficient UDLC systems for unbundled loop customers. They argue that not only is UDLC not a forward-looking technology, but the impact of this distinction is to give Ameritech a cost advantage. These "inconsistent" assumptions, according to McLeod, Ovation, MCI WorldCom, and Allegiance, also amount to a violation of the FCC's rules, which require costs to be calculated using the total demand of both unbundled elements and bundled elements in order to ensure that competitors benefit from the economies of scale and scope that would result from designing a network capable of supporting all services, both bundled and unbundled.

Ameritech's TELRIC studies, McLeod, Ovation, MCI WorldCom, and Allegiance argue, ignore the fundamental question of what technology most efficiently, and at the least cost, supports the provision of both bundled and unbundled loop facilities over the same network. They say that this creates a separate category of costs – the costs to move a retail loop from the bundled network to the unbundled network for purposes of providing a UNE. They argue that the short-run marginal costs that Ameritech incurs to move a loop from an IDLC to a UDLC system are generated directly as a result of Ameritech's refusal to make its network available to CLECs under the same terms and

conditions under which it uses that network to provision services to retail customers. Such expenses, they contend, are not appropriately recovered from CLECs.

According to McLeod, Ovation, MCI WorldCom, and Allegiance, Ameritech should not be allowed to assume the higher cost, less efficient UDLC technology in its TELRIC study, and then also charge CLECs for modifying its existing network to make this less efficient network architecture a reality. In such a situation, they assert that CLECs pay twice (once in higher TELRIC based rates and again in special construction charges) for a product that is less efficient than that against which they must compete (i.e., an Ameritech integrated retail loop). If the Commission allows Ameritech to continue this scheme, McLeod, Ovation, MCI WorldCom, and Allegiance argue, competitors will not be provided access to the Ameritech network on rates, terms and conditions equal to those which Ameritech itself enjoys in providing service to its own retail customers. They assert that as Ameritech continues to deploy more and more IDLC technology, an ever widening gap will develop between the cost structure Ameritech enjoys in providing loops and the costs incurred by its competitors who purchase UNEs.

Mr. Starkey asserts that ILECs have a strong incentive to increase the costs of the network facilities deployed to serve their competitors while simultaneously deploying more efficient, least cost facilities for their retail customers, thereby widening the gap that exists between their own costs of providing service to an end user and the costs their competitors must endure. He claims that these inherent, anti-competitive incentives can be overcome by requiring ILECs to charge rates to competitors that assume the use of the most efficient, least cost technology currently available (i.e., the technology that is most likely to be deployed to serve retail customers).

By setting rates that already assume the use of the most efficient technology available, and ignoring, for UNE pricing purposes, the actual technology deployed by the ILEC, Mr. Starkey maintains that ILECs are provided the proper incentive to deploy the most efficient, least cost technology available for all services/elements they provide. He asserts that this results from the fact that even if an ILEC chooses to use a less efficient technology to serve its competitors, it must absorb the higher costs resulting from that decision.

Mr. Starkey recommends that the Commission, when it re-evaluates Ameritech's unbundled loop costs, require Ameritech to construct a loop study that uses the most efficient, least cost, forward looking technology that can be deployed for purposes of supporting all services and products for which the network will be used. He claims Ameritech will likely be required to assume the exclusive use of IDLC equipment and to identify and quantify any forward looking expenses associated with deriving from that IDLC equipment an identifiable loop in the central office where a request for an unbundled loop is made. Mr. Starkey recommends that until Ameritech modifies its study in such a fashion, it should be required to rely upon its current costs studies to recover costs associated with provisioning unbundled loops in areas served by IDLC

equipment and should be precluded from recovering from its competitors, via special construction charges or any other mechanism, costs associated with modifying its existing network to provision unbundled loops.

McLeod, Ovation, MCI WorldCom, and Allegiance assert that Ameritech's position that there would be no "double recovery" is based on factual misstatements. They argue that Ameritech's TELRIC studies for unbundled loops, while assuming the use of UDLCs, do not assume that UDLCs are already in place, as Ameritech contends. McLeod, Ovation, MCI WorldCom, and Allegiance assert that rather, the studies include the costs of procuring, engineering, installing, and maintaining UDLC equipment, including both RTs and COTs, as well as plug-ins cards, sufficient to produce every unbundled loop. They argue that the studies assume that no facilities exist and that Ameritech must build, from scratch, all of the facilities in every circumstance. McLeod, Ovation, MCI WorldCom, and Allegiance contend that contrary to Ameritech's claim, the studies assume that a new COT must be constructed to support every unbundled loop. They conclude that recovery of these costs through the monthly recurring rate as well as special construction costs results in a double recovery.

According to McLeod, Ovation, MCI WorldCom, and Allegiance, while Ameritech maintains that its studies can not recover the cost of provisioning a loop served via IDLC or RSU since the studies do not assume the existence of such facilities, this position is too narrowly focused. They assert that since Ameritech's studies set loop rates at a price above cost, and includes "factors" that reflect the cost of provisioning, these rates more than cover any costs Ameritech incurs in provisioning loops served via IDLC or RSU.

McLeod, Ovation, MCI WorldCom, and Allegiance state that Ameritech's current unbundled loop rates are set in excess of the true forward looking cost of an unbundled loop assuming the use of least cost, forward looking technology. They maintain that this results from the fact that Ameritech's current studies assume the use of more expensive, less efficient UDLC equipment. This equipment, they argue, is not forward looking technology and increases the monthly charge for a loop using IDLC equipment. McLeod, Ovation, MCI WorldCom, and Allegiance contend that Ameritech assesses this overpayment monthly on every unbundled loop that is purchased, not just on those loops that are transferred from an IDLC to a UDLC system. They claim that these revenues should more than compensate Ameritech for the costs associated with transferring some smaller subset of loops from IDLC to UDLC.

While Ameritech may not have within its unbundled loop study a specifically identifiable cost element for swapping a loop from an IDLC system to a UDLC system, McLeod, Ovation, MCI WorldCom, and Allegiance assert that Ameritech's study includes expenses associated with these same activities in the form of "factors." These factors, they claim, are applied throughout the studies to "gross-up" material investments for purposes of arriving at total installed costs.

McLeod, Ovation, MCI WorldCom, and Allegiance state that Ameritech identifies its historical expenses incurred in procuring, installing, maintaining, and provisioning equipment and aggregates that data over a given year. They aver that it then compares the total expenses associated with these activities and compares the level of those expenses to the total price of all of the equipment that received the benefit of those activities in that year. They say it then arrives at a "ratio" of expenses associated with procurement, installation, maintenance, and provisioning the equipment relevant to a given level of material investment.

Mr. Starkey testifies that Ameritech's cost studies recover costs associated with any activities undertaken by its outside plant personnel in the normal course of provisioning and maintaining network facilities. He claims that if Ameritech's outside plant personnel have in the past undertaken activities to procure, install, maintain, move, add, or change the network for purposes of providing service (either to retail or wholesale customers), the current cost studies generate weighted average costs sufficient to reflect those activities.

According to Mr. Starkey, the myriad of "factors" employed by Ameritech are based upon expenses it incurs via the labor of its own employees, as well as third-party employees, that are subsequently booked to its Part 32 accounts and then allocated to its many cost studies. These expenses, he says, are booked according to the particular activity undertaken by the employee and are tracked by "Activity Code." He states that each employee, and the work he performs as a normal part of his job, is categorized into a specific Activity Code Account whereby the expenses incurred for that employee are tracked and eventually booked to specific Field Reporting Codes that match that employee's labor expenses with the network facility investments he supports. The factors for such activities as maintenance, engineering, installing, maintaining, procuring, equipping and otherwise managing the network are, according to Mr. Starkey, attributed to Ameritech's incremental cost studies. He asserts that to the extent that an Ameritech employee performs a task in the normal course of his daily work, and thereby assigns his time and expenses to the appropriate activity code, those expenses are captured by the Ameritech TELRIC studies and included in the costs for an unbundled (as well as retail) loop.

That, pursuant to the FCC's rules, expenses associated with special construction must be removed from these accounts in order to ensure that Ameritech does not double recover expenses when it assesses special construction charges implies to Mr. Starkey that the activities undertaken specific to special construction and the resultant expenses are currently included unless specifically excluded. He claims it is critical that the Ameritech financial data that serves as the basis for Ameritech's cost study factors is derived from Ameritech's books for 1992, 1993, and 1994. He argues that the data for these years is likely to show very little, if any, special construction charges associated with providing UNEs.

In its Reply Brief, McLeod, Ovation, MCI WorldCom, and Allegiance insist that Ameritech ignores relevant evidence when it claims that Mr. Starkey conceded that costs would be backed out of the factors. They state that Mr. Starkey explained under cross-examination that while there were activities during the 1992 through 1994 time frame when the costs underlying the studies were incurred, Ameritech was not collecting special construction charges from its retail customers. They argue that there were no offsets to those amounts.

Mr. Starkey asserts that Ameritech's unbundled loop study supporting its TELRIC rates must recover expenses associated with all of the activities undertaken by Ameritech's employees in the normal course of their jobs. He indicates that these activities include, but are not limited to, all of the activities for which Ameritech now suggests it must assess special construction charges. He argues that allowing Ameritech to recover special construction charges for these activities would allow Ameritech to double-recover its legitimate expenses.

Moreover, the telecommunications industry is a "declining cost industry", according to Mr. Starkey. He says that technology and productivity have allowed local exchange carriers like Ameritech to provision the same level of output while deploying fewer resources in the process, thereby significantly lowering per-unit costs. He argues that to the extent that most of Ameritech's "factors" used in its TELRIC studies employ historical data from as long ago as 1992, it is almost without doubt that Ameritech's factors over-estimate the level of expense Ameritech actually incurs today in provisioning UNEs.

McLeod, Ovation, MCI WorldCom, and Allegiance ask why, if Ameritech is allowed to recover from its competitors the costs of moving retail loops from IDLC and RSU equipment (equipment that lessens the cost of providing retail loops while increasing the costs of providing unbundled loops), would it ever consider a more efficient network design that minimizes the overall cost of providing all network services and elements (i.e., both bundled as well as unbundled loops). They also inquire as to what incentive Ameritech has to not increase its deployment of IDLC and RSU equipment so as to further reduce the costs of its retail, bundled loops (without devising a method to unbundle those facilities) and the costs its competitors must pay for unbundled loops.

The Commission, McLeod, Ovation, MCI WorldCom, and Allegiance note, should be aware that the IDLC/RSU problem will be exacerbated as Ameritech installs more integrated technology and the Commission allows Ameritech to assess special construction charges for transferring loops from IDLC or RSU equipment to either copper facilities or UDLC equipment. Such a policy, they claim, will very quickly drive an ever widening wedge between the loop costs Ameritech incurs in providing service to its retail customers and the costs its competitors will incur when they purchase unbundled loops. McLeod, Ovation, MCI WorldCom, and Allegiance assert that Ameritech has generally discontinued deploying UDLC systems because they are more

costly and less efficient than IDLC. At the same time, they report that Ameritech's rate of deploying IDLC technology has accelerated since 1996 when the TA96 was passed. McLeod, Ovation, MCI WorldCom, and Allegiance characterize as a major network initiative SBC and Ameritech's Project Pronto. They indicate that Project Pronto will significantly increase the number of IDLC systems deployed throughout the Ameritech network. Project Pronto, they claim, will thus further increase the number of circumstances in which Ameritech will demand special construction charges. Mr. Starkey argues that the IDLC equipment installed under Project Pronto will be GR-303 compatible, meaning that Ameritech will be able to provision unbundled loops from IDLCs. If the facilities to be deployed pursuant to Project Pronto will not support unbundled loops, as he contends Mr. Florence suggests, Mr. Starkey claims that Project Pronto will enhance Ameritech's ability to "hide" customers from its competitors behind equipment that can not be unbundled.

Ameritech, according to McLeod, Ovation, MCI WorldCom, and Allegiance, has repeatedly relied in this proceeding on paragraph 384 of the FCC's First Report and Order to support its argument that it should be allowed to use special construction charges to recover expenses associated with unbundling an IDLC system. A close reading of that paragraph, they assert, establishes it does not support Ameritech's position. Paragraph 384 states as follows:

> 384. We find that it is technically feasible to unbundle IDLC-delivered loops. One way to unbundle an individual loop from an IDLC is to use a demultiplexer to separate the unbundled loop(s) prior to connecting the remaining loops to the switch. Commenters identify a number of other methods for separating out individual loops from IDLC facilities, including methods that do not require demultiplexing.[831] Again, the costs associated with these mechanisms will be recovered from requesting carriers.

[831] Under more recent standards for IDLC facilities, a competitor's loop traffic could be separated from the incumbent LEC's loop traffic without the use of mutliplexers. See e.g., MCI comments at 30 (IDLC loops can be moved onto other loop carrier links, or alternatively, can be removed from the multiplexed signal through "hair pinning").

According to McLeod, Ovation, MCI WorldCom, and Allegiance, Ameritech is not "unbundling an IDLC-delivered loop," as described by the FCC in paragraph 384, by removing the loop from an IDLC system and deploying it via a non-integrated, UDLC system. Instead, they assert that when it undertakes such an activity, Ameritech is simply deploying an unbundled loop to the same location using a different technology. The four parties claim that the costs incurred by Ameritech are not the same costs contemplated by the FCC in paragraph 384. The important distinction between these two approaches, they assert, is that the FCC's approach requires that a single network (a network deploying IDLC technology) be used to provide service to both retail customers and purchasers of unbundled loops. Ameritech's approach, they argue,

simply relegates the provision of unbundled loops to a secondary, less efficient network and then, asks the CLEC to pay additional charges for the pleasure. In contrast, Mr. Starkey opines that in paragraph 384 the FCC decided that it is technically feasible to unbundle IDLC systems. He claims that in the three and one half years since that order was issued, technology has progressed to a point where unbundling an IDLC system is even more technically and economically feasible. An MCI WorldCom publication marked at Attachment 2 and affixed to Joint CLEC Ex. 1.0 purports to describe different ways in which an IDLC system may be unbundled.

In addition, Mr. Florence argues that only UDLC can provide the ability to terminate the individual loops on the MDF for cross-connection to the CLEC and that is, therefore, the appropriate technology to be used in TELRIC studies. In response, Mr. Starkey explains that the MDF is a facility in the ILEC central office wherein copper facilities are terminated for purposes of electrical protection and identification. He says that in traditional, copper-based outside plant architectures the MDF served as the primary connection frame in the central office and the vast majority of loops were terminated there before being cross-connected to the switch. With the advent of fiber technology and high-capacity, digital carrier devices, he claims that a number of other frames (generally referred to as digital cross-connect systems or DSXs) are also employed in the central office and perform the same function as the MDF for digitally derived circuits.

According to Mr. Starkey, while Mr. Florence believes that a technology must be capable of terminating a loop facility on the MDF before it can be unbundled, the FCC suggests that any distribution frame or its equivalent can be used to define the network element that constitutes an unbundled loop. He claims that IDLC systems can be, and generally are, terminated on a digital cross-connect frame within the central office. He concludes that even though these circuits do not terminate on the MDF, they do terminate on a distribution frame or its equivalent. McLeod, Ovation, MCI WorldCom, and Allegiance argue that the FCC's UNE Remand Order defined a local loop broadly enough to include terminations at these other points, which they claim disproves the argument that a technology must be capable of terminating a loop facility on the MDF before it can be unbundled.

Mr. Florence's contention that additional facilities will be necessary to unbundle IDLC loops, according to Mr. Starkey, can be misleading. Mr. Starkey argues that different, not necessarily additional, facilities might be necessary to accomplish such unbundling. When an IDLC system is terminated to the digital cross-connect frame and an unbundled circuit is thereby "groomed" from the bit-stream, Mr. Starkey states the MDF is no longer required to support that circuit. The MDF equipment, he claims, is simply replaced by the digital cross connect equipment. Mr. Starkey also asserts that while some additional labor might be involved to map certain circuits from the IDLC to a carrier's collocated equipment, there is no indication that this amount of labor will exceed the savings that result from using the more efficient IDLC equipment.

McLeod, Ovation, MCI WorldCom, and Allegiance point out that the only cost recovery mechanism included in the FCC's First Report and Order with respect to unbundled loops is its TELRIC rules, which they note are included at paragraphs 618 through 758. When the FCC suggested at paragraph 384 that an ILEC is allowed to recover its costs of provisioning a line served via an IDLC, they argue it necessarily implies that those expenses should be recovered pursuant to those TELRIC rules. Since Ameritech's special construction charges are not TELRIC-based rates, the four parties claim that they are not consistent with the FCC's rules. They contend that Ameritech is unreasonably relying on paragraph 384 as support for its position that special construction charges may be recovered where loops are provisioned via IDLC or RSU.

As for any suggestion that Ameritech may assess special construction charges when it performs a wire out of limits pursuant to its special construction tariff, Mr. Starkey argues that in the vast majority of cases wherein Ameritech must, because of a lack of spare facilities, provision service via a wire out of limits rearrangement, the customer has not "requested" that Ameritech perform a wire out of limits. Rather, he states that the retail customer has simply requested that he be provided a network access line. Ameritech then decides, Mr. Starkey continues, that the most expedient or efficient way in which to service that customer is to perform a wire out of limits rearrangement. This type of circumstance is not what the above referenced tariff is intended to address, according to Mr. Starkey. The tariff language, he contends, is meant to address situations wherein a customer wants a telephone cable that is being installed to be placed in a location or in a manner that Ameritech would not otherwise have chosen (for example, a customer wants the telephone line to be placed in such a way that leaves his garden or driveway undisturbed, or, a customer wants an underground cable placed instead of an aerial cable in an area wherein Ameritech would normally place an aerial facility).

In addition, in order for Ameritech to reasonably assess special construction charges on its CLEC competitors, Mr. Starkey maintains that Ameritech must meet two criteria. According to Mr. Starkey, it must first show that it *would* assess similar charges on its retail customers in the same circumstance (not just that it *could* pursuant to its tariff), and, second, it can not already be recovering expenses associated with the activities in question through the monthly recurring and nonrecurring TELRIC based rates the CLEC already pays. As indicated above, Mr. Starkey does not think that Ameritech meets the first of these tests with respect to wire out of limits. He adds that not only would Ameritech not assess special construction charges on its retail customers in the majority of wire out of limits situations, its tariff does not allow it to assess charges for these activities in most circumstances. With regard to his second criteria, Mr. Starkey insists that wire out of limits rearrangements are exactly the types of provisioning scenarios for which Ameritech's myriad of cost factors already allow it to recover expenses. Hence, he maintains that Ameritech meets neither of the two tests. Mr. Starkey recommends that the Commission not adopt Staff's initial recommendation concerning wire out of limits. Instead, he urges the Commission to adopt Staff's revised

recommendation prohibiting the assessment of special construction charges for wire out of limits.

4. Rhythms and Covad's Position

Throughout its testimony, according to Rhythms and Covad, Ameritech urges the Commission to force CLECs to pay special construction charges – the costs associated with its obsolete embedded plant – and ignore an efficient forward-looking network design. They claim that that analysis is wrong as a matter of law and policy. Rhythms and Covad assert that the FCC has found that prices should be based on the cost of a "reconstructed local network" deploying "the most efficient technology for reasonably foreseeable capacity requirements" and that the FCC's rules explicitly preclude the consideration of embedded costs. They observe that the Commission has similarly adopted the TELRIC pricing methodology.

Rhythms and Covad state that under a TELRIC methodology, the total recurring and nonrecurring charges for a given network element may not exceed the total forward looking economic cost for that element. Pursuant to these TELRIC principles, they argue that the combination of all Ameritech's recurring and nonrecurring charges – including special construction charges – must not exceed the total forward-looking economic cost for the applicable UNEs. Rhythms and Covad allege that Ameritech's special construction charges are both discriminatory and contrary to federal pricing rules because (1) they are not based upon a forward-looking network architecture consisting of the most efficient technology available, and (2) they constitute a double recovery of Ameritech's costs.

Ameritech, Rhythms and Covad aver, has based its recurring costs on an efficient forward-looking network, but based its non-recurring costs (or, special construction charges) on portions of its obsolete embedded network. Mixing and matching networks to obtain costs for different charges violates TELRIC principles, according to Rhythms and Covad. TELRIC principles, they argue, require that costs be based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the ILEC's wire centers.

Rhythms and Covad state that there can only be one "lowest cost network configuration." They argue that Ameritech has arbitrarily selected the highest combination of recurring and non-recurring rates to maximize its return – an act which they characterize as a shrewd business decision if it did not violate the FCC's pricing rules. Ameritech's combination scheme, Rhythms and Covad aver, does not reflect Ameritech's costs under any analysis and must be rejected.

According to Rhythms and Covad, Ameritech continues to argue that it is appropriate to recover special construction charges for unbundling loops from IDLCs, because the cost of such unbundling is not included in its TELRIC studies since its

UNE cost studies assume the older, more expensive UDLC. Ameritech makes this argument, Rhythms and Covad aver, despite the fact that it assumes the use of IDLC technology for its own retail services. They argue that this results in assumptions producing unbundled loop costs that exceed the costs identified for providing bundled loops.

The record evidence in this case, according to Rhythms and Covad, clearly shows that NGIDLCs are available and are being used by Ameritech. They contend that Ameritech witness Suthers admits as much in his surrebuttal testimony. Rhythms and Covad conclude that it is improper for Ameritech to impose these special construction charges on CLECs for work that would not be necessary in a forward looking architecture utilizing NGIDLCs.

Ameritech's monthly recurring charge for a basic unbundled loop, according to Rhythms and Covad, reflects the full-forward looking economic cost of a modern network design that does not include components such as load coils that interfere with DSL-based services and analog POTS modems. They assert that Ameritech's special construction charges, however, are based on a different network: Ameritech's embedded network. They claim that pre-1980 design is the only network that has loops where load coils and excessive bridged tap reside. Rhythms and Covad argue that Ameritech's special construction charges for conditioning are features of the inefficient embedded network.

Giving no weight to Ameritech's embedded costs, Rhythms and Covad argue, is consistent with the underlying goals of the TA96. They contend that TELRIC-based pricing was meant to mimic a competitive market. In such a market, according to Rhythms and Covad, a supplier cannot charge for costs that were incurred as a result of past activities when there are currently more efficient ways to supply the same good.

Ameritech can not continue to charge CLECs, according to Rhythms and Covad, the conditioning costs associated with its embedded network when the "market price" (i.e., efficient forward-looking costs) for an unbundled loop is less. They state that under any analysis, Ameritech's mix and match network approach overestimates the costs it incurs. They argue that Covad and Rhythms are charged recurring charges (including depreciation of a new network) that include all costs necessary to provide a network without load coils and bridged tap. Ameritech, they claim, is now seeking to recover – through its special construction charges – nonrecurring conditioning charges too. According to Rhythms and Covad, Ameritech cannot have the best of both worlds – nonrecurring conditioning charges to retrofit its outmoded, largely depreciated network, and recurring charges based on the full cost, including depreciation, for a modern network. They argue that the special construction charges Ameritech has charged, and continues to charge, for conditioning duplicate what Ameritech has already promised to CLECs with its recurring charges: a loop that is free of load coils and excessive bridged tap.

Rhythms and Covad claim that several other state commissions have already rejected a "mix and match" approach by other SBC operating companies similar to the one Ameritech advances here. They claim that the commissions in Texas, New York, and California refused to use different networks to develop recurring and nonrecurring costs. They urge the Commission to follow the lead of such states and reject Ameritech's approach. Recurring and nonrecurring charges, they argue, must be based on the same network architecture. When this analysis is used, according to Rhythms and Covad, additional special construction charges for conditioning are neither necessary nor appropriate.

Correctly designed outside plant built during the past two decades, Rhythms and Covad argue, should present minimal obstacles to the provisioning of xDSL services. The only reason Ameritech needs to condition loops, they claim, is because its plant is outdated and long past its useful economic life. Starting in 1980, they relate, ILECs developed long range outside plant plans for all central offices. According to Rhythms and Covad, those long range plans identified the ultimate design configuration for the local loop – that is, meeting the Carrier Serving Area criteria for 100% non-loaded loops, and limited bridged tap so that digital services like ISDN could be supported by all loops without special conditioning. They assert that these are the same Bellcore guidelines that Ameritech has used to build its outside plant.

According to Rhythms and Covad, by charging Illinois residents for a modern network over the last 30 years and then charging CLECs again for network upgrades that it failed to implement, Ameritech is attempting to impermissibly recover twice for a loop free of load coils, bridged tap, and repeaters. They maintain that Ameritech should have been deploying a modern plant for at least the past 30 years. According to Rhythms and Covad, when DSL CLECs order loops that supposedly exist in Ameritech's "modern" outside plant, they find that Ameritech has not deployed a modern plant in many locations. They say that instead, Ameritech has pushed its antiquated plant past its useful life and has apparently been pocketing money from Illinois ratepayers. To add insult to injury, they assert that Ameritech is now asking DSL CLECs like Rhythms and Covad to pay to modernize the plant for Ameritech again through its special construction charges. The Commission, according to Rhythms and Covad, should not allow Ameritech to recover the costs of a modern plant a second time.

Rhythms and Covad witness Riolo states that TELRIC studies are predicated on forward looking, least cost design. He claims that it would be difficult to embrace TELRIC plus "add-ons" as reflecting efficient deployment of a network developed to support a forward looking TELRIC type analysis. Like McLeod, Ovation, MCI WorldCom, and Allegiance witness Starkey, Mr. Riolo asserts that it is possible to provide unbundled loops from IDLC based facilities. He reports that such facilities include a powerful feature called the Time Slot Interchanger, which among other things, allows any customer connected to a RT to be "mapped" via software, to appear in any DS1 signal in the COT. The advantage, according to Mr. Riolo, is that the signal

remains in the digital format and can be routed to bypass the local digital switch. He claims that unbundling can be achieved without the need to utilize back to back conversions. Mr. Riolo also indicates that Ameritech's response to a data request stated that "Ameritech Illinois has deployed IDLC systems, such as LiteSpan, which are capable of providing unbundled loops without the installation of new COTs since 1993."

In response to Staff witness Phipps, Mr. Riolo states that load coils are not necessary to provision POTS. Because efficient forward-looking loop plant design uses fiber feeder facilities and electronics to reduce the length of copper plant, he states that load coils are not required to provide POTS service in outside plant built to an efficient modern engineering standard. Load coils, he asserts, have not been required to provide POTS service in outside plant that complies with widely accepted design standards for the last 30 years.

Rhythms and Covad state that Ameritech has repeatedly relied on paragraph 382 of the First Report and Order and paragraphs 190 through 194 from the FCC's UNE Remand Order to justify its special construction charges. That reliance, they contend, is misplaced because Rhythms and Covad have never requested free conditioning. Ameritech is entitled to recover costs associated with a conditioned loop, and it is already receiving that compensation, according to Rhythms and Covad. They argue that Ameritech charges a recurring rate that recovers the full cost of an efficient fiber and DLC-based network free of load coils, repeaters, and excessive bridged tap.

The FCC, according to Rhythms and Covad, recognized in its UNE Remand Order that ILECs, such as Ameritech, may be motivated to exaggerate their conditioning "costs" in order to recover more than they would be entitled to under the TELRIC methodology. They note that in paragraph 194 of the UNE Remand Order, the FCC stated "that incumbent LECs may have an incentive to inflate the charge for line conditioning by including additional common and overhead costs, as well as profits." Rhythms and Covad argue that such is the case here. They assert that in many cases the level of special construction charges that Ameritech has sought to impose for conditioning substantially exceeds the total investment per loop in even the highest-cost band in its existing TELRIC studies. Such a cost structure, they claim, leads to the conclusion that it would be more cost-effective for Ameritech to build entirely new loop plant to serve a request for an unbundled loop than for Ameritech to use an existing loop from which it must, for example, remove load coils.

To avoid such inflated costs, Rhythms and Covad say, the FCC deferred to state commissions the role of ensuring that the costs ILECs impose on competitors for line conditioning are in compliance with the TELRIC pricing rules. Because Ameritech is already recovering conditioning costs through its recurring loop charge, they aver, the Commission must find that any additional special construction charges for conditioning are improper.

According to Rhythms and Covad, even if the Commission determines that Ameritech should be able to impose additional charges for conditioning, Ameritech should be required to adopt fixed, interim conditioning rates. They argue that the interim conditioning charges from the joint Covad-Rhythms arbitration with Southwestern Bell Telephone ("SWBT") serve as a reasonable proxy for TELRIC-based costs. They recommend that these interim rates should remain in effect until Ameritech provides a properly documented loop conditioning cost study in compliance with the SBC/Ameritech merger conditions and all affected parties have an opportunity to review and comment on the study.

D. Commission Conclusion

In addressing the issue of double recovery, certain CLEC witnesses in this proceeding argue that Ameritech's current UNE rates are based on a misunderstanding of the FCC's rules and improper assumptions regarding Ameritech's network. Under their position, special construction charges are never appropriate because the FCC only authorized the recovery of costs from CLECs through TELRIC rates based on a forward looking network that would, in their opinion, not require any modifications to serve CLECs. To the extent that any party advocates revisions to Ameritech's UNE rates or the assumptions upon which those rates are based, the Commission is of the opinion that this investigation is not the appropriate forum in which to do so. This proceeding was initiated to determine whether Ameritech's application of special construction charges is discriminatory or preferential. Although the Commission is intrigued by the argument that rates for UNEs and retail service should be based on the same network assumptions, to adopt such an argument at this time would exceed the scope of this investigation. Furthermore, the Commission does not agree that the FCC prohibits the assessment of all special construction charges. As may be seen from the list of merger conditions adopted in CC Docket No. 98-141, the FCC sanctions Ameritech's collection of TELRIC based charges for loop conditioning—charges which are in addition to the standard TELRIC rates for UNEs.

In addition, McLeod, Ovation, MCI WorldCom, and Allegiance argue that Ameritech's current TELRIC rates do not reflect the fact that unbundled loops can be provisioned from NGIDLCs. McLeod, Ovation, MCI WorldCom, and Allegiance's witness, Michael Starkey, indicates that there are four technically feasible unbundling methods that can provide CLECs with non-discriminatory access to customers served by IDLCs: (1) multiple switch hosting, (2) integrated network architecture, (3) digital cross-connect system grooming, and (4) side-door grooming. In its UNE Remand Order, however, the FCC stated that the first two options only work with GR-303 compatible systems while the third option is very expensive and the fourth can only be done for a few lines per RT.[47] While Ameritech's network does employ some GR-303 compatible systems, the total of such represents a minority among Ameritech's systems. Even if the four options were all economical and generally available

[47] UNE Remand Order, ¶217, fn. 417.

throughout Ameritech's network, the Commission will not require Ameritech to modify its TELRIC rates in this proceeding to reflect such because, as indicated above, this docket is not the appropriate forum in which to modify Ameritech's TELRIC rates and because the record contains no specific cost information regarding the four options.

This is not to suggest, however, that the Commission will never recognize one or more of these four options or other options for unbundling IDLCs and require Ameritech's cost studies to reflect such. The Commission is particularly interested in these possibilities since SBC's Project Pronto entails spending $6 billion upgrading its network, including the installation of GR-303 compatible NGIDLCs in Illinois. Ameritech's own witnesses appear to appreciate the impact of these upgrades on CLECs. At first Ameritech witness Florence testifies that Ameritech does not plan to deploy GR-303 compatible NGIDLCs in its region in the foreseeable future and that only UDLCs can be used to provision unbundled loops. Ameritech witness Suthers, however, indicates that Ameritech's new IDLC facilities do not present the same unbundling problems as some of its older facilities since current NGIDLC technology permits unbundled loops to be provisioned without installing new COTs or RTs. Mr. Florence later revises his earlier position by stating that IDLC systems can be unbundled but only with significant work. Under cross-examination, Mr. Florence further concedes that Ameritech is installing GR-303 compatible NGIDLCs as part of Project Pronto, but claims that it is doing so only for bundled loops. At the appropriate time and in the proper forum, the Commission will consider revisions to Ameritech's cost studies reflecting the unbundling of NGIDLCs. At present, however, the Commission will conduct its double recovery analysis of Ameritech's special construction policy without taking into account the limited instances where circumstances and technological advances make it feasible to provision UNEs from IDLCs.

All of the active parties presented extensive argument on the question of double recovery. For the most part the Commission concurs with the position of Staff. Double recovery will be addressed separately with regard to complex work, IDLC/RSU technology, loop conditioning, and placing and splicing additional cable.

Ameritech argues that its complex work activities are not relevant to this investigation because it no longer intends to collect special construction charges for these activities and instead intends to recover the alleged costs associated with these activities through its TELRIC rate for UNEs. The Commission disagrees with this argument and concludes that it is entirely within the Commission's authority to evaluate the propriety of Ameritech's complex work activities. When this docket was initiated, Ameritech assessed special construction charges for complex work; it may not avoid scrutiny of such charges by relabeling them and attempting to recover the alleged costs in a different manner.

The first type of complex work is line station transfers. Mr. Phipps states that a line station transfer involves converting an Ameritech end user from its non-integrated

facilities to its integrated facilities for the purpose of freeing up a copper loop for a CLEC's use. He states that Ameritech would attempt a line station transfer when a CLEC requests a loop in an integrated environment where no unused copper loops are available for the CLEC's use. The Commission first notes that it appears that Ameritech's current TELRIC rates do not expressly recover the specific costs associated with line station transfers. As discussed below, however, the Commission finds that Ameritech may not assess special construction charges on a CLEC when COT technology is not utilized in conjunction with IDLC and a loop is unbundled by building separate non-integrated facilities since to do so constitutes double recovery. The Commission concludes that it would not be a reasonable result for Ameritech to assess special construction charges on a CLEC when it incurs lower costs associated with a line station transfer but does not assess special construction charges to build separate non-integrated facilities. In other words, while Ameritech's TELRIC rates will allow it to recover the cost associated with building separate non-integrated facilities to provision an unbundled loop when COT technology is not utilized, in some circumstances Ameritech may have the ability to provision the unbundled loop, via line station transfer, at a cost lower than that reflected in its TELRIC rates. Thus, the Commission finds that Ameritech may not assess special construction charges in addition to its current TELRIC rates for performing a line station transfer because it would over-recover its costs.

Defective loop recovery follows line station transfers in the list of complex work activities. The Commission concurs with Staff and finds that Ameritech's costs associated with defective loop recovery are already recovered in the TELRIC rate. When a loop becomes unusable because it requires maintenance, paragraph 268 of the FCC's First Report and Order indicates that Ameritech is obligated to "maintain, repair, or replace" it. Ameritech's costs associated with repairing defective circuits are reflected in its maintenance expenses, which Ameritech defines as costs "incurred in order to keep telephone plant and equipment resources in usable condition." Since Ameritech may not provide unusable UNEs to CLECs, its costs for repairing defective loops has been included in the TELRIC rate. Accordingly, Ameritech may not collect additional revenue for defective loop recovery since such would constitute double recovery of costs already reflected in TELRIC studies. This is true whether Ameritech seeks to collect for defective loop recovery through special construction charges or additions to its present TELRIC rates.

The third type of complex work activity concerns installing plug-in cards. Ameritech charges for acquiring and installing plug-in cards in a RT and COT to unbundle a loop in an IDLC/RSU environment if it determines that there are not enough plug-in cards in the RT and COT for a CLEC to use. As Staff demonstrated, Ameritech's TELRIC rates include the cost of plug-in cards. Installation of the plug-in cards is included as well via the in-plant/investment factor. The Commission finds that Ameritech may not charge for additional plug-in cards either through special construction charges or additions to its present TELRIC rates. Ameritech's argument that its cost studies only reflect existing plant is unpersuasive. In addition, the

Commission notes that through the TELRIC rates that every CLEC pays, Ameritech is being compensated for plug-in cards whether they are needed or not.

Wire out of limits is the next type of complex work. Ameritech will perform wire out of limits when a CLEC requests a loop and the serving terminal lacks sufficient capacity. Performing a wire out of limits, Mr. Phipps states, entails connecting the requested loop to an adjacent terminal with spare facilities. Although Mr. Phipps indicates that wire out of limits is very similar to item C of Ameritech's tariff Ill. C. C. No. 20, Part 2, Section 5, Original Sheet No. 1, Staff nevertheless opposes charging for wire out of limits on the grounds that it is inappropriate to do so merely because the serving terminal has run out of capacity. Mr. Starkey further argues that charges in excess of present TELRIC rates for wire out of limits are inconsistent with Ameritech's tariff and constitute double recovery. In resolving this issue, the Commission first notes that it does not share Mr. Starkey's interpretation of Ameritech's tariff. Mr. Starkey's second basis for rejecting the charges, that such charges would constitute double recovery, is similar to Mr. Phipps' reasoning. Staff suggests that proper implementation and observance of fill factors should prevent Ameritech from running out of capacity in the serving terminals. In other words, Staff is suggesting that Ameritech would double recover its costs if allowed to collect for wire out of limits since the fill factors incorporated into the TELRIC rates allow Ameritech to maintain a certain amount of excess capacity. The Commission agrees and Ameritech may not assess additional charges for wire out of limits either through special construction charges or additions to its current TELRIC rates due to the circumstances under which it performs wire out of limits.

The fifth type of complex work, break and connect through, involves, according to Mr. Phipps, breaking a connected circuit at a terminal where no service is being provided at that customer location, and connecting that circuit to a different customer location. The Commission agrees with Staff that Ameritech has not sufficiently distinguished this activity from the other types of simple dispatch, the costs of which Ameritech admits are recovered through its TELRIC rates. As such, Ameritech may not assess additional charges for break and connect through either as nonrecurring special construction charges or as an addition to its existing TELRIC rates.

The final type of complex work activity consists of installing pair gain devices. When no spare copper loops are available, Mr. Phipps asserts that Ameritech can use a pair gain device to expand the capacity of single copper loop by six times by deriving six pairs from a single pair. This type of complex work activity presents a situation similar to that of line station transfer in that Ameritech's TELRIC rates do not appear to include the specific cost of the actual pair gain device. As with line station transfer, however, installing pair gain devices appear to present an opportunity for Ameritech to incur lower costs associated with providing an unbundled loop than building separate non-integrated facilities, the full cost of which is already included in TELRIC rates, as discussed below. The Commission concludes that Ameritech may not assess special construction charges on a CLEC when it incurs lower costs associated with installing

pair gain devices since it may not assess special construction charges for building more costly separate non-integrated facilities. Stated another way, Ameritech should not be able to assess additional charges simply because it has the option of a short-cut which is not reflected in its TELRIC rates when, had the short-cut not been available, Ameritech would have been obligated to provide a loop anyway without assessing additional charges. Accordingly, Ameritech may not assess additional charges for installing pair gain devices either as nonrecurring special construction charges or as an addition to its existing TELRIC rates.

The Commission, in addition, notes that Ameritech would gain, at a CLEC's expense, additional capacity on its copper lines if the CLEC uses less than the number of lines gained by installing the pair gain device. Not only would Ameritech charge the CLEC the TELRIC based rate for the loop provided as a result of installing a pair gain device, Ameritech would also receive revenues from other CLECs or retail customers using the loops "created" through the installation of the pair gain device. Such a windfall is not appropriate since Ameritech is still obligated to provide an additional loop without assessing additional charges in the event that installing pair gain devices is not possible. Accordingly, Ameritech may not assess special construction charges or add to its TELRIC rate for installing pair gain devices.

With regard to IDLC/RSU technology, in those instances where a CLEC requests an unbundled loop served via IDLC/RSU and no spare copper loops are available, Ameritech argues that it is entitled to assess special construction charges to provision the unbundled loop if it deems appropriate. In such situations, Staff identifies two possible scenarios: either the IDLC/RSU is utilized in conjunction with COT technology, or it is not. The key difference between these two scenarios is that if COT technology is utilized, loops can be provisioned by utilizing plug-in cards at the RT and COT. If COT technology is not utilized, however, loops may be unbundled only by a line station transfer or building separate non-integrated facilities.

If Ameritech determines that the requested unbundled loop can be provisioned by installing plug-in cards, additional charges for such plug-in cards, either through special construction assessments or additions to the TELRIC rate, are not appropriate since, as indicated above, Ameritech's current TELRIC rates already include the cost investment and installation expense associated with plug-in cards. If COT technology is not present, meaning that additional plug-in cards are of no use, and a line station transfer is possible, Ameritech may not assess additional charges for the line station transfer as explained above. If an available unbundled loop may only be provisioned via the construction of new non-integrated facilities, the Commission concurs with Staff that such may be done through the acquisition and installation of a COT/RT system. The technical distinctions between IDLC and RSU do not merit different treatment since the same analysis and principle apply to both. Loops served via RSU may still be unbundled and made available through the use of a COT/RT system. As Staff demonstrated, the average costs of acquiring, installing, and maintaining these facilities necessary to provision an unbundled loop are already included in Ameritech's

TELRIC rates. Given that TELRIC rates recover Ameritech's investment in a facility over the life of the facility, Ameritech's assessment of special construction charges for such a COT/RT system would constitute double recovery. Ameritech counters that it has no guarantee that a CLEC will use the new facility long enough to recover its costs. The Commission observes, however, that there is no evidence that the CLEC served by the facility will not use it for the facility's useful life. Even if the first CLEC to use the facility ceases to do so, there is insufficient evidence that other CLECs will not follow; or for that matter, that Ameritech will not use the facility for its own retail customers. Given that the capacity of such new facilities will likely exceed that requested by the CLEC, Ameritech is free to use the additional capacity to serve other CLECs or its own retail customers. In addition, whether constructing a COT/RT system qualifies as special construction under the list on Original Sheet Nos. 1 and 2 of Ill. C. C. No. 20, Part 2, Section 5 is irrelevant since it has been determined that Ameritech is already recovering the cost of such activity through existing TELRIC rates.

Also deserving comment is Ameritech's argument that charging a CLEC when a COT or RT must be placed is not an impediment to the development of local competition. Ameritech witness Suthers maintains that no impediment exists because Ameritech's policy provides it and CLECs with symmetrical investment incentives. Ameritech contends that under its policy, both it and CLECs are faced with the same investment decision: is it in the company's best business interest to serve a particular customer, and, if so, how should the cost of doing so be recovered. To support this position, Ameritech relies on paragraph 334 of the FCC's First Report and Order, which discusses the greater risk faced by CLECs providing service through UNEs rather than resale. Setting aside the fact that Ameritech's TELRIC rates already recover the cost of a new COT or RT system, the Commission finds this argument untenable. In defense of its position, what Ameritech fails to address is the important fact that Ameritech owns any facilities in which a CLEC decides to "invest." Therefore, the investment decisions are not symmetrical. Even though a CLEC may recoup some of the money paid for a new COT or RT through services provided over such, it will never own the facility as Ameritech does after it installs facilities to serve its customers. Moreover, the fact that a CLEC paid for a new facility does not instill within it the privilege of using any additional capacity within that facility. This ability is held by Ameritech as part of its right of ownership. Accordingly, Ameritech can not legitimately claim that its policy creates symmetrical investment incentives.

The Commission finds that the cost of loop conditioning is not recovered in Ameritech's current TELRIC rates and qualifies as special construction under Ameritech tariff Ill. C. C. No. 20, Part 2, Section 5. Accordingly, Ameritech may assess special construction charges under Ill. C. C. No. 20, Part 2, Section 5 of its tariff so long as it does so in a nondiscriminatory manner as described below.

Finally, the Commission agrees with Staff's position on placing and splicing additional cable. As demonstrated by Mr. Phipps, Ameritech's current TELRIC rates, including the relevant fill factors, already recover any costs associated with placing and

splicing cable to provision a CLEC with an unbundled loop. Accordingly, assessing additional charges for placing and splicing cable in excess of Ameritech's current TELRIC rates would constitute double recovery and is prohibited.

VII. DISCRIMINATION

The next issue to address is whether Ameritech's special construction policy discriminates against CLECs. Ameritech allegedly assesses special construction charges on CLECs for many activities for which it would not assess special construction charges on similarly situated retail customers, resulting in a situation where end users are arguably more apt to take service from Ameritech than a CLEC. In light of the Commission's conclusion that Ameritech may only collect special construction charges for loop conditioning, it need only be decided how Ameritech may assess charges for this activity. To resolve this issue, however, it is necessary to examine the comparability of the provisioning of UNEs to CLECs and retail service to retail end users; a matter which is heavily contested.

A. Ameritech's Position

Even though Ameritech treats CLECs and retail customers differently, Ameritech witness Suthers argues that Ameritech's special construction policy is not discriminatory. According to Mr. Suthers, section 251(c)(3) of the TA96 requires ILECs to provide "nondiscriminatory access" to UNEs. He relates that in paragraph 315 of its First Report and Order, the FCC interpreted this to mean that the terms and conditions on which UNEs are provided "must be equally offered to all requesting carriers, and where applicable, must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself." In the same paragraph, he states, the FCC concludes that UNEs also must be provided "under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." Speaking more generally, Mr. Suthers contends that the key factors in addressing any claim of discrimination are whether the parties are similarly situated to one another and whether the services provided to the two customers are substantially similar. Ameritech also cites the Eighth Circuit's 1997 decision in Iowa Utilities Board v. FCC again for the proposition that nondiscrimination "merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others." (120 F.3d 753, 813)

In support of the assertion that retail services are dissimilar to UNEs, Mr. Suthers states that a UNE is not functionally comparable to either retail or wholesale/resale services; a UNE, according to Mr. Suthers, is a discrete physical facility that does not have any functionality on its own. Once a UNE is obtained, he reports that its use is determined by the CLEC, and it can be combined with other facilities in the CLEC's network. Local exchange service, by contrast, is a bundled end-to-end telecommunications service that includes the functionality of switching, and may include features, enhanced services, operator services, and directory assistance,

according to Mr. Suthers. In addition, he testifies that a CLEC orders a UNE with particular specifications to provide service to the CLEC's end user customer. On the other hand, he points out that Ameritech determines how it will provide service and over what facilities in fulfillment of a retail or wholesale/resale customer's request for service.

Mr. Suthers further states that the rates, terms, and conditions for retail services and UNEs are dramatically different. Rates for UNEs, he contends, are set at TELRIC, plus an allocation for some shared and common costs. Current rates, according to Ameritech witness Florence, do not include any allocation for any construction work in excess of simple dispatch. By contrast, Mr. Suthers testifies that rates for Ameritech's retail services are set a level above LRSIC, which Mr. Florence states is merely a price floor. Except for the nine situations described in Ameritech's "retail special construction tariff," Mr. Suthers reports that retail rates recover special construction costs by spreading them over all customers through contribution. The same is not true of TELRIC rates, he asserts, which seek to establish the forward looking costs of each individual element in a hypothetical network, and, Mr. Florence argues, do not recover any special construction costs.

In developing the TELRIC rate for UNEs, Ameritech witness Florence observes that the Commission rejected the inclusion of any residual cost component in UNE prices; a distinction which Ameritech contends is crucial in the discrimination analysis. As stated earlier, Mr. Florence describes residual costs as representing the "gap" between overall retail revenues (or UNE revenues, in the case of UNEs) and the sum of the LRSIC rates (or TELRIC rates) plus shared costs plus common costs of Ameritech's retail services (or UNEs). In his direct testimony, Mr. Florence states that this "gap" represents costs such as those related to the capacity of network equipment and facilities utilized at levels less than those assumed in the LRSIC and TELRIC studies, capital costs of common assets, and obsolete technology still in use in Ameritech's network. In his surrebuttal testimony he adds that the residual includes the economic costs incurred in retail special construction situations that are not assessed through specific special construction charges. Mr. Florence insists that the exclusion of residual costs from TELRIC is very important because it implicitly excludes any recovery of plant construction and engineering beyond the costs included in Ameritech's TELRIC studies. In contrast, he asserts that costs relating to complex dispatch and line conditioning fall into the residual category, which is recovered through contribution generated by all of Ameritech's retail services. Therefore, Ameritech maintains that it is recovering the same costs, through contribution, from retail customers which it seeks to recover from CLECs, through special construction charges. In response to Mr. Starkey's allegations that the residual is superfluous to this proceeding and is being used to merely mislead the Commission, Mr. Florence counters that it is Mr. Starkey who is really trying to mislead the Commission by characterizing the residual as "phantom costs" that either do not exist or if they do exist, have no relevance to this proceeding.

Both the FCC and this Commission have recognized that UNEs are not comparable to retail services and that CLECs are not comparable to retail end users, according to Mr. Suthers. He relies on paragraph 141 in the FCC's order in In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, CC Docket 97-137, FCC 97-298 (August 19, 1997), and paragraph 87 in In re Application of BellSouth Corp., CC Docket 98-121, FCC 98-271 (October 13, 1998), for the proposition that the provisioning of UNEs has "no retail analogue" and that, therefore, the only question under the TA96 is whether the access provided to the UNE gives the CLEC a meaningful opportunity to compete. Similarly, Mr. Suthers claims that this Commission recognized the lack of comparability between retail local exchange service and UNEs in its orders in Docket Nos. 96-AB-003/004, concerning AT&T Communications of Illinois, Inc. ("AT&T") and Ameritech's interconnection agreement arbitration, and Docket No. 98-0198, a complaint filed by AT&T against Ameritech.

In short, Mr. Suthers claims that the proper comparison is not between UNEs and retail service, but between how Ameritech treats a CLEC and how it treats other CLECs, itself, and its affiliates with respect to UNEs. If they are treated alike, he argues that the means by which they recover costs from end users is not of any competitive significance. Mr. Suthers testifies that Ameritech treats CLECs and its advanced services affiliate, Ameritech Advanced Data Services ("AADS"), the same. As for how Ameritech treats itself, Mr. Suthers states that Ameritech bears the cost of all construction services that it provides for itself, and therefore is in the same competitive position as a CLEC.

Moreover, Ameritech maintains that equating the purchase of UNEs with the purchase of retail services would not be sound policy because it would lead to absurd results. As an example of such results, Mr. Suthers states that if UNEs and retail service were "like services" for discrimination analysis, the price of the UNE platform would have to be identical to the price of retail services, and individual UNEs would have to be priced accordingly. Either retail customers, he continues, would be able to buy local exchange service at a TELRIC rate or CLECs would be required to pay retail rates.

With respect to specific allegations of discrimination in the xDSL market raised by Rhythms and Covad, Mr. Suthers states that Ameritech treats all CLECs identically with respect to special construction, including AADS. He states that Ameritech does not even offer xDSL services; such services are provided only through AADS, which he claims faces exactly the same special construction charges as Rhythms and Covad. Ameritech could not confirm or deny that it had provided service to a customer without assessing special construction charges after a CLEC had attempted to provide the same service to the same customer but declined to do so allegedly due to exorbitant special construction charges. Ameritech also denies approaching end users with offers for service after CLECs have been unable to provide service due to special construction charges. Ameritech contends that its units dealing with CLECs and retail end users do not communicate with one another.

As for ISDN service, which Ameritech does provide, Mr. Suthers responds to allegations that Ameritech has imposed loop conditioning charges on Rhythms and Covad when it provided retail ISDN service without such charges by repeating that UNEs and retail services are not comparable for purposes of a discrimination analysis. Both Ameritech and CLECs, Mr. Suthers asserts, sustain the same loop conditioning costs to serve a given customer; CLECs, he states, must then decide how to structure their own retail rate. As long as the costs sustained by Ameritech and the CLEC for providing ISDN service are identical, Mr. Suthers argues that there is no "discrimination" that would affect market forces. This is all the FCC requires, because that is all that is necessary to assure competitive parity under paragraph 315 of the First Report and Order, according to Mr. Suthers. In its Reply Brief, however, Ameritech states that although it does not agree that retail services and UNEs are comparable, it does not object to charging its retail customers for conditioning ISDN lines on the same basis that it imposes such charges on CLECs.

As indicated above, Ameritech indicates that in the future it will assess flat TELRIC based special construction charges for each instance of loop conditioning. Such is also a condition of the FCC's order CC Docket No. 98-141 approving the merger of SBC and Ameritech. The FCC imposed the condition at paragraph 375 of its order, which reads as follows:

> 375. *Loop Conditioning Charges and Cost Studies.* Numerous parties allege that the rates charged by incumbents for conditioning loops are unreasonably high and preclude competitors from offering advanced services to many potential customers, particularly residential and small business customers where the conditioning costs may exceed prospective net income. This condition is designed to ensure that SBC/Ameritech will not erect a barrier to the competitive deployment of advanced services by charging excessive rates for loop conditioning. Within 180 days of the merger's closing, SBC/Ameritech will file with state commissions cost studies and proposed rates for conditioning loops used in the provision of advanced services, prepared in accordance with the methodology contained in the [FCC's] pricing rules for UNEs. Pending approval of state-specific rates, SBC/Ameritech will immediately make available to carriers loop conditioning rates (provided that they are greater than zero) contained in any effective interconnection agreement to which an SBC/Ameritech incumbent LEC is a party, subject to true-up. In addition, subject to true-up, SBC/Ameritech will impose no loop conditioning charges on loops less than 12,000 theoretical feet during this period. Moreover, advanced services providers will have a choice in the amount and extent of conditioning on any particular loop.

Initially, Staff proposed that the Commission adopt as interim loop conditioning rates the rates contained in the interconnection agreement between SWBT, a SBC

subsidiary, and BroadSpan Communications ("BroadSpan"). The rates are for conditioning loops between 12,000 and 17,500 feet for xDSL service and are as follows:

Removal of Repeater Option	$289.51
Removal of Bridge Tap Option	$484.19
Removal of Load Coil Option	$797.78

Staff believes that, rather than charging on a case-by-case basis, Ameritech should be required to file tariffs for interim rates, subject to true-up once the Commission approves final loop conditioning rates. If the Commission decides to adopt interim rates in this proceeding, Mr. Florence recommends that the Commission adopt those contained in the BroadSpan agreement rather than those suggested by Mr. Starkey and later supported by Staff. Furthermore, Mr. Suthers states that Ameritech does not object to updating its tariffs to reflect the BroadSpan rates. Mr. Suthers also acknowledges that the adoption of interim rates for loop conditioning will eliminate the concerns of Staff and intervenors regarding the certainty and predictability of loop conditioning costs. In any event, however, in light of the true up requirement for interim rates, Mr. Florence states that this issue is not of central importance to Ameritech.

The interim rates proposed by Mr. Starkey are found in a Texas Arbitration Award in Docket Nos. 20226 and 20272 (released November 1999).[48] In these dockets, the Public Utility Commission of Texas ("PUCT") approved specific line conditioning rates to be included in the interconnection agreements between SWBT and Rhythms and Dieca Communications, Inc. (a/k/a Covad), respectively. The rates approved by the PUCT are as follows:

	Initial	Additional
IV. Removal of Load Coils		
- Loop < 12,000 kft.	$0.00	$0.00
- 12,000 kft. < Loop < 18,000 kft.	$25.66	$22.83
- 18,000 kft. < Loop	$40.55	$34.89
V. Removal of Bridged Tap		
- Loop < 12,000 kft.	$0.00	$0.00
- 12,000 kft. < Loop < 18,000 kft.	$17.62	$14.79
- 18,000 kft. < Loop	$24.46	$18.81
VI. Removal of Repeaters		
- Loop < 12,000 kft.	$0.00	$0.00
- 12,000 kft. < Loop < 18,000 kft.	$10.82	$9.41
- 18,000 kft. < Loop	$16.25	$13.42

[48] The Texas decision is affixed to Staff Ex. 1.2 as Attachment 3.

Mr. Suthers objects to incorporating the PUCT rates into Ameritech's tariff because the Texas rates are already available (subject to true-up) to any CLEC that wishes to execute an appropriate amendment to its interconnection agreement. Ameritech further states that the FCC order allows each CLEC to determine for itself which loop conditioning rates it would like to adopt. State commissions, Ameritech contends, have not been directed to choose a single rate on behalf of all CLECs. In addition, Mr. Suthers argues that Mr. Starkey provides no basis for finding the Texas interim rates to be "just and reasonable." The mere fact that certain rates have been adopted on an interim basis in Texas provides no basis for imposing those rates in Illinois, according to Mr. Suthers.

Ameritech also opposes the use of the PUCT rates on the grounds that they are too low. Ameritech's witnesses contend that the Texas Arbitration Award assumed incorrectly, with regard to loops between 12,000 feet and 18,000 feet in length, that 50 loops would be conditioned at a time, at no additional cost beyond the cost of conditioning a single loop. Mr. Florence asserts that this has the effect of spreading the outside plant engineering and cable splicing cost portion of the total conditioning costs over a value of 50, a reduction of 98% from the costs originally submitted by SWBT. For loops greater than 18,000 feet, he states that a value of 25 loops was assumed resulting in a 96% reduction. In fact, Mr. Suthers maintains, load coils and other devices are removed one loop at a time to avoid degrading voice service over loops that are not being data conditioned. As a result, he states that the Texas loop conditioning rates do not reasonably reflect actual costs of performing that work and are clearly not compensatory. Mr. Florence adds that SWBT argued that it should not be required to have its cost study reflect conditioning for more loops than the CLEC requests. He further states that at an open meeting held January 27, 2000, the PUCT stressed that the loop conditioning rates it ordered are interim, and would be re-evaluated when SWBT files its loop conditioning cost study.

Some parties have also alleged that the up-front nature of Ameritech's special construction charges have a discriminatory impact on CLECs. Ameritech argues that up-front charges are entirely appropriate. Since it incurs the costs associated with special construction activities up-front, Ameritech maintains that it should recover them up-front. Mr. Suthers states that when deciding to serve a customer through UNEs, all CLECs must decide whether to make the investment necessary to serve that customer, or whether it would make more sense to serve the customer through resale or through facilities obtained from some other source. Ameritech faces that same choice, according to Mr. Suthers, whenever it has to decide whether to invest in the special construction needed to serve a retail customer.

In contrast, Mr. Suthers contends that requiring Ameritech to recover special construction costs through increased TELRIC rates or some deferred payment mechanism could skew investment incentives and lead to inefficient investment decisions by CLECs. If a CLEC does not have to pay for such costs up-front, it will have a much greater incentive to rely on UNEs, rather than resale or non-Ameritech

facilities (including its own facilities), even when those other options would be more efficient in the long run, according to Mr. Suthers. He argues that this is because the lack of an up-front charge sends the wrong price signals and prevents CLECs from considering the true costs for serving that customer through UNEs.

Moreover, Ameritech claims that denying up-front recovery could prevent it from ever recovering all of its special construction costs, even though it is allegedly entitled to such recovery under the TA96, paragraphs 382 and 384 of FCC's First Report and Order, paragraphs 193 and 194 of the FCC's UNE Remand Order, and the U.S. Constitution. Mr. Suthers explains that CLECs lease UNEs on a month-by-month basis and have no obligation to continue the lease for any set period. Any of them could order a loop that includes special construction, use that loop for only a few months, and then decide it does not want the loop anymore or switch the customer to new facilities it has constructed, according to Mr. Suthers. In either case, Ameritech asserts that the CLEC would never pay the full unbundling costs it had imposed on Ameritech.

Ameritech further claims that use of an up-front charge is also consistent with the FCC's position in paragraph 334 of its First Report and Order that UNEs come with risks as well as benefits, and each CLEC must make its own up-front investment decision based on the costs of the UNE. Ameritech states that the FCC recognized that some new entrants will be unwilling to bear the financial risks of entry by means of UNEs and will choose to enter local market through resale. The CLECs try to avoid this market reality by forcing Ameritech to bear the financial risks associated with special construction costs either by not recovering those costs at all or recovering them through a mechanism that does not guarantee full reimbursement, according to Ameritech. In effect, Mr. Suthers claims that the CLECs want Ameritech to guarantee the profitability of each of their customers.

In addition, Mr. Suthers argues that there is no evidence that CLECs have no choice but to require their retail customers to immediately bear the entire up-front special construction charges, as they allege. The CLECs, like Ameritech, could spread their up-front costs across customers and over time, through their own retail rates, according to Mr. Suthers. The CLECs also contend that up-front charges are improper because they require CLECs to bear the entire cost of a facility, even when they seek to use only a portion of the facility. Mr. Suthers counters that Ameritech has no guarantee that other CLECs would seek to use the same facility, and Ameritech itself generally would not use the new facility, because it has its own integrated facilities for that purpose. If costs are not recovered from the CLEC imposing those costs, he contends that Ameritech would be forced to bear the risk that they would not be recovered at all; which, he opines, would violate the TA96 Act and the FCC's First Report and Order.

In any event, Ameritech recognizes that up-front charges are not the only possible means of recovering special construction costs. If up-front charges are the

problem, Ameritech states that the answer is to change the method of cost recovery, not deny recovery altogether.

B. Staff's Position

Contrary to Ameritech's position, Staff argues that the provisioning of an unbundled loop to a CLEC, so that the CLEC may provide service to its end users, is comparable for purposes of analyzing special construction charges to Ameritech provisioning service to its own retail customers. Staff witness Phipps asserts that he has shown that UNEs provided to CLECs and retail service provided to Ameritech's retail end users include very similar cost components, with a few minor differences, and are used to ultimately provide a similar service to similar customers. Specifically, he states that regardless of whether Ameritech provisions service to a retail customer or a CLEC, it assesses two initial non-recurring charges (service order charge and line connection charge) and a monthly recurring charge. Therefore, Mr. Phipps contends, the end users of both Ameritech and the CLEC will incur very similar recurring and non-recurring charges (since the CLEC will pass these through to its end users). Since the cost/rate structure as well as the ultimate service being provided are very similar, it is logical to compare the two for the purpose of analyzing special construction charges, according to Mr. Phipps.

Although Ameritech disagrees that these situations are comparable, Mr. Phipps maintains that the comparison that Ameritech relies on to support its assertion is flawed. While Ameritech compares the retail end user of Ameritech and the CLEC when analyzing special construction charges, Mr. Phipps asserts that the correct comparison is the ultimate service requested by the end-use customers of both the CLEC and Ameritech. Since Ameritech and CLECs are competing against each other to provide equivalent services to the same end users, he states that the service provided to these end users must instead be compared.

Mr. Phipps relies upon his understanding of Section 13-505.2 of the Act to support his position that assessing special construction charges on CLECs but not similarly situated retail end users constitutes discrimination. Section 13-505.2 states:

> Nondiscrimination in the provision of noncompetitive services. A telecommunications carrier that offers both noncompetitive and competitive services shall offer the noncompetitive services under the same rates, terms, and conditions without unreasonable discrimination to all persons, including all telecommunications carriers and competitors. A telecommunications carrier that offers a noncompetitive service together with any optional feature or functionality shall offer the noncompetitive service together with each optional feature or functionality under the same rates, terms, and conditions without unreasonable discrimination to all persons, including all telecommunications carriers and competitors.

Mr. Phipps asserts that it does not appear that Ameritech has applied its tariff under the same terms, rates, and conditions to wholesale customers (its competitors) as to its own retail customers; which he believes constitutes a violation of the Act.

As for particular instances of alleged discrimination, Mr. Graves reports that in response to a Staff data request, Allegiance indicated that on September 9, 1999 it learned from Ameritech that a particular UNE request would require payment of $2,318.39 in special construction charges before an order could be installed. Allegiance further stated that after the due date was moved by Ameritech to October 1, 1999, Allegiance cancelled to the order. On September 13, 1999, however, the end user customer acquired the same service from Ameritech, one day after placing the order with Ameritech, according to Allegiance. Allegiance claimed that Ameritech had previously told it that the special construction would delay installation of the UNE by three weeks. Mr. Graves states that Staff verified this statement through a telephone call to the end user customer. According to Mr. Graves, the customer indicated to Staff that he was not charged a special construction charge, although he was charged for inside wiring. This scenario is listed as No. 18 on Proprietary Attachment 9 to Staff Ex. 2.0.

Mr. Graves second example concerns item No. 6 on Proprietary Attachment 9 to Staff Ex. 2.0. In this situation, Mr. Graves asserts that NextLink chose not to provision service to a customer because of $3,110.09 in special construction charges for what Ameritech described as "[f]acility charges for provisioning unbundled ISDN loops where no facilities exist; requires placing and splicing aerial cable and a terminal." Through a telephone conversation with the end user customer, Mr. Graves reports that Staff determined that when the customer subsequently ordered service from Ameritech no special construction charges were assessed.

Mr. Graves last example regards an order for ISDN service by a NorthPoint customer. According to Mr. Graves, in order to provide the requested UNE, NorthPoint stated in its response to Staff's data request that Ameritech informed NorthPoint that the special construction described as "[t]he removal of load coils and provide non-loaded pairs" was necessary and would cost $4,334.00. Mr. Graves states that NorthPoint declined the charges and cancelled its customer's order. Upon calling the end user customer, he asserts that Staff learned that the customer had two ISDN lines installed by Ameritech without special construction charges being assessed. Mr. Graves avers that ISDN lines require the same conditioning as DSL lines. This situation is listed as item No. 1079 on Proprietary Attachment 9 to Staff Ex. 2.0.

In each of his examples, Mr. Graves contends that it appears that special construction charges were applied in a discriminatory manor. Another problem with these charges, he maintains, is that there is no way to verify that the costs were needed or that the assessments accurately reflected the cost incurred.

Since it believes that the provisioning of UNEs and retail service are comparable and that Ameritech has discriminated against CLECs in its assessment of special construction charges for loop conditioning, Staff advocates the adoption of interim loop conditioning rates in this proceeding. As indicated earlier, Staff originally proposed that the Commission adopt as interim conditioning rates those found in the SWBT/BroadSpan interconnection agreement. Based on his review of Mr. Starkey's testimony, however, Mr. Graves now recommends adoption of the interim loop conditioning rates approved by the PUCT. Mr. Graves states that these rates appear to qualify under the FCC requirements as "rates . . . contained in any effective interconnection agreement to which an SBC/Ameritech incumbent LEC is a party." As Ameritech and SBC have agreed to offer such rates on an interim basis pending approval of state specific rates and subject to true-up as a condition of their merger, Mr. Graves considers them appropriate interim rates for loop conditioning in Illinois.

Mr. Graves notes that Ameritech witness Suthers argues that the PUCT rates are not "just and reasonable." In response, Mr. Graves asserts that Ameritech has provided very little justification of its own conditioning rates, aside from the proprietary figures Ameritech offered in Docket No. 99-0525 for its "plant labor" and "engineering labor" costs.[49] Mr. Graves reports that these costs appear to be similar to costs developed in cost studies submitted in Docket No. 98-0385.[50] These studies are attached to Staff Ex. 1.2 as Proprietary Attachments 1 and 2. Mr. Graves discusses the cost comparisons that may be drawn among the proprietary costs in Staff Ex. 1.2.

Staff witness Graves further states that he is concerned that Ameritech's Fully Distributed Cost ("FDC") already contains shared and common loading factors. Applying a particular proprietary factor to the FDC should not have occurred, according to Mr. Graves, because it would overstate shared and common costs, basically accounting for the costs twice. He concludes that it is questionable whether Ameritech should charge common costs at all for loop conditioning. Where special construction is warranted under condition C of Ill. C. C. No. 20, Part 2, Section 5, Original Sheet No. 1, he maintains that Ameritech should only charge CLECs for excess construction cost over that which Ameritech would have ordinarily incurred. In other words, Mr. Graves states that Ameritech should only charge the incremental cost of doing the work. This incremental cost would exclude common costs because common costs will be incurred if the special construction is done or not, according to Mr. Graves. Thus, he contends, common costs are costs that Ameritech would have ordinarily incurred.

Nor does Mr. Graves find Ameritech's time estimates to complete work for conditioning loops reasonable. After analyzing items No. 3 and No. 85 listed in Proprietary Attachment 9 to ICC Ex. 2.0, Mr. Graves concluded that time involved with the former seemed excessive when compared with the latter. He further states that

[49] See Attachment A to Staff Ex. 1.00 in Docket 99-0525.

[50] According to Mr. Graves, Docket No. 98-0385 involved accusations by the Cable Television and Communications Association of cross-subsidization of Ameritech New Media's Cable operation by Ameritech; the case was withdrawn in 1999.

both of the time estimates result in far higher prices than that charged by Gallatin River Communications ("Gallatin"), another ILEC in Illinois. Mr. Graves reports that Gallatin charges $200 to condition a two-wire loop and that Gallatin's conditioning rate is all inclusive, meaning that it does not charge per bridge tap or per load coil removed.

Because the cost studies used to support the Texas rates are confidential, and thus not attached to the public version of the Arbitration Award, Mr. Graves states that he was not able to review the cost studies from a "just and reasonable" perspective. He adds, however, that the cost studies on which the Texas rates are based were provided by SWBT and are reported in the Arbitration Award to utilize TELRIC based methodology. Mr. Graves further notes that the studies were altered by the Texas Arbitrator in order to take into account the following factors: SWBT's internal practice is to condition at least 50 loops (a binder group) at a time for loops between 12,000 and 18,000 feet; SWBT's internal practice is to condition at least 25 loops at a time for loops greater than 18,000 feet; and charges for removal of bridge taps should not include re-installing bridge taps. Mr. Graves agrees with Ameritech that the effect of the first two findings was to lower the price of loop conditioning by allocating the cost of the conditioning equally among the 25 or 50 loops conditioned. He states that the third finding resulted in lowering the price for removing bridge taps. Mr. Graves asserts that it is also worth noting that the Texas Arbitrator found that loops less than 18,000 feet should no longer have load coils or repeaters attached to them, but nonetheless permitted SWBT to charge for conditioning loops less than 18,000 feet. He asserts that these adjustments were made to reflect the best practices of SWBT and seem reasonable to him. Mr. Graves also assumes that if those are in fact the most efficient practices, Ameritech should import them into its territory.

In any event, Mr. Graves states that the adoption of explicit rates for loop conditioning is important in order to give CLECs a reasonable opportunity to know how much and when they will be charged for conditioning of loops. Staff reminds the Commission that Mr. Suthers acknowledges that a tariffed rate would have these benefits. An explicit charge, he adds, will promote parity and eliminate controversy concerning whether Ameritech's advanced services affiliate is being charged the same rates as other CLECs for special construction. Mr. Graves maintains that a tariffed rate will also make loop conditioning charges easier for Ameritech to administer since it will not be forced to track and apply different rates to different CLECs that have opted into the BroadSpan rates as opposed to the Texas rates. He further contends that a tariff may be used by parties that have not yet entered Illinois in order to asses the financial viability of entry into the market.

With regard to Ameritech's final loop conditioning rates, Mr. Graves asserts that they must be TELRIC based and should not be tariffed as special construction charges. Moreover, he contends that they should be non-recurring charges specific to each removal of bridge taps, repeaters, and load coils in order to most accurately reflect the costs incurred by Ameritech.

Staff is also concerned about the up-front nature of Ameritech's special construction charges, but to a lesser extent than certain CLECs. Mr. Phipps begins his discussion of this issue by citing Mr. Starkey:

> To the extent possible, special construction charges should be recovered via monthly recurring, TELRIC based rates [...] to the extent that Ameritech believes it is incurring costs for which it is not being compensated via its current TELRIC based rates, its appropriate avenue of recourse is to conduct an unbundled loop study that does include those costs and submit that study to the Commission for approval. To the extent special construction activities concern adjustments to the Ameritech network for purposes of supporting either unbundled loops or retail loops, those expenses must be recovered from all parties that may use that facility over the facility's economic life [...] Ameritech's current policy of charging the entirety of the expense to the 'first man in' penalizes the first CLEC who encounters a facility, or a portion of the Ameritech network, that must be refashioned.[51]

Mr. Phipps concurs with Mr. Starkey's assessment under certain special construction instances, but does not agree in all cases. For example, assuming that there are no unbundled loops available in an IDLC environment and Ameritech must construct a separate parallel non-integrated facility, Mr. Phipps states that it would be improper for Ameritech to charge that requesting carrier for the entire facility up-front because (a) Ameritech could utilize that facility to provision service to other CLECs and retail customers and (b) Ameritech could double recover the costs of that facility by assessing an up-front charge as well as monthly recurring charges to recover the cost of the facility over its economic life. Mr. Phipps states that this example is analogous to Mr. Starkey's argument of penalizing the "first man in," a practice which he claims is specifically rejected by the FCC in paragraph 755 of its First Report and Order. In that paragraph, Mr. Phipps reports that the FCC determined that the costs of shared facilities should be recovered in a manner that efficiently apportions costs among users. In these instances, if recovery is allowed by the Commission, Ameritech should construct the facility and recover the cost from all CLECs using the facility via monthly recurring TELRIC based rates, according to Mr. Phipps.

However, in other instances, Mr. Phipps contends that it would be more appropriate for Ameritech to recover the cost of special construction via nonrecurring TELRIC based charges. Mr. Phipps lists four criteria which he believes should be used to determine when up-front charges are permissible:

1. The special construction activity is performed exclusively for the benefit of the requesting carrier;
2. The special construction activity is a "non-recurring" activity;

[51] Joint CLEC Ex. 1.0, pp42-43.

3. The special construction charge is not cost-prohibitive; and
4. The charges among retail customers and CLECs should be consistent.

These criteria, applied to loop conditioning, indicate that special construction charges for such work may be properly assessed as up-front charges, according to Mr. Phipps. Although he agrees with Mr. Starkey's assessment of up-front charges to the extent he applies it to costly, shared facilities, Mr. Phipps maintains that the above four criteria best determine whether to assess up-front special construction charges as opposed to recurring charges.

C. McLeod, Ovation, MCI WorldCom, and Allegiance's Position

McLeod, Ovation, MCI WorldCom, and Allegiance witness Starkey argues that allowing Ameritech to assess special construction charges only in situations wherein it would assess similar charges on its retail customers is the only way that Ameritech can be effectively precluded from disadvantaging its competitors who purchase UNEs *vis a vis* its own provision of retail services using those same network elements. Unless it is required to abide by this principle, Mr. Starkey contends that Ameritech will undoubtedly be tempted to continue following its obvious incentive to recover from its competitors costs that it does not likewise attempt to recover from its retail customers. Mr. Starkey cites proprietary information provided by Ameritech indicating that Ameritech assess special construction charges from its retail customers on far fewer occasions than it does so from CLECs[52] as evidence of Ameritech's discriminatory practices.

Mr. Starkey disagrees with Mr. Suthers that there are material differences between the purchase of a UNE and the purchase of a retail service. He asserts that Mr. Suthers' argument seems to be that Ameritech does not provide retail customers network elements; instead, Ameritech provides retail customers retail services. Hence, according to Mr. Starkey, it is Ameritech's position that when it provides a CLEC access to UNEs, this is the provision of an entirely different product and comparisons can not be made between this product and the services Ameritech provides its retail customers.

In response, Mr. Starkey claims that there is a major hole in Mr. Suthers' argument. He notes that the term "Network Element" included in Ameritech's tariff and throughout the majority of its interconnection agreements is capitalized. Mr. Starkey contends that this means that the term is not being used loosely; rather, it is being used consistent with a specific definition contained elsewhere in the interconnection agreement or elsewhere in applicable law. In this circumstance, Mr. Starkey states that the term "Network Element" is used as it is defined in Section 3 (29) of the TA96. Section 3 (29) states:

[52] See Joint CLEC Ex. 1.0, p.35.

> Network Element. – The term 'network element' means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

What is important to note about this definition, Mr. Starkey avers, is that it describes a Network Element as a facility or equipment used in the provision of a telecommunications service. He notes that it does not suggest that Network Elements only support *unbundled* Network Elements. Under the construct of the TA96, Mr. Starkey asserts that Network Elements are the common "building blocks" upon which retail, wholesale, and UNE products are provided. He maintains that Ameritech deploys Network Elements (i.e., discrete components of its network), or combinations of Network Elements, to serve end user customers who order retail services. Likewise, he states that Ameritech is required by Section 251 of the TA96 to allow CLECs to access its Network Elements directly on an unbundled basis. Ameritech obviously employs its Network Elements, Mr. Starkey continues, to serve retail customers as well as CLEC customers. Hence, when Ameritech in its tariff or in its interconnection agreements agrees to provide a CLEC access to Network Elements on terms and conditions no less favorable than the terms and conditions under which it provides such elements to itself, its subsidiaries, affiliates, and any other person, it is agreeing to provide nondiscriminatory access to the discrete, "building block" facilities of its network, according to Mr. Starkey. For this reason, when Ameritech rejects a CLEC's order for an unbundled facility and requires the payment of special construction charges for purposes of accessing that facility, and it does not or would not follow a similar procedure when the facility (or Network Element) is used to provision a retail service, Mr. Starkey contends that Ameritech is in violation of its tariff and its many interconnection agreements.

McLeod, Ovation, MCI WorldCom, and Allegiance maintain that Ameritech's reliance on Iowa Utilities Board v. FCC is disingenuous. While Ameritech states, "Likewise, the Eighth Circuit has explained that nondiscrimination merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others," the four CLECs argue that this statement is taken grossly out of context and occurs in the discussion of an entirely different issue -- the quality of the service provided. They contend that this discussion is not at all instructive on the discrimination issue for which it is cited by Ameritech.[53]

The four CLECs rely on paragraphs 218, 315, and 316 of the FCC's First Report and Order to support its position that service to CLECs and retail end users is

[53] McLeod, Ovation, MCI WorldCom, and Allegiance reference GTE South Inc. v. Morrison, 6 F.Supp.2d 517, 530, n. 10 (E.D.Va. 1998), which they assert similarly rejects an ILEC's out of context reliance on Iowa Utilities Board.

comparable:

> 218. Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself. Permitting such circumstances is inconsistent with the pro-competitive purpose of the Act. Therefore, we reject for purposes of section 251, our historical interpretation of "non-discriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term "nondiscriminatory," as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be "just" and "reasonable" under section 251(c)(2)(D).
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> 315. The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself. We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete. Such terms and conditions should serve to promote fair and efficient competition. This means, for example, that incumbent LECs may not provision unbundled elements that are inferior in quality to what the incumbent provides itself because this would likely deny an efficient competitor a meaningful opportunity to compete. We reach this conclusion because providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets to competition is designed to achieve.
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> 316. As is more fully discussed below, to enable new entrants, including small entities, to share the economies of scale, scope, and density within the incumbent LECs' networks, we conclude that incumbent LECs must

> provide carriers purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LECs operations support systems. Moreover, the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers.

McLeod, Ovation, MCI WorldCom, and Allegiance offer as further support for this position paragraph 279 from the FCC's order in In re Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act of 1996, CC Docket 99-295, FCC 99-404 (December 22, 1999). Paragraph 279 states:

> As noted above, in the past we have evaluated whether a BOC is meeting its nondiscrimination obligation with respect to loops by examining whether loops are provided in a fashion that provides an efficient competitor a meaningful opportunity to compete. In this application, however, we note that the New York Commission adopted a retail analogue for new unbundled loops, and Bell Atlantic submitted accompanying data with which we can conduct a direct parity comparison. Because this retail analogue was developed as a result of the rigorous collaborative process described above, we find this means of comparison to be reasonable in this instance. We therefore conclude that Bell Atlantic must satisfy its duty of nondiscrimination by demonstrating that it provisions new unbundled local loops to competing carriers in substantially the same time and manner as it does to its retail customer. Because the New York Commission did not identify a retail analogue to the coordinated cutover of an active loop, i.e., a "hot cut," however, we will examine Bell Atlantic's provision of hot cuts in terms of whether its performance affords competitors a meaningful opportunity to compete. We also discuss separately Bell Atlantic's evidence regarding its performance with respect to xDSL loops, describing how we will consider such evidence in evaluating future applications filed under section 271.

The four CLECs state that this order disproves Ameritech's contention that the FCC does not believe that retail service and unbundled loops can be compared.

Moreover, McLeod, Ovation, MCI WorldCom, and Allegiance assert that the portion of the order from the Ameritech Michigan 271 proceeding upon which Ameritech relies related to the provision of operational support services ("OSS") for ordering and provisioning unbundled elements. They report that the FCC concluded at paragraph 141 that certain OSS functions have no retail analogue.[54] The conclusion that OSS

[54]McLeod, Ovation, MCI WorldCom, and Allegiance contend that Ameritech fails to point out that the FCC found that certain OSS functions have a retail analogue. At paragraph 140 they note that the FCC stated as follows: "We find that OSS functions associated with pre-ordering, ordering and provisioning for resale services, and repair and maintenance for both resale services and bundled network elements all

may have no "retail analogue" comparable to the activity of ordering an unbundled loop is far different from concluding there is no retail analogue in terms of assessing special construction charges, according to McLeod, Ovation, MCI WorldCom, and Allegiance.

Mr. Starkey also responds to Mr. Suthers' argument that Ameritech is required only to provide access to UNEs in a way that provides CLECs a "meaningful opportunity to compete." First, Mr. Starkey states that it is important to note that all of the cites Mr. Suthers makes to the FCC's orders in the BellSouth Louisiana 271 proceeding and the Ameritech Michigan 271 proceeding deal with provisioning intervals, not with the rates or terms under which UNEs will be provided. In both the BellSouth Louisiana and Ameritech Michigan orders, wherein the FCC first introduced the concept that a "retail analogue" may not exist for some UNEs, Mr. Starkey contends that the FCC was struggling with the task of comparing provisioning intervals for providing access to specific UNEs. As an example, he states that in the BellSouth 271 application it appeared that BellSouth did not provision, on a retail basis, access to certain UNEs independently. Hence, there was no information by which to compare BellSouth's retail provisioning timeframes for access to these elements (i.e., retail performance benchmarks) with its timeframes for offering access to these elements on an unbundled basis so as to ensure parity treatment, according to Mr. Starkey. That circumstance, he asserts, is very different from Mr. Suthers use of this language (i.e., "no retail analogue") to suggest that the provision of a loop as a Network Element (either in combination with other Network Elements in the provision of a retail service, or, in the provision of direct access via an unbundled loop) has no comparative retail analogue for purposes of gauging equivalent rates, terms, and conditions. Since Ameritech does use its loop facilities (i.e., a Network Element) to provision both retail services and direct, unbundled access, Mr. Starkey avers that there is a retail analogue.

Second, Mr. Starkey relates that the FCC, in paragraph 491 of its UNE Remand Order, clarified its contention that ILECs must provide access to UNEs in a manner that allows its interconnecting carriers a "meaningful opportunity to compete:"

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

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have retail analogues. Similarly, because measuring daily customer usage for billing purposes requires essentially the same OSS functions for both competing carriers and incumbent LECs, equivalent access is the standard required by section 271 and section 251 of the Act for this billing subfunction as well." If this decision has any relevance whatsoever, the four CLECs maintain that it disproves Ameritech's point.

elements at the same level of quality that the incumbent LEC provides to itself.

Mr. Starkey states that it is important to note, consistent with the above discussion, that the FCC suggests its "meaningful opportunity to compete" standard applies only when "an incumbent LEC does not provide access to network elements to itself..." He insists that Ameritech uses its loop facilities (i.e., a Network Element) to provision service to itself and its retail customers in addition to providing access to that element on an unbundled basis. Therefore, Mr. Starkey asserts that Ameritech has an obligation to provide non-discriminatory access to particular Network Elements, not simply to provide access sufficient to provide CLECs a meaningful opportunity to compete.

Ameritech, the four CLECs further claim, goes to great lengths to draw a distinction between CLECs and its retail customers in an attempt to justify the special construction charges it assesses CLECs for UNEs. They contend that just as Ameritech did in Docket No. 99-0525, it admits that it treats CLECs and its own retail customers differently when it comes to special construction charges; but attempts to mitigate the differences by claiming that the costs of special construction are in fact recovered from both groups, just in different ways. In their view, Ameritech's position appears to be that retail special construction costs are reflected in its "residual costs," which it claims are recovered from retail customers through "contribution" generated by all retail offerings. Based on its assertion regarding its recovery of the residual "costs," McLeod, Ovation, MCI WorldCom, and Allegiance state that Ameritech infers that it does not discriminate when it assesses CLECs special construction charges for UNEs but does not assess such charges to its own retail customers when Ameritech provides services to those customers using the same network elements that CLECs utilize to provide services to those same customers. The record, they argue, demonstrates that the residual argument is wholly without merit – that it is nothing more than an attempt by Ameritech to divert attention from the clear discrimination it engages in through its policy of assessing CLECs special construction charges but not its own retail customers.

The residual, McLeod, Ovation, MCI WorldCom, and Allegiance assert, is irrelevant to this proceeding and should be ignored by the Commission. They claim that the residual is not a relevant economic concept, but is instead an Ameritech construct dating back to its first alternative regulation proceeding before this Commission. The residual, they argue, is simply the difference between Ameritech's original revenue requirement from a previous rate-of-return calculation (from the early 1990s) and the long run service incremental costs (plus joint and common costs) of the services it produces. They emphasize that the residual is not a cost of doing business nor is it in any way definable as an economic cost that is reasonably recovered from Ameritech's customers (either retail or CLEC customers). The residual, they contend, is simply a mathematical construct of Ameritech wherein it has, on numerous occasions, asked the Commission to "make it whole" in relation to some historic revenue requirement figure.

The four CLECs contend that the fundamental problem is that the revenue requirement figure used by Ameritech to determine its residual is nearly eight years old and is not a relevant number by which to compare the costs Ameritech incurs today. Additionally, they state that Ameritech has agreed to an alternative form of regulation wherein its prices, not its underlying costs as represented by a revenue requirement, are used to restrain its monopoly power. They argue that Ameritech's attempt to maintain its current alternative regulation prices (without a review of its profitability) yet still maintain its residual as a purportedly relevant economic measure, by which its costs should be measured, is contradictory and self-serving.

Contrary to Ameritech's argument, McLeod, Ovation, MCI WorldCom, and Allegiance contend that the residual does not incorporate the costs of the activities Ameritech is attempting to recover via special construction charges. They assert that the Commission has rejected the residual as a relevant factor in setting rates (either retail or wholesale) in Illinois. Both the TELRIC methodology employed to determine rates for interconnection and UNEs, and the LRSIC methodology used to determine retail rates, according to McLeod, Ovation, MCI WorldCom, and Allegiance, prohibit the reliance on historic costs. They insist that both require the use of forward looking, least cost assumptions. They further argue that to the extent the costs of the activities Mr. Florence describes in his testimony are forward-looking direct economic costs of UNEs sold to interconnectors, those costs should be, and are, included in the direct TELRIC costs (and prices) for those UNEs. They contend such costs are not, nor would it be appropriate to include them, in a residual. They aver the Commission agreed with this principle in Docket Nos. 96-0486/0569 (Consolidated), where it rejected Ameritech's attempt to include "residual costs" in the prices for UNEs. McLeod, Ovation, MCI WorldCom, and Allegiance argue that just as the Commission recognized in those consolidated dockets, there is no place for recovery of a residual in cost based UNE rates; and the alternative form of regulation that Ameritech opted for long ago severed the link between costs and prices, and threw out constructs of traditional rate of return regulation and reliance on historical costs. They claim that Ameritech's concept of the "residual" is inconsistent with the TELRIC and LRSIC methodologies and Ameritech's alternative form of regulation.

Moreover, the Commission's cost of service rules, according to the four CLECs, do not recognize nor provide for recovery of a "residual revenue requirement." They relate that nowhere is the term "residual" even mentioned in Part 791. The assert that when it adopted its cost of service rules, the Commission rejected the suggestion that the residual revenue requirement be included in the aggregate revenue tests that Ameritech must submit to demonstrate that its competitive services are not being subsidized by non-competitive services. By refusing to allow the residual revenue requirement to be allocated between competitive and non-competitive services, the four parties argue that the Commission rejected the inclusion of the residual revenue requirement in its cost of service rules and, in turn, the recovery by Ameritech of any "costs" that the residual revenue requirement purportedly reflects. McLeod, Ovation,

MCI WorldCom, and Allegiance state that the generic proceeding, Docket No. 96-0094, that the Commission initiated to investigate the source and appropriate treatment of those embedded costs, which they characterize in this docket as comprising the "residual revenue requirement," never resulted in a final Commission order because it was dismissed at the request of Ameritech.

McLeod, Ovation, MCI WorldCom, and Allegiance assert that Ameritech attempts to attribute its discriminatory practices with respect to special construction to rate design differences between CLEC and retail customers. There is nothing in the record of this proceeding, they claim, that would justify a change from the Commission's findings in Docket No. 99-0525. They insist that the residual is still not relevant, there is no evidence that special construction costs are reflected in the alleged residual, and even if there were any merit to the residual argument it would not excuse Ameritech's discriminatory application of special construction charges.

With regard to the proper interim loop conditioning rate, Mr. Starkey contends that the FCC's primary objective in implementing the merger condition concerning TELRIC based loop conditioning charges was to protect carriers from SBC/Ameritech's inherent incentive to overestimate line conditioning charges and thereby successfully erect barriers to the exploding advanced services marketplace. Allowing Ameritech to charge carriers unsupervised special construction charges for line conditioning, in the interim between now and the timeframe within which Ameritech must provide a line conditioning cost study, is not congruent with this objective, according to Mr. Starkey.

As indicated above, while CLECs wait for the Commission to approve final loop conditioning rates, Mr. Starkey recommends that the Commission adopt as interim rates the rates approved in Texas by the PUCT in Docket Nos. 20226 and 20272. Because CLECs have the right to avail themselves of the charges detailed above, Mr. Starkey states that the Commission should, in this proceeding, find that Ameritech can, at a maximum, assess the charges approved in Docket Nos. 20226 and 20272 until it receives approval from this Commission of a cost study supporting any line conditioning charges. He adds, however, that these charges should not be assessed as special construction charges at Ameritech's discretion.

As for the up-front nature of Ameritech's special construction charges, Mr. Starkey maintains that up-front charges have certain economic and public policy ramifications as opposed to recovering special construction expenses over the economic life of a facility. To the extent possible, he argues that special construction charges should be recovered via monthly recurring, TELRIC based rates. If Ameritech believes it is incurring costs for which it is not being compensated via its current TELRIC based rates, Mr. Starkey asserts that its appropriate avenue of recourse is to conduct an unbundled loop study that includes those costs and submit that study to the Commission for approval. To the extent special construction activities concern adjustments to the Ameritech network for purposes of supporting either unbundled loops or retail loops, he insists that those expenses must be recovered from all the

parties that may use that facility over the facility's economic life. The only way to ensure recovery in this economically rational fashion is to include the costs of those adjustments in a properly fashioned TELRIC study, according to Mr. Starkey. He states that Ameritech's current process of charging the entirety of the expense to the "first man in" penalizes the first CLEC who encounters a facility, or a portion of the Ameritech network, that must be refashioned. And, to the extent the first CLEC must relinquish the facility for whatever reason in a timeframe shorter than the economic life of the facility (for example, if the customer chooses another carrier), Mr. Starkey asserts that this process leaves Ameritech with a more efficient, more robust network to be used to serve other carriers and customers at the original CLEC's expense. Mr. Starkey maintains that neither of these outcomes is conducive to economically efficient cost recovery or good public policy.

Finally, McLeod, Ovation, MCI WorldCom, and Allegiance question Ameritech's suggestion that its affiliate, AADS, faces the same special construction charges from Ameritech as CLECs. They report that the Commission prohibited AADS from engaging in discrimination by imposing the following condition in granting its Certificate of Service Authority: "AADS shall not sell or provide any services pursuant to any expanded certificate authority received in this docket to any customer or end-user at a price lower than AADS' costs, including the costs of any service components utilized, to provide said services to that customer or end-user." (Docket No. 94-0308, August 16, 1995, p. 6) Thus, the four CLECs insist that Ameritech can not claim that it charges AADS special construction charges which AADS can then absorb at its discretion since it must pass those costs on to end use customers.

1. Impact of Ameritech's policies on McLeod and Ovation specifically

McLeod and Ovation witness Jennings agrees with Staff and Mr. Starkey that it is proper to compare Ameritech's provision of UNEs to CLECs to its provision of retail service to its end use customers. Since both Ameritech and the CLEC are attempting to compete for end users, Mr. Jennings states that the only appropriate comparison is from the perspective of the end user. As a result of being assessed special construction charges by Ameritech, Mr. Jennings testifies that McLeod has decided not to serve customers it otherwise would serve. For those customers McLeod decides to serve, he claims that it is forced to absorb a much higher cost of providing service than would otherwise be the case. Mr. Jennings does not believe that this is a fair or reasonable result, and clearly puts McLeod at a disadvantage relative to Ameritech. If Ameritech is permitted to continue its practice of materially increasing the cost of securing UNEs through special construction charges, he claims that McLeod will have to seriously reconsider the economics of further expanding its facilities-based services using UNEs to its small and medium business and residential customer base. McLeod simply can not compete with Ameritech if McLeod is forced to absorb charges that Ameritech does not itself charge at retail for the same service, according to Mr. Jennings.

Mr. Jennings adds that the material impact on the economic viability of facilities-based services to a large portion of McLeod's customer base in conjunction with the delays caused by Ameritech's special construction practices, has prevented McLeod from moving a large portion of its resold customer base to its own facilities-based service. He contends that McLeod is thus unable to realize improved margins for that portion of its customer base that must remain on resold Centrex service. He argues that this results in Ameritech retaining that much more control over how McLeod provides service to its customers; which clearly impedes competition.

Other anti-competitive results flow from Ameritech's conduct, according to Mr. Jennings. As an example, he testifies that McLeod is unable to expand its product offering since Ameritech has been unwilling to expand the features and functionalities of its Centrex product offering. Specifically, over the past three years, Mr. Jennings states that McLeod has requested that Ameritech add a Caller ID with name feature to Centrex service to enable McLeod to offer such services to its resold customer base. Mr. Jennings relates that Ameritech has refused to do so. In contrast, he reports that US West implicitly recognized this issue and made such functionality available with Centrex service. Mr. Jennings characterizes Ameritech's unwillingness to do so as not being in the spirit of fair competition. He further claims that Ameritech's refusal to add this functionality to Centrex has resulted in the loss of both existing customers and prospects to Ameritech, and has adversely impacted McLeod's competitiveness. Mr. Jennings explains that the reason this problem is relevant to this proceeding is that McLeod could offer this functionality to its end users if it could provision service to them on a facilities-basis. McLeod can not do so, however, because of Ameritech's special construction charge policy, according to Mr. Jennings.

Mr. Jennings also testifies that McLeod can not pass through to customers special construction charges and remain competitive. Given the choice of paying nothing to remain on Ameritech's service, or paying a very large up front cost to obtain service from McLeod, Mr. Jennings states that virtually every customer will choose to remain with Ameritech if McLeod attempts to pass on such costs. In areas in which McLeod competes with additional providers, he indicates that all competitors are effectively forced to direct their sales activities at the very largest telecommunications customers, for whom it may make some economic sense for a competitor to absorb the cost of special construction charges in order to obtain the end user's business. Ameritech's special construction policy is also forcing McLeod to become a "cherry picker," according to Mr. Jennings, by narrowly limiting the types of customers to whom it markets competitive services -- a result that is obviously at odds with the pro-competitive legislation adopted in Illinois and by Congress

Nor do Ameritech's practices give McLeod a meaningful opportunity to compete with Ameritech, according to Mr. Jennings. He argues that the fact that Ameritech has the financial strength to absorb such costs does not justify imposing such special construction charges on CLECs. If Ameritech were allowed to continue doing so, Mr.

Jennings fears that the result will be that only large, well-heeled competitors such as AT&T and MCI WorldCom will have a meaningful opportunity to compete. He maintains that smaller entities like McLeod simply will not be able to absorb these costs to the extent the industry behemoths can and still remain financially viable. Mr. Jennings avers that Congress clearly did not intend competition to be limited to a very few, large entrants.

As shown on McLeod Exhibit 1.3, Mr. Jennings testifies that a small percentage of orders have been impacted by Ameritech's special construction policy. However, if Ameritech's policy is not changed, he insists that this percentage will increase for two reasons. First, he states that McLeod is moving towards more facilities-based resale as the basis for provisioning local service. Second, and more important, Ameritech's existing inventory of spare copper loops is being depleted, according to Mr. Jennings. Once that occurs, he contends that every customer served by IDLC will require disintegration of the DLC before it can take service from a CLEC via an unbundled loop. As more customers move to CLECs providing service via unbundled loops, he testifies that this problem will become worse. Furthermore, Mr. Jennings asserts that Ameritech's reluctance to proactively plan for unbundled loop demand will exacerbate this problem in the absence of a change in its special construction charge policy

Mr. Jennings offers several specific examples which he claims demonstrate that Ameritech imposes special construction charges on McLeod when it does not impose like charges on its retail end use customers. In the instance of item No. 148 on Proprietary Attachment 9 to Staff Ex. 2.0, Mr. Jennings states that Ameritech charged special construction because it claimed it had to dispatch a technician to perform an activity described as "Dpro recovery of defective pairs." Mr. Jennings asserts that such a dispatch occurs where the only pairs in a cable are defective for some reason (shorts, ground, etc.) and the pair must be repaired before connection. In the past, he testifies that this process was routinely done by Ameritech to serve its retail customers, and indeed, replacement of defective pairs should be accomplished as part of Ameritech's maintenance routine. He claims that it is unlikely that a retail customer of Ameritech would be charged special construction for recovery of a defective pair before installation of service. Similarly, under item No. 104 on Proprietary Attachment 9 to Staff Ex. 2.0, Ameritech allegedly required additional cable to be placed and spliced for the unbundled loops to be provided. Mr. Jennings states that it is his experience that this type of work is typically done for a retail customer without charging for special construction. He testifies that installing additional cable and splicing that cable is part and parcel of provisioning of local service to a retail customer. Mr. Jennings also indicates that Ameritech no longer assesses up-front charges for this type of construction work. Mr. Jennings bases his conclusions that Ameritech would not charge retail customers for these activities upon his experience with Ameritech and Illinois Consolidated Telephone Company ("ICTC"), the incumbent local exchange carrier in East Central Illinois and a subsidiary of Consolidated Communications, Inc. ("CCI"). CCI merged with McLeod in September of 1997. In addition, his opinion is

supported by his understanding of the application of Ameritech's special construction tariff on retail customers, as explained by Mr. Starkey.

Mr. Jennings is also aware of at least three customers that Ameritech served without requiring payment of special construction charges after McLeod refused service as a result of Ameritech's effort to collect special construction charges for loops to serve the same customer. The first instance concerns item No. 188 on Proprietary Attachment 9 to Staff Ex. 2.0. McLeod placed an order for Illini Pella Inc at 1001 N. County Fair Drive in Champaign. Ameritech quoted special construction charges of $3,787.71 to construct what is described as "an entrance cable network interface and pad for new building" related to the provisioning of seven lines. Mr. Jennings testifies that McLeod declined to pay the charges but that Ameritech's retail unit subsequently marketed the same service to Illini Pella and Ameritech agreed to provide the facilities without assessing any special construction charges.

The second example regards item No. 160 on Proprietary Attachment 9 to Staff Ex. 2.0. Mr. Jennings states that in late 1997, Doug Dalby requested ISDN service from McLeod at his home at 1050 Hillcrest Drive, Decatur, Illinois. To provision such service, McLeod ordered an unbundled ISDN loop from Ameritech. According to Mr. Jennings, Ameritech informed McLeod that special construction charges totaling $5,027.05 would be required for equipment and labor to condition a loop for ISDN to the customer's address. He states that McLeod declined to pay the charges, and service was not installed for the customer. Immediately thereafter, Mr. Jennings reports that the customer ordered ISDN directly from Ameritech's retail business unit. He testifies that Ameritech did not mention special construction charges to the customer and installed Ameritech's ISDN service; charging the standard non-recurring charge for service installation and nothing more. Mr. Jennings also discloses that Mr. Dalby was an employee of Consolidated Communications Telecom Services ("CCTS") at the time he requested service. CCTS is a subsidiary of CCI. He asserts, however, that Mr. Dalby's order for ISDN service was precipitated by his personal desire for such service, and was not intended to catch Ameritech in a bad act. Mr. Dalby retained his ISDN service from Ameritech until he moved to a new location in August 1999.

After inquiring why Ameritech sought to assess special construction charges on McLeod but did not charge Mr. Dalby for special construction, Mr. Jennings testifies that Ameritech's Vice President-Sales/Service explained that Ameritech's retail operations simply chose not to pass those costs on to the retail customer. Mr. Jennings argues that Ameritech's response fails to justify its conduct. He insists that Ameritech has an obligation to provide access to competitors to UNEs under the same terms and conditions such services are made available to its retail customers. He further asserts that Ameritech is required to provide non-discriminatory service to all of its customers. Mr. Jennings maintains that Ameritech is failing to meet these obligations.

Item No. 156 on Proprietary Attachment 9 to Staff Ex. 2.0 represents the third example. In July of 1999, Mr. Jennings claims that Design Tuscano requested ISDN service from Ovation at its business address, 1645 Green Leaf, Elk Grove Village, Illinois. To provision such service, Ovation ordered two unbundled ISDN loops from Ameritech. Mr. Jennings asserts that Ameritech informed Ovation that special construction charges totaling $7,664.00 would be required for equipment and labor to condition the two loops for ISDN to the customer's address. He states that Ovation declined to pay the charges, and service was not installed for the customer. Immediately thereafter, Mr. Jennings testifies that the customer ordered ISDN directly from Ameritech's retail business unit. Again, Ameritech did not mention special construction charges to the customer, and instead simply installed ISDN service; charging only the standard non-recurring charge for service installation, according to Mr. Jennings.

Mr. Jennings testifies that other impacts resulting from Ameritech's special construction policy include lost customer prospects simply because of the delay in resolving the special construction issue. He claims that this is particularly so given that the customer does not incur such delays if it orders service from Ameritech. Ameritech's process related to special construction charges provides it a very significant advantage in the marketplace, since many customers place a very high priority on obtaining service in the shortest amount of time, according to Mr. Jennings.

D. Rhythms and Covad's Position

In their joint Initial Brief, Rhythms and Covad point to paragraphs 218, 315, and 316 of the FCC's First Report and Order for the proposition that Ameritech must provide CLECs access to UNEs on the same rates, terms, and conditions that it provides such access to itself, not simply in the same manner that it provides access to other CLECs. They also cite paragraph 279 of the FCC's order in the Bell Atlantic New York 271 proceeding, just as McLeod, Ovation, MCI WorldCom, and Allegiance do. Rhythms and Covad rely on Section 13-505.2 of the Act as well to support their position that Ameritech's special construction policy discriminates against CLECs.

Rhythms and Covad also urge the Commission to reject Ameritech's argument that it recovers special construction costs from its retail customers through the residual. They support Mr. Starkey's position that the residual is irrelevant to this proceeding. In particular, they add that Ameritech has failed to show that it recovers the cost of loop conditioning for its retail customers through contribution to the residual.

To the extent that Ameritech's services are competitive (such as ISDN Prime and ISDN Direct in MSA 1), Rhythms and Covad assert that Ameritech must comply with Section 13-502(c) of the Act. This section imposes a price floor on competitive services equal to LRSIC. They argue that the record shows that Ameritech frequently tells xDSL providers it will cost thousands of dollars to condition loops – loops it then turns around and conditions for free for its own ISDN customers. If loop conditioning is

a long-run incremental cost, as claimed by Ameritech in this proceeding, then this section of the Act does not allow Ameritech to provide ISDN customers with free loop conditioning, according to Rhythms and Covad. Nor, they continue, does this section of the Act allow Ameritech to recover those costs from its residual revenue requirement; it must recover those costs from ISDN customers.

Rhythms and Covad maintain that either loop conditioning is a long-run incremental cost that must be recovered from DSL providers and Ameritech's own ISDN customers, or loop conditioning is not an element of a proper LRSIC study or TELRIC study and it must therefore be provided without charge to both its own ISDN customers and to xDSL providers. They insist that as a company providing services subject to Section 13-502(c) of the Act, Ameritech is not, as it claims in its Initial Brief, "free to make choices about how to recover those costs." If loop conditioning is indeed a cost that can be recovered from xDSL providers, Rhythms and Covad assert that it is a cost that must be recovered directly from ISDN customers as well.

Rhythms and Covad also take issue with Ameritech's argument that its up-front charges are an appropriate method of recovering its costs because it incurs its loop conditioning and IDLC/RSU unbundling costs up-front. They contend that Ameritech's position is without merit for three reasons. First, they assert that Ameritech improperly assumes that its alleged up-front costs related to conditioning and IDLC/RSU unbundling must be recovered up-front. Contrary to Ameritech's assertion, the two CLECs state that there is no requirement that "up-front" costs be recovered up-front; the fact that Ameritech may prefer to do so is not dispositive. Instead, Rhythms and Covad assert that the critical issue is whether such up-front charges can be a barrier to competition. They claim that federal law recognizes that up-front charges are a barrier to a CLEC seeking to offer a competitive service, and to avoid such a result, allows nonrecurring costs to be recovered through recurring charges over a reasonable period of time. (47 C.F.R. § 51.507(e)) Thus, if this Commission allows Ameritech to impose special construction charges on CLECs, Rhythms and Covad maintain that the Commission should ensure that nonrecurring costs do not serve as a barrier to competition in Illinois and require Ameritech instead to recover those costs through its recurring rates over a reasonable period of time.

The two CLECs further contend that Ameritech's statement that it and CLECs are similarly situated with respect to investment decisions is not credible. Ignoring market realities, Ameritech maintains that, just like Ameritech, CLECs can spread their up-front costs over customers and time, according to Rhythms and Covad. In response, they argue that it is one thing for a profitable company like Ameritech to spread its costs over millions of customers throughout the state; but it is quite another for a young CLEC such as Rhythms or Covad (who allegedly make no profit) to spread the same costs over a thousand customers.

The third reason that up-front charges are not appropriate, according to Rhythms and Covad, is that there is no support for Ameritech's conclusion that some

CLECs should make the "efficient" decision to select resale over providing service through UNEs. They note that Ameritech maintains that its excessive up-front charges send the right "price signal" and provide CLECs with the proper economic incentives regarding use of resale. Perhaps, not surprisingly they contend, Ameritech prefers the "economic incentive" that ensures that CLECs will opt-for resale (a more profitable option for Ameritech) than purchasing UNEs. They counter, however, that Ameritech's preference is irrelevant. Rhythms and Covad state that the TA96 was intended to ensure that consumers would have a real choice among telecommunications carriers – not simply a choice among 15 carriers offering Ameritech's resold services. They recount that the FCC echoed this sentiment in paragraph 68 of its UNE Remand Order, "... [c]arriers using unbundled elements will have greater opportunities to offer services that are different from those services offered by the incumbents. More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent LEC offers at retail."

1. Impact of Ameritech's policies on Rhythms specifically

Rhythms witness Lopez testifies that Ameritech's imposition of special construction charges has impacted Rhythms' operations. She indicates that Rhythms has canceled unbundled loop orders to Ameritech on hundreds of occasions because of special construction and conditioning charges. Ms. Lopez states that generally, the charges imposed by Ameritech have been too high to be recovered in a retail service over predictable service lives. In some instances, she claims that Ameritech's charges have ranged as high as $360,000 for a single loop. While it is difficult for Rhythms to estimate monthly revenue for each customer due to the variety of services offered, she relates that generally the price of Rhythms' services range between $120 and $1,195 per month for business consumers, depending upon the speed of the service. Ms. Lopez adds that Rhythms has additional price points for general consumers which are competitive with ILECs' DSL services. She further testifies that Rhythms' data shows that nearly 20% of the unbundled loops ordered by Rhythms since July of 1999 have been impacted by special construction charges or have been denied and referred to Ameritech's BFR process. By comparison, she notes that the percentage of lines impacted by special construction charges in the BRE complaint before the MPSC was slightly more than 1%.

All customers, Ms. Lopez testifies, have a minimum set of expectations when requesting service from a carrier: to receive the requested service, to be charged a reasonable amount for that service, and to receive the service in a timely manner. She indicates that Ameritech's process and procedures for assessing special construction charges make it difficult for Rhythms to satisfy any of these expectations when providing service in Illinois. Additionally, she notes that while Ameritech is in control of the process, any delay to the customer is reflected on Rhythms and its ability to provide service.

Ms. Lopez claims that Ameritech's policy frequently causes Rhythms to deny service or provide a slower type of DSL service than requested by the customer. While the customer may elect to pay the special construction charges itself, she states that this may mean several thousand dollars (or more) of up-front charges that the customer did not anticipate. Similarly, if the customer is served by an integrated DLC that Ameritech claims can not be unbundled or Ameritech cancels the order because no unbundled facilities are available, Ms. Lopez asserts that Rhythms will not be able to provide service unless it submits a BFR and pays significant special construction charges for the construction of an unbundled facility. If the customer is not eligible for DSL service from Ameritech, it may be denied access to DSL service altogether, according to Ms. Lopez. In many other cases, she testifies that Ameritech has informed Rhythms after it ordered an ADSL loop that it would have to order an ISDN loop, because the loop is longer than 18,000 feet, an arbitrary length imposed by Ameritech for it's definition of ADSL. Although the customer can still receive ADSL service from Rhythms in this situation, Ms. Lopez indicates that the customer will receive a slower DSL service than originally anticipated, which is likely to disappoint the customer.

Even if Rhythms elects to pay the special construction charges assessed by Ameritech, Ms. Lopez maintains that provision of service to the customer generally will be delayed. She testifies that Rhythms generally learns *after* Ameritech provides a firm order date that a customer's order will be delayed because of the alleged need for special construction. Such work usually causes Rhythms to miss the date that it has promised to provide DSL service to the customer, according to Ms. Lopez. In such cases, she contends that the customer is likely to blame Rhythms, rather than Ameritech, for the missed deadline. She indicates that Rhythms has requested Ameritech to provide special construction on shorter intervals but that Ameritech refuses to establish a time guideline for the most frequent special construction and instead leaves the construction time frame up to each individual field engineer.

2. Impact of Ameritech's policies on Covad specifically

Covad witness Evans agrees that Ameritech should, at most, only assess special construction charges to Covad and other CLECs when it would also impose special construction charges on it own retail end user under its tariff. Ms. Evans testifies that Covad continues to receive substantial construction charges for xDSL loop conditioning. In contrast to Texas where SWBT now charges Covad less than $50 to condition a loop that is less than 18,000 feet in length, she avers that Ameritech continues to impose several thousands of dollars in special construction charges simply to remove load coils or excessive bridged taps. Ms. Evans maintains that Ameritech's policy artificially limits Covad's access to unbundled loops and thus has prohibited Covad from providing DSL service to numerous customers in Illinois.

Covad has also observed recently a dramatic increase in the number of orders rejected by Ameritech because no spare pairs or facilities are available, according to Ms. Evans. For the seven-month period between May and December of 1999, she

testifies that Covad received 160 notices from Ameritech canceling Covad's order because no spare pairs were available. In January 2000 alone, Ms. Evans states that Covad received 211 no spare pair notifications from Ameritech. She asserts that this surge in cancelled orders following Ameritech's special construction policy change concerns Covad. In her opinion, Ameritech has reclassified orders that previously would have fallen into the "special construction" category into the "no facilities available" category. In doing so, Ms. Evans states that Ameritech has effectively blocked Covad's access to those facilities. While in the past, Covad may have received inflated special construction charges to access the loop, she claims that Covad now has no ready means to access the loops that Ameritech labels "no spare pairs." At best, she indicates that Covad must submit a BFR to Ameritech in order to make the pair available. With a BFR, however, Ms. Evans laments that Covad has no assurance that Ameritech will in fact make those facilities available.

Like Rhythms, Covad is aware of instances where it was told special construction charges were necessary to serve an end user but that later the same end user obtained the same service from Ameritech without being assessed special construction charges. Ms. Evans identifies three situations where end users have been able to get an ISDN line from Ameritech at no extra charge even though Ameritech sought to impose several thousand dollars in special construction charges on Covad for the same loop. The first such example is represented by item No. 1379 on Proprietary Attachment 9 to Staff Ex. 2.0. Ms. Evans explains that on September 14, 1999, Merle Reitz placed an order with Covad for a DSL line. According to Mr. Reitz's affidavit, marked as VRE 1.8 and attached to Covad Ex. 1.0, Covad notified him on September 24, 1999 that Ameritech sought $1,431.61 in special construction charges for "removal of a bridged tap for 1 loop in Palatine wire center." Ms. Evans states that Covad cancelled the order due to the amount of special construction charges and resubmitted the order on October 20, 1999. Mr. Reitz states in his affidavit that this time Ameritech sought $1,996.72 in special construction charges to unload pairs and remove a bridged tap.[55] He adds that Covad did not approve the charges and the order was automatically cancelled within five days per Ameritech's policy. Subsequently, Mr. Reitz's affidavit indicates that he ordered an ISDN line direct from Ameritech; which was installed without the assessment of any special construction charges. He reports that the only charge he paid was a one-time installation fee of $145.00. Mr. Reitz's affidavit also indicates that he has been the Regional Transmission Manager for Covad since January of 1999.

Ms. Evans' second example concerns item No. 1710 on Proprietary Attachment 9 to Staff Ex. 2.0. She testifies that David Williamson placed an order through Covad for a DSL line. Ameritech notified Covad that $490.50 in special construction charges would be assessed for "cutting in pairs at the terminal," according to Ms. Evans. Subsequently, however, she claims that Mr. Williamson was advised by Ameritech that

[55] The second assessment of $1,996.72 does not appear on Proprietary Attachment 9 to Staff Ex. 2.0.

it could provide him with DSL service without any additional facilities or construction charges.[56]

The third example regards an order for DSL service placed with Covad by Peter Hamilton.[57] According to his affidavit, marked as VRE 1.10 and attached to Covad Ex. 1.0, Mr. Hamilton placed his order on July 6, 1999. His affidavit indicates that he was later notified by Covad that Ameritech sought $2,300 in special construction charges to provision the necessary loop. After the five-day approval period lapsed, he states that Ameritech cancelled the order. Subsequently, Mr. Hamilton reports that he ordered an ISDN line direct from Ameritech; which was installed on July 22, 1999 without the assessment of any special construction charges. He asserts that he paid only Ameritech's standard $145.00 one-time installation fee. Mr. Hamilton's affidavit also states that since December of 1998, he has been the Manager of Field Operations for Covad.

Ms. Evans testifies that all digital services, including ISDN and DSL, require a "clean" copper loop; thus, in order to provision ISDN to the customers listed above, Ameritech had to "condition" the loop in the same manner as for a DSL loop. As these examples illustrate, she avers that Ameritech is discriminatorily charging CLECs "special construction" for conditioning that it does not charge its own retail customers in similar circumstances.

Moreover, she contends that Ameritech's special construction charges are not uniformly or consistently imposed. She adds that Ameritech's special construction charges often vary for the same loop order. In the case of Mr. Reitz, Ms. Evans observes that when Covad resubmitted Mr. Reitz's loop order, the special construction charges increased by $500. She further observes that Covad has received inconsistent charges for the same type of line conditioning and basic maintenance items. As an example, she states that Covad continues to receive charges varying from $797 to more than $7,000 for removal of load coils. Thus, Covad has no way to predict whether special construction on a loop order will be $184 or $102,000, according to Ms. Evans.

When informed of special construction charges, Ms. Evans asserts that a customer's typical response is to cancel their order with Covad. From late May 1999 to the present, she claims that approximately 80% of Covad's orders that had been assessed special construction charges were cancelled. According to Ms. Evans, Covad has been informed that several of those customers were subsequently contacted by Ameritech sales representatives and offered DSL service without any special construction charges. After speaking with Ameritech representatives, she continues, several customers called their internet service provider ("ISP") to inquire why Ameritech DSL would not involve any additional construction charges. Covad

[56] Ms. Evans directs the Commission's attention to Client Order 100593 and Client Order log, marked as VRE 1.9 and attached to Covad Ex. 1.0.
[57] This order does not appear on Proprietary Attachment 9 to Staff Ex. 2.0.

believes that several customers may have opted for Ameritech's DSL service due to the substantial price differential created by the special construction charges imposed by Ameritech on Covad.

Ms. Evans testifies that Covad has been damaged by Ameritech's imposition of special construction charges in multiple ways. First, she states that Ameritech's practice of assessing special construction charges to provision loops makes it cost prohibitive for Covad to provide DSL services to a significant amount of Illinois customers requesting such service. As an example, she claims that Covad can not effectively compete if it must pay several thousands of dollars in special construction charges in order to obtain an unbundled loop that generates $50 a month in revenue. In addition, according to Ms. Evans, Ameritech's policy of automatically canceling a loop order if Covad does not approve the special construction charges within five days imposes additional processing costs for Covad. Because Covad must wait for its customer, the ISP, to notify in turn its customer (the end user) of the charges assessed, she reports that Covad often waits longer than five days to determine if the end user will accept the special construction charges. If the end user agrees to accept the charges, she states that the ISP then notifies Covad. By that time, Ms. Evans claims that Ameritech has typically cancelled the order because the five-day period has elapsed. Covad must then resubmit the order and begin the entire process again, according to Ms. Evans.

Moreover, in the past, Ms. Evans asserts that Covad often elected to resubmit select orders because the special construction charges imposed often varied for the same order. Thus, Covad would resubmit loop orders in the hope of receiving lower special construction charges, and in several cases was able to lower the charges so as to be able provide DSL service to the customer, according to Ms. Evans. She testifies that the additional costs incurred, however, by Covad from submitting the same order multiple times affects Covad's ability to compete and adversely impacts the deployment of advanced services in Illinois.

Covad contends that Ameritech's special construction policy has also substantially damaged its goodwill and reputation in the marketplace. Because Ameritech does not notify Covad that special construction charges will apply to an order until the firm order commitment date at the earliest, Ms. Evans relates that Covad has established an expectation with the customer that it will be able to provide DSL service at a fixed price. Covad, however, now finds itself frequently having to return to the customer to notify him that he must pay several additional thousands of dollars to obtain the promised DSL service, according to Ms. Evans. She testifies that few customers are able to understand why such charges appear several weeks after Covad initially accepted their order, and adds that many of those customers subsequently cancel their Covad DSL orders. Furthermore, Ms. Evans maintains that because Covad is a new company, it is still establishing its reputation in the marketplace. When it fails to provide service to one customer, she asserts that it risks losing not just that

customer, but other customers who are deterred from ordering Covad service based on the experiences of their friends or colleagues.

E. Commission Conclusion

The first step in resolving the discrimination issue is to determine whether UNEs and retail services are comparable. According to Ameritech, UNEs and retail services are never comparable. The Commission disagrees. Ameritech cites Ameritech Michigan's and BellSouth's 271 proceedings for the proposition that the provisioning of UNEs has no retail analogue. In the paragraphs cited by Ameritech, the FCC identified certain OSS functions as having no retail analogue. The lack of a retail analogue for certain OSS functions may not be generalized to the point of concluding that UNEs and retail services are never comparable. The Commission also observes that Ameritech neglected to mention that in paragraph 140 of the Ameritech Michigan order the FCC found that certain OSS functions do in fact have retail analogues. The prior Commission orders cited by Ameritech, Docket Nos. 96-AB-003/004 and 98-0198, are also distinguishable as they are based on facts not before the Commission now. Moreover, as noted by McLeod, Ovation, MCI WorldCom, Allegiance, Rhythms, and Covad, the FCC again recently held in paragraph 279 of Bell Atlantic New York's 271 proceeding that under certain circumstances, UNEs have retail analogues. Therefore, as a general proposition, UNEs and retail services may be comparable.

With specific regard to the provisioning of conditioned loops, the only activity (among those identified in this proceeding) for which Ameritech may assess special construction charges, the Commission concludes that loop conditioning for CLECs has a retail analogue. The activities associated with loop conditioning, eg: removal of bridged taps and load coils, must be conducted in order to provision both ISDN and DSL services. Loop conditioning performed in conjunction with the provisioning of ISDN services by Ameritech is the retail analogue of loop conditioning performed in conjunction with the provisioning of DSL capable loops to CLECs. Hence, there is little difference between the provisioning of ISDN services and DSL capable loops.

The next step in the analysis is whether Ameritech's special construction policy as it concerns loop conditioning is discriminatory. Ameritech claims that it recovers its costs associated with loop conditioning performed for retail customers through the residual component of its retail rates. A portion of every Ameritech retail customer's rates includes an indiscernible component representing Ameritech's residual costs, according to Ameritech witness Florence. Under this approach to cost recovery, every Ameritech retail customer is in essence paying some amount to recover Ameritech's costs associated with the loop conditioning performed for only a few of its retail customers. When Ameritech conditions a loop for a CLEC, Ameritech assesses special construction charges on that particular CLEC since the TELRIC based rates it charges the CLEC for the loop do not include a residual component. Ameritech adds that it does not provide xDSL services, but that its affiliate which does offer such services, AADS, faces the same conditioning charges as CLECs. Since it is recovering its loop

conditioning costs from both retail customers, its affiliate, and CLECs, Ameritech insists that there is no discrimination.

The Commission first concludes that Ameritech's "residual" is irrelevant under the alternative form of regulation that Ameritech now enjoys. Mr. Florence describes the residual as the gap between overall retail revenues and the sum of LRSIC rates plus shared and common costs. This type of revenue/cost comparison is more suited for a rate of return regime rather than Ameritech's current alternative regulation plan. Accordingly, Ameritech should recover its costs associated with loop conditioning for retail customers through explicit LRSIC based special construction charges.

Furthermore, Ameritech may not spread its retail loop conditioning costs among all retail customers, as it purports to have done through the residual, since to do so constitutes discrimination. Ameritech would have the Commission believe that so long as Ameritech provides UNEs to all CLECs, itself, and its affiliates on the same terms, it does not matter how Ameritech treats and recovers its costs from its retail end users for the same activity. This position can not be sustained since surely Congress did not intend, in enacting the TA96, to allow ILECs to structure their rates so that end users would always find a particular service to be cheaper if taken from the ILEC than an alternative provider in situations where that service is comparable as a UNE and retail service.

On the retail side, when a retail customer requests ISDN service, Ameritech would condition the loop without assessing an extra special construction charge since it claims that all retail customers would be contributing through their recurring rates to the recovery of that cost incurred on behalf of that one customer. The record includes at least five examples of instances where Ameritech provided ISDN service to end users without assessing special construction charges even though it had sought to assess such charges when a CLEC requested the appropriate UNE to provide an xDSL capable loop to the same customer. In contrast, under Ameritech's current policy, only after a CLEC negotiates a service agreement with an end user and requests a conditioned loop for that end user does the CLEC learn the amount of special construction charges for loop conditioning.

Ameritech's practices of assessing special construction charges allows a retail customer to obtain ISDN service directly from Ameritech without incurring special construction charges and, arguably, paying nothing for loop conditioning. As discussed above, because Ameritech is under an alternative regulation plan, the Commission rejects Ameritech's assertion that it is recovering loop conditioning charges from retail customers through the residual. Alternatively, Ameritech assesses up-front special construction charges on CLECs for loop conditioning. This is clearly disparate treatment which the Commission finds discriminatory.

Even if one assumed that Ameritech recovered loop conditioning costs from retail customers through the residual, its current special construction policies are

discriminatory to CLECs. Recovering such loop conditioning special construction costs from all end users through recurring rates is difficult for a CLEC to do since Ameritech's loop conditioning charges vary dramatically from order to order. CLECs would be regularly updating their rates to accommodate for the unpredictable nature of Ameritech's special construction charges for loop conditioning. If the CLEC wants to avoid regular modifications to its rates and still recover this cost, its alternative is to seek an additional nonrecurring payment from its end user and risk losing the end user if he does not want to pay the extra amount representing the special construction charges. The end result is that end users would be more apt to take services requiring loop conditioning from Ameritech since they would not be assessed a separate special construction charge. Those taking service from a CLEC would either encounter an additional charge or fluctuating rates trying to accommodate for Ameritech's varying special construction charges.

The suggestion has also been made that it is questionable whether Ameritech does in fact charge its affiliate, AADS, for loop conditioning; and, if it does charge AADS, that AADS may then be deciding to absorb those conditioning special construction costs. Insufficient evidence exists to find that Ameritech has not imposed loop conditioning costs on AADS or that AADS has absorbed those costs. The Commission trusts, however, that AADS is aware of and is abiding by the conditions imposed by the Commission in Docket No. 94-0308; namely that AADS shall not sell or provide any services offered pursuant to any expanded certificate authority received in that docket to any customer or end user at a price lower than AADS' costs, including the costs of any service components utilized, to provide said services to that customer or end user.

With regard to Ameritech's "absurd results" argument, the Commission's finding that loop conditioning is comparable does not necessarily mean that the charge for conditioning provided for retail customers and the charge for CLECs have to be identical. Rates for UNEs are based on TELRIC studies while rates for retail services are based on LRSIC studies. So long as the costs studies are properly performed and the results are applied in a nondiscriminatory manner, charges for loop conditioning under the current cost study methodologies may be different without constituting discrimination.

As required by the FCC's order approving the merger of Ameritech and SBC, Ameritech has filed proposed TELRIC based loop conditioning charges. In the interim, however, Ameritech must make available to CLECs conditioning rates contained in any effective interconnection agreement to which an SBC/Ameritech ILEC is a party. Although the interim rates proposed by McLeod, Ovation, MCI WorldCom, and Allegiance, and later supported by Staff, Rhythms, and Covad, come from an interconnection agreement to which an SBC/Ameritech ILEC is a party (SWBT), Ameritech objects to including such rates in its tariff on grounds that the PUCT erred in setting the rates. Ameritech states that it will make the PUCT rates available to CLECs, but only after a CLEC and Ameritech negotiate revisions to their interconnection

agreement reflecting such. In contrast, Ameritech is willing to modify its tariff to incorporate the higher loop conditioning rates found in the Ameritech/BroadSpan interconnection agreement, as initially recommended by Staff, without requiring a CLEC to negotiate revisions to its interconnection agreement reflecting the BroadSpan rates. Given the true up mechanism established in the FCC's order, however, Mr. Florence indicates that this issue is not of central long term importance to Ameritech.

In light of the true up mechanism, the Commission is puzzled as to why Ameritech is willing to modify its tariff to reflect the BroadSpan conditioning rates but opposes modifying its tariff to reflect the lower PUCT rates. Even if it is later found that the PUCT rates are too low, Ameritech would still be made whole through the true up mechanism. Moreover, requiring CLECs seeking to avail themselves of the PUCT rates to negotiate revisions to their interconnection agreements could render such negotiation efforts an exercise in futility since the length of negotiations could make interim rates moot if the Commission approves the final rates before approving the revisions to the interconnection agreement. The only conclusion that may be drawn from Ameritech's position is that it would prefer to collect the higher BroadSpan rates. Such is not sufficient justification for adopting Ameritech's position. Because (1) the conditioning rates adopted by the PUCT in Docket Nos. 20226 and 20272 satisfy the parameters of the FCC's merger order, (2) Ameritech is protected by the true up mechanism, and (3) modifying its tariff to incorporate the PUCT rates would be no more difficult for Ameritech than modifying its tariff to reflect the BroadSpan rates, the Commission concludes that Ameritech must make available to all CLECs as interim loop conditioning rates the rates approved by the PUCT in Docket Nos. 20226 and 20272 by modifying its tariff within five days of entry of this order.[58]

Given the nature of these loop conditioning charges, they may be collected from CLECs up-front so long as Ameritech imposes the same charges on its retail customers up-front. Since these charges are TELRIC based, however, Ameritech must file with the Commission LRSIC based loop conditioning charges to be assessed on retail customers within 90 days of entry of this order. The TELRIC based loop conditioning charges should be collected from retail customers until LRSIC based charges are available because otherwise Ameritech would be able to continue its discriminatory practices. Accordingly, Ameritech must also modify its tariff to reflect that its retail customers are to be charged the conditioning rates in the PUCT Docket Nos. 20226 and 20272 until LSRIC based loop conditioning charges are approved.

[58] Had it elected to adopt the higher BroadSpan rates, the Commission realizes that the true up mechanism would also protect those CLECs paying those rates. Because it is this Commission's policy, however, to support competition, the lower PUCT rates have been adopted since the higher BroadSpan rates may deter competition.

VIII. PREORDERING INFORMATION

Certain CLECs have also raised the issue of availability of preordering information. They contend that without sufficient preordering information they can not determine when a particular request for a UNE will result in special construction charges. They further state that Ameritech's possession of such information enables it to establish the correct customer expectation for service installation while CLECs can not do so since they lack comparable access to such information. Ameritech uses this information to its advantage, they argue, and withholds it from CLECs as a means of discriminating against them.

As a general matter, the Commission does not believe that this docket is the appropriate proceeding in which to establish parameters on preordering. To the extent that preordering relates to special construction, the Commission lacks sufficient information to determine what information should be available. In any event, the Commission finds that its definition of "available" and clarification of the tariff terms that govern available facilities should provide CLECs with a reasonable expectation of when special construction charges will be assessed.

IX. FINDING AND ORDERING PARAGRAPHS

The Commission, having considered the entire record, is of the opinion and finds that:

(1) Ameritech is a telecommunications carrier certificated to provide local exchange and intraMSA interexchange services in Illinois;

(2) the Commission has jurisdiction over the above-referenced parties and the subject matter hereof;

(3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record herein and are hereby adopted as findings of fact and conclusions of law;

(4) certain charges assessed by Ameritech pursuant to its special construction policy constitute double recovery of costs;

(5) Ameritech's special construction policy discriminates against CLECs in the assessment of special construction charges for loop conditioning;

(6) Ameritech's tariff and special construction policy should be revised as described in the prefatory portion of this Order;

(7) within five days of entry of this Order, Ameritech should modify its special construction policy and file revised tariff sheets as described in Finding (6); and

(8) within 90 days of entry of this Order, Ameritech should file LRSIC based rates for loop conditioning to be applied to retail customers.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Illinois Bell Telephone Company's special construction policy double recovers certain costs and discriminates against competitive local exchange carriers in the assessment of special construction charges for loop conditioning.

IT IS FURTHER ORDERED that Illinois Bell Telephone Company shall revise its tariff and special construction policy as set forth in Findings (6) and (7).

IT IS FURTHER ORDERED that Illinois Bell Telephone Company shall file LRSIC based rates for loop conditioning as described in Finding (8).

IT IS FURTHER ORDERED that any petitions, objections, or motions made in this proceeding that have not been specifically ruled upon are hereby disposed of in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 15th day of August, 2000.

(SIGNED) RICHARD L. MATHIAS

Chairman

(S E A L)

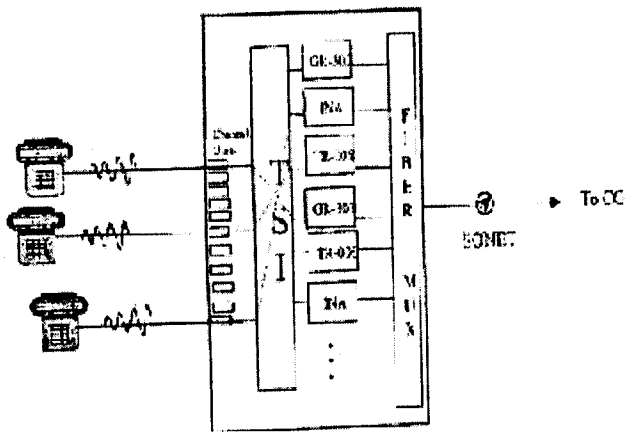
EXHIBIT I

TO COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM IV, INC. AGAINST UNITED TELEPHONE SOUTHEAST, INC.

DLC Issue

KMC-Sprint

KMC proposes to lease dedicated feeder T's from Sprint to their channel banks, cross connect to the RT using TR008 or GR303 group interface technology, MUX to DS0 level and cross connect to the mainframe



Questions:

1) Pricing – what are the key components and associated costs
2) Physical or virtual presence in the RT?
3) Could Sprint isolate KMC feeders from its own?
4) What power requirements would need to be considered?
5) Installation Intervals -- Can KMC avoid lengthy BFR and collocation processes?